

UNIFORM CIVIL CODE: REVENANT OF THE FUTURE

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Article 44 of the Indian Constitution is a Directive Principle of State Policy which envisions a Uniform Civil Code to be implemented throughout the State, bringing the vast variety of communities, religions, ethnicities, etc. under one rule of law. As of today, various communities in India are governed by the personal laws ratified as statutes which originate from religious beliefs, custom, and practices. This tends to bring about discrepancies in the application of uniform laws which are to be applied to all the citizens of the country without prejudice. This paper aims to illustrate the reasons as to why a Uniform Civil Code would be beneficial to the State as well as its citizens, while also addressing the various factors that mitigate the implementation of the same. By reviewing judicial decisions, debates in the constituent assembly, and the subsequent actions of State representatives, in contrast to the social and political circumstances of the times, a clear picture of the trajectory of this Directive Principle may be drawn.

“The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”¹

Article 44 of the Constitution of India was an ideal subjected to widespread debate and dialectic at the hands of the drafters of the Constitution, the subsequent Governments that took the throne, and reformists who envision its implementation. The drafting committee of the constitution deliberated making this provision, that is, the implementation of a uniform civil code, article 35 of the Constitution which would have given it the status of a fundamental right. However, due to various oppositions and explanation of the ill timing with regard to the social atmosphere of new-born India, there was no choice but to let it be as a Directive Principle. This does not take away any ground under the importance of this provision's feet but simply shows that the social demographic and collective conscience of the populace was not ready at the time, and perhaps might never be ready if certain mitigating factors, such as orthodox social dicta, do not cease to exist. Two major contentions made by the opposition were that it would leave the minorities at a great disadvantage as equality is not the same as justice², the orthodox ideals that

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¹ INDIA CONST. art 44.

² Constituent Assemble Debates, Vol. VII.

sought to solidify the caste system and other social stratification were to be replaced by uniform rules to govern all, as equals, but this would not negate the injustice that these ideals inflicted upon multiple generations. Secondly, the communal identities of various religions would be challenged and to an extent extinguished as this civil code would replace the archaic laws that govern these realms. Through the years following the inception of the Constitution, the Legislative and Executive have remained close to mum on the topic, letting Article 44 gather dust in cold storage but the Judiciary has done what is within its power to keep the provision in faint memory at the very least. Through judgements on cases regarding the injustice towards certain individuals by religious dicta, the Courts have intermittently reminded the other branches of the Government that they bear such a responsibility and are subject to the Directive Principles envisioned in the Constitution. The Constitution of India envisaged India to be, out of many ideals, a Secular state that promoted Justice and Equality to all its citizens. Although a uniform civil code may not assure justice, it does ensure secularism and equality, which should lead to justice, at the right time however. For millennia, the Indian subcontinent has brandished its communal identity as a chip on its shoulder, it made the nation unique, but for how long can these archaic and outdated religious ideals govern liberal 21st century citizens? Considering the rate at which India is developing, it would be plausible to implement a uniform civil code and get rid of the outdated laws that govern social relations, such as family. However, this is simply a hope for a utopian India which is impossible to manifest in the near future due to the political mechanisms that govern this nation. Power is the sole drive of the politicians that form the Legislative of this country and for as long as they depend on their vote banks and communal politics to achieve this pedestal of power, the ideals of equality, justice, secularism, or a uniform civil code will remain fiction. However, at the right time, the State shall implement this provision to its full extent.

A Uniform Civil Code is a set of secular civil laws that govern the whole of a nation in matters of civil law irrespective of religion, caste, tribe, etc. the need for such a code comes from the constitutional mandate to ensure justice and equality for all citizens. The concept sounds positively simple but that is far from reality. The implementation of a uniform civil code would result in a vast disruption of many age-old laws that govern various social relations such as family, and the interests and preferences vary from community to community. This is what makes the implementation of a uniform code such an ordeal for the State. Adding upon this is the volatile task of deciding what exactly constitutes civil law. According to one of the authors of the Constitution, Shri Alladi Krishna Ayyar, the subjects of entries 5,6,7,8,9,10,12, and 13 in the

concurrent list of schedule VII of the constitution would be subject matters of civil law³. These are laws governing spheres of marriage and divorce, adoption, wills and succession, joint family and partition, transfer of property, contracts, actionable wrongs, civil procedure, and so on. Some of these subjects have been codified under British Rule and are governed by the respective statute but personal laws govern most of them, such as marriage, divorce, succession, etc. Although the Nehru Government codified Hindu Law to a certain extent through the Hindu code bills through the 1950s, these were simply communal laws that were codified into a proper statute. At the same time, the Special Marriage Act was enacted, this was a supposedly secular collection of laws that governed marriage and divorce. However, it was drafted based majorly on Hindu laws and this is why it would not be a fitting example of what would constitute a uniform civil code. The best way to describe such a code would be to say it was drafted upon the same principles as the Special Marriage Act, but contain objectively secular laws covering all spheres of law mentioned above and govern all the citizens of the country. The object behind this principle is to help national integration as it would remove the contradictions based on ideologies.⁴

Through the years, many parties that formed the Government have mentioned the implementation or furtherance of a Uniform Civil Code, but none of these claims ever fabricated into reality. The Bharatiya Janata Party (BJP) has had clauses relating to the implementation of such a code in their manifesto since 1998⁵ but not an ounce of effort has been put into realising this. Similarly, post the Shah Bano case, the Rajiv Gandhi Government did not affect or incept any change in lieu of the Supreme Court reviving Article 44. This shows that although the legislative or executive may not be substantially affecting any change, the judiciary does undertake it's inherent duty of being the check of powers and reminding the other two branches of their duty to realise the directive principle embodied in Article 44.

In the year 1985, the Supreme Court of India passed it's verdict on the Shah Bano Case, in which it reminded the nation that article 44 is a Directive Principle of the Constitution and can not be neglected forever. Shah Bano Begum applied to the court for relief in the form of maintenance, as her ex-husband claimed that under Muslim law the husband need not maintain the wife if period of iddat is elapsed, which is barely 3 months. The conflicting rule of law is Section 125 of the CrPC, which mandates the husband to maintain the wife under order of the magistrate. The court stated that it is a matter of regret that the concerned branches of Government have let

³ Constituent Assembly Debates, Vol. VII.

⁴ John Vallamattom v Union of India, 1994 (Supp-1) SCC 713.

⁵ Lok Sabha Election Manifesto, Bharatiya Janata Party, 1998.

Article 44 remain a dead letter. The court further stated that it is not the responsibility of any individual community such as the Muslim community to reform their laws but actually it is the state who is charged with the duty of securing a uniform civil code and the legislation holds unquestionable authority to do so. However, “legislative competence is one thing, the political courage to use that competence is quite another. A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable.”⁶

Subsequently after little to no legislative action, one individual, Mr. Maharshi Avadesh filed a writ petition before the Supreme Court. He filed for the writ of Mandamus to be issued to the Government in lieu of neglecting to incept the provisions of Article 44⁷. The Supreme Court declined to file this writ as it believed that this was a matter for the legislation to deliberate and take effective steps upon. The court furthered this principle in the same year by saying that it is the unquestionable power of the Parliament to reform and rationalise the personal laws, but the command of Article 44 is yet to be realised.⁸

In the year 1995, the Supreme Court heard one of the most prominent cases which urged the need for a uniform civil code through the subject matter that it was contesting. The *Sarla Mudgal v Union of India* case was a group of four petitions presented under a similar plea. All four petitioners were women whose husbands had converted their religion from Hinduism to Islam for the sole purpose of remarrying, as Islam provides men with the right to practice polygamy. This case shows very clearly how conflicting ideologies due to variance in personal laws leads to not only detrimental circumstances but also legal cacophonies. The court was baffled as Hindu theologies state that a marriage lasts for seven lifetimes and hence the concept of divorce or nullity of marriage is absent. Whereas Muslim law describes marriage as a social contract and acknowledges the concept and specifies certain provisions regarding divorce. The Court had also urged the Government to make a uniform code in this very field of personal law in 1985 by stating “the law relating to judicial separation, divorce, and nullity of marriage is far from uniform. Surely the time has come for a complete reform of the law and make a uniform law applicable to all people irrespective of religion and caste. We suggest that the time has come for the intervention of the Legislation in these matters to provide a Uniform Civil Code.”⁹

⁶ Ahmed v Shah Bano, AIR 1985 SC 935.

⁷ Maharshi Avadesh v Union of India, 1994 (Supp-1) SCC 713.

⁸ S.R. Bommai v Union of India, AIR 1994 SC 1918.

⁹ Jordan Diengdeh v S.S. Chopra, AIR 1985 SC 935.

The Court began by saying that if 80% of the people have already been brought under codified law, then what is mitigating the inclusion of the rest. Further stated that the Nehru Government was the last to utter a sound about Article 44 and since then it has been stowed away in cold storage, and there is no justification that the legislation may give for delaying the realisation of a Uniform Civil Code. The court also delves further into the contestation that the implementation of a uniform civil code is an encroachment upon the fundamental right of freedom to practice and profess a religion. “Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27.”¹⁰ In the United States of America, bigamous marriage was prohibited as it claimed to be injurious to public morality. Similarly, the Hindu, Christian, Parsi, Sikh, and Jain communities’ laws have prohibited polygamy due to similar reasons, so why must one community be allowed to do so. Further, Muslim personal laws consider marriage to be a contract, if the Muslim community permits the Indian Contract Act, a secular codified statute, to govern their commercial contractual relations, then why not apply the same to social contracts. Moreover, Section 494 of the Indian Penal Code of 1860 prohibits marriage with another individual during the lifetime of a spouse. The Muslim community is subject to other provisions of the Indian Penal Code in accordance to criminal proceedings and the court ruled that Section 125 of the CrPC would also apply to Muslims in the Shah Bano case, so it is logically and judicially redundant to permit polygamy as an exception to this minority. Even though minority is the base contention that grants these exemptions to the Muslim community. The court then goes on to give directions to the Government through various individuals to make steps to implement Article 44. The court requested the Prime Minister to probe the Government to look into this implementation and the secretary of the Ministry of Law and Justice to file an affidavit regarding the steps already taken by the Government to work towards the same. This judgement did result in a miniscule change in the legislative policy of the following Governments as the implementation of a Uniform Civil Code was brought under the spotlight, but to no tangible progress could be seen. The BJP added the clause “Entrust the Law Commission to formulate a Uniform Civil Code based on the progressive practices from all traditions”¹¹ to their 1998 Lok Sabha Elections manifesto. Every manifesto of the BJP since then has had similar clauses, even in the manifesto for the 2019 elections, but no progress has actually

¹⁰ Sarla Mudgal v Union of India, AIR 1995 SC 1531.

¹¹ Lok Sabha Election Manifesto, Bharatiya Janata Party, 1998.

been made since 1998, this is said to be the case because a party that allegedly focuses its entire election campaign on vote banks and communal politics would not wish to see a uniform civil code in place as it would blur these divisions and promote integrity among the nation. However, there has been progress on the part of the Judiciary concerning this matter in the form of subsequent judgements.

The affidavit filed to the court in response to the Court's directions on behalf of the Union of India stated that the Legislation is able and ready to implement and enact such a uniform code if the respective communities sanction such enactment. the consent of the minorities and various communal groups was of utmost importance even during the meetings of the drafting committee. Dr. B.R. Ambedkar himself stressed upon the importance of consent to subjected to this uniform code from the various groups that would be affected.¹² This concern was brought up as it is common knowledge that change is never welcomed with open arms, especially any change that concerns religious sentiments in a country so tightly bound with it's religious identity. Although a Uniform Civil Code is desirable, the time and circumstances of it's implementation are crucial to it's success, Justice K. Ramaswamy explained to the court why it would not be fruitful to implement this change through a sudden and complete legislation. "A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."¹³

The Supreme Court went on to face serious backlash from critics and the other branches of Government as the previous judgements in lieu of Article 44 resulted in what appeared to be instructions or directives to the Legislation to implement the provisions of Article 44, but the Court clarified that these were not directives as it would be ultra vires to the court's mandate to order the Legislative. The judgement in the Sarla Mudgal case was specifically highlighted in regard to this, the Court went on to say that those words are simply the opinion of the respected judge and are in no way intended to be directives laid onto the legislative.¹⁴ This instance shows how a simple request to curb personal laws, even though constitutionally mandated, results in widespread back-lash. In 2015, a Christian unwed mother applied for guardianship of her child, who she raised

¹² Constituent Assembly Debates, Vol. VIII.

¹³ Pannalal Bansilal Patil v State of A.P., AIR 1996 SC 1023.

¹⁴ Lily Thomas v Union of India, AIR 2000 SC 1650.

with no aid from the father. The personal laws of the Christian community barred her from doing so without notifying the father, but she did not wish to name the child's father through any proceedings. The Supreme Court took notice of the fact that Hindu women have a natural right of guardianship over even their illegitimate children, which is reserved in the case of their Christian counterparts. The Supreme Court ruled in favour of the woman and granted her guardianship over her child and added "It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation."¹⁵ Through 1985 to 2015, the Supreme Court has, within its mandate, urged and reminded the Legislature that the Constitution has embodied an Article which directs them to unify and integrate all citizens of India under one Uniform Civil Code. By the theory of the three pillars of governance, this is the mechanism devised to check power and affect change, but this scenario is an exception to the results that the theory would aim to achieve. The Legislature either completely ignores the Court's reminders, or fails to show any tangible progress towards establishing this code. There are many reasons that attribute to this legislative stagnation.

The most prominent reason why the State has not been able to implement a Uniform Civil Code is the reluctance of the Muslim community to subject themselves to a set of secular laws. Muslims consider the Qur'an to be the Ultimate Truth and is said to be unalterable, unamendable words of God himself. Any laws that are thought to go against the Qur'an are said to be unacceptable. The fallacy in this belief is that the same Muslim community subjects itself to secular laws such as the Indian Contract Act, the Indian Penal Code, codes of Civil and Criminal Procedure, etc. It may simply be a claim to retain personal laws in spheres of social relations which are profitable or somehow advantageous to the community. By maintaining governance through personal law in the fields of marriage and divorce, patriarchy is sought to be maintained in society. The implementation of a uniform code would entail equality of the utmost extent between all members of society, which would defeat these archaic social structures that plague society. This can be seen through the various practices of unilateral divorce affected by the husband. Moreover, if this community aims at maintaining their religious identity to such an extent, then the same laws must apply to these individuals in other spheres of law, such as criminal proceedings. According to Sharia, a woman found guilty of adultery is to be flogged with lashes 100 times. According to the IPC, a woman could not even possibly commit the act of adultery, as it was defined as an act only perpetrated by men. The disparity between the punishments is exceptionally large and yet there is complete consent of the community to abide by it, so why treat civil law any differently. It

¹⁵ ABC v State (NCT of Delhi), Supreme Court dated 6.7.2015.

can be noticed that the communities that seek to preserve their personal laws, do so only in a limited scope as they easily succumb to lenient laws that are more humane. Furthermore, various fatwas given out by Islamic boards and Qazis are extremely horrendous to public morality. In 2005, a girl named Imrana was raped by her father-in-law and when she approached the Qazi, she was directed to cease cohabitation with her husband and to further refer to him as her son as she would now be her father-in-law's wife. This fatwa is one such example of a multitude of cases where personal laws may not be the most appropriate to govern citizens in this century. Yet, the State does nothing as the Muslim Personal Law Board sets up shariat courts parallel to judicial courts decreed by the Constitution itself. These laws are said to stem from the Qur'an itself which was said to have been recited to the last prophet Muhammad and this makes them close to 1400 years old. As is the case with every other religion, these texts could simply be the creation of a dark twisted mind, so it is redundant to follow them in the age of logic, reason and freedom. Many predominantly Islamic nations, such as Turkey have in fact codified and regulated their civil law systems. The practice of polygamy which has been the most common ground of contesting Muslim personal law is completely prohibited in Turkey¹⁶, yet this has not, in any way, infringed upon the Islamic identity of the nation or the people. The legislations of Egypt, Jordan, Sudan, Indonesia, Syria, and Iraq have all abolished the practice of "Triple Talaq"¹⁷ which continued to be prominently exercised in India until 2017. There is evident precedent of Muslim communities being subject to a common civil law which is morally and legally more substantial as compared to the Shariat, but the problem is not solely the opposition of the Muslim community. The amalgamation of political mechanisms, religious sentiments, and the lack of Legislative courage is the foundation of this opposition. Aruna Asaf Ali expressed her ideology that political parties have come to treat minorities as vote banks, in the Hindustan Standard. This simply means that politicians are scared to go against the staunch religious sentiment of the Muslim community out of fear of losing vote capital. At the same time, pro Hindutva parties also oppose encroachment of personal laws, even though Hindu law has already been codified because if there are no separate personal laws, then the communal divisions will slowly begin to fade, which threatens their vote bank of Hindus.

The minds that drafted the Constitution of India aimed to carve an integrated nation that flourished upon the ideals of equality and justice among many, but they failed to foresee that the hurdles in the way of securing these ideals could possibly stagnate the process as a whole. A

¹⁶ Tulzapurkar, AIR 1987 Journal.

¹⁷ Syed Ameer Ali, *Mohamedan law*, 1985, Vol II.

Uniform Civil Code is substantially necessary in order to ensure the ideal functionality of the Government as envisaged by the founders of the nation, but every revolutionary ideal that has ever triumphed in history has first faced a barrage of opposition and the same could be said about Article 44. Uniform Civil Code is a utopian concept that is very evidently not a possibility in India at the present time, considering the circumstances surrounding the social and political spheres. The Judiciary has made a sincere effort in order to urge the Legislation to revive the provisions of Article 44 but to no success. In fact, the Courts and respected judges have faced massive critique for a simple request made to the Prime Minister in lieu of this provision. This clearly shows that there is substantive opposition to the implementation of a Uniform Civil Code, but this opposition is not based on any logical or sound reasoning, it is based upon communal sentiment and in the fear of change. Many secular laws already govern institutes of personal law, such as maintenance and adoption, but these changes were brought in very slowly and over a prolonged period of time. Justice Ramaswamy mentioned the same thing by stating that change such as this needs to be brought in through a step by step process rather than a giant leap of faith. Therefore by studying the judgements given by the Apex Court it is obvious that a Uniform Civil Code is desirable and even to an extent necessary in India, but at the same time when the social and political arguments are taken into consideration it shows that the nation is not ready to accept a Uniform code, nor part with communal sentiments. At the same time it must be noted that many previously personal laws are now overridden by secular codified law which shows an advancement in the right tangent. The Indian state is moving in the right tangent and a Uniform Civil Code will be reality in the sovereign territory of India in the future at some point but in the words of the first Prime Minister of the Country “I do not think that at the present moment the time is ripe in India” and until such ripe time is at hand, Article 44 shall remain a dead letter in cold storage, only remembered in intervals through judicial inquest, until it is called upon as a revenant in the future.