JOURNAL OF
INDIAN LAW AND SOCIETY

Volume V Monsoon

Special Editorial Note

On Uniform Civil Code, Legal Pluralism and the Constitution of India[†]

—M.P. Singh[*]

I. Uniform civil code

Article 44 of the Constitution, which is central to the discussion, reads:

Uniform civil code for the citizens—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

It is one of the Directive Principles of State Policy (DPs) which are not enforceable in 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.[1] I have consistently argued that though DPs are not justiciable they are as much part of the Constitution as the Fundamental Rights (FRs) and, therefore, they deserve as much attention and importance as the FRs do.[2] The Court has also held that not only the FRs

---

[†] This paper was earlier presented at conference organized by Majlis, entitled "Negotiating Spaces: Uniform Civil Code… Inclusions and Exclusions" on 8-9 November, 2014 at Mumbai.

[*] Chair Professor, Centre for Comparative Law, NLU, Delhi. Former Vice Chancellor, NUJS, Kolkata and Professor of Law, University of Delhi.

[1] Constitution of India, art. 37.

[2] *See*, among others, M.P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directive Principles – A Human Rights Perspective*, 5 Supreme Court Cases (Journal) 1 (2003).

Published in Articles section of www.manupatra.com

must be harmonised with the DPs but such harmony is one of the basic features of the Constitution.[3] But the Court has also stratified some of the FRs. Some of them like Articles 14, 19 and 21, which are held part of the basic structure; the DPs are also capable of such stratification. For that reason some of them have been shifted to the chapter on FRs such as original Article 45 or others like Article 39 (b) and (c) have been given priority over some of the FRs. But priority to all of them over some of the FRs was found against the basic structure of the Constitution.[4]Accordingly, in my view, while DPs such as in Articles 38, 39, 39-A, 41, 43, 47need to be attended on priority basis the ones like in Article 44 or Article 49 may wait until appropriate opportunity comes for their realisation. That is the reason that after having expressed some urgency in *Sarla Mudgal* v. *Union of India*[5] for the realisation of the goal in Article 44 it disclaimed having expressed any such urgency in *Lily Thomas* v. *Union of India*[6] and *John Vallamattom* v. *Union of India*[7]. Earlier in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[8] an attempt by the Court to give relief to a Muslim woman in the light of Article 44 boomeranged requiring the Parliament to take remedial step in the form of Muslim Women (Protection of Rights on Divorce) Act, 1986. The Act may have given a better protection to Muslim women than she had before under the Muslim law, but in my view it is a step not in the direction but rather against the uniform civil code. Perhaps taking a leaf from this event the coalition government at the Centre led by Bharatiya Janata Party (BJP), the party which normally asks for the implementation of Article 44, did not take any steps in that direction during its tenure from 1999 to 2004. Its manifesto for the 2014 general elections says:

> *"Article 44 of the Constitution of India lists Uniform Civil Code as one of the Directive Principles of State Policy. BJP believes that there cannot be gender equality till such time India adopts a Uniform Civil Code, which protects the rights of all women, and the BJP reiterates its stand to draft a Uniform Civil Code, drawing upon the best traditions and harmonizing them with the modern times."*

This time, unlike ever before, it has absolute majority in Parliament, but I doubt that in the light of the past experience as well as its commitment to other more important issues facing the country it will pursue this matter.

I say this because equality of women was the main reason for some of our women members in the Constituent Assembly to get Article 44 introduced in the Constitution. In their minds the issue of Hindu women was more

---

3 Minerva Mills v Union of India, (1980) 3 SCC 625.
4 *Id.*
5 Sarla Mudgal v Union India, (1995) 3 SCC 635.
6 Lily Thomas v Union of India, (2000) 6 SCC 224.
7 John Vallamattom v Union of India, (2003) 6 SCC 611.
8 Mohd. Ahmed Khan v Shah Bano Begum, (1985) 2 SCC 556.

Published in Articles section of www.manupatra.com

predominant than the issue of Muslim women. The multiplicity of Hindu law was resulting in the inequality of women on several issues, particularly of property. Therefore, they wanted this law to be reformed and made uniform for all Hindus. As a matter of fact even that law has not yet been able to give equality to women vis-à-vis men in all matters for a number of reasons, which initially led Dr. Ambedkar to resign from the Union Cabinet. Statistically, the way Hindus are defined in the Constitution and in other relevant laws, the law reform would have covered more than eighty-five per cent of the population. But the sufficient political will and support has not been available even for that.

Moreover, the realisation of the goal of equality for women is not realisable by law alone. Whatever laws, including the Dowry Prohibition Act, 1961, Section 498-A of the Indian Penal Code, 1860, the Protection of Women from Domestic Violence Act, 2005 and the Hindu Succession Act, 1956 as amended in 2005 have not been able to give much relief to women. Much needs to be done for the social and economic empowerment of women before they are able to take any advantage of any laws ensuring equality to them.[9]

Some members in the Assembly like K.M. Munshi spoke of Muslim law reforms and cited the example of Turkey and some other Muslim countries in the Middle East and Arab world.[10] Apart from Muslim members of the Assembly taking objection to it, the facts about the Muslim world are not uniform. India was never with Turkey on this issue and there were and still are several Muslim countries which have not changed their Sharia law on this issue. In this regard it is also notable that unlike other religions, Koran provides a complete code of law which is as much part of revelation as other aspects of that religion. Therefore, it can be changed or improved only in accordance with the method provided in that law. Considering the right to religion not only of individuals but also of groups and secularism as *sarvadharamasambhava*, including not only non-interference but also support to minority religions to enable them to come at equal level, any change in Muslim law without taking Muslims into confidence on this issue may be found unconstitutional. In view of our record so far, I hope we will not venture to do otherwise.

One of the reasons for my foregoing assertion is the change in our legal and political culture since the making of the Constitution. Until mid-20th

[9] There is social science literature indicating that women's access to legal rights depend largely on their socio-economic position rather than the religion that they belong to. *See* Zoya Hasan and Ritu Menon, Unequal Citizens: A Study of Muslim Women in India (2004), Patricia Jeffery, *A Uniform Customary Code? Marital Breakdown and Women's Economic Entitlements in Western UP*, *in* Social and Political Change in Uttar Pradesh: -European Perspectives 77-101 (Roger Jeffery and Jens Lerche eds., Manohar, New Delhi 2003).

[10] Constituent Assembly Debates, Volume VII (Nov. 23, 1948).

Published in Articles section of www.manupatra.com

century the wave of nationalism which started towards the end of 18th century and reached its zenith by the end of the 19th century in the West, had also entered India during the national struggle for freedom in the early part of the 20th century evidently in Mahatma Gandhi's *swaraj* and *swadeshi* movements and the goal of involving masses up to the last person in the country in the struggle. Although it was strongly criticised by Tagore leading to exchange of somewhat bitter letters between him and Gandhi, it had its sway in the country's politics.[11] Nationalism preached specified territories for a country inhabited by people of one race, one religion, one language, one legal system with uniform laws applicable to all and so on for inculcating devotion and willingness to sacrifice anything and everything for the cause of the nation. The experience of two world wars, however, taught of the dangers inherent in the ideology of nationalism and, therefore, after the second World War it became a hated concept. But everything it had taught and created, including the concept of law, did not and could not change overnight. The idea of uniform civil code must have been influenced by similar codes made in almost all the European countries by the end of 19th century or early part of 20th century starting with the French Civil Code of 1804. The French code declared to have been written on a clean slate, had abolished every law and legal institution that existed until its coming into force. Thus all customary or statutory laws of different sections or classes of the people were replaced by one uniform law stated in the Code. The same precedent was repeated in the codes of other European countries.

II. Legal pluralism

Diversity is natural while uniformity is forced. Therefore, in the natural state, which Hobbes described as state of nature[12], people lived by their group norms, which in one or the other respect differed from group to group. But Hobbes gave a harrowing depiction of that society and developed the idea of a sovereign to whom all people expressed their allegiance in exchange for establishing order. Austin[13] used that concept to define law in top down terms that all law was direct or indirect command of the sovereign and whatever could not be so proved could not be law. Later scholars like Kelsen[14] and Hart[15] gave a bottom up description of all law by propounding that any norm or rule of conduct to be law must be capable of being traced back to a grundnorm or rule of recognition. Unless it is capable of being so traced it is not law. But from 1930s several scholars, most prominently Ehrlich[16] started questioning this notion of law. They noticed the difference between the state law

[11] For the exchange of letters *see*, Sabyasachi Bhattacharya, The Mahatma and the Poet, 54ff (National Book Trust, India 1997).

[12] *See,* Thomas Hobbes, Leviathan (1651).

[13] John Austin, the Province of Jurisprudence Determined (1832).

[14] Hans Kelsen, A General Theory of Law and State (1949).

[15] H. L. A. Hart, The Concept of law (1961).

[16] Eugene Ehrlich, Fundamental Principles of the Sociology of law (1936).

Published in Articles section of www.manupatra.com

and people's behaviour. People practiced and observed many things of which either there was no reference in the state law or even if there was such a reference, people behaved differently without coming into conflict with it. People indulged in many activities by making clubs or associations or religious groups or any other informal organisation without coming in conflict with the state law. The norms set by these bodies or groups could regulate large part of their lives, sometimes even larger than regulated by state law. Initially all societies lived like that by their customary laws. Even after the establishment of the state they continued to live like that except in criminal activities for which generally the same law applied to all of them. Accordingly, they claimed that legal centralism is a myth while legal pluralism is the reality, the fact of life. In the modern history Warren Hasting's following regulation of 1772 is cited as the first example of state recognition of legal pluralism:

> *"In all suits regarding marriage, caste, and other religious usages and institutionsthe law of the Koran with respect to the Mohammedans and of the Shaster with respect to the Gentoos shall be adhered to."*

With this exception everyone was governed by the state law applicable to all. Thus the plurality of law was officially recognised in India. Even though these laws were administered in the same courts their distinct existence and operation was acknowledged, this regulation became a model for all the European colonisers which covered large part of the world in the 18th and 19th centuries until colonisation started dissolving after the Second World War. But, as already noted, prior to that Europe had advanced the idea of nation state which pleaded for and applied centrist legal ideology in terms of unity of law. Scholars on legal pluralism[17] acknowledge that the State law would prevail in case of conflict with any customary or community law, but if there is no such conflict such law can very well operate.

Dealing with several theories of pluralism such as of Pospisil's theory of legal levels[18], Smith's theory of corporations[19], Ehrlich's theory of living law[20] drawing a distinction between rules for decision and rules of conduct and Sally Moore's concept of semi-autonomous social field[21], Griffiths concludes:

> *"Legal pluralism is an attribute of a social field and not of law or a legal system. A descriptive theory of legal pluralism deals with the fact that in a given field law of various provenances may be operative. It is when in a social field more than one source of law, more than one*

---

[17] For example, *see* M. B. Hooker, Legal Pluralism – An Introduction to Colonial and Neo-Colonial Laws (1975).

[18] Leopold Popisil, Anthropology of Law: A Comparative Theory (1971).

[19] M. G. Smith, Corporations and Society (1974)

[20] *Supra* note 16.

[21] S. F. Moore, Law as Process: An Anthropological Approach (1978).

Published in Articles section of www.manupatra.com

legal order, is observable, it is then that the social order of that field can be said to exhibit legal pluralism."[22]

He goes on to add:

"Law is present in every semi-autonomous social field, and since every society contains several such fields, legal pluralism is a universal feature of social organisation."[23]

And finally concludes:

"Legal pluralism is concomitant of social pluralism: the legal organisation of a society is congruent with its social organisation. Legal pluralism refers to the normative heterogeneity attendant upon the fact that social action takes place in the context of multiple overlapping, semi-autonomous social fields, which it may be added, is in practice a dynamic condition."[24]

Such a conception of legal pluralism perfectly fits with the social facts in India. India is known for its enormous diversity and social heterogeneity. But the same should apply to any society which is so diverse and heterogeneous. All societies are becoming more and more heterogeneous with globalisation resulting in movement of people of different backgrounds to a common place. Consequently legal pluralism becomes their condition too and therefore, more and more countries are now looking for solutions of legal problems that have been caused by social heterogeneity. Even in legal theory and facts of life, India is not unique in having more than one legal systems or laws operating within certain fields under the overall umbrella of a state legal system willing to accommodate its social heterogeneity.

III. The Constitution

Our Constitution fully recognises and accommodates the social and legal heterogeneity of the country. It leaves the family outside the discipline of FRs. Neither like many other constitutions it creates a FR to family nor does it disturb it by bringing the personal laws within the domain of law. Accordingly in the very early stages of the Constitution the Bombay High Court and later the Supreme Court also pronounced that law in Article 13 does not include personal laws and therefore, they cannot be challenged on the ground of violation of FRs.[25] Simultaneously it expressly recognises their existence and author-

[22] John Griffiths, *What is Legal Pluralism*?, 24 J. Legal pluralism & Unofficial L. 1, 38 (1986).
[23] *Id*.
[24] *Id*.
[25] *See*, State of Bombay v. NarasuAppa Mali, AIR 1952 SC 1952 Bom, at 84; Ahmedabad Women's Action Group v. Union of India, (1997) 3 SCC 573.

Published in Articles section of www.manupatra.com

ises people's representatives in Parliament and State legislatures to convert them into state laws.[26] Parliament and State legislatures have also done so from time to time more in the case Hindu law than in the case of Muslim law.

Besides personal laws, Constitution has umpteen provisions recognising and protecting social and legal pluralism. To begin with, it creates a federal system which recognises geographical, social, linguistic and other differences among different States and accordingly does not treat all of them uniformly in all matters.[27] Among others it imposes on them special obligations to protect linguistic minorities within their boundaries.[28] Detailed provisions have been made with respect to tribal areas within some of the States and for predominantly tribal States.[29] It confers a FR on any section of the citizens residing in the territory of India having a distinct language, script or culture to conserve the same. All minorities, whether based on religion or language, have the right to establish and administer educational institutions of their choice and to receive equal grants from the state for running them. They are also free from certain obligations which non-minority institutions must fulfil. Women and children and socially and educationally backward classes including Schedule Castes and Schedule Tribes have been given special consideration in matters of FRs. For Schedule Castes, Schedule Tribes, and small minorities like Anglo Indians, special safeguards including representation in Parliament, State legislatures, village Panchayats, municipalities and cooperative societies have also been provided. Schedule Tribes within some of the States and constituting some of the States have been secured special position by having the right to be governed by their laws. All these and several other provisions of the Constitution establish that while the Constitution in its Preamble assures the unity and integrity of the nation, it also endorses, preserves and supports its plurality. Even the goal of national unity stated in the Preamble and considered by Granville Austin as one of the three strands of the seamless web in the Constitution is strengthened rather than weakened by its due recognition of pluralism.

IV. Conclusion

As Tamanaha states, "[t]he longstanding vision of a uniform and monopolistic law that governs a community is plainly obsolete."[30] In the light of the foregoing discussion we may conclude that the uniform civil code is not one of

---

[26] *See*, Constitution of India, Entry 5 of List III, 7th Schedule r/w art. 246.
[27] Constitution of India, art. 370 & 371(A) - 371(J).
[28] Constitution of India, art. 350(A) & 350(B).
[29] Constitution of India, Part X, Schedule V & VI.
[30] Brian Z Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 Sydney L. Rev. 374, 409 (2008).

Published in Articles section of www.manupatra.com

the foremost goals of our Constitution.[31] If at all it has to be achieved, it must be achieved consistently with other provisions and goals of the Constitution. One of the fundamental duties imposed by the Constitution on all citizens of India, who definitely include our parliamentarians and state legislators, is "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities". The DP in Article 44 is expected to be harmonised with this duty. If consensus may be arrived at between different communities of people in consonance with this duty, process of realisation of a uniform civil code may be conceived of. But so long as such a consensus does not arise the process of realisation of a uniform civil code will have to wait.

Some lessons from the experience of other similarly situated countries, especially in Asia, may also be learnt in this regard. Indonesia, a predominantly Islamic country, which has a plurality of laws in the form of customary laws, Muslim law and civil law introduced by colonisers, has been making efforts in this direction, which have not yet been fully successful.[32] Some similar suggestions have been given by some scholars for the realisation of uniform civil code in India. We may examine all these examples and suggestions for creating a consensus on this issue.[33] But so long as such a consensus is not reached, any attempt to realise the goal of uniform civil code will not only remain unsuccessful, it will also be inconsistent with the Constitution.

---

[31] *See also*, Pawan Kumar, *Religious Pluralism in Globalised India: A Constitutional Perspective*, 3 IOSR Journal of Humanities and Social Science 5 (2012).

[32] *See also*, Ratno Lukito, Legal Pluralism in Indonesia (2013).

[33] *See also*, Narendra Subramanian, Nation and Family Personal Law, Cultural Pluralism, and Gendered Citizenship in India (2014); Religion and Personal Law in Secular India (Gerald James Larson ed., 2001); Bhawani Singh, Uniform Civil Code in Retrospect and Prospect (2002).

Published in Articles section of www.manupatra.com