UNIFORM CIVIL CODE, A VOCIFEROUS JUDICIAL CLAIM AND RELUCTANT POLITICAL WILL

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Abstract

Among the Directive Principles, Art. 44 of the Constitution of India directing the State to secure for citizens a Uniform Civil Code throughout the territory of India has occupied a pivotal place of conflict in respect of political ideologies and judicial activism. The paramount objective of unity and integrity of India as resolved by the People of India in the Preamble and agreed to be obeyed as Fundamental Duty under Art. 51A(c) of the Constitution of India, though not enforceable like directives, could be achieved only when, from out of various measures, directive of Art. 44 is transformed in to enforceable Uniform Civil Code.

***Keywords** : Civil code, judicial claim, political will.*

Directive Principles of State Policy contained in Part IV of the Constitution of India have irked frequent confrontation between Judiciary and Legislature in the area of their implementation. Among the Directive Principles, Art. 44 of the Constitution of India directing the State to secure for citizens a Uniform Civil Code throughout the territory of India has occupied a pivotal place of conflict in respect of political ideologies and judicial activism.

Uniform Civil Code, these three words divide the nation into three categories- Politically, Socially and Religiously. Politically, the nation is divided between parties which propagate implementation of the Uniform Civil Code and other parties which are against the implementation of the Uniform Civil Code. Socially, between the intellectual class of the country, who analyse logically the pros and cons of the Uniform Civil Code and the ignorant who have no opinion of their own. And Religiously, between Hindus and Muslims by creating a dangerous rupture between them.

Constituent Assembly Debate

While explaining the necessity of Art. 44 (Art. 35 in a Draft Constitution) in Part IV of the Constitution of India, Shri K.M. Munshi[1] addressed the Constituent Assembly that:

"this particular clause which is now before the House is not brought for discussion for the first time. It has been discussed in several committees and at several places before it came to the House. The ground that is now put forward against it is, firstly that it infringes the Fundamental Right mentioned in Article 19; and secondly, it is tyrannous to the minority.

As regards Article 19 the House accepted it and made it quite clear that – "Nothing in this article shall affect the operation of any existing law or preclude the State from making any law (a) regulating or restricting" – I am omitting the unnecessary words – "or other secular activity which may be associated with religious practices; (b) for social welfare and reforms". Therefore the House has already accepted the principle that if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament to make laws about it without infringing this Fundamental Right of a minority.

It must also be remembered that if this clause is not put in, it does not mean that the Parliament in future would have no right to enact a Civil Code. The only restriction to such a right would be Article 19 and I have already pointed out that Article 19, accepted by the House unanimously, permits legislation covering secular activities. The whole object of this article is that as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt ma be made to unify the personal law of the country.

A further argument has been advanced that the enactment of a Civil Code would be tyrannical to minorities. Is it tyrannical? Nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a Civil Code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. But I go further. When the Shariat Act was passed or when certain laws were passed in the Central Legislature in the old regime, the Khojas and Cutchi Memons were highly dissatisfied.

We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If however the religious practice in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. This is what is emphasized by this article."

Further, Shri Alladi Krishnaswami Ayyar[2] addressed the House that:

"The article actually aims at amity. It does not destroy amity. The idea is that differential contribute to the differences among the different peoples of India. What it aims at is to try to arrive at a common measure of

1. CAD Vol. VII, pp. 546, 547.

2. CAD, Vol. VII, p.549.

agreement in regard to these matters. It is not as if one legal system is not influencing or being influenced by another legal system. In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging always to the past. We are departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation.

Therefore, when there is impact between two civilizations or between two culture, each culture must be influenced and influence the other culture. If there is a determined opposition, or if there is strong opposition by any section of the community, it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a Uniform Civil Code."

While summing up the discussion, Dr. B. R. Ambedkar [3]opined that:

"We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law to Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are Negotiable Instruments Act : and 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. Therefore, the argument whether we should attempt such a thing seems to me somewhat whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it.

I think they have read rather too much into Article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method. "

3. CAD, Vol. VII, pp. 550-551.

Judicial Anxiety

With the days of judicial activism, the judiciary is also now seems to be little more vociferous on the demand. The need for enactment of Uniform Civil Code was first arose before the Supreme Court of India in the case of Mohammad Ahmed Khan v. Shah Bano Begum[4]. In this case, a penurious Muslim woman claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure, 1973 after she was given triple talaq from him.

The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125 beyond the Iddat period. The Court also regretted that Article 44 of the Constitution has remained a "dead letter" as there is "no evidence of any official activity for framing a common civil code for the country". Justice Y.V. Chandrachud, the then Chief Justice of India, emphasized: "A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies"

After this decision, nationwide discussions, meetings, and agitations were held. The then *Rajiv Gandhi* led Government overturned the *Shah Bano* case (supra) by bringing in Muslim Women (Right to Protection on Divorce) Act, 1986 which curtailed the right of a Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure, 1973. The explanation given for implementing this Act was that the Supreme Court had merely made an observation for enacting the Uniform Civil Code, not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within.

The Uniform Civil Code touches the personal life of person but does not touch the religion. The same view is reflected by the Supreme Court of India in the case of Sarla Mudgal v Union of India[5]

The questions for consideration in the abovementioned case were whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise second marriage. Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage *qua* the first wife who continue to be Hindu. Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code.

Answering the posed questions the Court held that the second marriage of a Hindu-husband after conversion to Islam, without having his first marriage dissolved under

4. AIR 1985 SC 945.
5. AIR 1995 SC 1531.

law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 of Indian Penal Code, 1860 and the apostate-husband would be guilty of the offence under Section 494 of Indian Penal Code, 1860.

While deciding this case Justice Kuldip Singh reiterated that, "Art. 44 is based on the concept that there is no necessary relation between religion and personal law in a civilized society. Art. 25 guarantees religious freedom where as Art. 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined in Arts. 25, 26 and 27. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India. We, therefore, request the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and "endeavour to secure for the citizens a uniform civil code throughout the territory of India." "But in Lily Thomas v. Union of India[6] Supreme Court of India clarified that any direction for the enforcement of Art. 44 of the Constitution of India could not have been issued by only one of the Judges in Sarla Mudgal's case(supra).

Further court also compared religion and law in Lily Thomos's case. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Religion, faith or devotion are not easily interchangeable. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a scared institution.[7]

The Supreme Court's latest reminder to the government of its Constitutional obligations to enact a Uniform Civil Code came in July 2003 when a Christian priest knocked the doors of the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act 1925 in the case of John Vallamattom v. Union of India[8]. A priest from Kerala, John Vallamattom, filed a writ petition in the year 1997 stating that Section 118 of the said Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purpose by Will.

While discussing the constitutionality of Sec. 118 of Indian Succession Act Justice V. N. Khare, the then Chief Justice of India reiterated the need for Uniform Civil Code and observed that "Art. 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Arts. 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Arts. 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Arts. 25 and 26 is a suspect legislation. It is a matter of regret that Art. 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

Conclusion

Though, Art. 37 of the Constitution of India mandates that the provisions contained in this part (Part-IV) shall not be enforceable by any Court, but the principles therein laid down 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, the Parliament has failed to discharge this Constitutional obligation in translating the principle of Art. 44 in to law by taking effective steps in this regard. The subject matters like inheritance, succession, Wills, Gifts, adoptions and maintenance are no longer the subjects having close affinity with religion, rather, these subjects are purely and squarely falling within the domain of Civil Laws. Parliament must, in its utmost wisdom, discriminate between issues touching Constitutional goals and issues pertaining to political end. The paramount objective of unity and integrity of India as resolved by the People of India in the Preamble and agreed to be obeyed as Fundamental Duty under Art. 51A(c) of the Constitution of India, though not enforceable like directives, could be achieved only when, from out of various measures, directive of Art. 44 is transformed in to enforceable Uniform Civil Code.

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6 AIR 2000 SC 1650.

7 Ibid at p. 1661.

8 AIR 2003 SC 2902.