DECODING THE UNIFORM CIVIL CODE

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Article 44 of the Constitution of India provides that "*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*". Although it is one of the simplest and shortest Articles in the Constitution, it has perhaps been one of the most contentious and debated provisions ever since the Constitution was promulgated, arousing extreme passions in both supporters as also detractors of the provision and a Uniform Civil Code.

Indeed, it is a fact of history that Article 44, which was Article 35 in the draft Constitution put to vote before the Constituent Assembly, was the subject matter of vociferous debates and impassioned discussions both in the Sub-Committee on Fundamental Rights as also in the Constituent Assembly. The Sub-Committee on Fundamental Rights comprised of 9 members including 2 women, and 4 out of said 9 members – including both women – opposed the placing of the said Article amongst the Directive Principles of State Policy instead of being made a Fundamental Right in the Constitution.[1] Thus, but for one vote, draft Article 35 may have been

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[1]See B. Shiva Rao, 1968, *The Framing of India's Constitution:Select Documents* (Vol. 2) Indian Institute of Public Administration;[distributors: NM Tripathi, Bombay] pp. 162 (Note of Dissent):

> *"We are not satisfied with the acceptance of a uniform civil code as an ultimate social objective set out in clause 41 as determined by the majority of the sub-committee. One of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life. We are of the view that a uniform civil code should be guaranteed to the Indian people within a period of 5 or 10 years in the same manner as the right to free and compulsory education has been guaranteed by clause 24 within 10 years. We, therefore, suggest that the Advisory Committee might transfer the clause regarding a uniform civil code from chapter 2 to chapter 1 after making suitable modifications in it.*
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> *Hansa Mehta*
> *Amrit Kaur"*

proposed to the Constituent Assembly as a Fundamental Right enforceable through the Courts of law, as opposed to a non-justiciable Directive Principle.

Even in the Constituent Assembly, several speakers from the Muslim community opposed the inclusion of Article 44 (being Article 35 in the draft Constitution) even as a Directive Principle. The essential argument put forth was that it was not the business of the State to interfere in the personal and family laws of the individual. It was pointed out by these speakers that issues such as marriage practices or laws of inheritance are not merely legal issues but are emotive issues covered and regulated by religious practices of the individuals, such that any interference with the same would necessarily tantamount to interference with the Fundamental Right to Freedom of Religion that the very same Constitution was guaranteeing. It was also stated at least by one of the speakers opposing the said Article – Mr. B. Pocker Sahib Bahadur – that the apprehension as regards interference with their religious practices was not only being felt by the Muslim community but also by several Hindu organizations.

Equally impassioned were the speeches by the supporters of the said Article, led by the redoubtable Dr. Ambedkar. It was pointed out by these speakers that even in the absence of such provision in the Constitution, it was not as if the State was precluded from enacting a Uniform Civil Code, particularly in light of the restriction contained in Article 25(2) of the Constitution – being Article 19(2) in the draft Constitution - to the Fundamental Right to Freedom of Religion enshrined in the said Article. It was also pointed out that many European countries including France, Germany and Italy had enacted Civil Codes that governed not only the citizens of the said countries but even people of other countries including India if they had property

in these countries. It was opined by Dr. Ambedkar, while culminating the debate on draft Article 35 that most aspects of life in India were already covered by uniform laws, and thus the efficacy of uniform laws already stood established. He stated:

> "*…I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change.*"

It is interesting to note that even today, many of the same arguments continue to be raised by the supporters and detractors of the Uniform Civil Code. For the purposes of this discussion, it is of course not only unnecessary but also undesirable to discuss the political posturing by the opposite sides of the debate. However, the legal aspects of enforceability of Article 44 as also any Uniform Civil Code that may be framed under it are aspects ripe for discussion and deliberation by the legal community.

The very first aspect that would require examination is the scope and limits of a Uniform Civil Code, or, to put it differently, which elements of personal laws would be amenable to codification by way of the Uniform Civil Code and which would not. This is because it appears that in the minds of many people, there exists considerable ambiguity as to the scope of a Uniform Civil Code. It is often touted - of course by political opportunists and for political reasons – that the Uniform Civil Code would cause substantial violence to inherent religious practices, thus endangering the religious identity of the person. Such alarmism is incorrect and misplaced. From a juristic point of view, it would appear that Article 25(2)(a) of the Constitution

itself provides sufficient indication that the elements of a Uniform Civil Code would include and cover only those aspects of religion that comprise its secular elements as opposed to personal elements, since that is the limit of the exception provided to the guarantee of Freedom of Religion incorporated in Article 25(1). As such, any Act or Code that goes beyond the said limitation runs the risk of being held in violation of the said guarantee and thus violative of the Constitution. The distinction and interplay between religion and law has been aptly stated by Justice Leila Seth in the following words: "*Religion is about faith – a relationship between an individual and his God; whereas law is about specific rights of an individual as against other individuals or society at large. One is the religious plane which is entirely personal; and the other is the social plane which deals with a person's status and self-esteem as a citizen of the country.*"[2]Thus, any aspect of religion that is personal and pertains to issues of faith – such as how to pray, how many times to pray, what time to pray, whether to pray at home or the temple/mosque/church, etc – are strictly religious issues with which any law or Code cannot interfere without offending the guarantee contained in Article 25(1) of the Constitution. However, such aspects of religion as pertain to interactions with other individuals and/or the society at large – such as marriage, divorce, succession, etc – would constitute the secular aspect of religion that would necessarily be amenable to codification and regulation by the law, whether by way of a Uniform Civil Code or otherwise.

The scope of the intended Uniform Civil Code as envisaged by the members of the Constituent Assembly is evident from the extract of Dr. Ambedkar's speech quoted before, wherein he expresses the desire for enactment of a Uniform Civil Code covering the issues of marriage and succession. Further indication towards the possible

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[2] Leila Seth, A Uniform Civil Code: Towards Gender Justice, India International Centre Quarterly, Vol. 31, No. 4 (Spring 2005).

elements of a Uniform Civil Code can be drawn from the Acts that arose from the original Hindu Code Bill of the 1940s and were passed in the 1950s for reform of Hindu laws - being the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority and Guardianship Act, 1956 and Hindu Adoptions and Maintenance Act, 1956 – and the range of subjects covered by the said Acts, including issues of marriage, divorce, succession, inheritance, adoption and guardianship. It would therefore be logical and reasonable to presume that it is these issues that would be covered by a Uniform Civil Code, if and when the same is framed.

It is often opined that a measure such as formulation of a Uniform Civil Code, which would necessarily involve interference with various aspects of personal laws of the people, ought to be left to the discretion of the society and ought not to be made the subject of legal processes. Undeniably, society has a significant role to play in preparing the public at large for formulating or adopting a measure such as the Uniform Civil Code. Nevertheless, such a measure is not only of sociological interest but is also of significant interest for the legal system, particularly in view of the principles of equality enshrined in Articles 14 and 15 of our Constitution. There is much literature to establish – including but not limited to the Constituent Assembly Debates – that the essential benefits that are envisaged by the proponents of Article 44 are (i) unification of the country by uniformity of laws, and (ii) gender equality and grant of equal status to women in regard to secular aspects of personal laws. While the former is a wider and more idealistic goal, it is the latter goal that commands immediate attention of the legal system, since it is an undeniable fact that women suffer a subordinate status in the personal laws of all religions. Indeed, the very demand for a Uniform Civil Code has its origin largely in the demand for equal rights for women, and therefore

Article 44 can almost be seen as a natural corollary to the concepts of social justice and equality that are major themes recurring in and underlying our Constitution.

It goes without saying that a Uniform Civil Code would not only be a legal document but rather would constitute an instrument of social change. Legal history is replete with instances where progressive legislations have been met with fierce resistance; however, once enacted, such legislations have served as vital instruments for reformation of society and for securing gender-justice. In the field of codification of personal laws itself, records show that there was fierce opposition to the Hindu Code Bill as originally proposed in the 1940s. Indeed, it took over a decade of deliberations and discussions before the measures for reform of Hindu Laws were passed in the mid-1950s in the modified form of four different Acts - being the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Minority and Guardianship Act, 1956 and Hindu Adoptions and Maintenance Act, 1956. The said Acts brought about substantial changes in traditional aspects of Hindu personal laws, with the intent of securing gender equality, by introduction of measures such as (i) abolition of bigamy/polygamy, (ii) provision of share of daughter in intestate inheritance as Class-I heir, (iii) sanctioning of adoption of girl child (though earlier Hindu law sanctioned adoption of male child alone), etc. Despite the vehement opposition faced by the Hindu Code Bill and its successor Acts then, half-a-century down the line the changes brought in by the said Acts have become the accepted norm for a large segment of the Hindu society. Alternatively, in cases where delinquent individuals seek to deny the rights conferred on Hindu women by the said Acts, the law provides to the concerned women the option of and machinery for asserting their rights. It is likely that a Uniform Civil

Code would have similar effect in ensuring gender-justice and equality in the wider society.

One more benefit that the formulation of a Uniform Civil Code would bring to the legal system is clarity of law as regards the secular aspects of personal laws, which is an issue of particular interest to jurists and persons in the legal profession. It is trite that clarity and certainty of legal provisions is a fundamental necessity for any just and rational legal system, so that people are aware of and can foresee the implications and possible consequences of their actions. The celebrated jurist Tom Bingham, being Master of the Rolls, Lord Chief Justice of England and Wales and Senior Law Lord of the United Kingdom, makes eight suggestions as to desired attributes of law in his book "The Rule of Law"[3], with the very first principle being that "*The law must be accessible and so far as possible intelligible, clear and predictable.*" The Ld. Author states as under:

> "*The core of the existing principle is, I suggest, that all persons and authorities with the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*"[4]

Codification of laws in our country over the last one-and-a-half centuries has brought clarity and certainty to vast majority of legal subjects, whether in the fields of civil, criminal or commercial laws. Codification of personal laws by way of Uniform Civil Code would also serve to bring similar clarity and certainty to myriad issues arising in that field, particularly for the segment of population that is still reliant

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[3] Tom Bingham, The Rule of Law, Penguin Books, 2010, P. 37.
[4] Ibid, P. 8.

upon pronouncements of religious leaders even on inter-personal and family issues.

That brings us to another aspect that has formed the subject of much legal debate is the enforceability of Article 44 of the Constitution – as to whether the enactment thereof depends completely upon the convenience and desire of the political executive or whether the legal system has any role to play in the process. This is so because the Supreme Court has, on several occasions, reminded the Political Executive of its obligation thereunder. Reference in this regard may be made to the judgment of a Constitution Bench of the Supreme Court in *Shah Bano case*[5], wherein the Supreme Court made the following observations:

> "*It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand*

[5] *Mohd. Ahmed Khan* v. *Shah Bano Begum & Ors.,* (1985) 2 SCC 556, pp 572-573, para 32

the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."

Similarly, observations have been made by the Supreme Court in the cases of *Jordan Diengdeh*[6], *Sarla Mudgal*[7], and *John Vallamattom*[8] –as to the need for enactment of a Uniform Civil Code.

It is of course an oft-cited fact that Article 44 having been placed in Part-IV of the Constitution pertaining to Directive Principles of State Policy, the same is non-justiciable in nature. However, that is not to say that the State can turn a blind eye to the Directive Principles or ignore the same as per its convenience. The precept regarding non-justiciable nature of Directive Principles is contained in Article 37 of the Constitution of India, which in its entirety reads as under:

"*The provisions contained in this Part shall not be enforceable by any court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*"
(emphasis supplied)

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[6] *Jordan Diengdeh* v. *S.S. Chopra* (1985) 3 SCC 62, pp. 62-63,71, para 1, 7

[7] *Sarla Mudgal v. Union of India & Ors. (1995) 3 SCC 635, per Kuldip Singh J., para 1, 30-38; per Desai J.(concurring) para 41-47*

[8] *John Vallamattom & Anr. v. Union of India (2003) 6 SCC 611, (per V. N. Khare CJ.) pp. 627, para 44*

It needs no gainsaying that the latter half of Article 37 has as much sanctity and force as the first half thereof, although it is often completely omitted from consideration whenever the nature of Directive Principles are discussed. It is thus evident from a reading of the entirety of Article 37 that for the framers of our Constitution, the Directive Principles were not an expression of meaningless idealism but fundamental goals to be achieved by the State proactively. It would therefore be doing violence to the ideals of the Constitution if the Directive Principles were to be treated as a useless appendage, with the State not being answerable at all even if it were to ignore the same in legislation and in governance.

Indeed, with regard to the issue of enforceability of Directive Principles, the Supreme Court has itself veered around from its original approach - that they are more moral than legal precepts and do not have much value from a legal point of view – to a view that the Courts are bound to evolve, affirm and adopt principles of interpretation that will further and not hinder the goals set out in the Directive Principles of State Policy. Even on the issue of primacy between Fundamental Rights and Directive Principles, the opinion of the Supreme Court has changed from an initial position of unquestioned primacy of Fundamental Rights to regarding both as co-equal and even to interpret Fundamental Rights in the light of, and so as to promote, the values underlying Directive Principles.[9] Thus, it would no longer be correct to categorize the Directive Principles as mere ideals or principles that require mere platitudes but no concrete action from the State.

It also stands to reason that a Constitutional provision such as Article 44, which was incorporated in the Constitution after much

[9]For a detailed and interesting discussion regarding the nature and status of Directive Principles, see Samaraditya Pal and Justice Ruma Pal (Ed.), M.P. Jain's Indian Constitutional Law, Volume 2, 6thEdn (2010), PP. 1953-1966.

debate and discussion and now has existed in black and white for almost seven decades, cannot be permitted to effectively be treated to be a dead-letter. The Courts have consistently held that the State is duty-bound to implement the provisions of the Directive Principles. Indeed, that the State takes its obligations under the Directive Principles of State Policy seriously is evident from the fact that it has enacted legislations covering many of the Directive Principles, such as Article 39(d), 39(e), 39-A, 40, 41, 42, 43, 46, 48, 48-A and 49. At some stage, therefore, the State has to be answerable as to what steps have been taken by it to progress towards the goal set out in Article 44.

It is also necessary to note that the world has undergone a significant change since the time our Constitution was framed, and international treaties entered into by the State and/or obligations undertaken by the State under international conventions may also constitute binding obligations upon the State that affect the discussion of constitutional requirements. With specific reference to Article 44 of the Constitution and the issue of the Uniform Civil Code, it bears mention that India has ratified both the International Covenant on Civil and Political Rights, 1966 (ICCPR) and International Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW). Both the said instruments impose obligations upon ratifying States to ensure social justice and gender equality under national laws. It is a moot point, open to debate, whether the obligations undertaken by the Indian State under such international instruments would enable affected persons to assail social or gender discrimination by seeking enactment of appropriate laws eliminating such discrimination, including but not limited to a Uniform Civil Code. In this regard, it is relevant to note that while referring inter alia to the CEDAW, the Supreme Court has observed in the case of

Apparel Export Promotion Council v. *A.K. Chopra* – (1999) 1 SCC 759, as under:

> "*These international instruments cast an obligation on the Indian State to gender-sensitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodies in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law.*" (emphasis supplied)

I am aware that while ratifying the CEDAW, the Indian Government has registered its intent not to interfere in the personal laws of communities in the form of a declaration to Article 16(1) thereof, by recording that "*The Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.*" However, it also requires to be noted that in the case of *Valsamma Paul* v. *Cochin University & Ors.* - (1996) 3 SCC 545, the Supreme Court has taken note of the said declaration of the Indian Government but then proceeded to observe as under:

> "*The principles embodied in CEDAW and the concomitant right to development became an integral part of the Constitution of India and the Human Rights Act and became enforceable… Though the Government of India kept its reservations on Article 5(e), 16(1),*

16(2) and 29 of CEDAW, they bear little consequence in view of the fundamental rights in Articles 15(1) and (3) and Article 21 and the Directive Principles of the Constitution." (emphasis supplied)

Thus, as I have stated before, the implications of obligations accepted by the Indian State under international conventions – including but not limited to CEDAW – would constitute an additional element requiring consideration in the debate as to the legal enforceability of Article 44 of the Constitution.

A significant step has recently been taken in the direction of formulation of a Uniform Civil Code, with the Law Commission formulating a questionnaire on the issue and seeking public response thereto. The basic endeavour of the exercise, as articulated by the Law Commission itself, is to "*…address discrimination against vulnerable groups and harmonise the various cultural practices*". The Law Commission has also made it clear that it intends to ensure that "*…the norms of no one class, group or community dominate the tone or tenor of family law reforms.*" It is understood that the Law Commission has received over 40,000 responses to the questionnaire, which demonstrates both the importance as also the depth of interest in the issue in the society at large.

The scope of discussion and deliberation on Article 44 and the Uniform Civil Code is too vast to be covered in a single speech or article. Indeed, there is vast amount of literature available highlighting various aspects of the Uniform Civil Code. The issue of Article 44 and a Uniform Civil Code for India is a subject replete with scope for legal debate, deliberation and discussion. In the sea of impassioned and often biased opinions that crowd the field, I believe and hope that the

legal community will play the important role of moderating passions and advancing a rational debate on the issue.