



WALKING DOWN FROM FRIENDLY TO UNFRIENDLY ROAD: A JOURNEY OF UNIFORM CIVIL CODE¹

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Abstract:

India is the largest democracy and diverse with million communities and traditions with a secular fabric attached to her. The Constitution of India is, since its enforcement, trying to make a diverse and tolerant nation. But the polarization along with religious lines is still active in our society. This paper proposes to bring out the actual socio-political issues which are far more urgent for a well thought out and careful implementation of Uniformity in personal laws, ensuring integrity, unity and equality between genders, communities rather than forcing a still maturing democracy into further complications of intolerance and homogeneity. This paper tosses a light on situation during ancient, medieval and modern and a comparative exploration is going to be pinched as in the course of ancient there was no cognizance about the words like secularism and uniform civil code, but there had been an essence of the same and also the confirmations as to how we deviated from the path of uniform civil code. Through this paper, the apprehension is to be drawn about all those whys and wherefores due to which we adopted the path of friendly to unfriendly. Although the Apex Court has emphasized upon the need of Uniform civil code to settle the ambiguity which has arisen due to the different interpretations of various personal laws and through various judgments in Shah Bano's case and recently the Vallamattam Case have unified inclination towards the enactment of the Code, but the unity of Tamilians in the context of Jallikattu against the order of SC has well justified the fact that nothing can be above the PEOPLE OF INDIA.

Keywords: uniform civil code, constitution, secular, democratic.

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“I personally do not understand why religion should be given this vast, expansive jurisdiction, so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights.”²

Introduction:

India is famously dubbed as the Land of Cultural Diversity, with multiple languages, cultures and religions, which means that it does not follow any one particular religion or there is no official religion for the country. India is also, the world's largest democracy and the second most populous countries of the world and it is emerging as a major power since the 1990's. It has a strong military and has cultural influence over everything and its economy is fast growing and powerful. India is a highly diverse country with so many linguistic, cultural and religious identities.

The Constitution of India envisaged a Uniform Civil Code (hereinafter, UCC) under Article 44, which includes a large ambit of personal laws. As far as uniform legislation is concerned, India has achieved the same in all spheres (civil, contractual, constitutional etc.) except family and matrimonial laws. So through Article 44, an attempt was made, investing the State with this onerous responsibility. The term came under heavy scrutiny during the Constitutional Assembly Debates, with each community vehemently expressing its dissent on the same.³ There was a failure to arrive at a common ground regarding the same hence the Article had been reduced to merely directive in nature, and not mandatory.

The talks of the UCC have been going on long since the Constitutional Assembly Debates. The Judiciary has played a very active role in trying to enforce the same, through several judgements and opinions. While there has been criticism alleging it to be ‘judicial overreach’, there has also been welcome support for the change being created, labelling it ‘judicial activism’ instead.

² B.R. Ambedkar

³ Constitutional Assembly Debates, Vol VII (1949) page 543.

Recently, the debate of UCC has yet again gained momentum due to a petition filed before the Supreme Court by Shayara Bano,² a 35 year old Muslim woman which calls to ban the practice of triple talaq and declare it as unconstitutional. The practices of polygamy and halala have also been brought under the judicial scanner. This has once again raised the question that whether UCC will be the magic solution in weeding out such practices which are being considered as oppressive and anti-women not only by people belonging to other religion but even group of people belonging to the same religion? The principle of UCC essentially involves the question of secularism. Secularism is a principle which needs to be analysed at great length. There are various interpretations of secularism and it is on the altar of all these interpretations, the UCC is both glorified and criticized. Some factions of our society consider the UCC anti-secular while some regard it as the harbinger of communal harmony and secularism. Lastly, the question of the human rights of Indian women looms large in the background of the UCC. Hence, it is needed to be understood whether uniformity in personal laws will definitely lead to the equal status of women in the society or would just remain a communal agenda

This paper tries to evaluate the entire dialogue around the UCC from ancient time to current trend, the arguments on its necessity and the various doubts on its nature, so as to ascertain the extent to which the question of women also gets addressed. India, which is a country of several religions and where every religion has its own customs and usages, how we can cope up with that situation, so that every section of people could flourish in the right manner.

Foot Prints of UCC

Since its inception India has always been a country of many sects. During the sixth century B.C. we have evidences that 63 sects had been living together. Out of these 63 sects some were prominent as: *Vedic, Buddhists, Janis, Ajivakas, Nihilists, Niyatiwadis, Sandehwadis etc.*⁴In Vedic period ancient scholars divided the society into four varnas according to their profession or eligibility. In its initial phase there was no discrimination in the society on the basis of their castes, creed and religion. We have so many examples where a person had complete liberty to choose or established a new sect according to his own ideology as a result of which there was an advent of the sects like Buddhism, Jainism, and others. Moreover; for the establishment of peace and harmony in the society our Rishis (Scholars) made provisions, rules and regulations. They composed Religious and non-religious literature. They also

⁴See; K.C. Sirivastav, Pracheen Bharat ka Itihaastha Sanskriti, United Book Depot; 13th edition (2015).

discussed the meaning and purpose of Dharma. According to ancient Indian scholars the meaning of Dharma was relatively diverse as we understand today. Even all the different sects which established after the Vedic period they also enriched the Indian culture. Ancient Indian scholars set the high standard norms for the upliftment of the society.

The concept of Dharma was entirely different as we understand today; According to ancient Indian scholars the meaning of Dharma was the right path and duty. In the most famous book Gita, Lord Krishna had said that “**to perform your duty is Dharma.**” Every person who is performing his duties is following his Dharma. They also established the ultimate goal of an individual person, which was known as “**Moksha**” (Salvation), but this Moksha could have attained through right path/ Dharma. They were very well aware of the requirement of a human being so they also discussed the theory of **Purusharth**. It was a balance of **Dharama**(Righteous path), **Arth** (Wealth) and **Kaam** (Sex or Physical pleasure). According to them, these were the essential things in the life of any human being and Salvation could be attained in life if a person has all these three things in his life.

Women were also given considerable liberty to profess her own ideology as anupshot of which they could actively partake in political and other social agendas as they were active members of political organization like Vidatha, Sabha and Samiti. Women were considered Ardhgini, which means half part of Men. They were also given proprietary rights.²

“Yajnavalkya is one with Brihaspati relating to the law of partition and inheritance. If the partition took place during the lifetime of the father, the eldest son was entitled to the best share or else it may be divided equally among all sons. If the partition took place after the death of the father, his assets and liabilities were shared by the sons equally. The mother was entitled to an equal share while the sisters got a fourth part of the son’s share. the following is the order of succession in the absence of sons, “ the wife, the daughters, both parents, brothers and their sons, the gentiles (gotrajas), the agnates(bandhus), the pupil and the fellow student”. Yajnavalkya championed widow’s right to inheritance and recognized the widow as an heir.”⁵

With the subsistence of so many sects there would be a possibility of occurrence of clashes within the society on the basis of ideology, religious-beliefs, customs and usages. To curb the possibility of those ideological clashes the provision of **Shastrarth** (Debates and

⁵*Ibid.*

Discussions)had evolved.⁶The result of those Shastrarth would lead to the wrapping up of difference of opinion. The inference could be drawn that during the early Vedic period the system of uniform civil code,which guaranteed every person had his equal rights or equality before law, had shown its existence.

India has always been a fatality of attacks by different invaders as a result of which it became the nestle of various castes and creeds as they got daunted with the culture and climate of Indian land so that they implicatedthemselves with the Indian Culture and gave the birth to mammoth culturally incredible heritage. A large number of foreigners had been assimilated into Indian society, and each group of foreigners was considered a kind of castes. The foreigners who had come as conquerors they were placed the status of the second class Kshatriya in society, ³ the other reason for the increase in the numbers of castes was the absorpion of many tribal people into the society. Infect during this period the women of the two lower varnas were free to earn their livelihood but the women of upper varnas were not free for the same.

“As Persians, Greeks, The Indo-Greeks, The Shakas, The Parthians, The Kushans and The Hunas they invaded India but after some time they impressed with Indian Culture and Heritage and not only had they settled in India but also they adopited our culture also. Many foreigner rulers adopted Indian religion and culture. Indo-Greek ruler Minander (165-145B.C.) was so impressed with Indian culture therefore he adopted Buddhism. TheShaka ruler Rudradaman(A.D, 130-150), was a great patronizer of Sanskrit.Kushan ruler Kanishka was also a great patroniser of Buddhism;we also gave them proper place in our society.The law scholar Manu stated that the Shakas and the Parthians were the Kshatriyas who had been deviated from their duties and fallen into status”⁷

A shift from friendly to Unfriendly

These different attackers settled in India. Most of them adopted Indian culture, they did marriages in India, but due to this several different castes were also established in India. Because of this the flexibility, which was the most remarkable feature of Indian society, it got changed and some complications had been occurred in the society.The Varna system became rigid, now the people were known by the birth of which caste or Varna they were

⁶See; Sharma Ram Sharma, Ancient India, NCERT; 2000 edition (2000).

⁷Ibid.

born. The Indian society which was so flexible in its initial phase, slowly and gradually complexity and rigidity became the part of society. The early Varna System, which was so flexible now had become so rigid. Several evil practices as Untouchability, Child Marriages, Polygamy, etc. established in this period. Practice of Sati tradition also established in this phase, even it had not increased in a large manner but the practice had been started. To govern the society many law books were composed, as: Manusmriti, Yagywalkyasmriti, Brihaspatismriti, Naradsmriti, Parasharsmriti, Devalsmriti, etc. still they could not remove evil practices which had been inculcated in the society. Infact some scholars established some discriminatory laws, which also effected the society in a dreadful manner.⁸

A landmark change occurred in the beginning of the 13th century in Indian History. In 1206 AD Qutub-ud-din laid the foundation of the Delhi Sultanate. From 1206 AD to 1526 AD different Dynasties and their rulers ruled in India, and they imposed their laws. During the entire Sultanate Period, all the Sultans were interested to convert the Dar-ul-harb (country of non-Muslims) into the Dar-ul-Islam (country of Muslims).⁴ The Sultanate period was ended by Babur and he established the Mughal Dynasty which remained till 1858 AD. Infact after the death of Aurangzeb all the Mughal rulers who sat on the throne of Delhi all of them were puppet Emperor.

But from 13th Century to 18th Century different Arab, Turk and Mughal rulers established Shariya laws in India. This Shariya law was based on Quran, Hadis and Ijma. In this period, Islam was the first religion. The law for the Hindus was "Islam or Death" but this was not so easy or feasible them to kill the entire public, therefore Hindus were considered as Zimmis and in a Muslim state they could have reside with some restrictions after paying Jizya. The Muslim law recognized Muslims alone as the citizens of an Islamic state and the non-Muslims were not allowed to enjoy to the same rights as Muslims. They considered Hindus as second grade citizenship and imposed on them some legal and political disabilities. Because of this the situation got worsened and peoples of both religions could not mix up with each other.⁹

This system remained same till the almost beginning of 19th century. In this phase a new race reached in India and established their supremacy.

During the beginning the 17th century British reached in India as traders, but within the 18th century political condition of India got deteriorated. The Mughals who had established a

⁸ See; Srivastava Ashirwadilal, Bharat ka Itihas 1000-1707, Shiva Lal Agarwala & Co., 1st Edition (2014).

⁹ Ibid.

great empire in which India, Pakistan and Bangladesh were existed, after the death of Aurangzeb later Mughal could not intact/unite India. As Mughal power deteriorated British gradually established its supremacy in India.

It was a remarkable change in Indian history, as they established their political supremacy they also established their laws in India or their impact was in the every field of administration. Infact Indian also got influenced with this change. New education system, new western ideas reached in India which influenced the Indian scholars and due to this during the beginning of 19th century Renaissance began in India, so many Indian scholars they scrutinized the evil practices which were established in Indian society, they raised their voice several social reforms movements run by different eminent scholars.¹⁰

After that so many evil practices like Sati-Pratha, Child Marriages, Slavery, and Polygamy etc. were abolished from Indian society. We also made provision of widow remarriages. Untouchability was also a bad practice of Indian society our social reformers and politicians tried to remove this practice from Indian society. Slowly and gradually so many evil practices were abolished.

To settle the disputes or establish harmony in Indian society our scholars made provisions during just before independence, Constituent Assembly was formed on 9th December, 1946 which worked till 26th January 1949, in this period after long debates and discussions our constitution was established. In between this period Indian also got the Independence on 15th August 1947. But with the independence, partition also took place because of communal issue.¹¹

Condition after Independence:

Several remarkable decisions were taken to established peace and harmony in India. We adopted democratic system. We declared our country as a Secular country in which all the religionists had the rights to perform their religious activities in balanced manner. The preamble of the Constitution states that India is a "Secular Democratic Republic" This means that there is no State religion.¹² A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It does not mean allowing all religions to be practiced. It means that religion should not interfere with the mundane life of an

¹⁰See; Grover B.L. A New Look at Modern Indian History, S. Chand and Publishing, 32nd Edition (2017).

¹¹*Ibid.*

¹²See; Grover B.L. A New Look at Modern Indian History, S. Chand and Publishing, 32nd Edition (2017).

individual. Although the Article 44 of the Indian Constitution guarantees Uniform Civil Code to all its citizens, but it was never implemented In this direction we established the Hindu Civil Code in 1955, in which several amendments were done in the ancient Hindu civil code and all the other sects of India like Sikhs, Buddhists and Janis are governed by the Hindu Civil Code of 1955. Infect at the same time we also discussed to amend the Muslim personal code, but lack of willpower or to appeaseMuslims Indian government did not pay attention on it.Infect at the same time we also discussed to amend the Muslim personal code, but lack of willpower or to appeaseMuslims Indian government did not pay attention on it.¹³

Current Scenario

The Supreme Court of India has always been an ardent supporter of the UCC. It was the legendary case of Mohd. Ahmed Khan v. Shah Bano¹⁴(hereinafter referred as Shah Bano case), that once again brought the issue of UCC on the preface. In this much celebrated case the Supreme Court brought a divorced Muslim woman within the cover of section 125 of the Code of Criminal Procedure, 1973 and declared that she was entitled for maintenance even after the completion of her iddat period. Although Supreme Court had assumed the role of a social reformer in many other previous cases,¹⁵Shah Bano case usurped a landmark position in the history of debates on religion, secularism and the rights of women. If we carefully sidestep the political drama that later unfolded, we would be able to trace the problems the courts of our country have been facing due to the separate conflicting personal laws.

As pointed out in the Constitutional Assembly debates, there already exist a number of uniform laws in our country. The courts were taken by surprise in situations where such uniform laws came at loggerheads with the various personal laws, as was the case in Shah Bano. With articles 14¹⁶, 15¹⁷ on one hand and article 25¹⁸ on the other, the courts found themselves in a fix so as to decide to give precedence to which fundamental right. The Supreme Court's use of a uniform law to provide remedy to Shah Bano proved to be a much easier path to protect the basic rights of women. Had the Supreme Court taken recourse to the

¹³*Ibid*

¹⁴Mohd. Ahmed Khan v. Shah Bano, AIR 1985 SC 945, Ms. JordenDiengdeh v. S.S. Chopra, (1985) 2 SCC 556, SarlaMudgal v. Union of India, (1995)3SCC635.

¹⁵Fazlunbi v. Khader Ali, 1980 SCR (3)1127.

¹⁶The Constitution of India, 1950, art: 14: 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.

¹⁷The Constitution of India, 1950 art. 15 (1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

¹⁸The Constitution of India, 1950, art. 25 (1) : Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

specific personal laws, it might have found itself embroiled in debates of theology thus neglecting the plight of the women.¹⁹

Shah Bano case highlights the need for a uniform law which addresses the core need of a woman in distress. It tries to state that it is the suffering of the woman that should be at the core of any gender justice law. The refusal of the husband to maintain his wife after conveniently giving her a divorce is the issue which the law should address rather than addressing what the specific religion has laid down for that woman.

V. R. Krishna Iyer J. who is known to have given a scintillating judgment in BaiTahira v. Ali HussainFissalliChowthia²⁰ also has an Ambedkarian view point on common civil code. Instead of being a majoritarian undertaking, the common code is supposed to be a collection of the best from every system of personal laws. He states:²¹

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 Mohammed than in Manu, if interpreted in its humanist liberalism and away from the desert context, which helps women and orphans, modernises marriage and morals, widens divorce and inheritance.

The judiciary has faced a plethora of problems in upholding the social reforms in the private sphere that the legislation tries to bring through various enactments. Surprisingly enough the recourse to fundamental rights is taken in challenging such enactments. It becomes extremely difficult to gauge the effects of such social reforms on a large scale since it might be possible that one community might be impervious to such social change due to its religious canons. This raises another question of discrimination on the grounds of religion which is once again prohibited by the Constitution vide article 14. How can the Supreme Court declare one practice as unconstitutional and violative of human dignity for one section of women but let it remain constitutional for another section of women since their personal laws allow it to be so?

¹⁹ Dr. B.R. Ambedkar, *The Annihilation of Cast: The Annotated Edition*, 11 (Navayana Publication, New Delhi, 2014).

²⁰ AIR 1979 SC 362.

²¹ V. R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act*, 32 (Eastern Book Company, Lucknow, 1987).

In the case of *State of Bombay v. NarasuAppa Mali*,²² the Supreme Court was face to face with such a situation. The constitutional validity of the Bombay (Prevention of Hindu Bigamous Marriages) Act, 1946 was to be determined by the High Court of Bombay. One of the two major contentions was that it was violative of articles 14 and 15 since the Hindus were singled out to abolish bigamy while the Muslim counterparts remained at full liberty to contract more than one marriage and this was discrimination on the grounds of religion. Questions such as these were raised due to an absence of a common civil code and clash of different principles in different personal laws. M.C. Chagla J. upheld the validity of the Act by stating that it was not violative of any Fundamental Right since such prohibition should not be seen through the lens of religious discrimination. He argued that the Muslims and Hindus differed from each other not only in religion, but in historical background cultural outlook towards life and various other considerations.

High Court of Madras also in *SrinivasaAiyar v. SaraswatiAmmal*²³ upheld the validity of Madras Prohibition of Bigamy Act on similar grounds. The trend which we have to notice is that the courts took a roundabout way to justify such discriminatory laws through extra-religious methods. Otherwise such discriminatory yet laudable attempts by the legislature to bring social change would have been rendered unconstitutional on the touchstone of article 15. Hence justifications such as personal laws not falling within the purview of article 13 and separate, distinct historical subject positions of religious communities were given. M.C. Chagla J. later on himself conceded, “All my sympathies were in favour of this argument, but with a great reluctance I had to come to a conclusion that I could not strike down the law.”²⁴

Such examples merely cite the problem of excessive reliance on relativity in the field of personal laws. Sadly, in political debates and public discussions, this has always been projected from the perspective of a man. That since a Hindu man is subjected to such discrimination; all men should give up their privilege of having gender specific superiority. Equality definition is portrayed in this manner and not through the subject position of the woman.

A Road Ahead

During The proponents of a uniform civil code have been campaigning for it even before the independence of India. India has always been a place of many colors and spices and before

²² AIR 1952 Bom 84.

²³ M.C. Chagla, *Roses in December*, 160 (Bhartiya Vidya Bhawan, 2000).

²⁴ M.C. Chagla, *Roses in December*, 160 (Bhartiya Vidya Bhawan, 2000).

independence in 1947 it would have been hard to point out what constituted India. Fighting the British rule and winning independence also helped in creating this nation call India. It was known even at that time that to further unite India and make it a truly secular nation would need a uniform civil code. But even after 66 years of independence haven't been able to do this and the reasons for why this has not been done are complex and a different topic on its own but it all boils down to political will. Politicians have always found it beneficial to play vote bank politics and try to appease different castes and groups instead of attempting to integrate nation. The objective underlying a uniform civil code is to enhance national integration by elimination contradictions based on religious ideologies. All communities in India would then stand on a common platform on civil matters like marriage and divorce, which are currently governed by diverse personal laws. The pertinent question that poses itself is: If the same law of contract or torts applies to a Hindu and a Muslim, why not the same law of marriage? As once observed by the Supreme Court, the implementation of a uniform civil code is imperative for both, the protection of the oppressed and the promotion of national integrity and unity. It is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, divorce, adoption, succession and the like are matters of a secular nature, and can therefore be regulated by a law applicable to all persons in a country.