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Uniform Civil Code: Whether a Directive to Promote Unity? Rhetoric and Reality

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Abstract

The bedrock of the present legal system of India was laid down by the Britishers. They succeeded in laying down uniform substantive and procedural laws in almost all the areas of law. In some civil laws viz, marriage, divorce, maintenance, adoption, guardianship and succession commonly known as personal laws no uniform law was laid down. The First Law Commission which was appointed in 1835 recommended that in personal matters viz, marriage, divorce, maintenance and like, the Hindu and Muslims would be governed by their respective personal laws. Same views were expressed by the second law commission which was appointed in 1853. Both commissions were asked to prepare a draft of uniform civil laws which would be applicable to all communities irrespective of religion. They doubted the wisdom of uniformity in these laws and consequently left them untouched. The second law commission even objected the codification of the Hindu and Muslim personal laws. After independence, legal position in this area was intended to undergo a change. The new Constitution which was adopted on 26th January 1950 incorporated a provision in this regard in the form of Article 44. The position did not change substantially as the provision did not create a definite obligation on the State in this regard. Consequently the personal laws continued to be administered as before. As time passed a need was felt to have a uniform civil code in order to bring unity in India. Presently even a debate is going on throughout India regarding the implementation of uniform Civil Code. The issue is not whether a uniform civil code is to be adopted or not but the real issue is whether it will bring unity? The present paper will make an attempt to peruse whether it is pragmatic to adopt such a code in heterogeneous society? The paper will also focus on the practicability of diversity in the family law and its essence in the country which is governed by the philosophy of freedom of religion in letter and spirit.

Keywords: Constitution; Diversity; Fundamental; Integrity; Personal; Religion; Secularism; Unity; Uniform

Introduction

The debate on uniform civil code has once again come to the fore after the Law Minster, Mr. Ravi Shankar Prasad in a written reply to a question raised by Mr. Yogi Adityanath in parliament said that the provision is already mentioned in Article 44 of the Constitution and the only thing now needed is proper discussion over it. However, bringing the Uniform Civil Code means to make changes in the entire gamut of personal laws related to property, marriage, divorce, maintenance, adoption and inheritance which the Muslims perceive as the interference in their personal matters and a denial of the freedom of religion guaranteed to them by the constitution itself [1].

The foundation of the present Legal system in India was laid down by the Britishers. They succeeded in laying down a uniform substantive and procedural law in almost all the areas of law. However, in some civil laws viz marriage, divorce, maintenance, adoption etc. commonly known as personal laws no uniform law was laid down. Although the First and the Second law commissions which were adopted in 1835 and 1853 respectively were asked to prepare a draft of uniform civil laws, which would be applicable to all the communities irrespective of their religion. Yet, they doubted the wisdom of uniformity in these laws and consequently left them untouched. The second law commission even objected the codification of the Hindu and Muslim Personal laws and remarkably observed:

"The Hindu law and Mohammadan law derive their authority respectively from the Hindu and Mohammadan religion. It follows that, as British legislature cannot make Mohammadan or Hindu religion, so neither it can make Mohammadan or Hindu law. A code of Mohammadan or a digest of any part of that law, if it were enacted as such by the legislative council of India, would not be entitled to be regarded by Mohammadans as very law itself but merely as an exposition of law, which possibly might be incorrect. We think it clear that it is not advisable to make any enactment which would stand on such a footing" [2].

Freedom of Religion

The Indian constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. However, the core of the commitment to this revolution lies in part III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the constitution [3].

The major document on the rights of the Pre-constituent assembly era has been the Sapru Report, published at the end of 1945. The Report suggested a constitutional scheme for India, and although the portions of the Sapru Report dealing with the fundamental rights contained overtones of the social revolution, it addressed itself mainly to the problem of placating minority fears which were overshadowing the political scene. The fundamental rights of the new Constitution, said

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the report will be a 'standing warning to all'.

"That what the Constitution demands and expects is perfect equality between one section of community and another in the matter of political and civil rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of ordinary applications of life" [4].

According to Granville Austin, perhaps the most striking thing about the treatment of rights in the Sapru Report was the distinction made between justiciable and non-justiciable rights [5]. A few months more than a year, the Constitutional Assembly in the backdrop of the relevant developments began framing the Fundamental Rights and the Directive Principles of State Policy.

Indian is a secular state but not an anti-religious state for the Constitutional guarantees the freedom of conscience and religion, [6] Article 27 and 28 emphasize the secular nature of the state, for they secure to every person freedom from payment of taxes for the promotion of any religion and freedom from attendance at religious instruction or religious worship in certain educational institutions.

In order to understand the scope of the freedom of the religion under the constitution of India, it is important to know the said freedom under the Constitution of United States of America and the concept of state secularism there as the decision of the United States Supreme Court has been relied on in a number of cases [7]. In United States, the concept of secularism presents a significantly different pattern, based essentially on the principle of freedom for the individual in the exercise of religion as a segment on the general scheme of the individual liberty. The First Amendment to the Constitution, which embodies the relevant provision, enjoins that:

"Congress shall not make any law regarding the establishment of a religion or restricting the free exercise thereof."

Thus, the US Constitution guarantees not only the 'free exercise' of religion but it also enjoins Congress not to make any law establishing a religion. The 'establishment clause' remains a peculiar feature of the US concept of 'state secularism'. The import of this clause was explained emphatically by Jafferson with the help of a metaphor now quite popular in discussion on the subject. In the words of Mr. Justice Black:

"Neither a state nor the federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jafferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state" [8].

It is worthwhile to mention that proposals were made before the constituent Assembly of India for the adoption of the very language of the First Amendment for the protection of freedom of religion in the Constitution of India. These proposals came in the form of amendments to the officially proposed draft of the Constitutional provision [9]. These proposed amendments were negated by the Constituent Assembly; for the establishment clause has been fraught with inherent difficulties which had begun to be sensed even when the Indian Constitution was on the anvil [10].

However, the framers of the Constitution of India shared with the Americans the ideology of the free exercise clause. They also believed that the state should neither sponsor nor favor any religion and should treat all religions with tolerance and equality. But they were sceptic of the aspect of the non-establishment clause which would take separation between church and state to the extreme where it broadened hostility and began to operate as a denial of religious freedom itself [11].

Article 25, the principal article in the Constitution of India on freedom of Religion reads as follows:

1. Subject to the Public order, morality and health and to other provisions of this part, all persons are equal entitled to freedom of conscience and the right to freely profess, practice and propagate religion.

2. Nothing in this article shall affect three operation of any existing law or prevent the state from making any law-

a. regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

b. providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

The Supreme Court in *Commissioner HRE v. Swamiar* laid down that the freedom guaranteed by Article 25 is not confined to mere belief in religion, but also to exhibit belief in outward acts and to propagate or disseminate religious ideas for the edification of others [12]. In the Courts opinion, the definition of religion given by US Supreme Court in *Davis v. Benson*, [13] is inadequate in Indian context. In this case it has been observed that the term religion has reference to one's views of his relation to his creator and to the obligations they impose of his reverence of being and character and of obedience to his will. It is often confounded with 'cults' or 'form of worship' of a particular sect, but it is distinguishable from latter. The court expressed doubt whether this definition of religion could have been in the minds of the framers of the constitution. The Court observed:

"Religion is certainly a matter of faith with the individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or any intelligent first cause. A religion undoubtedly has its basis in a system of belief and doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion" [14].

Again the Supreme Court in *Ratilal and others v. State of Bombay*, [15] reiterated this view and laid emphasis on the point that religion has its outward expressions in acts as well.

In *Durgah Committee, Ajmer v. Sayed Hussain* Ali, [16] the court observed that:

"This freedom guarantees to every citizen not only the right to entertain such religious beliefs as may appeal to his conscience but also affords him the right to exhibit his belief in his conduct by such outward acts as may appear to him proper in order to spread his idea for the benefit of others" [17].

The freedom of conscience remains the inner freedom of the citizen to mould his own relation with God in any way he likes. In this context, *Bijoe Emmanuel v. State of Kerala*, [18] where Supreme Court reversing the decision of the High Court, held that there is no legal obligation in India on a citizen to sing the national anthem. In the instant case, the children belonging to Jehovah witnesses of the Christian community were expelled from the school for refusing to sing national anthem which had been made compulsory by circular of Director of Public Instructions. Their expulsion was challenged on the ground that it

violated their fundamental right under Art. 25(1). According to them singing the national anthem was against their religious faith, which did not permit them to join in any ritual except when, it is in their prayer to their God Jehovah. While reversing the decision of the High Court, the Supreme Court observed that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. And, our personal views or reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Art. 25 but subject, of course to the limitations contained, therein.

While the right to freely practice religion subject to limitations of public order, health and morality is guaranteed, there is no such protection to activities which are economic, commercial or political in their character, though they are associated with religious practice [19]. It may not always be easy to say if any particular matter falls under essential religious practice or is only secular, commercial or political activity which has come to associated with religion. In some cases like *Mohd. Hanif Qurishi v. State of Bihar*, [20] the court has tried to spell out some activities like the sacrifice of cows on Bakr eid as not an essential part of the Islam. However, it has been rightly observed by HM Seervai that the broad general contention that under Art. 25(2)(b): *"all secular activities which may be associated with religion but do not constitute an essential part of it are amenable to state regulation can't be supported. First, because what constitutes the essential part of a religion is primarily to be determined with reference to the doctrines of that religion itself; Secondly, because the fact that religious rites and ceremonies require he expenditure of money, or the purchase and use of marketable commodities, would not convert the rites and ceremonies into economic or secular activities"* [21].

The above judgments revealed that religion is not merely the name of belief or faith, it is certainly something more. Had it been confined to mere belief or faith only, there would have been no room for the inclusion of Article 25 and 26 in Part III of Constitution. Personals laws as such can't be separated from the religious freedom guaranteed by the Constitution. The Muslim personal law is further protected and strengthened by Article 26 which guarantees every religious denominations or sections thereof, the right to manage its own affairs in religious matters. The family matters in Islam are widely believed to be affairs in the matters of religion.

In order to protect and safeguard personal laws the Delhi High Court [22] went a step ahead by ruling out the application of Articles 14 and 21 in family matters by calling these provisions as like pushing bull into a china wall. Later on in *Saroj Rani v. Sudharshan,* [23] the decision of High court was reaffirmed by the Apex Court.

Uniform Civil Code and Personal Laws

Article 44 of the Constitution contains a Directive Principle of the State policy. It states:

The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

The draft Article 35 (now article 44) nurtured the stage for the debates on personal laws in the Constituent Assembly. Many members mostly Muslims sought amendments to draft Article 35. Mr. Mohamad Ismail suggested the addition of proviso to Article 35:

"Provided that any group, section or community of people shall not be obliged to give up its personal law in case it has such a law" [24].

The reason stated by Mr. Mohamad Ismail was that since the right to follow the personal law is not only the part of the way of life but also the part of their religion and cultures of those people who have been following such laws for generations. Any interference, therefore, in this regard would tantamount to taking away the way of life [25].

Besides Mr Ismail, other members viz Mr. Naziruddin Ahmaad, Mr. Mehboob Ali Beg, Mr. Porcker Shib Bahadur and Hussain Imam also suggested amendments to draft Article 35 in order to protect personal laws [26]. The constituent Assembly rejected all these amendments and adopted Article 35(now article 44) in its present form. Since then the issue adoption of uniform civil code is being repeatedly debated. The judiciary through its different pronouncements added to the debate [27]. In particular the prominence to the debate was gained by the observation of the Apex Court in *Sarla Mudgal v. UOI* [28]. The court in this case desired the government to adopt a uniform civil code under Article 44 in order to protect the unity and integrity of India. However, the main issue in this case was regarding the status of marriage between two persons professing the same religion, if one of them becomes converting to another religion. Yet, Kuldeep Singh raised the question of uniform civil code in order to stop Hindu Husband to get converted to Islam. He further held that the UCC did not violate religious freedom [29].

Sahai in his concurring opinion made important observations regarding religious freedom: "When Constitution was framed with secularism as its ideal and goal, the consensus and conviction to be won, socially found its expression in Article 44 of the Constitution. But Religious freedom the basic foundation of secularism was given by Articles 25-28 of the Constitution. Article 25 is very widely worded. It guarantees all persons not only freedom of conscience but the right to profess, practice and propagate religion. What is religion? Any faith or belief that: Religion is more matter of faith. The Constitution by guaranteeing the freedom of conscience enshered inner aspects of religious belief, Marriage, Inheritance, divorce, conversion, are as much religious in nature and consent as any other belief or faith. Going round the fire seven rounds or giving consent before *Qazi* are as much matter of faith and conscience as the worship itself" [30].

The Apex Court in *Shastri Yagnapurush Das Ji v. Muldas Bandar Das Vaishya,* [31] observed that the matters of religion include religious ceremonies, practices and rites which are essential for the practice of religion and State can't interfere in the exercise of these rights except they are contrary to public order, health and morality.

The Britishers during their rule in India succeeded in laying down a uniform legal system in almost all the areas of law except some areas of civil law commonly known as personal laws. They inherited this legacy from the earlier legal system. During the Hindu Period and Muslim Period, in family matters the laws of respective religions were applied to all subjects. The policy of non-interference was followed by almost all the rulers before the British period [32]. The British rulers retained the system till the end of their rule. They too attempted to bring uniformity in these laws. However keeping in view the wisdom and essence of these laws they failed in their attempt to do so. Therefore they left them untouched and maintained status quo [2].

The diversity in the application of the personal laws was even acknowledged by Privy Council in *Skinner v. Orde*, [33] wherein it stated:

"In India, however, all or almost all, the religious communities of the world exist, side by side…while Brahmans, Buddhists, Christians, Mohammadans, Pasees, and Skihs area one nation enjoining equal

political rights and having perfect equality before the tribunals they co-exist as separate and very distinct communities having distinct laws affecting every relation of life, the law of husband and wife, parent and child, the descent, devolution and disposition of property are all different, depending in each case, on the body to which the individual is deemed to belong; and difference of religion pervades and governs all the domestic usages and social relations" [34].

In order to make administration of justice strong and result oriented, they appointed Hindu and Muslim law officers. Their function was to illucidate religious based laws to English judges who had no knowledge about their laws [35].

Presently the diversity in the personal laws in being viewed as a threat to national integration. True it is that the essence of uniformity in laws sounds logical but using it as tool to bring unity and integrity of the nation seems to be superfluous. The Apex Court has rightly observed in *Pannalal Bansilal v. State of Andhra Pradesh,* [36] that adoption of a uniform civil code can be counterproductive to unity and integrity of the nation. The personal laws not only vary from community to community but within community itself but it vary greatly. Clause (1) of section 7 of the Hindu Marriage Act, 1955 sets an example. It says:

A Hindu marriage may be solemnized in accordance with customary rites and ceremonies of either party thereto.

The Act does not specifically stipulate ceremonies but it leaves it to the customary practices observed by the parties. Same is true about Muslims who follow different *Madhabs.* They are divided into sects and sub sects the two big sects are Shias and Sunnis. Both Shias and Sunnis are divided into 38 sub sects [37]. The personal laws derive their authenticity from the religion itself, therefore diversities are bound to be there.

Besides these personal laws the Special Marriage Act, 1954 also governs family matters. The special and distinguishing feature of this Act is that it is a secular law. Interreligious marriages are not generally being allowed by personal laws, but under this secular law, religion is no bar to such marriages. Parties belonging to same religion or different religions are free to marry under this secular law [38]. This secular law lays down uniform law to all marrying parties. Even in the matters of succession, [39] the parties are governed by the uniform law viz. Indian Succession Act 1925. However, the parliament by amendment in 1976 added section 21-A which disturbed the special and distinguishing features of this secular enactment by introducing religious element. The effect of the amendment exempted the Hindu Marrying parties from the ambit of section 21. If any party to marriage irrespective being Hindu, Muslim, and Christians etc. is governed in the matter of succession by a common law, why an exemption for Hindu were made? If it not possible to have uniform secular laws whereby even an option is provided to the parties free from religious elements, how is it possible to replace the whole gamut of religious based personal laws by one uniform law? The Special Marriage Act, 1955, instead of becoming a catalyst for unity and integrity of India and paving way for abolition of personal laws lost rationale by this amendment. The amendment itself reinforces the fact that in a heterogeneous society there is no scope for uniform civil code.

Conclusion

The advocates of uniform civil code believe that such a code has potential to unite India and accordingly its enactment is always highlighted in reference to national integration. The rhetoric overlooks the essence of personal matters viz. marriage, maintenance, divorce etc. in one's life. Marriage and religion, divorce and religion, maintenance and religion are deeply interlinked and cannot be divorced in the name of unity and integrity of the nation. The strict adherence to these laws cannot permit uniformity of any sort. The reality is that the diversity in these laws reveals the essence of institution of family in civilized societies. Any attempt to unify these laws will be disastrous not for only for the institution of family but also for the society. In a country like India the unification of these laws will negate not only the essence attached to family as an institution but also philosophy of its secular principles. Therefore, no attempt should be made to abolish personal laws. The respect for this diversity practically unites people. Compulsion and compromises in the fundamental aspects of religion cannot unite people. It hurts religious sentiments and disillusions people of their belief in their nation. No Nationhood can be achieved by derooting culture. No nationhood can be achieved by negating identity.

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