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# Uniform Civil Code and its Fallacies

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## ABSTRACT

*Uniform Civil Code, the idea is to bring laws of all religions and classes/groups of sects within various religions under one big canopy, which will ensure equality, gender justice, and uniformity. Specific ambitions of progressive society are aspired to accomplish. However, this notion is not plain vanilla. While post 70 years of independence, many questions have been answered and many would be answered in the forthcoming years; but one dilemma shivers the spine, one question remains unanswered, will you sacrifice thine personal laws?*

*This paper analyzes the provisions laid down for the Uniform Civil Code under Article 44 of the Indian Constitution. We begin by looking at the constituent assembly debates, moving on to understanding the perspective of various religious groups and viewpoints on gender justice, and finally proposing our stance of implementation by critically answering the aforesaid question.*

## I. UNIFORM CIVIL CODE AND ITS FALLACIES

Article 44 of the constitution of India enjoins the state to endeavor to secure for the citizens a uniform civil code (hereinafter UCC)<sup>2</sup>. Although it is engraved in the constitution, the courts of Law cannot enforce this article because of the circumscribing provision under Article 37. The article above sets a task for the legislatures to secure a uniform code of all personal laws for India's citizens.

The idea is to bring laws of all religions and classes/groups of sects within various religions under one big canopy, which will ensure equality, gender justice, and uniformity. Specific ambitions of progressive society are aspired to accomplish. However, very little has been done towards achieving a uniform civil code by the legislatures in the last 70 years.

## II. CONSTITUENT ASSEMBLY DEBATES

A heated and unsettled debate took place in constituent assembly over Article 35(now Article

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<sup>2</sup> The constitution of India 1950, Article 44

44) of the constitution. Several conflicting opinions were presented on that day.<sup>3</sup>

The idea to adopt one code for all personal laws was considered antagonistic to article 19 (present-day Article 25). There were concerns regarding the base standard and which community would abandon their customary laws. It was contended that indulging in personal laws would lead to civil disobedience and unrest throughout the country. Moreover, B Pocker Sahib Bahadur stated that the reason the Britishers were successful in ruling for 150 years was their non-interference with personal laws. Muslim representation in the assembly shared that the UCC interferes with religious rights and practices; hence, it would be tyrannous.

However, Dr. Ambedkar showed the possibility that future legislatures might not make the UCC binding. Instead, the code could include only those sects who voluntarily by declaration may want to join.<sup>4</sup> The framers' intention was not to confine the various religious groups' rights to practice their respective customs and traditions.

### III. MINORITY RIGHTS

Several articles (Article 15(1), 16, 25, 26 & 29) are embedded in the constitution with a clear intention to protect discrimination based on religion, to preserve minority rights, and to empower minorities to manage their religious affairs and other cultural rights freely. Likewise, Article 26(b) of the constitution ensures the freedom to manage the affairs of religion.

In Shirur Mutt's case the courts have observed that in India, unlike other countries, religion is not restricted concerning one's creator and obedience to his will<sup>5</sup>. Nonetheless, the idea of religion is enormous; it encompasses all elements of one's life, from following ethical rules to rituals, observances, ceremonies, mode of worship, matters to marriage, succession, food, dress, etc. all are governed by religion<sup>6</sup>.

Ours is a democratic and a secular state; the rights of minorities must be treated at par with the majority, and their unique customs and traditions are protected from amalgamation with that of majority within our constitution. UCC revolves substantially around the notion of accomplishing the 'Indian Identity.' If we were to judge what the domain of the Indian Identity is, then we have nothing evidentiary to look upon. For different sections, it is different.

In a multicultural polity like ours, where one group constitutes the majority, there are severe threats involving the biased behavior of various institutions. The prejudice of what may be

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<sup>3</sup> Constituent assembly debates, 23<sup>rd</sup> November 1948

<sup>4</sup> Constituent assembly debates, 23<sup>rd</sup> November 1948

<sup>5</sup> *Vide Davis v. Benson* [1923]133 U.S. 333

<sup>6</sup> Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra. Thirtha Swamiar of Sri Shirur Mutt AIR [1954] SC 282

'good' based upon the majority view is rooted in the conscience of the legislatures and the judiciary. In order to support this claim, we can infer this from Dr. B R Ambedkar's stand on UCC in constituent assembly debates. He consciously warranted the implementation of Hindu laws on Muslims prior to 1935<sup>7</sup>.

Hindus form a majority in India. The term Hindu here apart from Hinduism includes various other religions like Sikhism, Jainism, Buddhism. The intention to include several Religions under the cap of 'Hindu' is not to keep people from other communities out of the ambit of judicial scrutiny but to include all the religions based on similar traditions and practices, *ejusdem generis*. If we consider in totality, Hindus (including religions described above) form a vast majority in India while religions of totally distinct traditions are a minority.

With the logic described above, the widely accepted Identity of the majority because of its massive acceptance in the society would be considered 'better' than those of the minority.

For minorities, the merger would be a tool used by the majority to integrate the minority identity into the majoritarian Identity. The Identity accepted throughout the country is the one that is recognized. These claims may look theoretical and arbitrary, but if we consider the recent example, they would be clear. The religion of Radha swamis has a recent history of existence in the state of Punjab and Haryana, yet people following it are governed legally under Hindu Laws. It might be possible because of the sameness in religion, but why was this sameness adopted in the first place? The answer is the acceptance of what the majority around them accepted. It may be acceptable for a newly developed religion but not for those who have a history based on customs and traditions. Are they expected to adopt the majority view too? It is contrary to the essence of our constitution.

If, in the future, legislation integrates the procedures of a valid marriage, and forms a common law for all sects. The new Law ought to be by the majoritarian viewpoint (as explained above); hence the concept of Mehr/dower would be excluded as it does not fit in with the traditions of the Hindu majority. Muslims, in that case, would have to get rid of their practices and traditions. Such incursion would be ultra vires to Article 26(b) of the constitution as it is directly targeting

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<sup>7</sup> I think most of my friends who have spoken on this amendment have quite forgotten that up to 1935 the North-West Frontier Province was not subject to the Shariat Law. It followed the Hindu Law in the matter of succession and in other matters, so much so that it was in 1939 that the Central Legislature had to come into the field and to abrogate the application of the Hindu Law to the Muslims of the North-West Frontier Province and to apply the Shariat Law to them. That is not all. My honourable friends have forgotten, that, apart from the North-West Frontier Province, up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu Law in the matter of succession. In order to bring them on the plane of uniformity with regard to the other Muslims who observed the Shariat Law, the Legislature had to intervene in 1937 and to pass an enactment applying the Shariat Law to the rest of India; Constituent assembly debates, 23<sup>rd</sup> November 1948

one's religious affairs.

Similarly, if the Law of will and gifts is amended and the 1/3<sup>rd</sup> rule of limitation is scrapped, and the new Law is in the consistency of majoritarian standards, then again Muslim community would have to get rid of their traditional norms. These norms have a historical religious source. Hence, the integration of personal laws would be ultra vires to the provisions of the constitution.

In contrast, implementation of the aforesaid minority laws on the majority itself is an improbable event, and the idea itself is abhorrent.

If viewed from the perspective of these minorities, then UCC appears to be an idea that will soothe the ambitions and traditions of the majority over the minority.

Apart from this, amalgamating traditions through UCC which would have a majoritarian influence, would be a denial to equality for those who are abandoning their traditions and practices<sup>8</sup>. Furthermore, the merger of several personal laws into one code will be antithetic to several articles of the constitution that bestowed to ensure the protection of minorities' interests.

Minoritarian stand seems to be well established through these aspects, but this is not the only aspect to examine the UCC.

#### **IV. ONLY THE MUSLIM LAW IS UNCODIFIED: A FABLE**

It is necessary to throw light on a wide misconception that only Muslim Laws are uncodified, and they are the only ones to be affected the most by the UCC.

Many personal laws of majority communities still allow and recognize the freedom to practice customs. Hereinbelow are The Hindu law depictions that recognize the usage of pre-existing customs: Prohibited degrees in marriage and sapinda relations<sup>9</sup>, Marriages-rites and ceremonies<sup>10</sup>, Adoption of adult and married persons<sup>11</sup>.

The scope of the aforesaid customary practices is vast. Even codifying Hindu laws does not bring the majority of Hindu's (cohesive religions) under one basket of uniformity.

As Werner Menski said, *While the codified Law, in social reality, all that happened was that the official Indian Law changed, while more and more of Hindu law went underground, populating the realm of the unofficial Law. The entire customary social edifice of Hindu culture*

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<sup>8</sup> Akeel Bilgrami; secularism, Identity, and enchantment (Harvard University Press, Cambridge,2014)

<sup>9</sup> Hindu Marriage Act 1955, section 5 (v)

<sup>10</sup> Hindu Marriage Act 1955, section

<sup>11</sup> Hindu Adoption and Maintenance Act, 1956 Section 10 (3)(4).

*remained mostly immune to the powerful wonder drug of legal modernization*<sup>12</sup>

In a similar view, Muslim Law is a composition of laws from different sources. Their traditions and practices are totally in contradiction with those of Hindu laws. Each tradition, custom, and practice has a historical religious source. If codification is on acknowledging the majoritarian view, then acceptance by the minority would be challenging.

## V. GENDER JUSTICE

Gender discrimination exposes the dreadful face of society. Women have always been a target of gender discrimination. There can be no suspicion that a substantial patriarchal influence is rooted in all social groups' personal laws in India. The reduced position of women was the main reason for legislating special provisions in women's laws. These laws immune them from being a sufferer of this biased patriarchy.

In our constitution, religious groups have the freedom to manage religious affairs<sup>13</sup>; In contrast, this right is used to sabotage the protection given to women. Both the major religious groups (Hindus and Muslims) have used this as a ground to justify their unequal treatment towards women.<sup>14</sup>

To overcome this menace, the legislatures started codifying personal laws. However, unfortunately, this progressive approach was primarily restricted to Hindu laws, and these too broadly had a symbolic effect.

The scuffle between UCC and various social/religious groups and political groups has been in focus after various supreme court judgments (*Sarla Mudgal's case*<sup>15</sup> & *Shah Bano's case*.<sup>16</sup>), which indicated a need for a uniform code that will eventually ensure gender Justice. In the latter case, the supreme court said: "*Where more than 80% of citizens have already brought under codified personal law, there is no justification whatsoever to keep in abeyance, any more, the introduction of uniform civil code for all citizens in India.*"

Hindu political groups call in for implementation of a UCC bragging upon the progressive developments in the realm of Hindu Personal laws. Their primary claim is that the women in Hindu society enjoy equal status with men, and support to this argument is the process of codification of Hindu laws since the 1950s.

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<sup>12</sup> Werner F Menski, Hindu law: beyond tradition and modernity (2003)

<sup>13</sup> The constitution of India 1950, Article 25

<sup>14</sup> Archana Paraskar, Gender Inequality and Religious Personal Laws in India (brown journal of world affairs 2008)

<sup>15</sup> Sarla Mudgal v Union of India AIR [1995] SC 1531

<sup>16</sup> Shayara Bano v Union of India [2017] SCC SC 963

Nevertheless, a question we must acknowledge is, are Hindu women equal to men in all aspects? Or is this claim based on a flawed approach?

Various conservative judgments are a perfect example to set the argument that very little and whimsical has been achieved by the codification of laws. The real run is in the hands of the members of the religious groups.

To understand an example of a conservative approach, we shall look at a judgment related to this "progressive legislation."

Justifying section 9 (Restitution of conjugal rights) of Hindu Marriage Act, the court in Harvinder Singh's case stated, "*Introduction of Constitutional Law in the home is most inappropriate; it is like pushing a bull into a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 has any place*"<sup>17</sup>.

Validating this Law is like granting the husband, the right over the wife's body. The mingling of Brahminical rituals and customary practices with English principles resulted in absurd and ridiculous rulings regarding the validity of Hindu marriages, and women have been the worst sufferers<sup>18</sup>.

In order to justify the claim made by Flavia Agnes, we do not even have to look for instances where women face injustice.

Practices in which religions expect women to wear sindoor, leave their maternal homes after marriage, force them to be a homemaker are a few examples of unacknowledged customary practices. Such traditions have a bias on genders—these notions broadly recognized as necessary customs, irrespective of their unjust, partisan, and patriarchal influence.

Because of malafide political hue on the discourse of women equality and gender justice by socio-political groups, the genuine demand of women's rights groups for gender equality is not acknowledged by religious groups.

Hereinbelow, we shall briefly discuss discriminatory and gender-biased customs and laws of various religions.

- **ISLAM:** Women under Islamic laws are allowed to inherit, though their share is half of what their male counterparts will get. The children of a predeceased son or daughter are barred to inherited by the surviving son or daughter. The doctrine of representation

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<sup>17</sup> Harvinder Kaur vs. Harvinder Singh AIR [1984] Del 66.

<sup>18</sup> Flavia Agnes, *Liberating Hindu Women* 2015.

has no place in Sunni Law, while under the Shia Law, the right of representation is a fundamental principle of inheritance. Bigamy is permitted in Muslim laws.

- **CHRISTIANITY:** The mother is not entitled to any share when the father is alive.<sup>19</sup> The mother takes only in the absence of the widow, lineal descendants, father, brother or sister, or their children. If all the above are not alive, the property goes to other relatives in the nearest degree of kindred in equal shares.
- **PARSEES:** The rules of Intestate Succession for Parsis are set out in Chapter III of Part V of the Indian Succession Act. In the property of a male Parsee, his widow and each of his sons shall take double the share of each daughter.<sup>20</sup> The father shall take a share equal to a half share of the son, and the mother takes a share equal to a half share of the daughter. In the property of a female Parsi, the husband and each child receive equal shares. There is also provision for the inheritance of the children of any predeceased.

Gender discrimination is not limited to women itself. The most overlooked issue in today's era is the rights of transgender. Eunuchs have two options under succession laws. Firstly, if the religion of a transgender is known, then he would be dealt with provisions of personal laws of that religion. Secondly, if the religion is not known then by their customary '*guru-chela parampara*'.<sup>21</sup>

Former possibility creates some conflicts. If the religion of a eunuch is known, then his property would devolve in accordance with the personal laws. Such a stance would be against customary practices and traditions of *the 'Kinner'* community. Since the religious personal laws, when religion is known, would bar Guru or Chela to inherit from one another, and the property would pass outside the community. Such devolution of property is against customary practices.

## VI. UNIFORM CIVIL CODE VS. COMMON CIVIL CODE

We instinctively assume that uniform and common are synonyms. However, it is necessary to draw a line of distinction between the two. The former means 'same in the similar circumstances' and latter means 'the same in all circumstances whatsoever'<sup>22</sup>. The idea to adopt a common civil code is obnoxious, and it would fail when enacted in a multicultural society like ours.

However, we can avoid forming a common code for various religions and adopt a uniform code

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<sup>19</sup> The Indian succession act, 1925

<sup>20</sup> The Indian succession act, 1925, Chapter III

<sup>21</sup> *Sweety (Eunuch) v General Public*, AIR [2016] HP 148

<sup>22</sup> Tahir Mehmood, *Personal Laws in Crisis* (1986).

in which we codify all personal laws and enact them under separate heads. Each head would consist of laws of different religions/sects. With this approach, we will be able to keep customs and traditions in effect and overcome unjust-discriminatory laws altogether.

The above discussion makes it clear that there will be hostility amongst various minority groups in implementing a common code. Under the ambit of codification, the state cannot oblige them to abandon their traditions and customs. We have also discussed the difference between a uniform code and a common code.

The legislatures' efforts should be towards making a uniform code, i.e. 'same in the similar circumstances'; and not a common code.

## VII. PROPOSAL

A commission must be formed for a detailed analysis of norms, customs, and laws of various religions and sects. The work of the commission would be to categorise religious groups and sects as per the principles of *ejusdem generis*.

The code further should be divided under different heads; each similar group shall be categorized under their respective head. Laws must be listed down in totality, and further must be evaluated by a committee which comprising the retired judges of any high court of India.

All the customs and laws, irrespective of which head they belong to (Hindu, Christian, Muslim, Jew or Parsi...etc), must undergo judicial scrutiny under that committee. The committee shall test laws with their validity under part III of the constitution. Power of that committee should not be confined to the constitution; they must test the listed laws/ customs with the principles of natural justice, and they must ensure that gender justice and equality prevail

It would be the duty of the committee to ensure that the listed laws are not manifestly arbitrary. In order to bring justice for one gender, another gender must not suffer, for example, with the amendment of 2005 of The Hindu Succession Act, legislatures intended to bring gender justice for women in highly patriarchal laws. Indeed, they, to some extent, were successful in achieving their goal. However, in order to uplift women, in certain specific situations, the Law treats the two genders unequally (Class I heirs include a mother, but it excludes a Father. It is discriminatory for a father.)

The committee shall try to make efforts to remove discrimination. Though it is difficult to make a herculean law, an attempt must be made.

All laws of succession, marriage, adoption, wills, and gifts of various religious groups shall remain unchanged unless they are in contradiction to the constitutional morality.

This approach will conform to the prime concern of minorities; that they will have to compromise with their traditions if a uniform code is formed. The idea of code, if limited to a common code, would justify the minorities' concerns, as majority laws will not be implemented on minorities.

Henceforth, a universal code that recognizes the laws and traditions of various religious groups and sects would absolve minority concerns.

Only laws that are manifestly discriminatory to either of the gender and are inconsistent with principles of constitutional morality or Part 3 of the constitution would be sacrificed, notwithstanding the significance to their religion. Religious groups must get rid of such laws and customs with the aim of moving towards a progressive society.

Moreover, in that code, a common secular law like the Special Marriage Act should be enacted, this would absolve the impediments of inter-religious marriages and those who consciously want to abandon their religious customs and laws.

With the above proposals, we would effectively save minority laws that ought to be protected under Article 25-26 of the constitution and ensure the aspired gender justice concurrently.

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