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Uniform Civil Code: Goan and Indian Perspective

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The Constitution of India typifies transition-transition from Tyranny rule to Swaraj; transition from primitivity to modernity and that from slavery to sovereignty. Because it is the fundamental law of the land, the Constitution has enshrined in it almost any and every guidance that the government or the citizens of India would require. It gives us all the rights to make us empowered individually, simultaneously, it reminds us of our duties towards our nation. One such directive for the government is enshrined in Part IV of the Indian Constitution, alternatively pronounced as Directive Principles of State Policy. A part of that Directive is the implementation of the Uniform Civil Code throughout the territory of the Indian Republic. Talking about Uniform Civil Code raises several unanswered questions. The primary reason for it is the lack of precision and it being just a notion to date. As a token of the practical application of the Civil Code, we have the example of the smallest territory, that is, Goa. The debate over the implementation of the above-mentioned directive principle has brought it not just in mainstream politics but has also put the entire legal fraternity at a task. Out of several unanswered questions at hand, an effort would be made to find an answer to the fundamental yet the most important question related to the directive principle, that is, the degree of possibility of the peaceful coexistence of the concept of the Uniform Civil Code in an incredibly diverse country like India. Further, an attempt would also be made to analyse the Civil Code of Goa and look at what aspects can be incorporated in the draft Uniform Civil Code.

Keywords: *directive principles, uniform civil code, peaceful coexistence, diversity.*

INTRODUCTION

The Uniform Civil Code is a Directive Principle that has been provisioned in the Constitution of India. It simply stands for an idea of one law that would implement personal laws of citizens irrespective of their religion. The very idea of this law is based on the concept of 'secularism'. The intention of the implementation of this law is to endorse and cement the concept of the fundamental right of Equality before Law enshrined in Article 14 of the Constitution.¹ The Constitutional introduction of Uniform Civil Code, as mentioned earlier, has been done through Article 44 (Article 35 in the draft Constitution)² which says 'The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India'. The idea of the implementation of the Uniform Civil Code dates back to the Colonial Era. The British East India Company tried to reform the personal laws of India by imposing Western ideologies but couldn't reach them far. With almost every religion being practised on this land, it became difficult for the British to draft balanced legislation. They faced offence from many cultures and sects of every religion. Further, every religion had some of the other local customs, believed to be the law for that particular patch of land. This made the British even more skeptical about their idea of codifying the personal laws of different religions. Although, notwithstanding the opposition from the leaders of the orthodox communities, the British tended to realise the idea of civil code by the enactment of the Indian Succession Act in the year 1865. This act gave economic rights to women.³ The idea of this act incubated looking at the discrimination that women faced because of their deprivation from rights like those of inheritance, remarriage, and divorce. The Sharia Law, particularly, provided for polygamy which made it even more difficult for Muslim women to exercise their rights.⁴

After independence, an attempt was made to codify personal laws and the lawmakers succeeded in codifying Hindu Personal Laws by the introduction of the Hindu Code Bills but couldn't do the same for the Muslim Personal Law. Although, the British withdrew their idea

¹ *Sarla Mudgal & Ors. v Union of India & Anr.* AIR 1531 SC 635

² Constituent Assembly of India Debates, 23 November 1948, vol. VII

³ Indian Succession Act, 1865

⁴ Chandini Chavan & Qutub Jehan Kidwai, *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code* (Inaugural Edition, Hope India Publication 2006) 87

of civil code because of their inclination towards Divide and Rule Policy. The Lex Loci Report of 1840 laid emphasis on the codification of Indian Laws but kept personal laws out of its ambit because they wanted India to get divided on religious grounds.⁵

THE COLLECTIVISATION AIMED AT

Even today, one of the most important and consuming questions about the Uniform Civil Code is one about its constitution. It is still a matter of debate as to which all provisions would constitute the Uniform Civil Code. Another question at hand, which cannot be emphasised enough, is about which all legislation would ‘collectively’ be imbibed under said law. One would understand it better if a mathematical analogy from the topic of Set Theory is presented. Considering the concept of superset and subset, the Uniform Civil Code would be a superset and all the legislations, which are presently enacted individually, would be called a subset of the above-mentioned superset. This clearly signifies that we are not going to lose on any law enacted in favor of the people of the country; amendments -if required- can be discussed thoroughly and adapted accordingly. There appears to be a set of legislation that deals with the issues that have been a primary focus since the idea of the Uniform Civil Code were conceived. It is anticipated that provisions from these legislations would take center stage in the draft of the Code.⁶ Some of these legislations have been mentioned below.⁷

Hindu Marriage Act, 1955: It was the first of the four acts passed under the notion of Hindu Code Bills on the recommendation of the Rau Committee. The very purpose of this act is to regulate the institution of marriage. Other than this, it also regulates the personal aspects of the life of Hindus. One significant work that the Act does is to provide legal protection to the children who, born out of marriage, suffer due to parental issues.⁸ This Act applies to all forms of Hinduism and recognises offshoots of Hinduism which, notably, include Jainism and

⁵ A C Banerjee, *English Laws in India* (Inaugural Edition, Abhinav Publication 1984) 134

⁶ A. Faizur Rahman, ‘Uniform Civil Code: Will it work in India?’ (*The Hindu*, 23 November 2014) <<https://www.thehindu.com/opinion/open-page/uniform-civil-code-will-it-work-in-india/article6625409.ece>> accessed 12 February 2022

⁷ ‘What is Uniform Civil Code’ (*Business Standard*) <<https://www.business-standard.com/about/what-is-uniform-civil-code>> accessed 12 February 2022

⁸ Hindu Marriage Act, 1955, s 26

Buddhism. The Act applies to the permanent residents of India who do not practice Islam, Judaism, or Christianity.⁹ Originally, the Act applied to Sikhs as well, but Anand Karaj Marriage Act gave Sikhs their law on marriage.¹⁰

Hindu Succession Act, 1956: It was the second of the four acts passed under the notion of Hindu Code Bills. This act relates to the comprehensive system of succession and inheritance. It, also, crystally talks about the intestate or unwilled succession.¹¹ Therefore, it is considered an exhaustive law on succession. People who are Buddhist, Jain, or Sikh also come under the ambit of the said act.¹² The act does not apply to people who are Muslim, Parsi, or Jew by religion.¹³

Hindu Minority and Guardianship Act, 1956: It was the third of the four acts passed under the notion of Hindu Code Bills. The Act advantages a child with relaxations from the law at the time when he/she is incapable to take proper care of himself/ herself, his/her own body, or property because of him/her being a minor. And the Act also mandates the minor to take help and guidance from his/her 'guardian' whenever a policy decision has to be necessitated.¹⁴ The Act applies to any person who is a Hindu in any of its forms or developments and one who is Jain, Buddhist, or Sikh by religion.¹⁵

Muslim Personal Law (Shariat) Application Act, 1937: This is a law that governs the matters of inheritance, succession, marriage, divorce, family relationships, and dower for people who follow Islam. This Act holds extreme importance as it is like a guiding principle for us to interpret the Muslim Personal Law. Though, it has also been mentioned that religious scriptures are to be considered fundamentally for any sort of clarification, if and when

⁹ 'Hindu Marriage Act 1955' (*Net Lawman*, December 2020) <<https://www.netlawman.co.in/ia/hindu-marriage-act-1955>> accessed 13 February 2022

¹⁰ *Ibid*

¹¹ Ishaan Banerjee, 'The Hindu Succession Act 1956' (*Ipleaders*, 26 February 2020) <<https://blog.ipleaders.in/the-hindu-succession-act-1956/>> accessed 13 February 2022

¹² Hindu Succession Act, 1956, s 2

¹³ *Ibid*

¹⁴ Chandan Kumar Pradhan, Overview of the Hindu Minority and Guardianship Act 1956 (*Ipleaders*, 27 February 2020) <<https://blog.ipleaders.in/overview-of-the-hindu-minority-and-guardianship-act-1956/>> accessed 13 February 2022

¹⁵ Hindu Minority and Guardianship Act, 1956, s 3

required.¹⁶ Additionally, Muslim Marriage Act, 1954, in force, deals with marriage amongst the Muslim community.

Special Marriage Act, 1954: This Act warrants people from two different religious backgrounds to come together in a bond of marriage. As per the said Act, the idea of marriage is one of a civil contract rather than it is a social contract, as seen as per the Hindu Marriage Act. The contracting parties, couples, in this case, need to submit notice along with relevant documents thirty days before the marriage.¹⁷

ANALYSIS

The above mentioned is not an exhaustive still relevant list of legislations that might 'collectively' form the Uniform Civil Code. Mere reading of these acts gives a fair idea about their jurisdictions. It can be well inferred that the fundamental idea of all the acts remains the same irrespective of their religious inclination. One aspect of the legal system needs to be understood with full dedication and a rational mind. All these legislations had been drafted keeping in mind the society -in this case, community- in general. No matter how diverse our country is, the fundamental practices remain 'similar'. And more importantly, every legislation enacted throughout the territory is to benefit society at large. And, the Constitution authorises the lawmakers to elaborate upon the exceptions if and when required. Taking the above facts into consideration, it can be certainly concluded that both Hindu Personal Laws and Muslim Personal Laws have been protecting the rights of the people concerning the same subject matters. It is only on the part of further interpretation that both these legislations stand diverged. ¹⁸ To further clarify, advocates of both the Personal Laws resort to their religious scriptures for in-depth interpretation or to refer to matters that require clarification for Constitutional reference. If a Uniform Civil Code is devised, some factors need to be taken into consideration without fail. The idea of adoption of fundamental aspects of the Code from the

¹⁶ Muslim Personal Law (Shariat) Application Act, 1937, s 2

¹⁷ 'What is Special Marriage Act, all you need to know' (*India Today*, 6 March 2021)

<<https://www.indiatoday.in/information/story/what-is-special-marriage-act-all-you-need-to-know-1776395-2021-03-06>> accessed 13 February 2022

¹⁸ Muslim Personal Law (Shariat) Application Act, 1937, s 2

religious texts cannot be emphasized enough. For, these religious texts introduce a particular community to the society. But the fact that there has been a drastic change in society since the documentation of these religious texts cannot be simply ruled out. The ever-evolving modern society needs an ever-evolving modern law. The lawmakers need to be humbly advised to study the pattern of society; look into the loopholes and discriminations that a community might be facing or would have faced, especially women¹⁹; anticipate the structure of society after a few decades, and then draft a Code suited to all. This effort of the lawmakers would help India transit to a Uniform Civil Code effortlessly.

FUNDAMENTAL RIGHTS V/s DIRECTIVE PRINCIPLES

This has been a matter of intense debate and discussion since the Constitution has been enacted. Even before the enactment, the members of the Constituent Assembly had an extended discussion about this at the time of the drafting of the Constitution. The primary subject matter of debate was whether the fundamental rights or directive principles should be given more importance. Conclusively, the decision was taken in favor of Fundamental Rights with a 5:4 majority by categorizing them as justiciable and Directive Principles as non-justiciable.²⁰ This decision has been reiterated by Supreme Court in its judgments.²² As far as the discussion about Uniform Civil Code is concerned, it primarily brings the Fundamental Right to Freedom of Religion into scrutiny. Article 25 lays down the fundamental right of the religion of an individual²³; Article 26(b) upholds the right of each religious denomination or any section thereof to “manage its own affairs in matters of religion”; Article 29 defines the right to conserve distinctive culture. It has been noted that Article 25 merely protects the freedom to practice rituals and ceremonies which are considered an integral part of religion.²⁴ It, anyway, would not overlap with the idea of the Uniform Civil Code because its

¹⁹ Hindu Succession (Amendment) Act, 2005, s 6

²⁰ Constitution of India, 1950, art. 32

²¹ Constitution of India, 1950, art. 37

²² *Minerva Mills Ltd. & Ors. v Union of India & Anr.* (1980) SCR (1) 206

²³ Faizan Mustafa, ‘Explained: After CJI’s remarks on Uniform Civil Code, a look at its status, debate around it’ (*The Indian Express*, 3 April 2021) <<https://indianexpress.com/article/explained/explained-after-cji-bobdes-remarks-on-uniform-civil-code-a-look-at-its-status-debate-around-it-7249410/>> accessed on 14 February 2022

²⁴ *John Vallamattom & Others v Union of India & Anrs.* (2003) AIR 2902, SSC 611

idea has been founded and evolved keeping in mind the very idea of secularism. The Civil Code is expected to be mutually exclusive to the core idea of religion. It must also be noted that these articles do not restrict the State from acting in an appropriate manner, in the larger public interest.²⁵ On a detailed reading and analysis of these articles and correlating them with the idea of the Uniform Civil Code, it can be partially inferred that the Code, being a civil law, would not barge into the core idea of the religion of any community.

However, if any such case appears, the Constitution provides that the non-synchronization cannot be challenged for the laws which implement the Directive Principles cannot be challenged of being violative of Articles 14 and 19, supposedly the articles that empower a person individually.²⁶ This is a critical point of contention that would seek clarification in the draft Uniform Civil Code. With due course of time, another debate has evolved amongst the Directive Principles talking about their importance. It has been argued that Article 44 has been drafted in such a way that it is interpreted as less important when analysed against other Directive Principles. While Article 44 uses the words “the state shall endeavor”, other Articles in the ‘Directive Principles’ chapter use words such as “in particular strive”; “shall, in particular, direct its policy”; “shall be an obligation of the state”.²⁷ It also appears that the Constitution framers prioritised other Directive Principles over Uniform Civil Code, multiple instances are available when they turned down the motion to discuss upon Uniform Civil Code.²⁸ Also, The Law Commission emphasised the non-necessity, non-desirability, and non-feasibility of implementation of the Uniform Civil Code.²⁹ Conclusively, we are compelled to give a second thought to the implementation of the Code.

²⁵ P M Bakshi, *The Constitution of India* (15th Edition, Universal Law Publishing) 94-95

²⁶ The Constitution (42nd Amendment) Act, 1976

²⁷ Constitution of India, 1950, art. 36-51

²⁸ Constituent Assembly of India Debates, 23 November 1948, vol. VII

²⁹ Meera Emanuel, ‘Uniform Civil Code neither necessary nor desirable at this stage, Law Commission of India’ (*Bar and Bench*, 1 September 2018) <<https://www.barandbench.com/news/uniform-civil-code-law-commission-india>> accessed on 14 February 2022

THE CIVIL CODE OF GOA

Goa is the only state in the entire Union of India to have a civil code. Though, the uniformity of this code has come under scrutiny.³⁰ Prima Facie, the Civil Code is the common civil law that applies to the residents of the State of Goa; irrespective of their religion, ethnicity, and language affiliation. Goa stands distinct amongst all the other states because of the distinct history it possesses. For the majority part of the time, Goa had been under the rule of the Portuguese. While the British refrained from interfering in the personal laws of the part of Indian territory they ruled, the Portuguese implemented the “Indianized” version of the Portuguese Civil Code on the part of India they ruled in the year 1867. There is a part of the Goan Civil Code that gives liberty to its advocates to call it a “uniform”. Perhaps, the Hon’ble Supreme Court lauded the “Uniform Civil Code of Goa” and directed the intellectuals to “visit the state” and “learn the administration of justice”³¹intending to emphasise these clauses. Hence, the reasonability and necessity go in favour of defining these clauses.³²

- For a married couple, there is a rule of joint ownership of all the assets owned before marriage and acquired after marriage.
- In case of divorce, the assets are legally mandated to get divided into two halves.
- Muslim men, registering their marriage in Goa, are in legal obligation not to practice ‘polygamy’. Also, there is no provision of verbal divorce (popularly called Talaq-ul-Biddat or Triple Talaq).
- The parents cannot ‘disinherit’ their children in totality. At least half of their property has to be passed on to the children compulsorily. And, this inherited property must be shared equally amongst the children.

³⁰ Tahir Mahmood, ‘SC’s example of Goa as a state with a Uniform Civil Code is inconsistent with Article 44’ (*The Indian Express*, 18 September 2019) <<https://indianexpress.com/article/opinion/columns/uniform-civil-code-supreme-court-article-44-6004340/>> accessed on 15 February 2022

³¹ ‘Chief Justice of India S A Bobde lauds Uniform Civil Code in Goa’ (*The Indian Express*, 28 March 2021) <<https://indianexpress.com/elections/chief-justice-of-india-s-a-bobde-lauds-uniform-civil-code-in-go-7248631/>> accessed on 15 February 2022

³² Portuguese Civil Code, 1867

ANALYSIS

The argument favoring “uniformity” gets weakened when one starts to delve deep into the law. At the very first instance, it needs to be seriously considered that the Civil Code of Goa has not been “enacted” by the people of India but has been “imposed” by the Portuguese. Like the British, the Portuguese had the intent to ‘rule’. Therefore, they extended the Portuguese Uniform Civil Code to the people of Goa. But to maintain the law-and-order situation, even they were compelled to introduce exceptions to the “uniform law” which consequently diluted the “uniformity” envisioned by the Portuguese lawmakers.

Another premise that holds well in the above-mentioned topic is that the population of Portugal stands at 1.03 crores which, if converted, would not account for even one percent of the total Indian population. Another fact worth emphasizing is the demographic structure of Portugal. Eighty-one percent of the total population are Roman Catholic. Even if people from any other religion exist, they are not more than four percent of the total population. The above-mentioned data crystallises the homogeneity in the population of Portugal. This, in turn, made the enactment of the civil code easy in Portugal. But, the situation in India has been in stark contrast. It enjoys an incredibly heterogeneous population share which makes the implementation of the Uniform Civil Code a tough job to do. Because of the incredible diversity, every religion is divided into several sections. The article which provides provision for registration of marriages lacks uniformity between Catholic and non-Catholic marriages.³³ People of the same religion, Christianity in this case, have different processes. Also, the annulment power of marriages does not restrict in the hands of a single authority.³⁴ It is also provisioned that a husband can get a divorce on grounds of adultery but the wife can get a divorce only if the husband has committed adultery along with public scandal.³⁵ This way it can be comfortably concluded that the “uniform” civil code of Goa discriminates against women. Article 3 of the Decree of Gentile Hindu Usages and Customs of Goa, 1880 provides that a Hindu husband can marry a second girl in the absence of an issue, if the wife has

³³ Portuguese Civil Code, 1867, art. 1057

³⁴ Portuguese Civil Code, 1867, art. 1086

³⁵ Portuguese Civil Code, 1867, art. 1204

attained the age of 25, and if she has attained 30 without having a son. To sum up, the above-mentioned decree authorises male members of a particular Hindu community to practice bigamy which is strictly an offense under the Indian Penal Code and the Hindu Marriage Act. The above-mentioned facts and their notable exceptions have compelled us to conclude that the “claimed” Uniform Civil Code of Goa is, in reality, an example of plurality in the law. It also hints those exceptions should be resorted to maintaining the public order in the territory. It is also learned that a uniform code for all religions does not ensure equality and justice. Therefore, the ‘Uniform’ Civil Code of Goa is non-uniform to the best degree.

CIVIL CODE AND SECULARISM

Secularism is, inter alia, one of the guiding principles of the Constitution of India. The root of the entire idea of secularism lies in the respect and celebration of different religions. Though, in general, both religion and the idea of secularism stand mutually exhaustive. But the Indian idea of secularism keeps both religion and the idea mutually exclusive. It is, probably, because of ‘this’ Indian version of secularism that such a large population coexists peacefully. The question, here, is not whether the Uniform Civil Code would stand the test of secularism but one of the “peaceful coexistence” of the code in such a diverse nation. The idea of secularism has been explicitly endorsed by the Constitution of India in the form of the fundamental right to freedom of religion. As has been discussed earlier, the Uniform Civil Code touches the above-mentioned right and to a great extent infringes upon the right of individuals but has to settle for the ‘greater good of the public’. It is important to get acquainted with the “Indian idea of Secularism”. Further, the French idea of secularism has also been emphasised. It has been done with the intent to draw a comparison between the two ideas.

*Indian Idea of Secularism*³⁶

The Indian idea of Secularism (hereinafter, referred to as Indian Secularism) is very different from that of the west. Though, there have been claims that the idea has been copied from that of the west. But, given the diversity of India, this argument can be effortlessly ruled out.

³⁶ *Political Theory: Textbook for Class XI* (1st Edition, NCERT 2006) 117-121

Indian Secularism respects every religion and accepts people showcasing their religious inclination. To further clarify, a Sikh brother in India is accepted and welcomed in the society with his turban and 'kirpan', and a Muslim brother is accepted and welcomed with a beard covering the best part of his chest. This means that Indian Secularism respects and accepts every 'person' irrespective of his religion and, simultaneously, does not stop any person from propagating or professing his religion publicly. The Indian Secularism respects not only the inter-religious differences but also the intra-religious differences. Evidently, it regulates intra-religious dominance. This means even the minority in the majority is allowed to profess his religion with full freedom. Indian secularism considers itself out of the ambit of the State. This means that the State does not have an official religion. This idea had been accepted by the lawmakers for the peaceful coexistence of all the religious communities and to keep the diversity intact. "But, if and when required, the state would interfere in the religious affairs to re-establish peace and harmony in the country".

*French Idea of Secularism*³⁷

The French idea of Secularism (hereinafter, referred to as French Secularism) focuses on church-state separation. This means that the state would not interfere in the religious matters inside the territory. This means they are not concerned about the private practice of their citizens. Though, it has been categorically said by the State of France that it wants all its citizens to "look" equal. To further clarify, a Sikh man in France is not allowed to keep long hair and wear a turban. He has to mandatorily keep short hairs to "look" like other French men. And, a Muslim man is not allowed to keep a long beard. He is mandated to keep his appearance in accordance with those of the men of France. The reason suggested by the State for this act is that a different appearance would compel human minds to think and respond differently which would, in turn, disturb the prevailing equal treatment. All secular states have one thing in common: they are neither theocratic nor do they establish any religion. Here, Indian Secularism has been compared with French Secularism because both the ideas support and respect the personal belief of their countrymen but act differently when it comes to the

³⁷ *Ibid*

public. On careful comparison of the two ideas of secularism, it is crystally evident that the former idea of secularism would be more effective in a heterogeneous society, like India, and the latter idea might be effective in a homogenous society like France. Either idea of secularism cannot be proved incorrect. But it can be said that implementation of a uniform law on a homogenous population is a bit easy, especially when the state shows some degree of dominance.

CONCLUSION

The entire study helps us to conclude that the Uniform Civil Code still requires an immense amount of ground analysis before it gets implemented. A “piecemeal” approach needs to be resorted to realize the idea of the Uniform Civil Code maintaining the peace and harmony of the country. If it gets implemented, the Uniform Civil Code would be one of its kind secular law which would supposedly de-link religion from the law. This would, in turn, help in achieving gender equality as women suffer due to patriarchal domination. Implementation of the Code would also lead to synchronization of the legal system as there won't be many acts to deal with. The reason for non-implementation appears simple. As the Supreme Court pointed out, over eighty percent population of the country is governed by the codified law, that is, the Hindu Code Acts.³⁸ This has relaxed the system and the mandate has kept on shifting with time. Moreover, the idea of the Uniform Civil Code has evolved and, resultantly, broadened. A conception stands whether a Uniform Civil Code would not incorporate only the personal laws. The ambit of the code should be extended to the Transfer of Property Act and many other non-personal civil legislations. Though, we don't have something exemplary as far as the court judgments concerning the Uniform Civil Code are concerned. Almost every time, the courts have emphasised its implementation and not its incorporation. It is disturbing to note that India does not have a 'central' definition of a terrorist because the matter of 'Police and Public Order' falls under the concurrent list. This practically means that a person can be a terrorist in one state but cannot be in another due to differences in definition. The same might happen in the case of the Uniform Civil Code because it also comes under the concurrent list.

³⁸ *Sarla Mudgal & Ors. v Union of India & Anr.* (1995) SCC (3) 635

And almost every codified civil law has gone through several amendments to incorporate exceptions to the law. This opens the chances of the Uniform Civil Code getting amended which might “dilute” its “uniformity”.

Conclusively, the queries and concerns of different communities need to be addressed and a common program needs to be adopted which would be fundamental in the formation of the Uniform Civil Code. Undoubtedly, fundamental rights stand over directive principles but people of the country need to give up on their certain rights for the greater good of the public. There are indeed several ambiguities regarding the content of the Code but it can only be resolved in a piecemeal manner. Ironically, there is an anticipation of invocation of “criminal laws” for the implementation of “civil laws”. If this happens, the entire idea of the peaceful coexistence of the Uniform Civil Code and India’s diversity would go down the drain.