

Balancing Beliefs: An Analysis Concerning Article 25, Secularism and the Search for A Common Civil Code

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Abstract:

This article gives instances of the difficulties that can accrue when implementing a Uniform Civil Code in country like India due to language, religion, culture differences. The views on the matter specially in relation to secularism to personal laws and the conception of vital religious activities also find their articulation through the Constitution of India. Moreover, the paper underlines the fact that, while the creation of the political community is a reasonable cause, this cannot be done at the same rate as the destruction of the Indian culture and social-economic diversities. Exploring the theme of gender justice in personal laws the text is aimed at providing cases of the certain legislation which have been recognized as violating women's rights.

The article ends on a note of realism stating that Indian society is too complicated to have a pure UCC as there are bound to be some failures. It also stresses the need of appreciation of differentiation for the strength of nation and as affirmed by Supreme Court in case of Madhu Kishwar and T.M.A Pai Foundation.

Keywords: Constitutional Rights, Discrimination, Freedom, Secularism, Fundamental rights, Gender Justice, Judicial Interpretation, Uniform Civil Code (UCC), Muslim Personal Laws.

Introduction:

The peculiar nature of Indian society and its structure prove to be a major challenge to the enjoyment of legal and religious freedoms. The 42nd Amendment which states that the State shall not make any discrimination on the basis of religion or any religion continued to create a constitutional definition of secularism after the 1976 emergency. It is about the reasons this concept was introduced and is linked to why respect for other people's faiths is legal, something supported by court interpretations of the constitution and has come to represent constitutionalism.

The freedom of conscience and freedom to bear arms form the content of Article 25 of the Constitution which spells out in the clearest of terms that the state shall not restrict these rights. The doctrine of 'Essential Religious Practices' has been judicially developed to safeguard religious rights by making sure that the State does not infringe on the fundamental aspects of a religion's tenets. This notion is important in relation to the religious and cultural endeavor of the different groups and concern with civil laws in marriage, divorce and inheritance.

The Indian constitution under chapter III entrenched Article 44 states the intention of central government to establish a uniform civil code to eradicate disparities arising from numerous personal laws. However,

this initiative has lots of problems due to diversity of the community of India, apart from this the Constitution of India also provides special protection of regional and tribal laws and customs. The debate around the UCC has escalated once again as the ruling Bharatiya Janata Party, which, according to its Sankalp Patra (working agenda), promised to implement the UCC through its functioning if it is re-elected in the next General Election. Still, with this commitment the conflict between the nation's legal homogeneity and cultural and religious heterogeneity is hotting up. Even now, it remains difficult to meet demands of all the aforementioned subjects and preserve secularism in the country—they have a complicated multireligious state.

However, before going further explaining the impact of UCC, it is important to have an understanding of what Secularism means in Indian Constitution, Article 25, essential religious practices as a doctrine, the necessity and the difficulties in codification of UCC in India.

Idea Of Indian Secularism:

There is reference to the word secularism in the preamble of the Indian Constitution. India is a secular state from 1976 when landmark amendment was passed in the Indian constitution.¹ In the landmark judgement of *Raj Narayan V. Indira Nehru Gandhi*², Chief Justice of India, Y. V. Chandrachud held that: *If there are any elements of the Constitution that are part of its fundamental framework and cannot be changed, they are as follows:*

Each and every citizen shall have freedom to have almost similar rights to freedom of religion and freedom of conscience, freedom to worship and freedom to propagate religion of their own choice. There will be no state religion that the state will be acknowledging.

The argument that a “democratic” Constitution should permit religion to impact the lives of most people was the clear common secularism position taken during the Constitution Assembly Debate. A few loud noises like the need to have the Assembly offer only a limited freedom of religion or the need to have the uniform civil code accepted as a fundamental right outvoted this idea³. Out of all those compared and discussed in the Assembly discussions, the “Equal-respect” theory was believed to be the most suitable to respond to the demands of Indian society. The secularism ideology in India therefore devotes a lot of attention to equal respect for all the religions than it does to either tolerance or avoidance of religions. Because it recognizes the role of religion in people's lives and bans the state from considering any religion as merely an individual's sin, religious liberty is guaranteed. This approach helps to avoid the discrimination of any religion since every religion is provided with equal treatment that is supposed to be afforded to them by the state.⁴

Mandate For Personal Laws:

Family law of the religion applies to every aspect of inheritance in addition to marriage practice, divorce and other related procedures. These regulations that are implemented and complied only by individuals

¹ S.R. Bommai v. Union of India, AIR 1994 SC 1918.

² AIR 1975 SC 2299. See also *Abhiram Singh v. C.D. Commachen*, (2017) 2 SCC 629, *Kalpna Mehta v. Union of India*, (2018) 7 SCC 1, *M. Siddiq v. Suresh Das*, (2020) 1 SCC 1.

³ T N Madan, *Modern Myths, Locked Minds*, OUP, Delhi (1997).

⁴ Shefali Jha, *Secularism in the Constituent Assembly Debates, 1946-1950*, 37 *Economic and Political Weekly*, 3175–80 (2002).

who embrace a certain religion are called personal religious laws. Civil laws do not recognize any citizens' right to practice their faiths; hence they are all equal to the laws irrespective of their religious beliefs. The Hindu Marriage Act came into force and is still in force only for Hindu citizens of India as the codification of Hindu personal law. The Dissolution of Muslim Marriages Act of 1939 operates just as the Indian Divorce Act of 1869 does, applicable for Muslims only. Thus, the above mentioned codified personal laws are religious and not secular in order to acknowledge protective religion of these minorities and for this purpose protection under Articles 25 to 28 is provided to them.

In the case of *Krishna Singh v. Mathura Ahir*⁵, the SC stated that "Part III of the Constitution does not deal with Personal Laws of the parties and that Parties have to apply Personal Law of the parties as per recognized authoritative sources of Personal Law and not as per the HC's ideas of modern concept". Furthermore, the Hon'ble Justice J. S. Kehar⁶ did a great job by asserting that the company benefits from Article 25 of the Indian Constitution.

Essential Religious Practices And Judicial Construction In India Under Article 25:

The doctrine of 'Essential religious practices' evolved via judicial interpretation⁷, safeguards the right of free religious practice as it declares that the government cannot interfere in affairs or practices that are essential to a faith. It has been written in religious scriptures that marriage, divorce, adoption, child support and inheritance are all fundamental sacred duties. Thus, such behaviors belong to the nucleus of religion itself and was asserted in the case of *Sarla Mudgal v. Union of India*⁸, the Supreme Court held that: "Every instance of a social interaction, or rite of passage such as marriage, inheritance, divorce, or conversion, is religious and aligns with any particular religion or faith. It is a faith and moral conviction that is as such as worship when one says "yes" before Qazi or when one goes seven times around a fire".

It was held in the case of *G.V. Rao V. L.H.V Prasad and others*⁹, "A sacred ceremony with its main leaps the purpose to enable young people to start a family and live a quiet life."

According to this decision in the case of *Commissioner, Hindu Religious Endowment, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*¹⁰, "what article 25(2)(a) stipulates does not regulate ... the freedom of which is guaranteed by the Constitution to profess religion subject to any obligation in specifications of public order, welfare and having regard to ethical code." However, as the activities may be related to the Various kinds of economic commercial or political activities, what remains consistent or what define religion or what forms the kernel of religion, is to be sought primarily by reference to the ideas associated with the religion in question". The judgement made in the *State of Rajasthan v. Tilkayat Shri Govindlaji Maharaj* continued it¹¹, the court noted that a custom is considered to be an essential or integral part of a given religion where it is considered by the religious community as obligatory. Not only

⁵ AIR 1982 SC 686.

⁶ *Shayara Bano v. UOI*, (2017) 9 SCC 1.

⁷ *The Commissioner, Hindu Religious Endowment, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR1954 SC 282.

⁸ (1995) 3 SCC 635, See also: *Ms. Jordan Diengdeh v. S.S. Chopra* AIR 1985 SC 935.

⁹ (2000) 3 SCC 693.

¹⁰ *supari Note 7*

¹¹ AIR 1963 SC 1638. See also, *Hasan Ali v. Mansoor Ali*, (1948) 50 BOM LR 389.

freedom for the furthering of religion under the provisions of Article 25 and Article 26 of the Constitution is protected, but thinking is also conducted within the confines of such provision.¹²

In *State of Bombay V. Sardar Syedna Taher Saifuddin Saheb*¹³, the court observed that it maybe not for the Court to decide as to what is a 'essential practice' of the religion but to get some idea about the same from the texts and tenets of the religion. This article analyses the Quran as a source of information on issues that are considered Islamic such as adoption, succession, marriage, divorce, and inheritance.

The promotion of religion is distinguished from other activities conducted by religions under the Article 25.¹⁴ The state can regulate or perhaps even suppress such secular functions of religion as are indirectly linked to the practice of a faith but are instead involved in matters associated with a faith.

Problems And Possibilities With Putting A Uniform Civil Code Into Practice:

Implementing UCC will replace personal laws and govern every citizen with a standard set of laws. It simply means that people of this nation are proud to be different in their ethnicities, religion, culture, and languages instead of having same identity. In the same deliberation, the state aims at developing an image of a united political community, which is the primary reason behind the development of UCC. However, a country with such a diversity will not be united if diversity is not respected. The same view is presented in the 21st Law Commission study where the focus is made on the idea that nations do not need to be unified to have similar laws.¹⁵ That is the balance between diversity and undeniable statements about the existence and nonexistence of human rights.¹⁶ The Supreme Court in the case of *TMA Pai Foundation Vs, State of Karnataka and Others*¹⁷, maintained that:

The idea of India which we need to follow as a secular nation means documenting and sustaining the various varieties of people in terms of language and religion and unifying them as India.

The possibility of establishing a UCC can be problematic because of constitutional provisions like the Sixth Schedule and Art 371 (A) to (I). These protect states like Assam, Nagaland, Mizoram, Andhra Pradesh, and Goa in relation to family law. The 6th Schedule thus envisages autonomous districts and regions which have legislative jurisdiction over questions relating to inheritance and succession, marriage and divorce and administration of justice. In extending certain protection to the status conferred upon Schedule tribes. In the case of *Madhu Kishwar & Ors Versus State of Bihar*¹⁸, the apex Court stated that: *In the presence of these divisions and visible barriers created by the sensitive tribal people who respect their own culture, laws, and traditions, it is a very challenging and time-consuming work to apply other people's personal laws by identifying such judicial activism based on the exclusive approach or equality principle. It is not very advisable to declare tribal residents' laws as violative of Articles 14, 15 & 21 of the Constitution.*

¹² *The Commissioner, Hindu Religious Endowment, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (1954) AIR 282. See also, *Hasan Ali v. Mansoor Ali*, (1948) 50 Bom LR 389.

¹³ AIR 1962 SC 853.

¹⁴ INDIA CONST. Art. 25.

¹⁵ Law Commission of India, 21st Report (2018).

¹⁶ Law Commission of India, 21st Report, at 14 (2018).

¹⁷ (1994) 2 SCC 195.

¹⁸ AIR 1996 SC 1864.

The Need For Gender Justice Under Personal Laws:

The UCC also seeks to abolish such behaviors or social taboos that are shielded by personal laws in order to transform society. Through the use of appropriate language in UCC, the goal of gender justice and equal rights could be achieved.

Personal laws include laws relating to marriage, divorce, and guardianships and are religious laws concerning the scriptures of the dominant religions in the states, most of which are discriminative towards women. In the cases of *Jiauddin Ahmed Versus Anwara Begum*¹⁹, *Nazeer Versus Shemeema*²⁰ and *Shayara Bano Versus Union of India*²¹, where it has been argued that personal laws are highly discriminatory and oppressive against women. It also shows the instance of misuse of Triple Talaq, which not only discriminatory against woman but also contravened the principle of constitutional morality. However, Triple Talaq has been declared as unlawful, void and penalized by the lawmaker in 2019, other types of some unilateral divorce by Husband are available which are 'Talaq-e-Ahsan' and 'Talaq-Ehsaan'²², which are discriminatory against women. Not only Muslim personal law²³, but specific provisions of Hindu Personal law are also discriminatory against women. For example, In the case of *Githa Hariharan v. Reserve Bank of India*²⁴, this Court held the provisions of the Hindu Minority and Guardianship Act, 1956²⁵, unconstitutional. There have been different legislations over the past that negated 'Sati'²⁶, 'Devadasi'²⁷, 'Untouchability'²⁸, and 'Polygamy' which were parts of Hindu religion detrimental to women. However, many such practices still exist. One of the situations that supports the necessity for a Uniform Civil Code is the Muslim faith, where polygamy is legal despite the Hindu religion's legislative prohibition on it.

This paper also seeks to discuss how the 'Khula-Unilateral divorce at the instance of wife' law discriminates both males as well as females. Since Gender is among the prohibited grounds on which persons may receive different treatment under our constitution, it constitutes violation of Articles 14 & 15 of the Constitution.

These are clauses embodied in many personal laws that are anti-feminist, for example S.2(7) of the Sharia Act which allows entanglement but not the other way round. Further, the Supreme Court of has observed the necessity of a UCC in some of its decision in the cases such as *Mohammad Ahmad Khan Versus Shan*

¹⁹ (1981) 1 Gau. L.R. 358. See also *Masroor Ahmed v. State* (NCT of Delhi) 2008 (103) DRJ 137; *Must. Rukia Khatun v. Abdul Khaliq Laskar* (1981) 1 Gau. L.R. 375.

²⁰ 2017 (1) KLT 300M.

²¹ (2017) 9 SCC 1.

²² Sir Dinshaw Fardunji Mulla, *PRINCIPLES OF MAHOMDAN LAW* (1922).

²³ Muslim Personal laws refer to the laws which are applied to the people of Muslim religion in India in personal matters like Divorce, Marriage, Property, Succession, Adoption, Minority etc. some of which are The Muslim Personal Law (Shariat) Application Act, 1937; The Muslim Women (Protection of Rights on Marriage) Act, 2019; The Cutchi Memoms Act, 1938; The Kazis Act, 1880; The Mussalman Wakf Act, 1923.

²⁴ (1999) 2 SCC 228.

²⁵ Hindu Minority & Guardianship Act, 1956.

²⁶ The Commission of Sati (Prevention) Act, 1987.

²⁷ The Madras Devdasi (Prevention of Devdasi) Act, 1947.

²⁸ The Untouchability (Offences) Act, 1955.

*Bano Begum & Ors.*²⁹ and *Jordan Diengdeh Versus S.S. Chopra*³⁰. *Sarla Mudgal Versus Union of India*³¹ was a typical example where a person sought to beat the law through religious freedom and the court underlined the necessity of having UCC to counter this.

Conclusion:

The complexity of the Indian social structure in the ethnic, religious, cultural, and lingual sense makes it inevitable to fail at having the Uniform Civil Code. This is made aware by the doctrine of essential religious practice and its recognition from judicial consideration on the need to protect freedom of religion and religion practices. They are usually associated with personal laws governing matters of adoption, marriage, divorce and succession. The BJP claimed that they want to join the political community through implementation of UCC but they are not recognizing the applicability of constitutional rights provided to various communities especially the Sixth Schedule & Article 371 protected regions and states which is violation of spirit of Secularism provided in the Indian Constitution. With a view to fostering the spirit of unity, the Supreme Court cases like *Madhu Kishwa* and *T. M. A. Pai Foundation* has underlined the need for recognizing the idea of differentiation. Consequently, any effort towards adopting or implementing such a model – the UCC, for instance – must not undermine the country's cultural or religious fabric that has over the years built the reputation of India's civilization.

²⁹ (1985) 2 SCC 556: AIR 1985 SC 945.

³⁰ (1985) 3 SCC 62. See also *John Vallamattom v. Union of India*, (2003) 6 SCC 611: AIR 2003 SC 2902; *Jose Paulo Coutinho Vs Maria Luiza Valentina Pereira*, (2019) 20 S.C.C 85.

³¹ (1995) 3 SCC 635: AIR 1995 SC 1531.