



## **UNIFORM CIVIL CODE: A UTOPIAN CONCEPT?**

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### **ABSTRACT**

The Uniform Civil Code is a constitutionally mandated directive provided in Part IV of the Constitution of India. It has however, remained in the textual form for years due to the lack of consensus and fears of different communities of a code which may be discriminatory in nature. The subject has been discussed, deliberated and debated at length over the years. Even the judiciary has, in many cases, reiterated the need to draft a code that shall represent all diverse religions and practices by way of one single law on matters of marriage, divorce, adoption, succession etc. Considering this background, the paper shall discuss the concept of Uniform Civil Code, its origins and rationale for having a common law for personal laws. Furthermore, a reference shall be made to the most prominent judicial interpretations and observations on the idea of the Uniform Civil Code. The paper shall review whether such a law may indeed be discriminatory and violate certain prominent human rights laws, including the right to religion. The paper shall discuss the apparent contradictions of such drafting such a law in a multi-religious and culturally diverse nation like India. The study is an attempt to comprehend whether such a code may be actually realized or will remain a theoretical concept.

### **INTRODUCTION**

The concept of a Uniform Civil Code is provided in the Constitution of India in Part IV. The concept has remained a theoretical concept for years and although attempts have been made, it has failed to yield anything substantial. The essential aim of such a code is to provide a common legal standard for all personal law matters, viz., marriage, divorce, adoption, succession and maintenance. It is aimed towards removing the multi-fold complex and varied religious laws on personal matters with a neutral common code for all Indian citizens. Surely, such a code is bound to create controversy and face reservations from different stakeholders. This paper is an attempt to re-visualize the concept of a Uniform Civil Code in relation to fundamental human rights which is guaranteed to all citizens of the world, particularly under the aegis of the United Nations and to assess whether a uniform civil code will remain a utopian dream.

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## **UNIFORM CIVIL CODE: ORIGINS AND MEANING**

Article 44 reads as, “*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.*”<sup>2</sup>

This article was subjected to much debate during its drafting. The Constituent Assembly debates reflect the divisive nature of the code. Several minority members of the drafting committee felt that such a code would undermine the personal laws and thrust a code which shall conform to the majority opinion. The clause was adopted after much discussion and only after B R Ambedkar, Chairman of the Constitution Drafting Committee, assured the minorities that the Article would not be forced upon anyone.<sup>3</sup> The objections raised were rebutted by stating: (i) the India had already achieved a uniformity of law over a vast area; (ii) that though there was diversity in personal laws, there was nothing sacrosanct about them; (iii) the secular activities, such as, inheritance, covered by personal laws should be separated from religion; (iv) that a uniform law applicable to all would promote national unity; and (v) that no legislature would forcibly amend any personal law in future if people were opposed to it.<sup>4</sup>

Closely associated with this concept is the idea of secularism<sup>5</sup>. The framers did not include the term, ‘*secular*’ in the Preamble and rejected the proposal to include such an explicit provision.<sup>6</sup> However, they believed that that Constitution was inherently so secular and

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<sup>2</sup> INDIA CONST. art. 44.

<sup>3</sup> Maneesh Chhibber, *Uniform Civil Code debate is not new, divided Constituent Assembly as well*, THE INDIAN EXPRESS, Oct. 17, 2016 (May 20, 2018 10:15 AM) <http://indianexpress.com/article/explained/in-fact-uniform-civil-code-debate-is-not-new-divided-constituent-assembly-as-well-3086583/>.

“It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method.”

U.C.C. was originally encapsulated in article 35 of the Draft Constitution. There was a demand to add a proviso in article 35 which would make the UCC, whenever it would have been enacted, not obligatory in nature and personal laws be kept out of its purview. The proviso read as, “provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law”. See, Shambhavi, *Uniform Civil Code: The Necessity and the Absurdity*, Vol I, ILI REVIEW, 2017 (May 20, 2018 11:02AM) <http://ili.ac.in/pdf/paper217.pdf>.

<sup>4</sup> VII Constituent Assembly Debate 540-2.

<sup>5</sup> The Oxford Dictionary defines *secularism* as, “*The principle of separation of the state from religious institutions*”. (<https://en.oxforddictionaries.com/definition/secularism>).

<sup>6</sup> “The assembly virtually took for granted India’s secular status. To them, any republic that purports to grant equality before the law to all its citizens, that purports to recognise people’s rights to free speech, to a freedom of religion and conscience simply cannot be un-secular. To be so would be an incongruity. Secularism, as would be clear on any morally reasonable analysis, is inbuilt in the foundations of constitutionalism, in the idea of a democracy properly understood. In the case of our Constitution, it flows from the series of fundamental rights guaranteed in Part III.” Suhrith Parthasarathy, *Understanding secularism in the Indian context*, THE HINDU, Jan. 2, 2018 (May 20, 2018 7:50PM) <http://www.thehindu.com/opinion/lead/the-secular-condition/article22347527.ece>.



provided for the essence of secularism in Part III, Articles 25 to 28, which provides for the Fundamental Right to religion. India does not have a state religion and thereby, does not prefer or lay emphasis on any one religion but treats all religions equally. This was confirmed and reiterated when the term was explicitly inserted into the Preamble of the Constitution by the forty-second amendment.<sup>7</sup> A uniform code is designed to forward this principle of secularism and thereby provide all persons of different religions an equal footing on personal law matters, thereby avoiding any discrimination or bias.

A Uniform Civil Code is essentially a common legal code for all citizens of the country that shall determine and regulate all personal law matters, including marriage, divorce, succession, adoption and maintenance. The Code is aimed at bringing standardization for all citizens and thereby make the process of regulation easier and even for all Indian citizens without any bias or discrimination. However, the questions raised by the framers are still relevant: who decides and what will be the nature and content of the laws?<sup>8</sup>

In India, currently, there are different laws on personal matters depending on the religion. The idea of personal laws is intimately connected to religion and this has given rise to numerous issues, including those of bias and regressive laws against women; irregularities and difference in interpretations based on customs and practices; archaic personal laws that do not change with the times and no longer reflect the changing dynamics of the country and its people. Due to this, there is a clear absence of any consistency or coherence in personal law matters. Further, such undue emphasis on religion may dilute objectivity and emotional or sentimental value may overshadow pure legal principles. Thus, there is a strong cry for a Uniform Civil Code by numerous sections of society.

### **CONSTITUTIONAL PROVISION: WHY A DIRECTIVE PRINCIPLE?**

The Constitution of India provides for two distinct legal provisions applicable for the citizens of India; namely, the Fundamental Rights in Part III and the Directive Principles of State

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<sup>7</sup> Hart, Henry C., *The Indian Constitution: Political Development and Decay*, Vol. 20, Asia Survey, No. 4, University of California Press.

The 42nd amendment to Constitution of India, officially known as The Constitution (Forty-second amendment) Act, 1976, was enacted during the Emergency period, i.e. 25 June 1975 – 21 March 1977, by the Indian National Congress headed by Indira Gandhi.

<sup>8</sup> Supra note 2.

B Pocker Sahib Bahadur (Madras) referred to the questions being raised by some Hindu Members to the proposed Article. “I know there are great differences in the law of inheritance and various other matters between the various sections of the Hindu community. Is this Assembly going to set aside all these differences and make them uniform? By uniform, I ask, what do you mean and which particular law, of which community are you going to take as the standard?” he asked. “What have you got in your mind in enacting a clause like this? There are the Mitakshara and Dayabhaga systems; there are so many other systems followed by various other communities. What is it that you are making the basis?”



Policy in Part IV. While the former set of rights is enforceable and obligatory to be afforded to all citizens of the country; the directive principles are not justiciable and therefore only in the form of advices; requests to states to fulfil and translate these provisions into reality. Due to the nature of such directives being only persuasive, many directive principles have remained in the books without any actual implementation. Consequently, the idea of a uniform code remains in its theoretical form.

It is interesting to note that due to the controversial nature of the uniform civil code, perhaps a mention of a code is provided only as a Directive Principle as it was the only option for the constitution framers. Surely, enumerating it under Part III would have resulted in much uproar and would have courted much resistance and hindrance. India, being newly independent, was walking a tight rope particularly due to the religious division of India and Pakistan. Due to the overt religious sentiments and discrimination on both sides with bloodshed and violence, the idea was limited to be a directive principle rather than a fundamental right.

### **JUDICIAL INTERPRETATIONS OF UNIFORM CIVIL CODE**

The history of judicial interpretations on the concept of Uniform Civil Code may, in itself call for a full detailed research. The judiciary has often questioned the legislature for its failure to translate the directive principle into reality. The scepticism and overt political hues of such a code is recognized by the Supreme Court in many cases.

The first time when the Hon'ble Court specifically directed the Parliament to draft the code was in the famous case of *Mohd. Ahmed Khan v Shah Bano Begum*,<sup>9</sup> in 1985. In *Ms. Jorden Diengdeh v. S.S. Chopra*,<sup>10</sup> the Supreme Court stated, ... *the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform... We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce.*"<sup>11</sup> This was reiterated in 1995 in the case of *Sarla Mudgal v Union of India*,<sup>12</sup> wherein Justice Kuldeep Singh made sharp observations on the need for a

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<sup>9</sup> A.I.R. 1985 S.C. 945.

In the case, a Muslim woman, who was divorced by her husband following the concept of triple talaq, petitioned for maintenance from her husband under section 125 of the Code of Criminal Procedure. The Court concluded that she has a right to maintenance under Section 125 of the neutral criminal code. It observed that 'Article 44[3] of the Constitution has remained a dead letter'.

<sup>10</sup> A.I.R. 1985 S.C. 934.

<sup>11</sup> Ibid.

<sup>12</sup> A.I.R. 1995 S.C. 1531.



code and why such a code can become a reality, and “*for protection of the oppressed and promotion of national unity and solidarity*”.<sup>13</sup>

Another prominent case pertaining to the Uniform Civil Code and the observation of the Supreme Court is the case of *John Vallamattan v. Union of India*.<sup>14</sup> In the given case, the Court while holding Section 118 of the Indian Succession Act as unconstitutional, stated that the Parliament should take concrete steps to enact a Uniform Civil Code<sup>15</sup>.

In *Ahmedabad Women Action Group v. Union of India*,<sup>16</sup> the Supreme Court refused to declare certain aspects of the Muslim Personal Law as void, holding that “*the issues raised were fit to be dealt with by the Legislature and not the Courts*”.

The Courts have attempted to, in their limited scope, bring about changes to the law and bridge the gap with constitutional values. However, this responsibility of drafting and implementing a code lies with the legislature and therefore, the Courts shall restrict themselves to merely reminding the legislature of its responsibilities.

### **APPARENT CONTRADICTIONS OF UNIFORM CIVIL CODE WITH FUNDAMENTAL HUMAN RIGHTS**

The notion of a uniform civil code is based on the existing criminal code in India. The argument forwarded by those in favour of such a code state that since such a criminal code is already in practice, why not a civil code. However, one crucial point of difference is that while criminal acts are of a nature condemned by all, civil matters, and in particular, those which are aimed to be secularised by a Uniform Civil Code have overt religious and cultural significance and importance. Furthermore, it is suggested that the present laws violate many fundamental human rights, particularly those against women. Gender equality and modernisation of archaic laws may be accomplished by reviewing the existing laws to attune them to the present day. A separate code may not be the most feasible option considering the diversity of India.

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<sup>13</sup> Id. “Where more than 80 percent 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 the ‘uniform civil code’ for all the citizens in the territory of India.” Also *See*, *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650.

<sup>14</sup> A.I.R. 2003 S.C. 2902.

<sup>15</sup> The Supreme Court bench was composed of Chief Justice of India V.N. Khare, Justice S.B. Sinha and Justice A.R. Lakshmanan. The Chief Justice stated that, “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. A common civil code will help the cause of national integration by removing the contradictions based on ideologies”.

<sup>16</sup> A.I.R. 1997 S.C. 3614.



The first and most obvious point of conflict is with the freedom of religion as provided under the Constitution and other internationally recognised instruments. The Constitution affords to its citizens numerous rights on religion including its practice and propagation<sup>17</sup>. This is attuned to the international rights provided under the Universal Declaration of Human Rights and the main Covenants.<sup>18</sup> It is undeniably that a possible code will surely raise issues of religious practices and customs.

A Uniform Civil Code shall be one which is made applicable to all citizens without any distinction on any ground. However, drafting of such a code will be a herculean task, particularly since any code so drafted, will be based on one religion or the other, to the exclusion of others. This raises apprehensions and questions of forceful imposition of different practices and customs on others. This is a particular area of concern for the religious minorities and those who have their own unique religion and practices, some which are based on traditions followed by successive generations from time immemorial.

This is a pertinent concern since in India, religion is held to be of grave importance and in a position of dominance. It is often suggested that such matters, viz. marriage, adoption, succession etc. should be divorced from religion and made neutral without any religious tones. However, this is extremely difficult since most personal laws are predicated on religion, and this has been followed by people as the rule. Religion is ingrained in these practices. Hypothetically, if the code confers upon marriage the concept of contract and compulsory registration, there will surely be questions raised on its sacred aspect. Furthermore, what system and traditions would be emphasised upon in the code and what would be excluded. There will surely be a stark difference of opinion and arriving at a compromise may be impossible.

Secondly, it may conflict with the concept of non-discrimination, a principle which is of grave significance and one which is afforded a very prominent status in international instruments<sup>19</sup>. A Code which accounts for certain religions, to the exclusion of others may

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<sup>17</sup> The Constitution of India, in Articles 25 to 28 confer the rights relating to freedom of religion not only for citizens but also to all persons in India. These rights extend not only to individuals but also to religious groups. The freedom is protected from state interference and guarantees equality of treatment and enjoyment of constitutional protection without any bias or discrimination.

<sup>18</sup> See, Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights. Furthermore, under the International Bill of Human Rights, i.e. the collective of the Universal Declaration and the twin Covenants, discrimination based on religion is prohibited.

<sup>19</sup> The concept of '*non-discrimination*' is a critical and pertinent aspect of all rights guaranteed in international human rights instruments. Discrimination based on any ground, including religion is prohibited.



deem to violate the principle of non-discrimination.<sup>20</sup> For instance, adoption is not formally recognised in Islam law, though it has been extended to them by the Supreme Court. Muslim law accepts the concept of acknowledgement; however, the paternity of the child cannot be established if he adopts a child.<sup>21</sup> It is provided one may raise a child but not confer upon him/her any official parentage. He/she continues to keep his/her own name and does not adopt the name of the adopting family. Consequently, most are unable to officially confer property rights to such children under the law and the child does not have a right to claim the same.<sup>22</sup> Supposedly, if the code made such property rights obligatory under the Code, Muslims may stop the practice of adoption altogether to the disadvantage of such children who may otherwise have had a chance at growing up in a family and an equal chance at making a life for themselves albeit without any official property rights. The process of drafting must account for these varied differences which may be extremely difficult to reconcile.

Thirdly, the code may violate basic customary practices and traditions.<sup>23</sup> It is well acknowledged, and numerous judicial pronouncements have confirmed that customs and traditions are important and critical aspects of a person's life and one which may be practiced if it fulfils certain criteria.<sup>24</sup> The drafting of such a neutral secular code may violate and come in direct conflict with these customary practices which may be held dearly by the people. For instance, '*saptapadi*' is a critical aspect of Hindu marriages, if such a neutral code does not make relevant reference to it, it may result in violating the beliefs and cultural practices of certain section of the society. Considering the emotional and sentimental values of such practices, such a code may call for resentment and overt disobedience, thereby nullifying the whole concept of drafting such a code.

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<sup>20</sup> The expression '*intolerance and discrimination based on religion or belief*' means any distinction, exclusion, restriction or preference based on religion or belief and have as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis. See, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the General Assembly on Nov. 25, 1981.

<sup>21</sup> In Muhammad Allahdad Khan and Anr. v. Muhammad Ismail Khan and Ors., (1888) I.L.R. 10 All. 289, it was held that there is nothing in the Mohammedan Law similar to adoption as recognised in the Hindu system and the acknowledgement of parentage is only a substitute for adoption.

<sup>22</sup> See generally, Piyush Srivastava, *Sunni authority insists adopted children cannot inherit property*, Feb. 20, 2014, THE DAILY MAIL, (May 24, 2018 7:45PM), <http://www.dailymail.co.uk/indiahome/indianews/article-2564104/Sunni-authority-insists-adopted-children-inherit-property.html>.

<sup>23</sup> See, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted by the General Assembly on Dec. 18, 1992.

<sup>24</sup> Antiquity, uniformity/continuity, certainty and conscious acceptance as of right, etc. are the essential formative elements of a valid custom.



Each of these points may be rebutted by those in favour of such a code. Surely, a code may be realized if these contradictories are eliminated. However, the core of the issue lies in finding the right solution and a possible middle ground for realizing a uniform civil code.

### **POSSIBLE SOLUTIONS AND SUGGESTIONS**

A Uniform Civil Code may be drafted and even implemented if it accommodates and provides sensible responses and answers to the apprehensions and doubts of the people. The idea of such a code is enveloped in the idea of religion and discrimination based on religion. Additionally, the current state of affairs reduce the hope of drafting such a code, particularly when religious sentiments are often exploited by the political class for vote bank politics. India is a secular republic which is predicated on the fundamental principles of the Constitution of India. However, there is where the contradictories lie. While the fundamental right to religion is protected and afforded to all, such a code may violate this essential right and be unconstitutional. While the state is empowered make any law '*providing for social welfare and reform*', under clause 2, nonetheless, if that is the sole purpose, there are other ways as well to bring about change.

Moreover, the present political climate is not conducive to bring a Uniform Civil Code. Exploiting the sentiments of the voters to advance political gains is the most important tool in the hands of the politicians and this will hamper the drafting of a balanced and non-discriminatory Uniform Civil Code. Consequently, contradictory positions are taken by different political parties to safeguard their own voters and such a code will surely be contested for its validity.

The concept of secularism is often misunderstood and abused. To truly become a secular state, India should position religion secondary to constitutional values.<sup>25</sup> In these personal law matters, where religion dictates the laws, procedures and values, the imposition of a secular neutral law may be problematic. Demarcating religion out of these, when the political class themselves are so involved in religious jingoism will be perceived as being inconsistent. Objectively, the idea of advancing '*national integration*' through the code may be unrealistic and somewhat poetic rather than real-world.

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<sup>25</sup> See also, Samrat Chakrabarti, *Secularism begins with uniform civil code: Romila Thapar*, THE HINDU, Oct. 27, 2015 (updated May 28, 2016) (May 23, 2018 8:25PM), <http://www.thehindu.com/news/national/secularism-begins-with-uniform-civil-code-romila-thapar/article7806714.ece>.





Therefore, considering the difficult and precarious position, the aim of the legislators should rather be to modernise archaic personal laws which are discriminatory and gender unjust and consequently, make the rights uniformly applicable to them rather than drafting a new law which will be forcibly made to be applicable for all religions. Issues of gender injustice, bias in matters of marriage and property laws, dowry etc can be resolved by revisiting existing laws and making necessary changes to them. Drafting a code which does not violate the freedom of religion, the right to practice cultural and customary traditions and values and one which does not discriminate against anyone is highly improbable. Some of these issues will surely be violated and that will surely result in opening floodgates of litigation and judicial determinations.

### **CONCLUSION**

A Uniform Civil Code shall remain a dream unless the pertinent contradictories are eradicated. The dream of drafting a law which shall accommodate and address concerns of all religions and give due recognition to all religious practices is highly doubtful. This is further derailed by the reluctance of the legislation to draft such a law, for reasons of their own vested interests. The problem of realisation lies with the misconceptions and incapability of the political class to truly visualise a law as envisaged by the Constitutional framers. The current set of legislators are far more concerned for their own political advantage rather than educating the public on why such a code is necessary and how such a code may be drafted. The primary concerns raised against the code is by the minorities and rightly so. It is often suggested that it is erroneous to believe that such a code would be more favourable to the majority population and would ignore the minorities. However, such apprehensions are but obvious, particularly when the people are so intimately connected to their religions. Considering the ground realities, the political class and the overt reverence to religion, a uniform code shall remain a distant dream. The idea of a Uniform Civil Code which does not trample upon religion, customs and cultural values is improbable and one which is unrealistic considering the present state in India. If at all this is realised, it will have to be based on far greater interaction and discussions with the population of the country accommodating all and one which does not, in its ultimate aim to resolve human rights violations, end up creating other set of violations and abuses. Unity in diversity is the strength of the country. Such a code may unfortunately create far more greater crevices which the state may find far more difficult to resolve. A realistic and accurate assessment of the ground realities is necessary, instead of living in the fantasy of an ideal world.

