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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
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The Essential Desideratum for a Uniform Civil Code of Personal Laws– A Judicial Overview

By: Reddy Sai Spandana, Hemalatha R & Anita Sali

1.0 INTRODUCTION

1.1. Introduction:
One of the most debated topics since the inception of Indian Constitution is that of Uniform Civil Code (UCC). Article 44\(^1\) of Constitution which is a Directive Principle of State Policy directs the state to make endeavours towards a UCC.

However, the intricacies involved with UCC are far more complex in India given various religions which form the basis of the Indian Civil and Personal Law. When these personal laws come in contact with each other, there is conflict of laws, customs and ideologies. So, the harmonization of these conflicting laws is a convoluted task, but the authors of this paper of the opinion that it is an essential task that must be undertaken to uphold the integrity and harmony of the nation.

Currently, given the political atmosphere, the upsurge of communalism and potential threat of severe communal violence in the country, the need to reduce the differences and remove religious superiority complexes amongst people is more than ever before.

As such, this paper will look at the historical inception of UCC, the precedents supporting it and examine the repercussions of UCC from a legal and social angle and its role in upholding constitutional principles of equality and secularism.

1.2 Literature review:

1. **Constitutional Assembly Debate, 23\(^{rd}\) November 1948, Volume VII.**
   - The research paper has focused enormously on the CAD in order to understand the intention of the forefathers and why UCC was added as a DPSP.

   The author strikes to explain the background of UCC in India and also refers to Prof A.A.A. Faizi (a Muslim Philosopher) who brings out the difference between law and religion. According to the philosopher, laws are set of rules that shall be applied to all citizens without any exception. But religion is something attached to personal beliefs.

3. **The Civil Code in Portugal and Goa: Common Heritage and Future Prospects, Dário Moura Vicente.**

\(^1\) Article 44 of Indian Constitution: The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.
This article explains in detail the history, adaptation and application of the Portuguese civil code in Goa and the issues that need to be addressed for having a UCC. Further, it explains the major problems faced by the contemporary codification of civil code and the future prospects of such a code. The current law applicable to Goa is old and outdated, Portuguese itself has made changes to adapt itself to the present and the same must happen in Goa as well.

4. **A Contemporary Study on the Uniform Civil Code S.Sadhana and S.Bhuvaneswari.**

The paper explains the legal dimensions of UCC with examining its meaning and essence. It discusses the origin, objective and need for UCC with further analysis of the advantages and disadvantages of such governance. It throws light on factors of implementation of UCC and its effect of disintegration of the nation. The paper has made recommendations and suggestions based on the analysis of various Indian judicial decisions on the same. The researcher agrees with the recommendations made by this paper considering the present social circumstance in India.

5. **All That Is Uniform Is Not Gold: UCC In Goa and India’s Predicament, Souradeep Mukopadhyay.**

This paper explains in detail the relationship between state and religion, its changing dynamics over years and the struggle for power to rule. It moves on to indicate that UCC is a mid-way meeting of the two institutions of state and religion, hence exploring the meaning of UCC in this perspective. The paper also scrutinizes the implication of UCC in India as a unique nation with vast diversity, moving on to a specific case study of Goa with the imprints of Portugal law. It dwells deeply on the specifications on marriage, divorce and succession in Goa expressing its various discriminatory legal provisions. The researchers are in consensus with this author about the necessity to make urgent changes to the prevalent laws to secure people from injustice.

6. **Shakala Patil, “After Triple Talaq, a Look At the Other Discriminatory Personal Laws That Need to Go” (The Wire).**

In this Article, the author who is a lawyer in Mumbai expresses her views about the discriminatory provisions that still exist in India today and need to be remedied. She points out that while the Triple Talaq judgment was in deed a very progressive one, there are still many such exploitative personal laws in India.

7. **“Response to Law Commission of India on Uniform Civil Code” (Orinam March 5, 2019).**

This was a letter that members of Orinam- an NGO that works closely with members of the LGBTQ community wrote to the Law commission of India making recommendations and suggestions to the Commission’s report on UCC. The letter clearly indicates with several
examples from real life wherein members of the LGBTQ community could not exercise their right to marriage, divorce, adoption, succession etc. or had to face a lot of social and familial pressure and criticism when they attempted to do so.

1.3. Research questions:
1.) Will implementing a UCC for personal laws under Article 44 impact the fundamental right to religion, as guaranteed by article 25 of the Constitution?
2.) How can a UCC for personal law be instrumental in attaining gender equality?
3.) What are the challenges that need to be overcome in order to draft a harmonious UCC for personal laws?

2.0 CONSTITUTIONAL OVERVIEW OF UCC FOR PERSONAL LAWS

2.1. Will UCC lead to cultural genocide?

- During the colonial time, the Britishers came up with a uniform law for crimes, property, contracts, etc. but they felt interfering with domestic laws might cause agitation among different religious groups. Later the separate laws for Hindu’s and Muslims, increased intolerance between the communities.
- Though the Constituent Assembly felt the need for UCC; that was not the right time to implement it, considering the partition phase. But the framers believed, such a need would arise in the future, and then UCC must be enforced. This was the reason UCC was placed under Article 44 as Directive Principle of State Policy.
- It is said that Article 44 guarantees and recognizes the existence of diversity among personal laws, but that’s not true. Instead it directs state to come up with UCC when necessary.
- Why should religion be given the jurisdiction in a secular state? Considering the modernization of this era, it will not be right to base a law particularly on custom and religion that might be discriminatory in nature. UCC is a signal that proves the nation is moving far

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3Art.44 (N1).
away from theological thoughts. When we strive for national unity what have to be considered are benefit that can be produced and not the practices that shall be forgotten.

- UCC was believed to end discrimination by harmonious compilation of personal laws. The minority groups believed imposing UCC in a diverse nation like India will lead to cultural genocide. Whereas what should be understood is that, UCC shall not encroach into religious freedom, instead it shall curb the discriminatory religious and cultural practices.

- Cultural autonomy cannot be used as a tool for national unity. Even culture evolves and changes over time. So being restricted by old discriminatory laws will not take us anywhere forward. Old religious practices cannot be given priority over human rights. It is unfair to say, one practice is unconstitutional for one community and the same shall remain valid for another community?

- Initially Muslims in India were governed by local courts for criminal matters, as per customs. But later, Britishes made uniform Criminal law applicable to all. At that time no agitation was raised in accepting the criminal code. “Therefore, no system can be self-contained, because it is essential to have elements of growth”.

- “No law should be enacted that might force any community to give up their personal culture or identity.” In Bai Tahir v Ali Hussain Fissalli Chouthia, it was said, UCC should not entirely demolish any personal law. Instead the progressive practice of each community is to be compiled into a uniform code.

- If a particular practice of a majoritarian religion (Hinduism) is incorporated in UCC, it is only for the progress of the society. This should not be regarded as tyranny of the majority.

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16 Aiyar (N12).
• Consultation from all the communities is required because any forceful imposition might serve as a threat to secularism\textsuperscript{17}. This is in accordance with CAD, where it was discussed, ‘	extit{Personal laws guaranteed under the constitution for any community shall not be modified without the approval of that community}\textsuperscript{18}’. Dr. Ambedkar\textsuperscript{19} stated that, people should be given time to get accustomed to UCC. So initially a voluntary application is better than an imposition.

• If personal laws are immutable and inseparable from religion why do Muslim women knock the doors of Courts, opposing their personal law? Many Islam countries have themselves made dynamic changes to their laws with regard to societal changes.

2.2. Right to religion vs. UCC

• Secularization is a process where religion loses its social, legal and cultural significance, thus transforming a society imbued with religious values into a non-religious secular nation. In such a progressive nation clear distinction between religious faith and laws should be done\textsuperscript{20}.

• A few argued that ‘	extit{civil law}’ includes only property law, contract law, etc. but not personal laws as these are laws practised by religious communities and fall under article 25\textsuperscript{21}. But in \textit{John Vallamattom v UOI}\textsuperscript{22}, it was established that article 44 implies there should not be any connection between religion and laws in a civilised society. Article 25 guarantees right to religion and article 44 diverges religion and personal law\textsuperscript{23}. But this does not mean there exists a conflict between articles 25 and 44. Matters like marriage, divorce and succession are secular in nature and thus should not fall under the ambit of article 25\textsuperscript{24}.

• Personal laws should always be kept divorced from religion because there should be only one way of life for all people. Religion must be restricted only to faith and other matters are to be

\textsuperscript{17} Gary Jeffrey, \textit{The Wheel of Law: India’s Secularism in a Comparative Constitutional Context} (Oxford University Press, New Delhi, 2003).
\textsuperscript{18} Constituent Assembly Debates, 23\textsuperscript{rd} November, 1948 speech by available at Naziruddin Ahmad <https://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-11-23> accessed on 01 May, 2019.
\textsuperscript{19} Ambedker (N15).
\textsuperscript{22} John Vallamattom v UOI AIR, 2003 SC 2902.
\textsuperscript{23} Sarla Mudgal v UOI, 1995 AIR 1531.
governed by a uniform code for national unity\textsuperscript{25}. So, religion is just a matter of faith and so should not be mingled with domestic matters that are to be regulated by uniform laws\textsuperscript{26}.

\section*{3.0. UCC- A TOOL TO COMBAT GENDER AND LGBTQ BIAS}

Equality and inclusiveness are cornerstones for a truly progressive society. They ensure that every person irrespective of caste, religion, gender, sex, sexual orientation amongst other things has the freedom and the legal right to live freely and fully. In this regard, the personal laws that regulate important aspects of a person’s life such as marriage, divorce, adoption, succession etc. fall short on being truly ‘inclusive’.

In the past many of these laws were detrimental towards women. For instance, until 2005, Hindu women were not allowed to inherit property, and were not allowed to be ‘kartas’ of a Hindu Family. Muslim women were denied maintenance under Section 125 of the Cr.P.C\textsuperscript{27} in the name of upholding Islamic customs of ‘iddat.’ Further, many Muslim women were subject to much discrimination and were left support-less due to the concept of ‘Triple Talaq’ that gave a Muslim man the right to divorce his wife without any legal sanction just by uttering the word “Talaq” three times.

The above mentioned personal laws have over time been abolished, owing to judicial precedents and legislative amendments. The Amendment to the Hindu Succession Act in 2005 gave daughters an equal right to inheritance. The Supreme Court’s judgement in the case of \textit{Shayara Bano v Union of India & Others}\textsuperscript{28} in 2017 made the practice of Triple Talaq illegal and abolished it. The maintenance for Muslim women has had a chaotic evolution since the case of \textit{Mohd. Ahmed Khan v Shah Bano Begum}\textsuperscript{29} in 1985, the enactment of the Muslim Woman (Protection on Rights of Divorce) Act, 1986\textsuperscript{30}, the protests and controversies that followed afterwards to finally the judgment in the case of \textit{Shamima Bano v Ashraf Khan}\textsuperscript{31} in 2014 wherein it was held that a divorced Muslim woman is also entitled to maintenance under section 125 Cr.P.C.

\subsection*{3.1. Discriminatory Provisions existing under Personal Laws}

The above stated laws were not the only discriminatory personal laws. There are many more that need to be remedied and addressed. Under section 15 of the Hindu Succession Act\textsuperscript{32}, 1956 (applicable to Hindus, Buddhists, Jains and Sikhs), Section 15, if a women dies intestate i.e. without a will, then her property will go to her children and husband and in their absence, it devolves upon her husband’s heirs.

\begin{footnotesize}
\textsuperscript{25} Munshi (N8).
\textsuperscript{26} S.R.Bommai v UOI, 1994 AIR 1918.
\textsuperscript{27} Section, 125, The Code of Criminal Procedure, 1973
\textsuperscript{28} Shayara Bano v Union of India & Others, (2017) 9 SCC 1.
\textsuperscript{29} Mohd. Ahmed Khan v Shah Bano Begum, AIR 1985 SC 945.
\textsuperscript{30} Muslim Woman (Protection on Rights of Divorce) Act, 1986.
\textsuperscript{31} Shamima Bano v Ashraf Khan (2014) 12 SCC.
\textsuperscript{32} The Hindu Succession Act, 1956, Section 15.
\end{footnotesize}
and only in the absence of such heirs can it devolve upon the woman’s own relatives.\textsuperscript{33}
Further, under the Indian Succession Act, 1925\textsuperscript{34} (applicable to Christians and certain provisions to Parsis) the property of a man who dies intestate and without lineal descendants passes only in half to his widow.\textsuperscript{35}
The Hindu Minority and Guardianship Act, 1956, under section 6\textsuperscript{36} lays down that the father is the ‘natural guardian’ of a Hindu child. The mother is measured a guardian only in the absence of the father or if the child is under five years of age.\textsuperscript{37}
Polygamy is still permitted under Muslim personal law. Till date, by law, a Muslim man is allowed to have up to 4 wives. Although this practice is not as common in practice, the law nonetheless remains unchanged.\textsuperscript{38}
These are some of the discriminatory laws that exist post- the triple Talaq judgment. These laws are discriminatory, the words used in the legislations therein are sexist and such laws must be done away with.

3.2. Transgender and LGBTQ Rights
Another important aspect that is overlooked and ignored under the personal laws is the rights of the LGBTQ community. Members of this community are looked down upon and ostracized even in today’s day and age. On top of this, they are inadequately represented by their respective personal law. In fact, most of the personal laws do not even recognize the marriage, divorce, adoption and succession rights of transgender people. Homosexual individuals are thus, in an uncomfortably complex situation with regard to their marriage rights under the existing personal laws.
The judgement of the Supreme Court in the case of \textit{Navtej Singh Johar v Union of India}\textsuperscript{39} in September 2018 delivered a landmark judgment decriminalized consensual homosexual relationships and removed them from the purview of “Unnatural offences” under section 377 of the Indian Penal Code, 1860.\textsuperscript{40} However, the personal laws have not provisioned for the lawful marriage of the homosexual community. To add insult to injury, the Government has openly opposed same-sex marriages in the House of the people in 2021 even after the de-criminalization of Homosexuality.
In 2014, in the case of \textit{National Legal Services Authority v Union of India}\textsuperscript{41} the Supreme Court of India, declared transgender people to be a ‘third gender’, and stated that they had the right to self-

\textsuperscript{34} Indian Succession Act, 1925.
\textsuperscript{35} Patil (N33).
\textsuperscript{36}Section 6, Hindu Minority and Guardianship Act, 1956.
\textsuperscript{38} \textit{Ibid}.
\textsuperscript{39} Navtej Singh Johar v Union of India, (2018) 1 SCC 791.
\textsuperscript{40} Section 377, Indian Penal Code, 1860.
\textsuperscript{41} National Legal Services Authority v Union of India, April 13 2014.
identification of their gender as male, female or third-gender. While this was a very forward-looking and necessary judgment, the practicality remains that the personal laws have not made sufficient space to include these rights.

In July 2018, the Law Commission of India prepared a report on UCC and had asked for responses and inputs from the public in prior. In tune with this, Orinam an NGO wrote to the Law Commission enlisting the problems that the transgender community faces as a result of the existing personal laws. This letter mentioned the complications and violations of fundamental rights that occurred during the, marriage, divorce and employment of transgender people and also the issues related to relationships that were not acceptable to ‘nodal’ families. The NGO urged that an inclusive and non-biased UCC be recommended by the Law Commission to address these issues.

3.3. A Comprehensive UCC- An Optimistic Solution

In order to combat these sex, gender and gender-identity based discriminations that still exist in the society, the drafting and implementation of a UCC that is inclusive of all persons and is personal law-neutral, gender empowering, non-discriminatory and uniform to all is essential.

Also, UCC makes the work of legislators less time-consuming as instead of making individual amends to individual personal law, they can draft one UCC for all that is unanimously applicable to all irrespective of religion.

Such a UCC will render justice and equity to one and all alike and pave way towards a bias-free society and uphold the principle of Equality and Freedom of life and personal liberty in its truest sense.

4.0 CHALLENGES IN THE APPLICATION OF UCC TO INDIA

This chapter will throw light on the practical problems involved in implementing a UCC through the case study of Goa’s UCC.

Dr. B R Ambedkar a true democrat was insistent on inclusion of UCC in the constitution of India. The idea of UCC is to simply reduce the dogmatism of religions while providing for a society which can share more common ground between communities. A law this fundamental in bring together a diverse society has various obstacles in its application.

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Firstly, “Without a Uniform Civil Code, labelling India to be a Secular nation is just an illusion46,” but UCC impacts one key pillar of our democracy i.e. secularism. Secularism followed in India is not complete separation of state and religion but state governs religion in limited areas47. Whereas, UCC gives power to the state to amend personal laws that are considered sacrosanct and unchallengeable48. Secondly, UCC is against fundamental right guaranteed under Art.2549, Art.2650 and Art.2951. It is contended that ‘culture’ forms a major part of personal laws52 resists implementation of UCC. Making these norms optional reduces the sanctity of religion and gives state enormous power to govern the intricate aspects of life.

Thirdly, “laws that are not enforceable are not laws at all”53. The most crucial aspect of a law is social acceptance. Eg: the Prohibition of Dowry laws, the exchange of dowry happens till date regardless of the law54. UCC should not become one such law which does not make any difference to the existing situation. Unless the law is accepted its implementation is impossible.

Lastly, drafting or the authentic codification itself is an issue. Eg: for Hindus marriage is a contract and Islam considers marriage a contract55, restrictions on marriage with a person committing murder56, etc. It will be a challenging task to harmonize distinct religious restrictions, beliefs and norms but providing flexibility for religions will defeat the purpose of UCC, as in case of Goa.

4.1. The Disastrous Goan UCC – a case study

Goa is considered as an example to other Indian states for having a functional UCC from 1869. However, it is an example of exactly how not to draft a UCC. In the words of Niveditha Menon the Goan Code is “neither uniform nor gender-just”57. The reasons for this are discussed herein under.

4.1.1 Background

48 In India secularism has a positive meaning, which is developing understanding and respect towards different religions. Example: teaching of Sanskrit, acquisition of place of worship, education institutions for minority religions, reservation of seats, are not considered acts against secularism.
50 Freedom of conscience and free profession, practice and propagation of religion.
51 Freedom to manage religious affairs.
52 Protection of interests of minorities.
53 Mukopadhhyay (N45).
56 Ibid.
In 1869 the Portuguese Civil Code was made applicable to all its overseas provinces. After Goa was annexed by India, the UCC left behind by the Portuguese was applicable to residents irrespective of their religion, unlike rest of India which had different personal laws.\(^{58}\) By virtue of the Goa, Daman and Diu (Administration) Act 1962, UCC continued as the internal law of the new Union Territories which governs the family matters of marriage, divorce, adoption, succession, inheritance, maintenance, family property, etc.\(^{60}\) Other civil matters like contract, transfer of property are governed by the Indian Acts.

### 4.1.2 Analysis of the uniformity of Goan UCC:

A few consolidating provisions which promote equity are that the provisions of the act are applicable to all residents irrespective of their religion, compulsory registration of marriage, no provision for verbal divorce, marriage is contractual, no polygamy, secular marriage, divorce and succession, etc.\(^{61}\) A detailed analysis of the provisions will bring to light the differences hidden under the name of uniformity. The code not only provides flexibility to various religious practices but in specific discriminates women, which defeats the purpose of the act.

Consider Marriage, it is classified into three\(^{62}\) categories based on religion of the parties and where the marriage is held. In case of divorce, the grounds available are different for females and males example: adultery as a ground is only available to Hindu male. Also the grounds for separation vary on the type of solemnization of marriage\(^{63}\). In the case of *E. Nunes of Bicholim v P Nicolau Fernandes of Merces*\(^{64}\) such arbitrary grounds were struck down as ultra-virus the constitution but have not been given legislative backup. The property law which is considered the most forward can be nullifies by prenuptial agreements of various types. Lack of awareness, abuse\(^{65}\) and logistic issues with registration\(^{66}\) makes Goan UCC impractical, difficult to comprehend and not implementable.

Uniformity on marriage for example must be, ‘Marriage’ means legal union under this act of one person with another regardless of the gender.\(^{67}\) In such a definition restriction of age, soundness of

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\(^{60}\) Mukopadhyay (N45).

\(^{61}\) Ibid.

\(^{62}\) The Code divides marriages into three categories- Marriage between Catholics conducted at a Catholic Church, Marriage between Catholics not conducted at a Catholic Church, Marriage between Non-Catholics.

\(^{63}\) Mukopadhyay (N45).

\(^{64}\) E. Nunes of Bicholim v P Nicolau Fernandes of Merces AIR 1974 Goa 46.

\(^{65}\) As the law was in Portuguese till 2017, the law was heard by the judges as the lawyers interpret it. Leading to misinterpretation of provisions, which can be corrected in the future case only if the judge knows the language.

\(^{66}\) The courts for registration are located only in districts and not panchayats leading to difficulty in registration and lack of digitalization to identity second marriage.

mind, blood relation, etc. can be imposed instead of religious classification\textsuperscript{68}.

UCC for personal laws is a necessity\textsuperscript{69} but not in terms of the Goan civil code\textsuperscript{70} but in its development direction\textsuperscript{71}. Uniformity is treating equals equally\textsuperscript{72}. In case of personal laws it is human race and not individual people of different religion. UCC is a step towards integration of humanity in the personal sphere.

5.0. CONCLUSION

During Constitutional Assembly Debates, some of our constitutional forefathers felt the need for UCC. However, the members belonging to minorities, especially Muslim community were of the opinion that the implementation of UCC would entail the imposition of Hindu law on everyone. Therefore, UCC was kept aside as DPSP, so that when need arises, it can be enforced. Considering the conflicting dynamics among religious communities now is the time to give life to this dead letter law. We must of course be mindful of the neutrality of the laws and ensure that the new uniform law that is applicable to everyone – does not favor the beliefs of one religion over another. The committee responsible for the drafting of such a law must consist of member representatives from all religions, sects and groups. Necessary sub-committees must be formed and adequate research must be made.

Further, in today's day and age where the debates about sexual identity, sexual orientation and gender roles have made their way to mainstream social dialogues, it is essential that law, as one of the key institutions of society, plays an active role and pioneers the accelerated pace of social change in order to ensure equality and fundamental human justice to all.

Thus, drafting of a UCC for personal laws that is inclusive of LGBTQ+ sensibilities will not only ensure that the people belonging to this community can exercise their right to marriage, divorce, adoption, succession etc. liberally, but it will also help achieve the larger goal of increasing social acceptability of these groups.

Lastly, the Goan code clearly indicates how the consolidation of personal laws in a country filled with diversity can be un-uniform. This defeats the very purpose of such a convergence where flexibility is provided to all religions to govern important aspects personal sphere of life, which ultimately breaches the principle of equal treatment. As such, it must be ensured that, while drafting a UCC for the whole of India, the shortcomings of the Goan Code must be combated and the Code must seek to harmonize personal laws and follow secularism in its true intent.

\textsuperscript{68} Ibid.

\textsuperscript{69} Mounica Kasturi, ‘Need For A Uniform Civil Code In India - Academike’ (Academike, 2014)

\textsuperscript{70} Menon (N57).

\textsuperscript{71} Prakash Kamat, ‘Goa Passes Bill to Replace Portuguese Succession Law’, The Hindu (Nov. 18, 2017, 8:00PM),

\textsuperscript{72} V. N Shukla and Mahendra Pal Singh, V.N. Shukla's Constitution Of India (12th edn, Eastern Book Company 2013).