

UNIFORM CIVIL CODE: A QUESTION OF UNSETTLED GENDER INEQUALITIES

Abhayachandran K

Assistant Professor, NUALS, Kochi

INTRODUCTION

In 1949, a beautiful constitution was enacted by the people of India for the people. It defines the various organs of governments at the centre and states their powers, limitations and responsibilities, and it also denotes the various provisions to regulate the relationship between the state and its population. The most significant task and challenge of constitution-making was to unite a heterogeneous population of more than thirty million population with legendary language, culture, and religious diversity, including minorities, Dalits, backward classes and indigenous people. Despite the country's size and diversity, the framers succeeded in framing a constitution inclusive of all the diversities of India. This Constitution is said to be the longest Constitution, consisting of 395 articles and 12 schedules, besides several additional articles and parts inserted by amendments from time to time. The preamble to the Constitution sets out the aims and aspirations of the people of India, representing democratic values. The 42nd Amendment of 1976 inserted the word 'secular' in the preamble to the Constitution to establish a secular state. It is based on equal respect for persons who believe in different religious faiths. Among various concepts of secularism, the common element is the absence of state-sponsored or favoured religion¹. This principle is an integral part of the Constitution, and the Supreme Court has repeatedly held that secularism is an unamendable essential feature of the Indian Constitution².

Two chapters of the Constitution are directly connected with the rights and welfare of the people of India. They are Part III and Part IV of the Constitution. The Constitution has guaranteed us certain fundamental rights, and the right to enforce them through the courts is also a fundamental right. Other rights which can be acquired only after a certain period are covered in the next chapter, known as Directive Principles of State Policy. One is the Uniform Civil Code under Article 44 of the Constitution, which will be implemented in the future. The article provides that "the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". However, ambiguities existed even when incorporating this

¹ V. M. Shukla, Constitution of India, A-23

² S. R. Bommai v. Union of India, (1994) 3 SCC 1

article regarding the content and nature of the Code to be envisaged. What is meant by the Uniform Civil Code? There are uniform criminal laws applicable to all in India. There are several uniform civil laws like the Indian Contract Act³, Transfer of Property Act⁴, and Civil Procedure Code⁵, etc. Hence, this Uniform Civil Code clearly refers to personal laws like marriage, divorce, inheritance, etc. However, certain laws in these areas were consolidated and given uniformity only for laws of marriage, succession, guardianship, and maintenance among Hindus⁶. At this juncture, a reference to the Hindu Code and the circumstances leading to its enactment may be helpful to understand the Uniform Civil Code.

HINDU CODE

The new challenge posed by the new Constitution envisioned by independent India was to end all existing discriminations, including those in personal laws. Under the leadership of Nehru and Ambedkar, major revolutionary changes were brought about by the codification of Hindu personal laws. Until then, women's lives were often in the hands of male interpreters of Hinduism. It was a great liberation from the system and its humiliating gender rules, where women's equality was stifled by an immature interpretation based on Vedas, Puranas and Smritis. Therefore, the essential duty of the first Parliament was to enact a comprehensive law to eradicate all forms of discrimination⁷. Finally, a bill for codification of Hindu personal law was introduced before the Parliament on 11 April 1947⁸ but immediately met with strong opposition from conservative Hindu elements in the country. Even the first President of India, Dr Rajendra Prasad, opposed the idea. He asked Nehru to shelve it, but the Prime Minister replied that it would be difficult for him to override his cabinet's decision and went ahead with the process. How those challenges were met and who and which organisations tried to resist and defeat those challenges are part of history. Therefore, one of the most revolutionary social legislations introduced in independent India was the Hindu Laws or the Hindu Code amendments. These amendments created massive protests in many parts of India, the most

³ The Indian Contract Act of 1872 came into force on 1st September 1872 and is one of the oldest mercantile laws of India. The Act prescribes the law relating to contracts in India and is based on the principles of English Common Law.

⁴ The Transfer of Property Act 1882 came into force in India in July 1882. It regulates the transfer of property and related provisions. This Act is one of the oldest laws in the Indian legal system for transferring immovable property between individuals, companies and organisations.

⁵ The Civil Procedure Code of 1908, which came into force on 1 January 1909, is a procedural law relating to civil proceedings in India.

⁶ V. N. Shukla, *Constitution of India*, 384

⁷ In 1948, Nehru entrusted the drafting of the new code to Dr. B. R. Ambedkar that codifying Hindu law would, to a great extent, check the injustices suffered by Hindu women.

⁸ The Hindu Code Bill was introduced in the Constituent Assembly on 11 April 1947 and referred to a Select Committee on 9 April 1948. After 4 years of deliberations, protesting that it remained in limbo, Ambedkar resigned from the Cabinet on 27 September 1951.

notable and robust opposition of which came from the Hindu Mahasabha⁹. Despite constant protests, Jawaharlal Nehru and Dr. B.R. Ambedkar also decided to proceed with the amendment. Dr. B. R. Ambedkar was chosen by Nehru in 1948 to serve as the chairman of the subcommittee charged with developing the Hindu Code Bill. The Hindu Code Bill aimed to codify the various property laws and procedures that apply to both men and women belonging to the Hindu religion.

Some of the main arguments against the Hindu Code were based on ancient religious scriptures, especially when they quoted chapters and verses from Manu¹⁰. They believed that the orthodox Hindu communities' right to maintain and work towards social inequalities. These people propagate that inequality in society is God's creation, and humans can only adapt to it. The best example of this is the arguments raised against efforts to ban slavery in the United States. President Abraham Lincoln tried to outlaw slavery, and the Republican Party in the USA supported slavery because they believed God created it. In the same way the Hindus here also support the caste system because they try to convince others that God makes it. So, man has no power to change this system. Opponents of the Code occupy an illogical position since they are defending iniquitous social laws whose continued existence stands in direct contravention of the provisions of the Constitution¹¹. After the initial resistance, the Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoption and Maintenance Act were reintroduced and passed.

SECULARISM VS. RELIGIOUS RIGHTS

The word secularism was inserted in the Constitution through the 42nd amendment to the Constitution in 1976 to ensure the nature of Indian polity. Since secularism does not have a universally agreed definition or form, the common element is the absence of state-sponsored or state-favoured religion. Religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution¹². There is no base for the argument that secularism is a European principle that we borrowed during the making of the Constitution. Even before it emerged as a progressive idea in Europe, the Indian rulers had adopted secularism as a political strategy. The Western world has judged secularism as a wall between religion and the state. It separated religion from the political affairs of the state. It also insists that the state should not interfere in religious activities. Therefore, the model of Indian secularism is not considered a copy of Western secularism. The idea set forth by the Indian Constitution is the

⁹ Hindu Mahasabha Publication, *The Hindu Outlook from 1941-1956*. Managing editor Indra Prakash

¹⁰ Leila Seth, *India International Centre Quarterly*, SPRING 2005, Vol. 31, No. 4 (SPRING 2005), pp. 40-54, 41

¹¹ See Renuka Ray, *The Background of the Hindu Code Bill*, *Pacific Affairs*, Vol. 25, No. 3 (Sep., 1952), pp. 268-277

¹² *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 147

peaceful coexistence of religious communities. It also ensures equal religious freedom for all. This element has always been present in the background, making the final provisions of the Constitution¹³. However, India is neither a theocracy nor a secular state, as the Constitution's basic provisions provide freedom of religion as a fundamental right¹⁴. Although the Constitution nowhere defines the term religion, some judgments of the Supreme Court have tried to explain the concept in broader ways. In *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Nutt*¹⁵ in the following words.

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code or ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observations might extend even to matters of food and dress¹⁶.

The right to religion is a fundamental right with enumerated restrictions like public order, morality and health, and other provisions of Part III of the Constitution. Exploitation in the name of religion is not justified. Indian legislatures have declared it as a punishable crime, for example, sati, slavery, devadasi, dowry, child marriage etc. Indian secularism is for universal tolerance due to its historical and cultural background and multi-religious faiths. Secularism in the Indian context bears positive and affirmative emphasis. Positive secularism believes in the basic values of freedom, equality and fellowship. Morality under positive secularism is a pervasive force in favour of human freedom or secular living. Indian form of secularism is not anti-religious or anti-God, but it emphasises religious tolerance and upholds morality, which protects the freedoms and rights of persons irrespective of their religious faith. The Supreme Court has explained the concept of secularism in the following words.

Secularism teaches spirit of tolerance, catholicity of outlook, respect for each other's faith and willingness to abide by rules of self-discipline. This has to be for both — as an individual and as a member of the group. Religion and secularism operate at different planes. Religion is a matter of personal belief and mode of worship and prayer, personal to the individual while secularism operates, as stated earlier, on the temporal aspect of the State activity in dealing with the people professing different religious faiths. The

¹³ V. N. Shukla, Constitution of India, (12th ed) 23

¹⁴ Articles 25 to 28 constitute the right to freedom of religion.

¹⁵ AIR 1954 SC 284

¹⁶ *Ibid*, 290

more devoted a person in his religious belief, the greater should be his sense of heart, spirit of tolerance, adherence of secular path. Secularism, therefore, is not antithesis of religious devoutness¹⁷.

India's religious freedom is blended with the unique form of Indian secularism, which shaped people of all religious faiths living in different parts of the country to tolerate each other's religious faith or beliefs, and each religion made its contribution to enriching the composite Indian culture as a happy blend or synthesis. Our religious tolerance received reflections in our constitutional creed. Secular activities associated with religious practices are saved by clause (2) of Article 25 of the Constitution. Provision of a uniform civil code to citizens in India is not against the religious rights under Article 25 of the Constitution, but it would protect against discriminatory treatment only on the reason of sex. At the time when Article 44 of the Constitution was enacted, it faced strong opposition within and outside the Constituent Assembly mainly on two grounds: firstly, it would infringe the fundamental right to freedom of religion mentioned in Article 25, and secondly, it would be a tyranny to the minority¹⁸.

CONSTITUENT ASSEMBLY DEBATES ON UNIFORM CIVIL CODE

The demand for codifying Hindu personal laws came mainly from the Hindu community. But here, the need for codification has arisen outside the Muslim community. By Uniform Civil Code, the framers of the Constitution meant that civil laws could be applied uniformly throughout the country to personal matters, regardless of regional differences. Dr B. R. Ambedkar makes this clear in his speech¹⁹. He described that in some parts of this country, Hindus and Muslims follow the same law of inheritance. He pointed to the experience of North Malabar, where both Hindus and Muslims followed matriarchal law, and opposed the claims of some Muslim brothers that Sharia law was applicable to all Muslims in India. He established that the civil laws of Muslims were not uniform. Correct and progressive elements of all personal laws could be incorporated into the newly envisaged Uniform Civil Code. After the partition of 1947, the Muslim minority community believed that the introduction of the Uniform Civil Code would affect their religious freedom and encroach on their personal law, which is an integral part of religious freedom. Mr. Mohammad Ismail Khan's words expressing their concern were presented to the congregation and are reproduced below.

Now the right to follow personal law is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This

¹⁷ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 166

¹⁸ V.N. Shukla, *Constitution of India*, 383

¹⁹ CAD, 23rd November 1948

secular state which we are trying to create should not do anything to interfere with the way of life and religion of the people. Therefore, Sir, what I submit is that for creating and augmenting harmony in the land it is not necessary to compel people to give up their personal law. I request the Honourable Mover to accept this amendment²⁰.

However, some examples were pointed out in the Constituent Assembly itself that many Muslim countries were not against the uniform civil Code, ignoring the objections to implementing the Code. It was also pointed out that some dissatisfaction was raised by the Khojas and Cutchi Memons when the Shariat Act was passed in India.²¹ The Constituent Assembly did not think that uniform civil law should be imposed on all sections of people. Dr. Ambedkar feared that the government would try to forcefully implement the uniform civil Code, so he said in the assembly that the provision merely proposes that the state shall endeavour to secure a civil code for the country's citizens. 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.²² Ambedkar's position in the Constituent Assembly about the Uniform Civil Code was that although a uniform, personal law was desirable, it should not be imposed for the time being, and people should decide whether it would apply to them. He commented like this.

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, so that the fear which my friends have expressed here will be altogether nullified. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat law which should be applied to Mussalmans who wanted that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors²³.

Dr. B. R. Ambedkar's position on the Uniform Civil Code was not only secular and democratic but also entirely protected the freedom of religion guaranteed by Articles 25 and 26 of the

²⁰ Mohammad Ismail Khan, CAD, 23 Nov 1948

²¹ *Constituent Assembly Debate*, Vol. VII, 547, Sri K. M. Munshi, in his speech, pointed out that nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a civil code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights.

²² CAD Vol. VI, 551

²³ Constituent Assembly debates, Volume VII (here on, CAD, Vol.) 3 December 1948 p. 1979.

Constitution. It can be seen that he only opposed feudalist orthodox religious interpretations and discrimination against women. Unfortunately, a vigorous debate took place on both sides; there was yet to be a consensus in the Constituent Assembly on what the Uniform Civil Code would be. At the end of the discussions, the Constituent Assembly agreed to include the Uniform Civil Code as a directive principle rather than a fundamental right. In the following years, there were many interventions from the legislature, courts and civil society to amend personal laws or establish a uniform civil code. Foremost among them are comments from the courts.

SUPREME COURT ON UNIFORM CIVIL CODE

The Court has repeatedly pointed out the inaction on the part of Parliament in legislating the Uniform Civil Code. The Court's displeasure came out through several judgments. The Court pointed out that the most important thing is that the Uniform Civil Code should be formed to realise the equality envisioned by the Constitution. Through it, the inequality between men and women can be eradicated. In the *Shabanu Begum* case²⁴, the Supreme Court opined that the legislature should make a Uniform Civil Code to overcome discrimination against women in Muslim personal law. The Court held that:

Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the state which entrusted with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning.²⁵

The Supreme Court's observation in the *Sarala Mudgal* case²⁶ that the Constitution does not permit the encroachment of fundamental rights in the name of freedom of religion or personal rights is very relevant.

Ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression. Article 44 contemplates the Uniform Civil Code based on the idea that in a civilised society, there is no need for a relationship

²⁴ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945

²⁵ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945

²⁶ *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635

between religion and personal law. It keeps religion away from personal laws and secular social relations.²⁷

In *John Vallamattom v. Union of India*²⁸, the Supreme Court examined the constitutionality of section 118²⁹ of the Indian Succession Act, 1925, as it was inconsistent with Articles 14 and 15 of the Constitution. Declaring this section unconstitutional, Chief Justice V. N. Khare made some observations about Article 44 of the Constitution that are very relevant. He commented as follows.

Article 44 provides that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilised society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country³⁰.

However, there is no uniformity in judgments regarding implementing the uniform civil Code and the directions to Parliament. In *Lily Thomas v. Union of India*³¹, the Supreme Court held that Parliament had no direction about enforcing the uniform civil Code. It was clarified that the Supreme Court has never issued directions for the codification of various personal laws into a Uniform Civil Code. In another decision, viz., *Pannalal Bansilal Pitti v. State of A.P.*³², the Court observed that the implementation of a uniform civil code, though desirable, would be counterproductive. In *Maharshi Avadhesh v. Union of India*³³, the Court had specifically declined to issue a writ directing the respondents to consider the question of enacting a common

²⁷ *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, 649

²⁸ (2003) 6 SCC 611

²⁹ Indian Succession Act, 1925, s.118. Bequest to religious or charitable uses.—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.

³⁰ *John Vallamattom v. Union of India*, (2003) 6 SCC 611, 627

³¹ (2000) 6 SCC 224, 245

³² (1996) 2 SCC 498

³³ 1994 Supp (1) SCC 713

civil code for all citizens of India, holding that the issue raised is a matter of policy, it was for the legislature to take effective steps as the Court cannot legislate.

In all these judgments, the Court does not question the validity of personal laws, rather, the discriminations in personal law are questioned. The Court did not examine the supremacy of fundamental rights in case of conflict between personal law and equality. The Uniform Civil Code does not contravene Article 25 of the Constitution because if any practice or belief of religion is contrary to public order, the state is empowered under Article 25 (2) of the Constitution to make a secular law³⁴. The fundamental rights guaranteed by the Constitution clearly outlaw discrimination on grounds of sex. The Constitution has abolished all restrictions operating against women in the pursuit of any career or entry into any of the public services³⁵

CONCLUSION

Based on the above studies, it can be concluded that by introducing the Uniform Civil Code, the framers of the Constitution intended to eradicate the inequality of women and thereby implement the constitutionally defined equal rights and justice regardless of caste and religion. But, this initiative is not a change that can be brought about by law, but political and social changes are needed along with the law. As Dr. B. R. Ambedkar pointed out, the progress of a society can be judged based on the progress of women in that society. At the same time, a uniform civil code cannot be imposed on people overnight³⁶. Personal law cannot be codified in a manner inconsistent with the Constitution and accepted interpretations of the Constitution of India. While codifying personal laws, the law should be made in accordance with the fundamental rights guaranteed by the Constitution. If there are any clauses or customs in the existing religious personal laws or customs which are contrary to equal rights, they should be deleted. The Uniform Civil Code should focus on the diversity of family laws and practices of all religions while addressing social injustice and inequality in personal laws. The Court has recognised the difficulties of bringing people of different beliefs and assumptions into a uniform civil code³⁷. (Shabanu Begum case) Instead of introducing a completely secular personal law, efforts should be made to implement gender equality by acknowledging the role of religions in personal laws as a starting point. The government can use court judgments as a starting point. It is the duty of secular India to consider the grievances of religious minorities and ensure that the Uniform Civil Code does not become an effort against a particular religion. It should be ensured that by introducing it, religious hatred should not be fostered, and religious harmony should not be aggravated. Therefore, Muslim laws need to be reformed by the values

³⁴ D. C. Manooja, *Uniform Civil Code: A Suggestion* JILI, April-December 2000, Vol. 42, No. 2/4, Constitutional Law Special Issue (April-December 2000), pp. 448-457

³⁵ Article

³⁶ See Krishnayan Sen 4196 Economic and Political Weekly September 11, 2004

³⁷ *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556, 572

of the Constitution, just like the laws passed by the Indian Parliament to end the discrimination against women that existed in the Hindu Personal Laws.