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A Never-Ending Tussle between Equality and Faith: Uniform Civil Code V. Article 25

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ABSTRACT

Uniform Civil Code has remained one of the most contentious provisions in the Indian Constitution. The Constituent Assembly had put the onus of bringing a Uniform Civil Code on the State according to its wisdom. But for last 70 years, provision of Uniform Civil Code has remained dead. The researchers through the medium of the article endeavours to determine the requisite for a Uniform Civil Code, which has been matter of a political controversy since the enactment of the Constitution, and how Article 25 i.e. right to freedom of practice of religion has always played a role of thorn in the way of implementing Uniform Civil Code. Researchers in this paper undertake to elucidate the contradiction of Article 14 i.e. right to equality and Article 25 i.e. right to freedom of practice of religion and will try to find out which has to be given preference according to established precedents. Researchers will also try to answer whether this contradiction of two fundamental rights can be resolved by bringing the Uniform Civil Code. In furtherance of this, researchers will elucidate advantages of the Uniform Civil Code such as gender equality, national integration, modernisation, religious equality, end of constitutional contradictions and achievement of true form of secularism. In the light of above mentioned areas of investigation, our key argument focuses on the interplay between Uniform Civil Code, Article 14 and Article 25 as well as the need, desirability, impacts, implementation of the Uniform Civil Code.

I. INTRODUCTION

The war of words over the implementation of a Uniform Civil Code in India has been ubiquitous since the enforcement of the Indian Constitution. The framers of the Constitution desired to include the provision for a Uniform Civil Code as a basic structure of the Constitution of India.³ But, due to proliferating opposition, the provision regarding a Uniform Civil Code could only be included in the Indian Constitution as a Directive Principal for State Policy. Article 44 of the Constitution of India says:

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³ Avni Kritika, *Uniform Civil Code: A Progressive Step*, 1 Jus Dicere JLES. 516, 517 (2018).

“Uniform civil code for the citizens—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”

The controversy over the Uniform Civil Code once again came to the limelight when the Bhartiya Janata Party included the implementation of a Uniform Civil Code in its 2019 Lok Sabha Election Manifesto⁴, and came to power with full majority.

As India’s beauty lies in diversity, though there is a uniform code for criminal matters, civil matters in the country are governed by different codes and customs for different communities. When implemented, Uniform Civil Code will replace personal laws of different communities in India with a uniform set of laws governing every citizen equally, throughout the territory of India.⁵ While Uniform Civil Code is regarded by many scholars as test for secularism, national integration and gender equality,⁶ the minorities believe that implementation of a Uniform Civil Code will eliminate their religion and violate their freedom to practice religion.⁷

The tussle between the implementation of a Uniform Civil Code and the freedom to practice religion emerges from the Indian Constitution itself. On one hand, the Indian Constitution proposes the implementation of a Uniform Civil Code⁸, and on the other hand, it ensures to all the freedom of conscience and the right to freely profess, practice and propagate religion.⁹ The Indian Constitution ensures to every person the equality before the law or equal protection of the laws within the territory of India,¹⁰ yet there exist different personal law codes for different religious communities in India.

In this paper, the authors intend to analyse the conflict between Article 44, i.e. provision for a Uniform Civil Code, and Article 25, i.e. freedom of religion, in the light of Article 14 or the right to equality. The authors also intend to examine whether a Uniform Civil Code can be implemented in India by replacing Personal Laws of different communities, or will the implementation of a Uniform Civil Code in India will do more harm than good.

II. AN ENDLESS CONFLICT

After the independence, Right to Equality was placed under Article 14 as a fundamental right

⁴ Economic Times, <https://economictimes.indiatimes.com/news/politics-and-nation/bjp-manifesto-2019-ucc-ram-mandir-trade-commission-among-key-highlights/videoshow/68775856.cms?from=mdr/> (Feb. 28, 2021).

⁵ *Id.* at 1.

⁶ Tinju V. Thomas and Vinita Jones, *Uniform Civil Code-A Voluntary Transformation*, 2 *GNLU JLDP* 152, 152 (2010).

⁷ Shefali Murthy, *Uniform Civil Code v. Secular Personal Laws*, *Bharati L. R.* 289, 289 (2016).

⁸ INDIA CONST. art. 44.

⁹ INDIA CONST. art. 25.

¹⁰ INDIA CONST. art. 14.

and Right to freedom of practice of Religion was placed under Article 25 as a fundamental right. But there was disunion in the Constituent Assembly for placing Uniform Civil Code as a fundamental right. Raj Kumari Amrit Kaur, M.R. Masani and Hansa Mehta were in favour of making the provision of Uniform Civil Code a Fundamental Right instead of a Directive Principle for State Policy as the existence of various personal laws was one of the main reasons for keeping India divided.¹¹ While, minority leaders like Mohamed Ismail Saheb and B. Pocker Sahib took the other extreme view and opposed the insertion of Uniform Civil Code in the Constitution. Leaders like B.R. Ambedkar and K.M. Munshi intervened and then a consensus was reached and the onus of framing a Uniform Civil Code was shifted on the future government, when it will be required. Hence, Uniform Civil Code was placed under Article 44 as a Directive Principle for State Policy.

Uniform Civil Code remained a dead provision all these years but it is seen as a panacea for the tussle between Article 14 and Article 25. Various instances of conflicts of these rights have already been witnessed by the Supreme Court. The Supreme Court at various times has expressed its dejection over the unavailability of a Uniform Civil Code for the people of India. In *Shah Bano*¹² case, a Constitution Bench headed by Y.V. Chandrachud C.J. said, “A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.” But some argue that Uniform Civil Code is against the idea of one’s right to religion and bringing it will be an attack on the rights of the minorities and will violate their right to freedom of practice of religion. This topic has been a part of constant debates which are going on since the framing of the constitution.

The question arises that what is the conflict between these fundamental right to equality and right to practice one’s religion? Which right has to be given precedent and how Uniform Civil Code can help in overcoming this problem?

The right to freedom of practice of religion also includes the right to manage affairs in the matters of religion by respective religious denomination.¹³ So every religion has a set of its own personal laws according to which a person of that religion is governed. Personal laws have been part of the society from centuries in the form of customs or usages, and they still work on the patriarchal thinking. A law needs to be reformed from time to time with the changing society, but these laws have remained the exact way they have been from the beginning. Any major reform for these laws has not taken place in our society.

¹¹ 2 B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 162 (Government of India Press, Nasik 1968).

¹² Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

¹³ INDIA CONST. art.26 § (b).

Women have always been seen as an inferior sex. The rights that the religious groups claim are the rights that are denied to the women within these communities. For instance, as opposed to men, women do not enjoy an equal right not to be discriminated against, access to available resources, etc.¹⁴ In *Shayara Bano v. Union of India & Others*¹⁵, the Supreme Court found the practice of instant triple-talaq unconstitutional as it directly violated the fundamental right to equality of Muslim women and directed the government to ban this practice by bringing a legislation. In *Malti Ray Chowdhury v. Sudhindranath Majumdar*¹⁶, a female child was adopted by the deceased female in a married state. The husband never raised any objection neither in the physical handing of the child and nor in the ceremony of adoption, and yet, the court held the adoption taken by a woman will not be valid even with the consent of her husband.

Another loophole of personal laws is that they differ from religion to religion and thus rights of every person differ according to their religion and this inequality seriously violates Article 14. In *John Vallamattom v. Union of India*¹⁷, Section 118 of the Indian Succession Act put an embargo only on Christians on bequeathing property to charitable or religious uses. The provision was challenged in the Supreme Court on the rationale of right to equality and the court held that it violated Article 14 therefore the said provision was declared ultra vires.

Over the years, Supreme Court was itself taking different opinions regarding the personal laws. In number of cases the Supreme Court held that personal laws can't be validated on the basis of Part III of the Constitution. On the other hand, in a number of other cases the Supreme Court has tested personal laws on the touchstone of fundamental rights and read down these laws or interpreted them to make them consistent with fundamental rights.¹⁸ These actions of the Court were the result of a wrong judgement delivered in the case of *State of Bombay v. Narasu Appa Mali*¹⁹, by the Bombay High Court. The court in the given case held that personal law is not 'law' or 'laws in force' under Article 13 and made personal laws immune from the constitutional scrutiny. But in the recent judgement of *Indian Young Lawyers Assn. v. State of Kerala*²⁰, (also known as Sabrimala judgement) the Supreme Court finally exorcised the ghost of Narasu Appa Mali judgement and held that customs and usages

¹⁴ Tinju V. Thomas and Vinita Jones, *Uniform Civil Code-A Voluntary Transformation*, 2 GNLU JLDP 152, 154 (2010).

¹⁵ *Shayara Bano v. Union of India & Others*, (2017) 9 SCC 1.

¹⁶ *Malti Ray Chowdhury v. Sudhindranath Majumdar*, AIR 2007 Cal. 4.

¹⁷ *John Vallamattom v. Union of India*, (2003) 6 SCC 611.

¹⁸ Mihir Desai, *Flip-flop on personal laws*, INDIA TOGETHER (Mar. 2, 2021, 1:16 AM), <http://indiatogether.org/combatlaw/vol3/issue4/flipflop.htm>.

¹⁹ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

²⁰ *Indian Young Lawyers Assn. v. State of Kerala*, (2019) 11 SCC 1.

as well as personal laws are a part of 'laws in force' under Article 13(1) and hence can be tested for conformity with Part III of the Constitution.

The Supreme Court has now made it clear that personal laws also come under 'laws in force' under Article 13(1) and it will always be the right to equality which will be given precedent upon the right to freedom of practice of religion. And since it is the duty of the legislature to frame laws, therefore, bringing a Uniform Civil Code should be the top priority of the government and actions for it should be taken at present. If a Uniform Civil Code is brought then it will give a definite set of laws according to which a person will be governed irrespective of religion, gender, caste, etc. And if it assures that the right to equality is not violated and if it is accepted by all, it would provide a solution to the contradiction between Articles 14 and 25.²¹ Uniform civil code will play a major role in national integration, modernisation and making a society which is free from any discrimination, a society where women can live with dignity and then only a true meaning of secular state can be achieved by India.

If we speak of minorities in India, they never favoured to accept the Uniform Civil Code, instead they see this provision as an attempt to impose Hindu faith over them. From past 70 years their stand for Uniform Civil Code remained the same and it can't be seen as changing in the near future. The ideology of personal laws being a matter of religion rather than a matter of nationalistic importance coined by the Britishers at their time for dividing the people of India on the basis of religion is present till now. The tragic part is after all the only community that is willing to adapt itself to changing times seems to be the majority community in the country.²² While, the minority thinks a change in personal laws is a violation of their right to freedom of practice of religion. Because, of these aged views a law which could have transformed the nation still remain a distant dream.

III. CALL FOR A UNIFORM CIVIL CODE

India is a secular country, but surprisingly it has different personal laws for people belonging to different communities for civil matters, which also violate the right to equality under Article 14. Also, some of these personal laws are discriminatory in nature. Due to these issues, the implementation of a Uniform Civil Code seems to be *sine qua non* to free India from the clutches of these discriminatory personal laws.

The main proposition behind the implementation of a Uniform Civil Code is to modernize

²¹ Sakshat Bansal and Saema Jamili, *Uniform Civil Code: Panacea or a Problem*, 8 CNLU LJ 98, 101 (2018-19).

²² V. Sudhish Pai, *Uniform Civil Code—A Constitutional Goal*, 2 SCC J 40, 41(2016).

these personal laws and to bring uniformity. The main rationales behind the desirability of a Uniform Civil Code in India are: (1) Irrespective of the religious practices of its citizens, a secular country like India needs uniform set of laws for all. (2) Women rights are usually limited under personal laws, for gender equality, India needs to modernize these laws by bringing uniform set of laws.²³

The following are some of the advantages of the implementation of a Uniform Civil Code:

1. Gender equality and equal rights to women.

*“I measure the progress of a community by the degree of progress which women have achieved.”*²⁴—Bhim Rao Ambedkar

The constitution of India under Article 15(3) has directed the state to make special provision for women, still personal laws are highly misused due to the patriarchal approach of the society and inefficient legislation.²⁵ Freedom of religion under Article 25 cannot justify the exploitation of human rights of women in the society. Many personal laws regarding marriage, divorce, succession and inheritance in all the communities are unjust and discriminatory towards women. The prevalence of these misogynistic personal laws has led to the ill-treatment of women by the male dominated society.²⁶ Even today in the 21st CE, women are being considered inferior to men and gender equality is still a dream.

The need for the enforcement of a Uniform Civil Code was again realised when a constitution bench of the Supreme Court of India declared the practice of instant Triple Talaq unconstitutional in the case of *Shayara Bano v. Union of India*.²⁷ The practice of instant Triple Talaq has been declared unconstitutional, but there still exist many such laws that are anti-women and degrade the status of women. The enforcement of a Uniform Civil Code will improve the condition of women and will honour their rights. Uniform Civil Code will end these misogynistic personal laws and will propagate the principles of gender equality. The implementation of a Uniform Civil Code is capable of fulfilling our dream of ensuring equal rights to women.

2. Real Secularism.

Religion sensitization in India is a sensitive issue since ages. The minorities have always

²³ Varsha Gupta, *A Dead Letter to the Constitution: Addressing Structural Inequalities*, 6 Nirma University L. J. 15, 18-19 (2017).

²⁴ Joseph Demakis, *The Ultimate Book of Quotations* 415 (Createspace Independent Pub 2012).

²⁵ Zubair Ahmed Khan, *Uniform Civil Code: Prospect of Gender Equality*, Bharati L. R. 46, 49 (2016).

²⁶ Avni Kritika, *Uniform Civil Code: A Progressive Step*, 1 Jus Dicere J.L.E.S. 516, 519 (2018).

²⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

regarded the idea of a Uniform Civil Code as a threat to their religion.²⁸ The Preamble of the Constitution of India states that India is a Secular country. But, today, Pseudo Secularism or Selective Secularism is more prevalent in India. People, who oppose the implementation of a Uniform Civil Code in India, are blindfolded by Pseudo Secularism and fail to understand the real meaning of secularism.

When a Uniform Civil Code will be implemented in India, it will make all the Indians follow a uniform set of civil laws, despite them being followers of Hinduism, Islam, Christianity or Buddhism. There will be no discrimination against anybody on the basis of religion, which is the actual rationale behind the very idea of secularism. The implementation of a Uniform Civil Code will not snatch the freedom of religion from anybody. It will wipe out the discrimination prevalent on the basis of religion and will bring all the citizens under the umbrella of a uniform set of civil laws.

3. Equality for All

In India, every religion, under Freedom of Religion, has been given the right to govern their personal matters. This discrimination on the basis of religion has a tussle with Right to Equality guaranteed under Article 14 of the Constitution. The implementation of a Uniform Civil Code will bring equality by treating every citizen by the same civil code, irrespective of their religion. It will ensure to every citizen the equality before the law.

4. National Integration

Different personal laws for different communities are crippling India by creating contradictions and disparities. Personal laws are different for different communities and are conflicting in nature. The enforcement of a Uniform Civil Code will remove the conflicts, contradictions and disparities. The implementation of a Uniform Civil Code will integrate India and will save the idea of “One Nation, One Flag and One Law.”²⁹

5. End of Constitutional Contradictions.

There's a huge tussle going on between Article 14, Article 25 and Article 44 of the Constitution of India since the birth of the Constitution. Article 44, which proposes the adoption of a Uniform Civil Code, has the status of a Directive Principle for State Policy. Which means the implementation of a Uniform Civil Code was the desire of the framers of our Constitution. But, Article 25, which guarantees the freedom of conscience and the right to

²⁸ *Id.* at 5.

²⁹ J.G. Arora, *Only Uniform Civil Code can Save India*, PGURUS (Mar. 9, 2021, 11:30 PM), <https://www.pgurus.com/only-uniform-civil-code-can-save-india>.

freely profess, practice, and propagate religion, is in contradiction with Article 44. And, Article 14, which guarantees the right to equality, is in contradiction with the personal laws governed under Article 25.

The implementation of a Uniform Civil Code will do away with these constitutional contradictions. It will end the conflict between Article 14 and personal laws.

6. Removal of Defective Personal Laws

Personal laws are customary laws regulated by religious practices. There are many prevalent personal laws that originated centuries ago and are orthodox in nature. Many of these personal laws quite don't fit in the modern society. The enforcement of a Uniform Civil Code will remove these defective personal laws or restrict them and will modernize our civil law system.

IV. THE PATH AHEAD: IMPLEMENTATION OF A UNIFORM CIVIL CODE IN INDIA

*“Article 44 is a mandatory provision binding on the government. The Constitution was enacted for the whole country, it is binding on the whole country and every section and community must accept its provisions and directives.”*³⁰– Chagla, C.J.

A Uniform Civil Code will definitely be, in its best sense and manifestation, the celebration of the idea of India.³¹ However, the enforcement of a Uniform Civil Code is a sensitive issue. The minorities believe that the implementation of a Uniform Civil Code will take away their freedom to practice and profess religion. If a Uniform Civil Code is implemented in the near future, there will be extreme opposition from the minorities. It would not be easy to convince people to sacrifice their personal laws, but it is high time to implement a uniform civil code in India to fulfil the dreams of our constitution framers and to ensure women empowerment, national integration, secularism and equality. To quote K.M. Munshi, *“This attitude of mind perpetuated under the British rule, that personal law is part of religion, has been fostered by British and British Courts. We must, therefore, outgrow it.”*³²

Also, after independence many secular laws have been enacted that override various personal laws and were widely accepted by the masses. Special Marriage Act 1954, Dowry Prohibition Act 1961, Medical Termination of Pregnancy Act 1975, Juvenile Justice Act 2000 and Prohibition of Child Marriage Act 2006 are some instances of secular or uniform personal laws. But, these laws do not form a civil code and cover only few civil matters. However,

³⁰ Chagla, C.J., *“Plea for a Uniform Civil Code”*, Weekly Round Table (25-3-1973).

³¹ V. Sudhish Pai, *Uniform Civil Code- A Constitutional Goal*, 2 SCC (J) 40, 48 (2016).

³² Constituent Assembly Debate, Vol. VII.

while drafting a uniform civil code, these secular acts should be taken into consideration as they were enacted without hurting the sentiments of minorities. Also, the sociological and cultural aspects of each community should be taken into consideration while drafting a uniform civil code.³³ India is a country of mixed culture, where every community has its different culture according to religion, region, tribe, etc. Each of these communities has their own rituals and customs. Therefore, the State while drafting a code should adhere that these communities should have full freedom in performing these rituals, customs for their ceremonies like marriage, etc. in order to preserve their culture.

There have also been many High Court and Supreme Court judgements that point towards the need of implementation of a Uniform Civil Code. In *Ms. Jorden Diengdeh v. S.S. Chopra*³⁴, the Supreme Court of India was of the view that it was time to reform the laws relating to matrimonial affairs including divorce and separation, and implement a Uniform Civil Code for all. The Court also observed that it's high time for legislature to intervene in personal matters and enforce a Uniform Civil Code. In the case of *Ahmed Khan v. Shah Bano Begum*³⁵, the Supreme Court observed that it is an affair of regret that Uniform Civil Code has remained a dead letter. Further, in the case of *Sarla Mudgal v. Union of India*³⁶, the Supreme Court observed that Republic of India is one nation and therefore on the basis of religion, no community could claim to be a separate entity. The *Sarla Mudgal* Judgement throws lights on the issue of bigamy and contradicting personal laws, and emphasizes on the need of enacting a uniform civil code. The Supreme Court also requested the legislature to revisit Article 44. In *John Vallamattom v. Union of India*³⁷, the Supreme Court said that a uniform civil code should be implemented for national integration.

Also, in India, the Union Territory of Goa has a Uniform Civil Code. In Goa, the family matters like marriage, divorce, succession, etc. are governed by the Portuguese Civil Code. Portuguese Civil Code is applicable on all the citizens of Goa, irrespective of their religion. In Goa, both husband and wife and their children have equal rights over their property. Marriage is considered a contract between two people of opposite sex. Catholics are allowed to marry in church and non-Catholic marriages are only recognised when registered at civil registrar's office. In case of divorce, both husband and wife are entitled to equally divide their property, and in case of death of one spouse, the ownership of his or her share is

³³ Tinju V. Thomas and Vinita Jones, *Uniform Civil Code-A Voluntary Transformation*, 2 *GNLU JLDP* 152, 162 (2010).

³⁴ *Ms. Jorden Diengdeh v. S.S. Chopra*, AIR 1985 SC 934.

³⁵ *Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

³⁶ *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531.

³⁷ *John Vallamattom v. Union of India*, (2003) 6 SCC 611.

retained by the living spouse. Bigamy is allowed for Hindus if there is no male heir and bigamy is prohibited for Muslims if there is one registered marriage. The Supreme Court has considered Goa a shining example of successful enforcement of a uniform civil code. Inspiration from the successful Uniform Civil Code Model of Goa should be taken for implementing a uniform civil code throughout the territory of India. If a uniform civil code can successfully work out in an Indian state, then it can be successfully implemented in whole of India.

The Supreme Court, through *Shayara Bano* and *Sabarimala* Judgement, has paved the way for the implementation of a uniform civil code. It is now high-time for the legislature to work towards its implementation. At first, it would be difficult to convince the minorities to accept a uniform civil code, but it has been almost 70 years since the enforcement of our constitution, and we have made no progress towards the implementation of a uniform civil code. Only through the implementation of a uniform civil code, we can ensure gender justice, secularism, equality and national integration in India. The legislature needs to leap forward and implement a uniform civil code to save the idea of India and fulfil the dreams of our constitution framers. It is the need of the hour that legislature should start awareness program to educate the masses about the advantages of a uniform civil code, so that it can be whole heartedly welcome by the citizens of India.

V. CONCLUDING REMARKS

*“Religion is based on faith and a matter of conscience which no law can dictate. I have often said the expression ‘religious laws’ is an oxymoron. What is religion is not law, and what is law is not religion.”*³⁸- Indira Jaising

In conclusion it can be figured that personal laws are a part of religion is based on a hollow ideology given by Britishers to prevent Hindus and Muslims from being united. Every citizen of our country especially minorities should realise that personal laws are not a matter of faith but a matter of national significance. And as a citizen it is our duty to put our nation before our religion.

Personal laws have always been the genesis of constant tussle between the right to equality and right to freedom of practice of religion. Due to these laws women in our society have already suffered and are still suffering. The Supreme Court has already cleared that in the matter between faith and equality it will always be the equality that will be given precedent.

³⁸ Indira Jaising, *The Ghost of NarasuAppa Mali is stalking the Supreme Court of India*, THE LEAFLET (Mar. 14, 2021, 11:43 PM), <https://theleaflet.in/specialissues/the-ghost-of-narasu-appa-mali-is-stalking-the-supreme-court-of-india-by-indira-jaising/>.

So it will be a valid time for the government to bring a Uniform Civil Code for ending the constant tussle between the right to equality and right to freedom of practice of religion and end the sufferings of all women.

Uniform Civil Code will not only give women rights but it will also help in achieving equality for all persons irrespective of their religion, caste, etc. Apart from equality, a Uniform Civil Code will assist in modernisation, national integration, promoting real secularism and uplifting India's image on international level. State of Goa is adjudged as a shining example for having a Uniform Civil Code where every person has been given equal rights apart from few exceptions.

The minorities have always remained hostile toward the implementation of Uniform Civil Code, therefore implementation of Uniform Civil Code is perceived as strenuous job. But it is high time for the legislature to come forward and complete the dream of framers of the Constitution and build an India where a woman can walk with her head held high, where a person can know the real meaning of secularism, where every person has equal rights.
