



Uniform Civil Code: Skepticism on Its Practical Possibility in India

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Introduction

In India, we have different set of laws for various religious communities relating to personal matters like marriage, divorce, adoption, maintenance and property known as personal laws. Uniform Civil Code is the proposal to replace the personal laws of each religious community in India with a common set governing every citizen irrespective of religion. Article 44 of the Constitution exhorts the State to endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India. The Law Commission of India headed by Dr. Justice B.S Chauhan (Former Judge, Supreme Court of India) has prepared a questionnaire to solicit opinions and ideas of public at large about the ways in which family law reform could be introduced in the most integrative manner that does not compromise the diversity and the plurality that constitutes the core of India's social fabric. The Law Commission of India has appealed all concerned to engage with it on comprehensive exercise of the revision and reform of family law, as the Article 44 of the Indian Constitution provides that "the State shall endeavor to provide for its citizens a Uniform Civil Code throughout the territory of India". The objective



behind this endeavor is to address discrimination against vulnerable groups and harmonise the various cultural practices. The Commission invited suggestions on all possible models and templates of a common civil code.¹

The aim of the present write-up is to explore into the practical possibility of Uniform Civil Code in India.

1. Various Stumble Blocks on the Way to Uniform Civil Code

Even a cursory glance through the Hindu Law-mostly codified (applicable on about 81% Indian population) and Mohammedan Law-mostly uncodified (applicable on largest minority i.e. Muslims constituting about 15% of Indian population) reveals that these laws vary in myriad ways both in theory and practice as applicable on people belonging to different caste, race, sects etc within a religious community.

(a) Notwithstanding having codified enacted Hindu laws (on inheritance, succession, adoption, marriage, divorce etc), customs/usages having force of law (as saved by said laws) govern different castes among Hindus as discernible from some examples given below:

- i. The Section 3 (g) of Hindu Marriage Act, 1955 enumerating the “Degree of Prohibited Relationship” prohibits the marriage with a widowed bhabhi. However, Kareva marriage is prevalent in certain castes among Hindus and same has been saved by Section 5(v) of HMA,

¹ . see Law Commission of India's questionnaire on Uniform Civil Code at <http://lawcommissionofindia.nic.in/questionnaire.pdf>. Vide question no. 7 'Maitri karar' practiced by Hindus in Gujarat also under lens Maitri Karar (Friendship deed) : a married hindu man signs a friendship pact on stamp paper with other woman and brings her home to live together. Q. No. 9 re 2 year period of wait for finalizing divorce based on mutual consent (Note: in writ petition (c) 127/2015 (Albert Anthony vs UOI), the SC on 13/7/2015 had exhorted upon government to take a decision on amending the section 10A(1) of the Christian Divorce Act (prescribing 2 years) to reduce it to 1 year at par with germane provision of the other religious communities)



1955 (ie giving primacy to liberal custom/usage). The legal position qua Hindu Marriage may be summed up as “stricter enacted law gives way to liberal customs”.

- ii. Section 29(2) of HMA, 1955 saves customary divorce prevalent in certain castes.
- iii. Under Mitakshara Law a son (although now daughter also) can ask for partition of ancestral/HUF property from the father during his lifetime. However, customary law in agriculturist communities among Hindus in northern India does not recognize such right of a son.
- iv. Conditions governing adopted child and adoptive person as prescribed by Sections 10 & 11 of the Hindu Adoption and Maintenance Act, 1956 are subject to customs or usages applicable to parties.

(b) Likewise, the Sunni and the Shia schools of Mohammedan Law do have important points of differences on the matters of Marriage, Talaq, Dower, Maternity, Guardianship, Maintenance, Gift, Waqf, Pre-emption, Wills, Inheritance e.g.

- i. Among the Shias temporary marriage (Muta) is lawful but not so among the Sunnis.
 - ii. The Sunni law prescribes the presence of two male witnesses at the time of marriage which the Shia law does not deem it a necessary condition.
 - iii. Talaq under Sunni laws may be effected orally or by a written document. Under Shia law a Talaq must be pronounced orally in the presence of two witnesses and a Talaq communicated in writing is not valid unless the husband is physically incapacitated. Most importantly, Shia Law does not recognize Talaq-ul-Biddat (Triple Talaq).
- c. Khojas and Cutchi Memons Muslims are governed in matters of succession and inheritance, not by the Mohammedan law, but by the old Hindu law.



- d. The Articles 371A and 371G provide that no parliamentary law- dealing with religious or social practices of Nagas/Mizos, Naga/Mizo customary law and procedure, administration of civil and criminal justice involving decisions according to Naga/Mizo customary law- unless the Legislative Assemblies of Nagaland and Mizoram by resolutions so decide.

2. Secular Application of Certain Laws on all Religious Communities

i. The Prohibition of Child Marriage Act, 2006 and The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 apply to all citizens of India (except in Jammu and Kashmir) irrespective of their religious adherence. Moreover, vide Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, a divorced woman and her former husband may declare, by affidavit or any other declaration in writing in such form as may be prescribed either jointly or separately, that they would prefer to be governed by the provisions of Section 125-128 of the CrPC, 1973.

ii. The Special Marriage Act, 1954 providing for a special form of marriage (vide S. 12 (2) the marriage may be solemnized in any form which the parties may choose to adopt subject to the conditions enumerated in the proviso thereto), for registration of such and certain other marriages and for divorce may be availed of by all citizens of India (except Jammu and Kashmir) irrespective of religion, ethnicity and linguistic affiliation. Moreover, vide S. 22 succession to the property of any person whose marriage is solemnized under said Act and to the issue of such marriage shall be regulated by the provisions of the Indian Succession Act, 1925. However, the



Section 21A (inserted by Act 68 of 1976 in the said Act of 1954) has exempted the Hindu, Buddhist, Sikh, Jaina inter alia from the effects of section 21.

iii. The Indian Succession Act, 1925 and The Guardian and Wards Act, 1890 dealing with intestate and testamentary succession and guardianship respectively applies to all citizens to varying degree.

iv. Juvenile Justice (Care And Protection of Children) Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption.

3. The Goa Uniform Civil Code (Goa Family Law)

It is a set of civil laws that governs the residents of the Indian state of Goa irrespective of religion, ethnicity or linguistic affiliation. The Goa civil code is largely based on the Portuguese Civil Code of 1867, which was introduced in Goa in 1870. Later, the code saw some modifications via the Portuguese Gentile Hindu Usages Decrees of 1880, the Portuguese Decrees on Marriage and Divorce of 1910, the Portuguese Decrees on Canonical Marriages of 1946. The civil code was retained in Goa after its merger with the Indian Union in 1961. In 1981, the Government of India appointed a Personal Law Committee to determine if the non-uniform laws of the Union could be extended to Goa. The Goa Muslim Shariah Organization supported the move, but it was met with stiff resistance from the Muslim Youth Welfare Association and the Goa Muslim Women's Associations.²

². Source: https://en.wikipedia.org/wiki/Goa_civil_code



(i) Some ways in which the Goa Civil Code is different from other Indian laws include: A married couple jointly holds ownership of all the assets owned (before the marriage) or acquired (after the marriage) by each spouse. In case of a divorce, each spouse is entitled to a half share of the assets. However, the law also allows ante-nuptial agreements, which may state a different division of assets in case of a divorce. These agreements also allow the spouses to hold the assets acquired before marriage separately. Such agreements cannot be changed or revoked. A married person cannot sell the property without the consent of his/her spouse. The parents cannot disinherit their children entirely. At least half of their property has to be passed on to the children compulsorily. This inherited property must be shared equally among the children. Muslim men, who have their marriages registered in Goa, cannot practice polygamy. Also, there is no provision for a verbal divorce.³

(ii) The Goa Civil Code is not strictly a Uniform Civil Code, as it has specific provisions for certain communities. For example: The Hindu men have the right to bigamy under specific circumstances mentioned in Codes of Usages and Customs of Gentile Hindus of Goa (if the wife fails to deliver a child by the age of 25, or if she fails to deliver a male child by the age of 30). For other communities, the law prohibits bigamy. The Roman Catholics can solemnize their marriages in church after obtaining a No Objection Certificate from the Civil Registrar. For others, only a civil registration of the marriage is accepted as a proof of marriage. The Catholics marrying in the church are excluded from divorce provisions under the civil law. For Hindus,

³ .ibid



the divorce is permitted only on the grounds of adultery by the wife. The law has inequalities in case of adopted and illegitimate children.⁴

Conclusion

Uniform Civil Code may indeed be a good proposition. Nonetheless, it's immensely pertinent to mention herein that The Hindu Marriage Act, 1955 clearly enumerates the persons who are out of bounds in the form of 'sapinda relationship' and 'degree of prohibited relationship' for the purposes of marriage. At the same time it does not prohibit the same gotra marriage in toto. Marriage with a person placed beyond the third generation in the line of ascent through the mother, and the fifth generation in the line of ascent through the father is valid and legal. However, ultra sensitive disposition of certain people among Hindus especially in northern India over the issue of same gotra/same village/bhaichara/ghwand marriages sometimes even leading to bloodshed (Honour Killings) although Hindu Marriage Act, 1955 unequivocally permitting such marriages since 1955 shows that every good idea is not necessarily practicable and acceptable to all.

Hence, instead of chasing after an elusive and politically loaded notion of Uniform Civil Code, need of hour is to remove the social vices (gender discrimination, archaic & retrogressive practices etc) from the different personal laws governing the different religious communities and

⁴. *ibid.* Also read - Goa passes bill to replace Portuguese succession law at <http://www.thehindu.com/news/national/other-states/goa-passes-bill-to-replace-portugese-succession-law/article8955082.ece>



to modernize (reform) them in sync with the demand and challenges of the modern age (as far as possible in tune with fundamental rights enshrined in part III of the Indian Constitution).