

Need For Uniform Civil Code In India: An Analysis

Naresh Kumar

FCI Member,

*Under the Ministry of Consumer Affairs,
Food and Public Distribution, Government of India.*

Abstract

India being a multicultural and multi religious country and it has adopted the concept of secularism in the preamble of the constitution in its 42nd amendment. The term secular means that the State will not follow any particular religion and neither will the people be discriminated because of the religion that they follow. Family law is the set of personal law that govern disputes on Marriage, Divorce, Successions, Adoption, Guardianship and etc. The Family law differs for Christians, Hindu, Muslim, etc., and they have separate civil code governing them. For ex Hindu Marriage Act, Christian Marriage Act etc., There is also no uniform civil code, which is a great flaw in the system. The constitution of India guarantees the right to equality¹. This constitutional guarantee of equality is silent in the perspective of the family law. As India being a patriarchal society, the personal laws have been inclined towards the men. This leads to the question of gender inequality in the existing personal laws existing in India. The personal laws in India have put women behind men and have given very less rights for women comparing to men. This clearly indicates the need for the reform in the gender just law. There is also an existing difference in the regulation of the family laws and also this leads to the need for the Uniform Code for the regulation of the civil code which will be a regulating statute for all the religions in India. Uniform Civil Code as an institution would help in bridging the discrepancies in the existing family laws. Only Indian region to follow the Uniform Civil Code is Goa. It has its own code known as The Goa Civil Code. This was a code formed by the Portuguese Rulers and was left to be followed even after the joining of Goa to the Indian territories because of the request from the people.² So this type of Uniform code is needed for the secular states like India. In India, nearly, half of the population consists of women who suffer from patriarchy which is supported by tradition, religion and culture. Tradition, religion and the culture of Indian society subordinated women to men. Women had to struggle for equality, liberty and justice. Women are often victimized, ignored. Religion, has however, proved to be a formidable barrier to recognize the rights of women within family as well as in society. Women suffered from gender based prejudices and therefore they are marginalized. Gender equality is embodied as ideal in the constitutional provisions and that is to be achieved by special affirmative action such as implementation of Uniform Civil Code.

Keywords- Constitution, right to equality, gender justice, Uniform Civil code.

¹ Article 14 in The Constitution Of India 1949 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

² Carmo D'Souza, "Family Laws of Goa – Research and Reforms", available on <http://www.fd.ulisboa.pt/wpcontent/uploads/2014/12/Souza-Carmo-Family-Laws-of-Goa-Research-And-Reforms.pdf> (last accessed on 26 August, 2019)

Introduction

Status of women is the benchmark of social process. India has envisaged a great degree of legislative protection for women but in terms of required International standard a lot is yet to be achieved¹. The Hindu sage Manu condemned women to eternal bondage, while the followers of Prophet Mohammed placed the fair sex behind Purdah².

In Indian context, Indian women have come a long way from the Vedic ages. But when we go through the personal laws, it becomes obvious that the women have been conferred an inferior status in most of the personal matters compared to men.

The basic issue of ensuring justice and equality to women is connected with many other contemporary issues like religion, secularism and freedom. Secularism means all religion must be treated equally by the state and the state must not have a religion of its own. In order to establish true equality among the citizen of the country, the state must enforce uniform civil code. Uniform Civil Code is about secularism and equality. The preamble of our Constitution talks about Indian state being secular and Article 15 of the Constitution provides statutory provisions for the existence of equality. The Uniform Civil Code and gender justice in many aspects have a relation which cannot be given a blind eye.

Personal Law and Discrimination against Women

On a clear analysis of all the personal laws, it becomes obvious that the women have been conferred on inferior status in most of the personal matters compared to men.

Until the codification of Hindu Law women did not enjoy equal right along with men. Polygamy was prevalent among Hindus. Hindu women could not hold any property as its absolute owner except in the case of “stridhanam”³. She had only limited estate which was passed on to the heirs of the last full male owner called reversioners on her death. She doesn't have the right to adopt a child on her own. Even though the Hindu law has been codified certain discriminatory provisions still exist even today i.e., gender discrimination is evident in Hindu Law.

Muslim Women

The Holy Quran gives equal right to men and women and places women in respectable position. However, there are certain aspects in Islam that render the position of Muslim women especially the wives insecure and inferior.

A Muslim male is permitted conditionally to marry as many as four wives at a time. It is important to note that the polygamy among Muslim men is only a permission but not a compulsion. The Shia Muslim male can contract Muta Marriages for an agreed period of time. There is no ceiling on the number of muta marriages that may be contracted by a Muslim male. In the matter of divorce, the position of the Muslim women is the most inferior and insecure compared to others, Particularly the method of divorcing the wife by the husband by pronouncing triple “Talak” is highly discriminatory., This is inspite of the clear message of Holy Quran which discourages “Talak-ul-Sunnat” and “Talak-ul-Biddat because the right of the husband to divorce his wife is unilateral and unfettered. In the matter of succession, a Muslim woman is discriminated, despite the assertion of certain Muslim scholars that the Islam in this regard is more progressive and liberal. The legal position is that when two sharers or residuaries of opposite sex but of the same degree inherit the property of the deceased, -the Muslim male gets twice the share of the female. For example, if brother and

¹Dr. N.K. Chakrabarti and Dr. ShachiChakrabati, “Emerging Necessities of Gender Balance in Law”, 2006,p.19.

²R.N. Sharma, “Indian Social Problems”, 1982, p. 85.

³G.B. Reddy's “Women and Law”, 1998, p. 66.

sister inherit the property as successors, the brother gets two shares-Whereas the sister gets only one share.

In the matter of maintenance also the divorced Muslim wife is not required to be maintained beyond the 'Iddat' period. The Criminal Procedure Code which imposes an obligation on a husband to maintain his wife including divorced wife until she maintains herself is a secular law and is applicable to all. There is a controversy as to whether a Muslim husband can be directed to maintain his divorced wife even beyond the Iddat period under the provisions of Section 125 Cr. P.C. In the famous case of *Mohd. Ahmed Khan v. Shah Bano Begum*¹, the Supreme Court, speaking through Chandrachud, the then Chief Justice held that Section 125 Cr. P.C. is applicable also to the Muslims and that even a Muslim husband also is liable to maintain his divorced wife beyond the Iddat period. Because of the controversy, the Parliament has passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to overrule the judgment in Shah Bano case. The effect of this act is that a Muslim husband is not liable to maintain his divorced wife beyond the 'Iddat' period, unless both the spouses submit to the court at the appropriate time that they would like to be governed by Cr.P.C. Recently in accordance with the directions of the Supreme Court, the central government drafted a Muslim Women (Protection of Rights on Marriage) bill, 2017 and presented it to the parliament on 28 December 2017. On the same date, the bill was passed by Lok Sabha, but it was not passed by Rajya Sabha.

The Muslim Women (Protection of Rights on Marriage) Bill, 2018's main features are the following:

1. **Definition and Scope**- The bill defines talaq as "talaq means talaq-e-biddat or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband". The act shall be extended to the whole of India except the state of Jammu and Kashmir.
2. **Offences and Penalty**- The bill states that talaq-e-biddat is a cognizable offence-with the punishment of imprisonment up to 3 years with fine. Also, the offence will be cognizable only if the married women against whom the talaq has been declared or any person related to her by marriage or blood, will give the information related to the offence.
3. **Bail by the magistrate**- Under the bill, the magistrate may grant bail if he is satisfied that there are reasonable grounds after hearing the women against whom the talaq is pronounced.
4. **Compounding of the offences by the magistrate**- Compounding of the offences refers to the procedure where the two sides agree to stop legal proceedings, and settle the dispute, the magistrate may determine the terms and conditions of compounding the offence.
5. **Allowance**- The women against whom the offence has been committed is entitled to seek allowance and the magistrate will determine the amount to be paid as allowance.
6. **Custody of the children**- The women against whom the talaq has been pronounced will be entitled to get the custody of her minor children and the manner of custody will be determined by the magistrate.

In the case of Christian women, the situation is not different. The Indian Christian are governed by the Indian Christian Marriage Act 1989, the Indian Divorce Act 1969 and the Cochin Christian Succession Act 1921 etc. Parsi are governed by a different set of laws. Thus it is clear that there is no uniformity in all personal laws as they confer unequal rights depending the religion and the gender.

¹AIR 1985 SC 945.

It is here which comes the importance of Uniform Civil Code. A common civil code is a process whereby family law is impressed with a secular character so that citizenship as Indian; not his particular religion or section or school will pronounce the prescriptions that govern his economic, social and other temporal affairs¹.

The Uniform Civil Code and the Indian Constitution

The Indian Constitution, in its Part IV, Article 44 directs the State to provide a Uniform Civil Code throughout the territory of India. However, it is only a directive principle of State policy, therefore it cannot be enforced in a court of law. It is the prerogative of the State to introduce Uniform Civil Code. The Constituent Assembly Debates clearly show that there was a wide spread opposition to the incorporation of Article 44. Dr. B.R. Ambedkar stated that in our country there is practically a Civil Code, uniform in its content and applicable to the whole of the country. He cited many instances like Uniform Criminal law, transfer of property and Negotiable Instruments Act which are applicable to one and all. However, he conceded that the only province, the civil law has not been able to invade so far is marriage and succession. He also dispelled the arguments of certain Muslim members that the Muslim law is immutable and uniform throughout India. He cited the example of the North-West Frontier Province which was not subject to the Shariat law prior to 1935 and until then followed the Hindu law in the matter of succession etc.! Similarly, in the North Malabar region of Kerala, the Marumakkutayan law applied to all, not only to Hindus but also to Muslims. Up till 1937, in the rest of India, the various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu law of succession.

Some of the learned members however predicted that a stage would come when the Civil Code would be uniform and stated that power given to the State to make the Civil Code uniform is in advance of the time. Dr. Ambedkar also opined that 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. The foregoing discussion clearly establishes that the framers of the constitution were aware of the gender injustice and sexual inequality of women and they incorporated Article 44 in the constitution hoping that it would be introduced in future at the appropriate time. It is really unfortunate that even after 50 years of independence, the State did not find it necessary to make any efforts to honor this constitutional commitment.

Need of Uniform Civil Code in India

In 1947 when India got independence to make it a truly secular nation we would need a uniform civil code. But even after 72 years of independence we haven't been able to do this. The reasons for why this was not possible is a complex and a different topic. On positive aspect there is need a uniform civil code for reasons. The first reason for the need of uniform civil code is to promote secularism: A uniform civil code doesn't mean it will limit the freedom of people to follow their religion, it just means that every person will be treated the same. Second reason is, equal rights to females: A uniform civil code will also help in improving the condition of women in India. Indian society is extremely patriarchal and misogynistic and by allowing old religious rules to continue to govern the family thus condemning all Indian women to subjugation and mistreatment. A uniform civil code will help in changing these age old traditions that have no place in today's society where women

¹Justice V.R. Krishna Iyer on "The Muslim women (Protection of Right on Divorce) Act, 1986, p. 27.

should be treated fairly and given equal rights. Thirdly, a uniform civil code is the sign of modern progressive nation. It is a sign that the nation has moved away from caste and religious politics. While Indian economic growth has been the highest in the world our social growth has not happened at all. It will help the society move forward and take India towards its goal of becoming a developed nation.

Fourthly, it eradicates loop holes in Personal Laws: The various personal laws are basically a loop hole to be exploited by those who have the power. The panchayats continue to give judgments that are against Indian constitution, human rights are violated through honor killings and female feticide throughout the country. By allowing personal laws there is constituted an alternate judicial system that still operates on thousands of years old values. A uniform civil code would change that. Fifthly, a uniform civil code will also help in reducing vote bank politics that most political parties indulge in during every election. If all religions are covered under the same laws, the politicians will have less to offer to certain minorities in exchange of their vote. Not having a uniform civil code is detrimental to true democracy and that has to change. Sixthly, a uniform civil code will help in integrating India more than it has ever been since independence. A lot of the animosity is caused by preferential treatment by the law of certain religious communities and this can be avoided by a uniform civil code. It will help in bringing every Indian, despite his caste, religion or tribe under one national civil code of conduct¹.

Uniform Civil Code, Indian Constitution, Concept of Secularism.

Uniform Civil Code (UCC) is the need of the hour in the sub continent to regulate the existing inequalities in India. UCC was the sole part Of the Draft Constitution of the Independent India and later was subsumed in Article 44² under the part IV of the Indian Constitution as a Directive Principles of State Policy (DPSP). As the name suggests they are only directives given to the state and these are also not justifiable in the courts. Thus the implementation of UCC was left in the hands of the government. Even after 7 decades after the independence the government has not taken any steps in implementing the Uniform Civil Code.

The Preamble of the Indian Constitution resolves to constitute a "Secular" Democratic Republic. This means that there is no state religion or in other words the state does not operate on any one particular religion and shall not discriminate on the ground of religion. Article 25 and 26 of the Constitution of India as enforceable fundamental rights guarantee freedom of religion and freedom to manage religious affairs. Uniform Civil Code is a set of codes which would be governing all religions equally and there would be no discrimination on the name of religion and implementation of this code would help in promoting the peace and this implementation would not be resulting in the concept of secularism in India. The

¹Dr. Saroj Bohra, Uniform Civil Code, Women Empowerment and Gender Justice, South -Asian Journal of Multi disciplinary Studies (SAJMS) Vol.3, Is 2, p22.

² Article 44 in The Constitution of India 1949

The State shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India.

UCC would be dealing with the equal treatment of religion and will also be promoting the harmony and would be helping in the equal treatment of all citizen irrespective of the religion they belong to.

Uniform civil code and judicial attitude

In the case of *Sarla Mudgal v. Union of India*¹, Justice Kuldip Singh has stated that Article 44 has to be retrieved from the cold storage where it is lying since 1949. He says that the legislature must take into the consideration of the need for UCC and must bring it into the effect.

In *Bai Tahira v. Ali Hussain Fissalli Chowthia* the renowned Justice V R Krishna Iyer has had an Ambedkarian view on the need of the common civil code to be implemented in India. He states in the book He states:

*Speaking for myself, there are several excellent provisions of the Muslim law understood in its pristine and progressive intendment which may adorn India's common civil code. There is more in Moham med than in Manu, if interpreted in its humanist liberalism and away from the desert context, which helps women and orphans, modernizes marriage and morals, widens divorce and inheritance.*²

Justice Krishna Iyer has stated that religious practices must go hand in hand with that of Human Rights, any practices which go against the Human Rights cannot be tolerated and it shouldn't be going against the dignity and basic rights of the citizen.

In the case of *Srinivasa Aiyar v. Saraswati Ammal*³, the High Court of Madras has validated the Madras Prohibition of Bigamy Act which has been challenged under the fundamental right to Freedom and the court had held that these mere prohibition of Bigamy doesn't mean they are against the right to freedom but these promote the right to equality between the men and women. Also this prohibition helps in promoting gender justice in the Madras state.

In the case of State of Bombay v. Narasu Appa Mali the Bombay High Court has held that Gajendragadkar J. stated: The State Legislature may have thought that the Hindu community was more ripe for the reform in question. Social reformers amongst the Hindus have agitated for this reform vehemently for many years past and the social conscience of the Hindus,

¹ *Sarla Mudgal v. Union of India* AIR 1995 SC 153

² V. R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act, 32* (Eastern Book Company, Lucknow, 1987).

³ *Srinivasa Aiyar v. Saraswati Ammal* AIR 1952 Mad 193.

according to the Legislature, may have been more in tune with the spirit of the proposed reform. Besides, amongst the Mahomedans divorce has always been permissible and marriage amongst them is a matter of contract. If the State Legislature acting on such considerations decided to enforce this reform in the first instance amongst the Hindus, it would be impossible in my opinion to hold that in confining the impugned Act to Hindus as defined by the Act it has violated the equality before law as guaranteed by Art. 14. In my opinion, therefore, the argument that Art. 14 is violated by the impugned Act must fail.¹

These judgements have shown us the discriminations of the gender and persons of different religion to be existing in different parts of India. Thus this helps us to promote the need of the implementation of the UCC in India.

The judiciary in India has taken note of the injustice done to the women in the matters of many personal laws. It has been voicing its concern through a few judgements indicating the necessity to have uniformity in personal matters of all citizens.

The desirability of Uniform Civil code was declared by the Supreme Court of India in 1985 in the case of *Md. Ahmed Khan Vs Shah Bano Begum*². In this case the Supreme Court of India held that a Muslim divorcee was entitled to get maintenance from the former husband beyond the period of Iddat under Section 125 of the code of criminal procedure, if she had not married and could not maintain herself from the dower received at the time of divorce. Where this decision gave Muslim women great relief but on the other side Muslim fundamentalist led to the enactment of Muslim women (protection of Rights on divorce) Act, 1986 which excluded divorced women from the purview of Sec.125 of Cr.P.C. This Act was severely criticized and it was a glaring example of injustice and gender inequality. The Muslim fundamentalist criticized the supreme court of India as the court had unnecessarily interfered with their personal laws.

But in *Danial Latif's*³ case, the supreme court liberally interpreted S.3 of the Act, 1986 and has ruled that a Muslim husband is liable to make provision for the future of the divorced wife even after the Iddat period⁴.

The Supreme Court of India though appreciated the difficulties involved in bringing persons of different faith and belief under one common code but it regretted that Art.44 remained as a 'dead letter.'⁵

The Supreme Court of India has emphasized that the steps be initiated to enact Uniform Civil Code by the State as it has the legislative competence to enact it.

In the absence of such a code or a general matrimonial law, some individuals are taking advantages and in order to escape liability under Hindu personal law, they get converted into Islam to solemnize second marriage. In such Cases, the question was whether second marriage without the first marriage⁶ has been dissolved, would be a valid marriage. The Court was of the opinion that such marriage will be void in terms of Sec.494 of Indian Penal Code.

¹ *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84.

² AIR 1985 SC 985.

³ (2001) 7 SCC 740,757.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Sarala Mudgal Vs. Union Of India*, AIR 1995, SC 1531, *Danial Latif Vs. Union of India*, (2001) 7 SCC 740,757.

But the court refused to declare polygamy and certain aspect of Muslim personal law as void under Art. 14 and 15 of the Constitution of India. The court, however, pleaded for a Uniform civil code for the protection of oppressed and for the promotion of national unity and solidarity¹.

In *SarlaMudgal*²the court emphasized that there is no relation between personal law and religion in a civilized society. Marriage, succession and like matters are of secular character and cannot be brought within the guarantee enshrined in Art.25,26 and 27. The court pointed out that the Hindu personal law has been reformed to make it secular but Muslim personal law is yet to reform to divest it from religion. The court urged the govt. to have a fresh look at the issue of Uniform Civil court. The Supreme Court of India, though, considered it as a serious inaction on the part of the Government but the court is yet to interpret the meaning of the provision contained in Art.44.

In *Lilly Thomas vUnion Of India*³, while dealing with the validity of second marriage contracted by Hindu husband after his conversion to Islam, the Supreme Court clarified that the court had not issued any directions for the codification of a common civil code and that the judges constituting the different Benches had only expressed their views in the facts and circumstances of those cases. It appears that the apex judiciary has taken a back ward step in the matter of uniform civil code.. The first step towards Uniform Civil Code. In *Seema v. Ashwani Kumar*⁴, the Supreme has held that all marriages, irrespective of their religion, be compulsorily registered. Moved by the plight of women fighting for their rights under marriage like maintenance and custody of their children, a two Judges Bench of the Supreme Court comprising of Justice ArijitPasayat and S.H. Kapadia directed the Centre and State Governments to amend the law or frame rules and notify them within three months. The Court directed the government to provide for “consequences of non-registration of marriages” in the rules which should be formalized after inviting public response and considering them. The Court said the rules so framed would continue to operate till the respective governments framed proper legislations for the compulsory registration of marriages. Giving no room for appeasement or dilution of the objective to be achieved through such legislations, Justice Pasayat said all new laws to be framed by the governments have to be placed for scrutiny before the Supreme Court. The Court felt that this ruling was necessitated by the need of time as certain unscrupulous husbands deny marriages leaving the spouses in the lurch, be it for seeking maintenance, custody of children or inheritance of property. The ruling of the Court will itself facilitate the object of having a common civil code as most the problems relating to it are due to the non-registration of marriage. The benefits of this ruling are as follows: -

It will-

- (1) prevent child marriage;
- (2) check bigamy and polygamy;
- (3) help women to exercise their rights under marriage- maintenance- custody of children;
- (4) enable widows to claim inheritance; and
- (5) deter husbands from deserting their wives.

Conclusion

¹M.P.Jain,Indian Constitutional Law,7thedn.,p.1431.

²AIR 1995 SC 1531.

³AIR 2000 SC 1650

⁴AIR 2006 SC1158

The Uniform Civil Code is not only about the need for gender justice but also to promote Article 14 the Right to Equality in India. Because the Uniform civil Code helps in promoting equal and fair treatment of Indian Citizens irrespective of their religion, caste or creed. This goal of the Uniform Civil Code is the need of the hour in India to promote peace and harmony.

This helps us to understand that the Uniform Civil code doesn't go against the article 25 and 26 of the Indian Constitution but merely promotes it. The problem in the existing personal laws is that there is chance of bias arising in many ways out of it. Thus the Parliament of India must take necessary steps in framing up a legislation like the special marriage act which would help in the passing of a uniform code across religions and promote equality in India.

The people in India must understand the role law and religion are of two different ideas. Even after the implementation of the Uniform Civil Code the people would be allowed to follow their own religion and there wouldn't be any restriction on them. Thus its in the hands of the government in power to take necessary steps in the implementation of the Uniform Civil Code in India.

It is clear that no gender justice could be rendered in its comprehensive sense, unless we have a uniform civil code containing the best provisions taken from all the religions, with the sole aim of doing gender justice. Unless women irrespective of their religious affiliation have been conferred equal rights on par with men in personal matters, the constitutional mandate of right to equality of status and opportunity can't be implemented. However adequate care should be taken to see that only rights are made uniform and not the rituals as it would violate the basic structure of the constitution i.e. Secularism.