Chapter - 3

*Uniform Civil Code and The Constitution of India*
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Personal laws attracted the attention of the Constituent Assembly and heated debates in favour of Uniform Civil Code and against it took place. The Uniform Civil Code was debated under Article 35. Muslim members strongly opposed it whereas most of the Hindu members supported it. B.R. Ambedkar opined in favour of interference in personal laws. This researcher has taken into account whole controversy in the light of the Constitution of India and drawn conclusions impartially.

A. Constituent Assembly Debates and Uniform Civil Code

Soon after independence the question of the position of personal laws got entangled into the whirlpool of national politics. On the floor of the Constituent Assembly, for about two years, the issue suffered convulsions caused by the utterances of progressive legislators, dissenting voices of their so called conservative brethren, apprehensions echoed by the spokesmen of the minorities, and bricks and buckets thrown from outside by laymen and law-men.¹

The Constituent Assembly Debates in the constitution making process revealed that the constitution makers debated the
concept, relevance and utility of the Uniform Civil Code. The Muslim members of the Constituent Assembly opposed the move with all possible intensity at their command. In this background, the arguments for and a quest for the objective evaluation of the Uniform Civil Code, will not be out of place in India which is known for its religious, cultural and lingual diversities. The Constituent Assembly had its first meeting in December 1946. However just after the freedom of India from the grip of British imperialist, the place and shape of personal laws in the future legal order in the country got much entangled into the whirlpool of national politics. Framers of the constitution envisage to establish a Sovereign, Democratic, Republic - ideas based on the ideas of justice, liberty, equality and fraternity. Later on, in 1976, words 'secularism' and 'socialism' were added to the Preamble. Fundamental rights especially regarding the right of freedom to religion was designed in our Constitution before its commencement in 1950. Since then, in the Constituent Assembly as well as on every platform, a great deal of discussion on personal laws has taken place repeatedly. Even prior to the commencement of the Constitution much was debated in the Constituent Assembly for and against the personal laws.2

i) The attitude of the antagonists

The Constituent Assembly debated the Uniform Civil Code under Article 35. Mohammad Ismail from Madras moved the
following proviso for addition to Article 33 which provided that ‘any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law’. He advocated that the right to adhere to one's own personal laws was one of the fundamental rights. He asserted that personal laws were a part of the way of life of the people. In his evaluation, personal laws were the part and parcel of religion and culture. Any interference with the personal laws, in his view, would tantamount to interference with the very way of life of those who had been observing such laws from generation to generation. He elucidated that India was emerging as a secular state and it must not do anything which hinder the religious and cultural ethos of the people. To strengthen his argument, he cited precedents of Yugoslavia, the Kingdom of Serbs, Croats and Slovenes which were obliged under treaty obligations to guarantee to Muslims being in minority in the matter of family laws and personal status:

"The Serbs, Croats and Slovene States agree to grant to Mussalmans in the matter of family law and personal status, provisions suitable for regulating these matters in accordance with Mussalman usage."³

To enrich his arguments, he named similar protective clauses of other European constitutions which dealt with the minorities. However, he pointed out that such clauses were narrow in scope as they dealt with any group, section or community of the people
and not confined to minorities only. His proposed amendments read:

“\text{That any group, section or community of the people shall not be obliged to give up its personal law in case it has such a law.}”

His proposed amendments sought to secure the rights of people in respect of their existing personal laws. He contended that in favour of the Uniform Civil Code was counter productive and the discontentment and faithfulness would be the natural result. By following their own personal laws, people of different caste and communities would not be in conflict with each other. The argument of Mohd. Ismail was objected by H.C. Majumdar, another member of the Constituent Assembly, who contended that the proposed amendment was in direct negation of Article 35. His objection was sustained by the Vice-President and Mohd. Ismail could not succeed. Another member of the Constituent Assembly Nazir Ahmad moved a proviso to article 35 which read:

“\text{Provided that the personal law of any community which has been guaranteed by the statutes shall not be changed except with the previous approval of the community ascertained in such a manner as Union legislature may determine by law.”}

He further remarked that the Uniform Civil Code would create inconvenience not only to Muslims but to all religious
communities who had religion oriented laws. He further pointed out that the very concept of Uniform Civil Code clashed with the religious and cultural freedom guaranted to every citizen. He was also apprehensive that under Article 35 the state may violate the religious freedom of the citizens.

Surveying the legal developments in the Indian subcontinent, he pinpointed certain provisions of the Civil Procedure Code, 1908 which had already interfered with the Muslim Personal Law. However, the British administration, as he pointed out, during its 175 years rule, did not interfere with the institution of marriage, dower, divorce, maintenance, guardianship, paternity and acknowledgment, administration of estate, wills, gifts, waqf and inheritance. Whatever laws were enacted in the area of Muslim Personal Law during the British administration of justice were mostly on the initiative of Muslim community. He put a note of caution in these words:

"What the British in 175 years failed to do or was afraid to do. What the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do at all once... I submit Sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy."

Another member, Mahboob Ali Beg sahib Bahadur moved the following proviso to Article 35:
Mahboob Ali Beg emphasized that the civil code spoken of in Article 35 did not include family law and inheritance but since some people have doubts about it should be made clear by a proviso to assure that the civil code would cover transfer of property, contract, etc., but not matters regulated by personal laws. He also claimed that secularism did not negative diversity in Personal laws. M.A. Ayyanger, member of the Constituent Assembly intervened and remarked on it as a matter of contract. Ayyanger tried to put his argument forcefully and asserted that the matrimonial contract was enjoined by the Holy Qur'an and the Traditions of the Prophet (SAW). He stated that the Indian concept of secularism tolerated the existence of all religions with equal honour and dignity. He emphasised that in secular state like India, different communities must have the freedom to practice their own religion and culture, and they should be allowed to observe their own personal law. B. Pocker Sahib another Muslim member of the constituent Assembly while supporting the motion proposed the following provisio to Article 35.

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

He laid emphasis on the following points:
(a) One of the ‘secrets of the success’ of the British rulers and the basis of their judicial administration was retention of personal laws;

(b) If the civil code was intended to supersede the provisions of the various civil code laws guaranting application of personal laws to cases of family law and inheritance, etc., Article 35 should be termed as ‘tyrannous provision’; and

(c) No community favoured uniformity of civil laws.

Organisations - both of Hindus and Muslims, questioned the competence of the Constituent Assembly to interfere with religious laws. Article 35 was thus, antagonistic to religious freedom. Hussain Imam, too expressed similar views and pointed out:

"India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything. In the north, we have got extreme heat. In Assam we have got more rain than anywhere in else in the world...."

In Rajputana desert we have no rain. In a country so diverse, Is it possible to have uniformity of civil laws? We have ourselves provided for -

Concurrent jurisdiction to the provinces as well as to the centre in matters of succession, marriage,
divorce and other things. How is it possible to have uniformity when there are 11 or 12 legislative bodies ... to legislate on subject according to requirements of their own people?"³⁹

He further argued and appealed:

"The apprehension felt by the members of minority community is very real. Secular state does not mean that it is anti-religious but non-religious and as such there is a word of difference between irreligious and non-religious. I, therefore, suggest that it would be a good policy for the member of the Drafting Committee to come forward to such safeguards in this proviso as will meet the apprehension genuinely felt and which people are feeling and I have every hope that ingenuity of Dr. Ambedkar will be able to find a solution to this."⁴⁰

The above account of the opinions expressed by Muslim members shows two different opinions. While Naziruddin Ahmad and Hussain Imam visualized the possibility of having uniform family law sometime in future the other speakers ruled out the possibility of having a Uniform Civil Code for all time to come. Thus, members of the minority strongly argued for exclusion of personal laws from the ambit of the Uniform Civil Code.
Nevertheless, despite their convincing arguments and deep resentment, they could not succeed. They only got some assurance from Dr. B.R. Ambedkar.

(ii) The attitude of protagonists

Many members of the Hindu community expressed their opinions contrary to the views of Muslim members. K.M. Munshi expressed the following views.

(A) Even in the absence of Article 35 it would be lawful for Parliament to enact a uniform civil code, since the article guaranteeing religious freedom gave to the state power to regulate secular activities associated with religion.

(B) In some Muslims countries, for example, Turkey and Egypt personal laws of religious minorities were not protected;

(C) Certain communities amongst Muslims, for example, Khojas and Memons did not want to follow the Shariat, but they were made to so under the Shariat Act, 1937;

(D) European countries had uniform laws applied even to minorities;

(E) Religion should be divorced from personal law; The Hindu Code Bill did not conform in its provisions to the precepts of Manu and Yajnavalkya;

(F) Personal laws discriminated between person and person on the basis of sex which was not permitted by the Constitution;
People should outgrow the notion given by the British that personal law was part of religion. Conclusively, he beseeched to divorce religion from personal laws.

"We want to divorce religion from personal laws from what may be called social relations or from the rights of the parties as regards inheritance or succession. What have these things got to do with religion, we really fail to understand."

He advised Muslim brethren in these words.

"I want my Muslim friends to realise this that the sooner we forget this isolationist outlook on life, it will be better for the country. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible into a strong and consolidated nation."

A.K. Iyer, a member of the Constituent Assembly, supported K.M. Munshi and urged the assembly to pass the article dealing with the Uniform Civil Code. He explained the scope of Uniform Civil Code:

'A Civil Code ... runs into every department of civil relations to the law of contract, to the law of
property, to the law of succession, to the law of marriage and similar matter.\textsuperscript{12}

The Assembly passed the article accordingly, brushing aside the proposal of the Muslim members for the exclusion of personal laws from the ambit of Uniform Civil Code. In the words of Prof. Tahir Mahmood:

"I want to point out that Mohd. Ismail, Hussain Imam, Mahboob Ali Beg and Naziruddin Ahmad had the same status in the Constituent Assembly as Hans Mehta, H.C. Majumdar, K.M. Munsi and A.K. Iyer whose opinion prevailed is a different matter.\textsuperscript{13}

Dr. B.R. Ambedkar although did not accept the amendments and defended the right of the state to interfere in the personal laws of different communities. He defended laws of different communities. He defended the arguments of Hindu members of the Constituent Assembly. But the same time he also gave some assurances to the Muslim members and he explained that the proposal was creating only a ‘power’ not an ‘obligation’, and closed the debate with these memorable words:

‘Sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of power must reconcile itself to the sentiments of different communities. No government can exercise its power in such a manner as to provoke
the Muslim community to rise in rebellion. I think it would be a mad government if it did so. But that is a matter which relates to exercise of power and not the power itself."^{14}

Besides, the above observation Dr. Ambedkar persuaded the Muslim members "Not to read too much into Article 44". He affirmed even if the Uniform Civil Code was implemented it would be applicable to those who would consent to be governed by it.\(^{15}\)

B. Personal Laws and the Constitution of India

The Constitution of India empowers the Legislature to legislate with respect to family relations governed by the personal laws by a Common Civil Code. With the enactment of the Hindu Code to replace significant segments of the customary Law of the Hindu Law, the demand for a Common Civil Code on the one hand and for the reform of the Muslim Personal Law on the other, has gained momentum. Enactment of a Common Code is recommended for a wide variety of reasons, which include averting communal riot and acceleration of the process of National Integration. While replacement of Muslim Law by a Common Civil Code has provoked intense opposition from a section of Muslims. Not all the advocates of the reforms are for replacement of Muslim family law, nor all their opponents, in India are scholars of Muslim Law. They do not conduct the debate on sound and sober lines. Consequently, the real issues are lost in a
whirlpool of non issues. We have already seen in the preceeding section how the debate took in relation to Uniform Civil Code. How after heated discussion the Article 35 of the draft constitution (Now Article 44) was incorporated in the Indian Constitution. Dr. Ambedkar the Chairman of the drafting Committee while supporting the inclusion of the provisio of Uniform Civil Code assured the members that they should not read too much into Article 44". he also assured the Muslim members that even if the Uniform Civil Code was implemented it would be applicable only to those who would consent to be governed by it.

The Constitution of India guarantees the religious and cultural freedom to every citizen of India Article 25 (1) states :

“All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”

Article 26 states :

“every religious denomination or any section thereof shall have the right : (a) To establish and maintain institutions for religious and charitable purposes; (b) To manage its own affairs in matters of religion”;

Article 29 (1) states :

“Any sections of the citizens ... having a distinct lagnuage, script or culture of it sown shall have the right to conserve the same”.

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Religion is the matter of faith and conscience. The culture and civilization incorporate the religious ethos. Muslim Personal Law being the very core of Islamic religious faith amalgamates in itself 'belief', 'practice', Propagation'. The ambit of religious and cultural freedom enshrined in Part III of the Constitution as the fundamental rights covers the Muslims Personal Law.

Under Article 372, the Constitution of India ensures the application of "all the law in force in the territory of India immediately before" its commencement. The Muslim Personal Law (Shariat) Application Act, 1937 is 'the law in force before the commencement of the Constitution of India.'

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, The President may by such order make such adaptation and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date...
as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of Law.

(3) Nothing in clause (2) shall be deemed:

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.

The expression "law in force" in this Article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding. That it or parts of it may not be then in operation either at all or in particular areas.

The very letter and spirit of Article 372 of the Constitution reveal that the Muslim Personal Law (Shariat) Application Act, 1937 which ensures and governs the application of Muslim Personal law is the 'law in force' as it is enacted by the competent legislature. Since its application, the Act has have been 'altered or
repealed or amended by the competent legislature or other competent authority' till date, so that it is the 'law in force' or 'living law' according to Article 372 of the Constitution.18

The phrase "all the law in force" in this article includes statutory, customary and, it seems, also personal laws.19 The language of Article 372(1) is analogous to section 292 of the Government of India Act, 1935, which also recognised the continued application of "all law in force" then. The Federal Court in United Provinces v. Atiqa,20 had held that the phrase included also non-statutory laws including personal laws. Even after the commencement of the Constitution the High Courts of Rajasthan,21 Hyderabad,22 Calcutta,23 Madhya Pradesh24 and Bombay25 have confirmed the applicability of Article 372 to personal laws. This article, in any case, is the only provision of the Constitution under which personal laws can be claimed to have been recognized. If we do not apply it to personal laws, those laws are left without any Constitutional recognition.26

As regard the Constitutional postulate of continuity and change in the matter of pre-1950 laws, at the time of the commencement of the Constitution a variety of Personal laws both codified and uncodified was applied to various religions and ethnic communities. By virtue of Article 372 of the Constitution all these laws, of every variety, got a statutory lease. It was not, however, a perpetual lease. The period of lease for all such laws extended till "further action", if any, by a "competent
authority”\textsuperscript{27}. As specified in Article 372(1), this “further action” could be taken in the form of alteration, repeal, amendment, or adaptation. The principal “competent authority” that could take any such ‘action’ would, of course, be Parliament or a state Legislature. An executive authority, however, could also exercise the power of delegated legislation.\textsuperscript{27}

The question of the power of adaptation and modification of the existing laws, conferred by Article 373 (2) on the President of the Republic, could be exercised by him also in respect of an uncodified law or custom has not been free from difficulty. However, since that power was not exercised by the President within the stipulated period of three years from the commencement of the Constitution, this question is now more or less redundant.\textsuperscript{28}

It should be remembered that all the three lists in schedule VII of the Constitution of India also include subjects relating to personal laws. They are as follows:

(i) Marriage and divorce; infants and minors; adoption; wills, integracy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.\textsuperscript{29}

(ii) Transfer of property other than agricultural land; registration of deeds and documents.\textsuperscript{30}

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(iii) Charities and charitable institutions, charitable and religious endowments and religious institutions.\textsuperscript{31}

List II (specifying the subjects on which state legislatures can make law) includes burial and burial grounds,\textsuperscript{32} rights in or over land\textsuperscript{33} (covering succession to agricultural lands) and administration of justice and organization of courts at the district level.\textsuperscript{34}

In List I (mentioning subjects for parliamentary legislation) the only entry relevant to Muslim law is "Pilgrimage to places outside India."\textsuperscript{35} Under this provision Parliament can make laws regulating \textit{Haj} and \textit{Ziyarat}.

Thus, nearly the entire gamut of subjects which traditionally falls within the ambit of personal law, has been placed at the disposal of either the state Legislature or the Parliament.\textsuperscript{36}

\textbf{Summary}

In post-independent India the status of personal laws got politicised. For two years, the Constituent Assembly witnessed heated debates in favour of and against Uniform Civil Code. In fact the Uniform Civil Code divided the house on communal lines. Muslim members opposed it while Hindu members strongly supported the move.

The debates were carried on under Article 35 Mohammad Ismail of Madras moved an amendment exempting any group or
community from being covered by such legislation. He cited precedents of Serbs, Croat etc. where Muslims were assured to have their own personal laws. Some members like H.C. Majumdar contested the amendments on the ground that it negates Article 35. Objections were sustained and Mohd. Ismail’s amendments were over-ruled. Some other members also moved for amendments but they failed despite strong pleas and arguments. Some of the Hindu members opined just opposite to Muslim members. K.M. Munshi, A.K. Iyer and even Dr. B.R. Ambedkar were most vocal in this regard. Dr. Ambedkar coldly suggested to Muslim members, “not to read too much into Article 44” and declared that Uniform Civil Code will be applicable only with their consent.

No doubt Constitution of India empowers Parliament to enact Uniform Civil Code. After enactment of Hindu Code the demand for reforms in Muslim Personal Laws and Uniform Civil Code gained momentum. Constitutionally all laws including personal laws can be changed or amended. In reality personal laws are placed within the purview of Parliament and legislature.

So far as the question of recognition of personal laws is concerned, the Constitution does acknowledge the existence and continuation of such laws under Entry 5 List III of Seventh Schedule, together with Article 372.
References


9. *Id.* at 546.


12. *See Supra note* 4, for K.M. Munshi’s speech in the Constituent Assembly.

13. *Supra note* 1 at 124


15. *Supra note* 3.
16. Supra note 2 at 40.
17. Supra note 3 at 55.
18. Ibid.
20. A.I.R. 1941 F.C. 16
26. Supra note 3 at 97.
27. Supra note 11 at 43.
28. Ibid.
29. Entry 5
30. Entry 6
31. Entry 28
32. Entry 10
33. Entry 18
34. Entry 5
35. Entry 20
36. Supra note 11 at 44