

# UTILITY OF UNIFORM CIVIL CODE

## Abstract

The paper analyses the right to equality from a group perspective while dealing with the issue of uniform civil code. In light of this discussion, it suggests that rather than providing solutions, a common civil code will create more problems. This is so because equality is a multi-faceted right and operates at different levels, *i.e.*, individual as well as groups. Therefore, the normative concerns that are sought to be redressed by UCC will, rather than fading away, become serious issues. After briefly discussing the utility of UCC the paper suggests that what is required is not UCC, but better implementation of formal as well as substantive equality at all levels.

## I Introduction

ARTICLE 44 of the Indian Constitution puts an obligation upon the state to secure a uniform civil code (hereinafter UCC) for all citizens of the country. The controversy with respect to the enforcement of this constitutional obligation is not new in the country's socio-legal and political discourse. A heated but inconclusive debate took place in the Constituent Assembly over its inclusion in the Constitution. This was precisely the reason why the constitutional architects bestowed this responsibility upon the future generations and placed the subject in the directive principles of state policy. The tussle with respect to UCC between different socio-religious and political groups reached its zenith after the Supreme Court's judgment in the *Shah Bano* case.<sup>1</sup> However, after deciding several cases on similar lines and focusing upon the need for UCC, the apex court has refrained from directly engaging with the issue by referring it as a matter which falls within the purview of legislature.<sup>2</sup> The issue of UCC attracted the limelight of public discourse, especially legal, in the country after Bharatiya Janata Party's return to power with a strong mandate in the 2014 general elections.<sup>3</sup> Recently, it gathered momentum when the Law Commission of India asked for public opinion regarding its implementation through a questionnaire.

The trajectory which the debate on UCC has taken becomes interesting because it passes through three phases which are grounded in different normative concerns,

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1 *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985 SC 945.

2 The Indian Supreme Court focused on implementation of UCC in several cases, such as *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985 SC 945; *Jorden Diengdeb v. S.S. Chopra*, AIR 1985 SC 935; *Smt. Sarla Mudgal v. Union of India*, AIR 1995 SC 1531. But later in *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573, the court refused to entertain the writ petitions by observing that it is an issue of state policy with which the court will not ordinarily have any concern.

3 M.P. Singh, "On Uniform Civil Code, Legal Pluralism and the Constitution of India" 5 *Indian Law & Society Review* 5 (2014).

which are, national consolidation, equality of laws and gender justice.<sup>4</sup> However, if looked closely, it seems that there have been only two concerns, *i.e.* national consolidation and gender justice. It is on the basis of the latter two concerns that the third concern, *i.e.*, equality of laws is promoted. Thus, in simple words, this third concern is nothing but the issue of UCC itself. Therefore, this paper discusses the issue of UCC keeping in mind the two concerns of national consolidation and gender justice. These two concerns are viewed from the perspective of group equality, as equality is a multi-faceted right which operates at different levels.

The idea of UCC owes its origin to the concept of a common national identity. While making a case in favour of UCC, K.M. Munshi in the Constituent Assembly observed:<sup>5</sup>

[T]here are many factors - and important factors - which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say, Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation.

If seen from this viewpoint, a UCC might prove of some worth in constructing an *Indian identity*, but it is equally important to consider its effects on other identities, such as, religious and regional identities, which often are important to individuals and groups. Moreover, as Bhikhu Parekh says, “identity is a product of the conscious and unconscious interaction between the range of alternatives offered by the wider society and our self-understanding.”<sup>6</sup> Therefore, it is pertinent to highlight the interplay of inter group equality and religious identity of minorities while discussing the issue of UCC in the country.

## II Inter-group equality and religious identity

Hindus constitute the majority of Indian population while other religions, such as, Muslims, Christians, Sikhs, Buddhists, Jains are in minority. Therefore, to safeguard the interests of religious minorities, the Indian Constitution explicitly prohibits

4 Peter Ronald deSouza, “Politics of the Uniform Civil Code in India” 50(48) *Economic and Political Weekly* 51 (2015).

5 K.M. Munshi, 7 Constituent Assembly Debates at 11 (Nov. 23, 1948), available at: <http://parliamentofindia.nic.in/lS/debates/> (last visited on Feb. 5, 2017).

6 See Bhikhu Parekh, “The Constitution as a Statement of Indian Identity” in Rajeev Bhargava (ed.), *Politics and Ethics of the Indian Constitution* (Oxford University Press, New Delhi, 2008).

discrimination amongst its citizens on the basis of religion. In addition to this, the Constitution besides providing minorities the right to freely manage their religious affairs and other cultural rights, also declares India as a secular state. All this is done to assure the minority groups that they will be treated at par with the majority, and that their distinct religious identity will be protected from being assimilated in the national identity. However, if observed closely and from the perspective of liberal multicultural theory, it appears that these protections not only fail to provide substantive equality to minority groups but also pose a constant threat to their religious identity. These claims can be substantiated from the following theoretical premises.

*First*, the minority groups lack a stable 'cultural structure', which is an important factor in the development of individual autonomy.<sup>7</sup> Thus, individuals belonging to minority groups have to struggle to match the social status of those belonging to majority groups whose cultural structures are far more stable. This stability in the cultural structure leads to a stable, enhanced sense of identity which becomes the benchmark of 'good' in any society. However, according to the logic of freedom of choice, individuals have the liberty to select those aspects from their cultural structure which they consider to be 'good' while constructing a sense of their total identity. Hence, if individuals belonging to minority religious groups decide to follow that conception of 'good', which is in consonance with their group, and the result does not meet the standard already set by the majority group, then it is the individuals of minority groups who are to be blamed. According to this understanding, there seems to be no connection between the freely made choice of individuals and the social structure of their group. However, if seen from a liberal and multicultural perspective of right to freedom it appears that there is a valid connection between them. Freedom of choice is best exercised when there is not only absence of external interference and presence of certain enabling conditions, but also a settled framework of meaningful choices and life-options within one's own group.<sup>8</sup> Therefore, if the cultural structure of minorities had been as stable as that of the majority community, then the decision of minority individuals to follow their groups' conception of good might have proved beneficial.

*Second*, in a multi-religious polity where one group constitutes the majority, there are serious doubts regarding the neutral behavior of state institutions. It might be that

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7 Cultural structure is an inherited set of values and customs, and is necessary for developing personal autonomy or the capacity of meaningful choices. See Will Kymlicka, *Liberalism, Community, and Culture* (Oxford University Press, Oxford, 1991).

8 See Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press, Oxford, 2002).

these institutions are not indifferent or neutral to religious identities and are tilted in favor of the majority. This is why some scholars have expressed serious concerns with respect to secularism in a multi-religious polity like India. They view it as being discriminatory, because it allows the state to treat minorities at par with majority, often at the cost of ignoring their differentiated needs.<sup>9</sup>

The Indian case of UCC resonates closely with this scenario, as the idea of attaining a common *Indian identity*, adds to the threat of assimilation prevalent amongst minority groups, more so, because its content is unknown. Thus, the minorities view it as a tool employed by majority groups to assimilate them into the national identity, which will generally be a reflection of the majority identity. Though these may appear as hollow claims, they are not without substance. For example, there is, if not substantial, but visible, difference in the religious practices of Sikhs, Jains, Buddhists, and Hindus. Despite this fact they are considered to be a part of the broader domain of Hindu religion.<sup>10</sup> Therefore, treating these arguments as hypothetical not only undermines the value of theoretical discourse on multiculturalism and the essential human value of equality, but also overlooks the practical hardships faced by religious minorities.

Hence, if UCC is viewed from the perspective of inter group equality and religious identity, then it appears as an idea which perpetuates the will of the majority on the minority. Apart from this, forging a common identity through UCC, which is believed to have a majoritarian tint, will also amount to a denial of equality to the members of these groups as they will be compelled to abandon their distinct religious identities. Undoubtedly, this shall be an unjust sacrifice on their part, as the majorities do not have to do so. Thus, their stand against UCC appears to be justified. However, this is only one aspect of the case concerning UCC. The opposite side of the case for UCC is also concerned with the human value of equality, but from an intra-group perspective.

### III Intra-group equality and gender justice

Women as a group have been a common target of discrimination in all broader social groups, irrespective of their majority or minority status in any country. Though some feminist scholars have categorized women by the degree of discrimination they have to face owing to their membership in a marginalized social group of any country,

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9 See Akeel Bilgrami, *Secularism, Identity, and Enchantment* (Harvard University Press, Cambridge, 2014).

10 See Farrah Ahmed, *Religious Freedom Under the Personal Law System* (Oxford University Press, UK, 2016).

they are generally in agreement with the before-stated fact.<sup>11</sup> The position of women in India was no different, and this was precisely why the Constitution-makers specifically prohibited discrimination on the basis of sex. On the contrary, to uplift their position in the social set-up of the country, the state was empowered to make special provisions, which are immune from being questioned on the grounds of equality.

However, as religious groups in the country were bestowed the right to freely manage their religious affairs by the Constitution, such protections did not prove to be of great help for Indian women.<sup>12</sup> This was because these religious groups, particularly Hindus and Muslims, used their religious personal laws as tools for internal governance of their respective groups, often to the disadvantage of women.<sup>13</sup> It was to overcome this menace that the codification and progressive amendment of personal laws were commenced through legislative interference. But, unfortunately, the ambit of reforms was kept limited to Hindu personal laws and these too only had a symbolic effect.

The issue of gender justice in personal laws gathered heat and were put forth as a justification to implement UCC after the Supreme Court pronounced several decisions in this regard. The demand for its implementation, generally, comes from the right-wing Hindu socio-political groups and women's rights groups. However, there are serious differences with respect to the intention of these groups with regard to their demand for UCC.<sup>14</sup>

The Hindu socio-political groups, generally, call for the implementation of UCC owing to the legal developments in the realm of Hindu personal laws. Their primary proposition is that women in Hindu society enjoy an equal social status with men. To support this, they rely upon the codification process that was done in relation to Hindu personal laws in the mid-1950s. In addition to this, they also point at the amendments done in the codified Hindu personal laws at different points of time in post-colonial legal history of the country. In their understanding, these laws, made through legislative interference, have succeeded in making the Hindu personal laws gender just. However, if viewed closely, this understanding seems disputed, because the legislative interference

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11 Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" 43(6) *Stanford Law Review* 1241 (1991).

12 Shalina A Chibber, "Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code" 83 *Indian Law Journal* 695 (2008).

13 Archana Parashar, "Gender Inequality and Religious Personal Laws in India" 14 *Brown Journal of World Affairs* 103 (2008).

14 See Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (Oxford University Press, USA, 2006).

in the realm of Hindu personal laws has by far retained the conservative patriarchal setup, and have done little good for women of the Hindu society.<sup>15</sup>

These groups also bring up the argument of equality whereby they claim that if legislative interference can be allowed in Hindu personal laws then it can be allowed in Muslim personal laws too. Obviously, this argument does not demand serious engagement, more so, when the social reality belies this legal fiction.<sup>16</sup> The reason behind the chasm between social and legal reality is appealingly explained by Werner Menski, an expert on Hindu law, and can be discerned from his following comment:<sup>17</sup>

[H]indu Law has always been a reflection of the way of life of millions of very diverse people.... What was abolished by the formal law was manifestly only a fragment of the field, not the entire social reality of Hindu Law.

On similar veins, Muslim law as a whole is also not merely bookish law but is a conglomeration of laws from various sources, traditions and practices.<sup>18</sup> Thus, even if reformation of Muslim personal laws is done through legislative interference, there is no guarantee that such laws would be accepted and practiced by the Muslim community.

It is because of this political hue given to the discourse of gender justice by the Hindu socio-political groups that the genuine demands of women rights groups for gender equality in personal laws lose their credibility and are not taken seriously by the religious groups. However, the religious basis of personal laws and freedom to manage religious affairs granted by the Indian Constitution cannot be taken as a defense to deny equal rights to women. These religious groups must realize that their illiberal social setup has been and is discriminatory towards women. Besides this, they must also take into consideration the fact that on one hand they oppose the implementation of UCC on the ground of equality, while on the other they deny equal status to a group, *i.e.*, women, which forms part of their larger group. Therefore, if looked upon from the perspective of intra group equality and the issue of gender justice, it seems that the demand for implementation of UCC is, to some extent, justified.

15 Flavia Agnes, "Liberating Hindu Women" 10(50) *Economic & Political Weekly* 15 (2015).

16 Codification and amendments in Hindu personal laws may have altered the legal position of personal laws of Hindus but the practice, in general, remains by far unaltered.

17 See Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press, New Delhi, 2003).

18 See Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge, 2006). See also, H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford University Press, UK, 2014).

#### IV Utility of uniformity

If the issue of UCC is viewed from the perspective of group equality and grounded in concerns of national consolidation and gender justice, it seems that the debate is evenly poised. When seen from the angle of national identity, UCC seems undesirable, while the result comes out to be contrary when seen from the angle of gender justice in personal laws. Thus, the questions which arise at this juncture and need to be answered are: will implementation of a UCC help secure an equal status for women in the Indian society? What will be the impact of UCC on the process of national consolidation and unity?

With respect to the utility of UCC for the issue of gender justice in personal laws, Flavia Agnes provides a satisfactory solution while taking into consideration the plight of Hindu women after codification of Hindu personal laws. She observes:<sup>19</sup>

[T]he lessons learnt in the last 60 years are that uniformity has not worked. It has also had a disastrous impact on the rights of Hindu women... Rather than excluding women from the realm of rights, we need to adopt an inclusive approach... so that women at the margins are not deprived of their right to a life with dignity and sustenance by adopting moralistic principles that are alien to cultural ethos and customary practices..... Rather than uniformity, what women need are an accessible and affordable justice delivery system and inclusive models of development that will help to eliminate their poverty and destitution and help to build an egalitarian world.

This observation from Agnes makes the picture clear that uniformity has not been of much help in uplifting the position of women in Hindu society. Therefore, drawing an analogy from this, it would not be wrong to assume that the same shall be true for women as a group in the country. Hence, the only valid ground which remains to push the demand for UCC is the quest for common laws for all in order to foster national identity. However, if we go by the discussion above, it is pretty clear that it will never be acceptable to the religious minorities as it threatens their distinct religious identities. Besides this, forging UCC to obtain a common Indian identity will add to the discontentment of religious minorities and will thereby harm the national unity and peace.

The other set of arguments which disfavor the implementation of UCC on the ground of national unity stem from the contemporary legal framework of personal laws of different religious groups and the theoretical discourse on legal pluralism.

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<sup>19</sup> *Supra* note 15 at 16.

Historically, the arena of personal laws in India was marked by deep diversity. It was because different religious groups in the country were governed by different laws. This plurality was further enhanced by the regional customs and traditions.<sup>20</sup> Thus, plurality of laws was prevalent not only amongst different religious groups but also within a homogenous religious group.<sup>21</sup> Therefore, a uniform code seemed an intriguing idea and a venture to be pursued for ease of governance of personal laws and also as a symbol of national unity during the Constitution drafting process.

The legislative interference in the colonial as well as post-colonial period has, if not entirely, but surely to a great extent modified the legal framework of personal laws. It has caused convergence of the personal laws to ideals of equality laid down in the Indian Constitution thereby making them similar to each other in many aspects. An illustration which justifies the latter claim comes from the comparison of present legal framework of personal laws with respect to the issue of divorce. The other reason to cite this very illustration is because of the decision of Indian Supreme Court in *Ms. Jordan Diengdeh v. S.S. Chopra*,<sup>22</sup> wherein the court while deciding a divorce petition with respect to Indian Christian law stressed upon the necessity of a UCC.

After the passage of Hindu Marriage Act in 1955 and its amendment in 1976, the Hindu divorce law had become progressive, egalitarian and liberal. Similar reforms were done in the Parsi divorce law in 1988. The Special Marriage Act of 1954 also provided for grounds on which both men and women could seek divorce, however, this Act applied only to those who had solemnized the marriage in accordance with the provisions of the Act itself. Therefore, the provisions of the Act could not apply to marriages done in accordance with the religious personal laws. With reference to Muslim personal laws, women had a right to seek for dissolution of marriage both under the religious personal laws as well as under the Dissolution of Muslim Marriage Act, 1939. Thus, the only religious group whose divorce law remained to be reformed was Indian Christians as it did not allow the Christian spouses tied in unhappy marriages an easier exit in comparison to personal laws of other religious groups. The plight of Christian women was even worse in this respect. However, the Parliament paid little attention to this issue despite the Kerala High Court judgment in *Mary Sonia Zacharia*

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20 See Pandurang Vaman Kane, *2 History of Dharmasāstra* (Bhandarkar Oriental Research Institute, Poona, 1941).

21 Homogenous religious groups such as Hindus and Muslims in the country were governed by different rules with respect to the issues which fell under the domain of personal laws. This difference was owing to regional customs and practices.

22 AIR 1985 SC 935.



v. *Union of India*<sup>23</sup> owing to political reasons. Ultimately realizing that this aspect of Indian Christian law required amendment, particularly to protect the interest of Christian women and to bring them at par with women of other religious groups, the Indian Parliament amended the Indian Divorce Act in 2001. The amended Act now provides 10 grounds over which a Christian spouse can seek divorce. A Christian woman, in addition to these grounds can seek divorce if she can prove that “the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.” Thus, what this amendment has done is that it has brought the Christian divorce laws in line with personal laws of other religious groups of the country.<sup>24</sup>

Another discourse which emerges out from the above example and is in juxtaposition to the idea of UCC on ground of national unity is that of legal pluralism. While describing its relevance in present times, Tamanaha states:<sup>25</sup>

[L]egal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. In addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. What makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations.

The present Indian state is a glaring example of the above description of legal pluralism. There are numerous legal traditions operating at different levels in different parts of the country. Suppressing these multiple legal traditions or causing them to assimilate with the mainstream legal tradition will not only threaten the unity of the country but will also be seen as an application of colonial mindset by free legislators

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23 1995(1) KLT 644 (FB).

24 Similarly, several other uniformities have been brought about by the legislative interference in the realm of personal laws in the country. For example, the succession laws of Hindus and Muslims appear similar to each other after the passage of Hindu Succession (Amendment) Act, 2005. Similar is the case with laws relating to maintenance. See Werner Menski, “Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda” 9(3) *German Law Journal* 211 (2008).

25 See Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” 30 *Sydney Law Review* 375 (2008).

of a sovereign state. However, if this discourse on legal pluralism is viewed in the context of contemporary legal framework of personal laws, it is clear that uniformity can be obtained without doing away with the plurality of laws.

India, unlike other south Asian countries, has successfully attained some level of constitutionalism and is only second to the United States of America with respect to endurance of constitutions.<sup>26</sup> It is because not only Indians but also the Indian Constitution has succeeded in establishing an identity for itself.<sup>27</sup> All this has been possible because the Indian Constitution for the large part has attempted to not only resonate with the plural socio-cultural ethos of the country, but also to integrate them by giving them space to function within the constitutional framework. Thus, the idea achieving of common Indian identity through UCC is undesirable because Indian identity is itself plural and a synthesis of differing views of every Indian citizen coupled with his or her regional cultures and identities.<sup>28</sup> Thus, what the country requires at present is not a UCC but ensuring implementation of formal as well as substantive equality at all levels.

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26 See Zachary Elkins, Tom Ginsburg *et.al.*, *The Endurance of National Constitutions* (Cambridge University Press, Cambridge, 2009).

27 See Gary Jeffrey Jacobsohn, "Constitutional Identity" in Sujit Choudhry, Madhav Khosla *et.al.*, (eds.), *Oxford Handbook of the Indian Constitution* (Oxford University Press, New Delhi, 2016).

28 *Supra* note 6.

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