

CHASING UTOPIA — THE QUEST FOR A UNIFORM CIVIL CODE

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The Uniform Civil Code (UCC) is in the news again. While Union Home Minister Amit Shah announced that it [would be implemented in Himachal Pradesh](#) if the Bharatiya Janata Party (BJP) is returned back to power in the Assembly elections, the Gujarat Home Minister Harsh Sanghavi declared that the [State will constitute a committee](#) headed by a retired High Court judge to explore the possibility of implementing it.

The issue has been simmering since May 2019 when BJP member Ashwini Kumar Upadhyay filed a petition in the Delhi High Court seeking directions to the Union of India to frame a UCC. Obviously, Mr. Upadhyay was trying to force the BJP into honouring the promises made in its 2014 and 2019 election manifestoes that a UCC would be drafted “drawing upon the best traditions and harmonizing them with the modern times”.

But the BJP knows that implementing such a code in India is next to impossible. No wonder the response of the BJP-led Union government has been confusingly different from the rhetoric of the BJP.

For instance, in October 2022 the Law Ministry filed an affidavit telling the Supreme Court that it could not direct Parliament to enact any law, and therefore, all public interest litigations (PILs) on a UCC must be dismissed with costs for being non-maintainable.

The affidavit also informed the court that the issue of a UCC would be placed before the 22nd Law Commission for consideration, and after receiving its report the matter would be examined in consultation with various stakeholders involved.

This is baffling because in June 2016 the Ministry of Law and Justice had asked the previous Law Commission to “examine matters in relation to uniform civil code”, in response to which the 21st Commission presented a 185-page report in August 2018 titled “Consultation Paper on Reform of Family Law” wherein it was made clear that a UCC “is neither necessary nor desirable at this stage”.

Certainly, things could not have changed so drastically between August 2018 and October 2022

as to warrant another examination of “matters in relation to uniform civil code”. Besides, the 22nd Commission was constituted only this month, more than two and a half years after it was notified in February 2020. This means it has just about three months to prepare and submit a report before its term expires in February 2023.

Does the Union government think the new Commission will find justifiable grounds in this short period to invert the reasoning of the previous panel and declare that a UCC is not just desirable but necessary at this stage?

Supreme Court’s push for UCC

Nonetheless, no other party shares the BJP’s enthusiasm for a UCC. This is in keeping with the fact that even after the intensely debated Article 35 of the Draft Constitution — which exhorted the state to secure a UCC throughout the territory of India — was adopted as Article 44 in Part IV of the Indian Constitution, successive Union governments had shown little interest in legislating it.

Strangely, it is the Supreme Court that has been urging the state time and again to enact a UCC despite Article 37 making it clear that the Directive Principles of State Policy specified in Part IV “shall not be enforceable by any court” although they are “fundamental in the governance of the country”.

In the *Shah Bano* case (1985) Justice Y. V. Chandrachud lamented that Article 44 “has remained a dead letter” because there was “no evidence of any official activity for framing a common civil code for the country”. He wanted a beginning to be made in that direction “if the Constitution is to have any meaning”.

In the *Kesavananda Bharati* case (1973) Chief Justice Sikri, even after conceding that “no Court can compel the Government to lay down a uniform civil code”, stated that a UCC “is essentially desirable in the interest of the integrity, and unity of the country”. Similar concerns were voiced as recently as 2019 in the *Jose Paulo Coutinho vs Maria Luiza Valentina Pereira* case.

The good intentions of those who genuinely believe that a UCC would establish communal harmony in India cannot be questioned. But they do not seem to realise that such a unifying code that is acceptable to all communities is not possible in a country as culturally and religiously diverse as India.

This was convincingly brought out by the 21st Law Commission in its August 2018 report which warned that “cultural diversity cannot be compromised to the extent that our urge for uniformity itself becomes a reason for threat to the territorial integrity of the nation”. Resolution of differences may not be undesirable, said the report, but it should not lead to their abolition because the existence of differences “is indicative of a robust democracy”.

The Commission counted Articles 371 (A) to (I) and the Sixth Schedule of the Constitution — which provide certain exceptions to the States of Assam, Nagaland, Mizoram, Andhra Pradesh and Goa with respect to family law — among the foreseeable hindrances to the implementation of a UCC.

Many of the exceptions, the Commission stated, entail the preservation of not only distinct family law systems but also various other exceptions relating to other aspects of civil law. For instance, the Code of Civil Procedure (CPC), and the Code of Criminal Procedure (CrPC) are not applicable to Nagaland and the tribal areas.

In any case, the CPC and CrPC are not uniform throughout the country as they have been amended several times by various State governments. For instance, in May 2018 the Maharashtra Chief Minister approved no less than 29 amendments to the CrPC, and in November 2020 the Rajasthan Assembly amended the CPC to provide exemption to agricultural land from attachment of property in recovery proceedings.

In the same month, the State Assembly passed three other bills — the Essential Commodities (Special Provisions and Rajasthan Amendment) Bill 2020, the Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services (Rajasthan Amendment) Bill 2020, and the Farmers Produce Trade and Commerce (Promotion and Facilitation) (Rajasthan Amendment) Bill 2020 — to counter the Centre's agriculture sector laws.

To quote another example, Section 118 of the Indian Succession Act (1925) was struck down in 2003 by the Supreme Court for being unfair to Christians. Yet Hindu Undivided Families continue to enjoy tax benefits in India which are not available to other communities without anyone demanding a common fiscal code. This lack of uniformity in most of the other laws prevailing in the country renders the talk of a UCC absurd and specious.

A discussion on the viability of an otherwise unenforceable UCC has been made possible only because it finds an inscrutable mention in the Directive Principles of State Policy. Perhaps the framers of our Constitution erred in inserting this provision despite their genuine intent to establish communal harmony through it.

Nonetheless, the Directive Principles are meant, as Article 38 states, to impel the state to promote the welfare of all citizens “by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life”.

If any one aspect of this constitutionally recommended policy — Article 44 in this case — is obsessively emphasised while ignoring its overall intent it would reduce the Directive Principles to what T. T. Krishnamachari called “a veritable dustbin of sentiment... sufficiently resilient as to permit any individual... to ride his hobby horse into it”.

Therefore, the only way to prevent this would be to reassess the presumption of immutability that surrounds Article 44 and examine why this provision has been singled out for accentuation when it has proved to be impracticable since its inception in 1950.

In the meantime, the state cannot take for granted the imperativeness of a UCC merely on the basis of its inclusion in the Directive Principles. As historian Granville Austin points out in *The Indian Constitution: Cornerstone of a Nation*, India's constitutional structure is a good example of the principle of accommodation which is “the ability to reconcile, to harmonize, and to make work without changing their content, apparently incompatible concepts”.

Unlike a compromise wherein each party gives up the portion of its desired end that conflicts with the interests of the other parties, through accommodation, asserts Austin, “concepts and viewpoints, although seemingly incompatible, stand intact. They are not whittled away by compromise, but are worked simultaneously.”

To emphasise this point he quotes Sarvepalli Radhakrishnan: “Why look at things in terms of this or that? Why not try to have both this *and* that?” This is perhaps what B. R. Ambedkar meant when he described the Indian Constitution as “both unitary as well as federal according to the requirements of time and circumstances”.

In the present circumstances, our Constitution should be treated as federal and the idea of enforcing legal concinnity through a UCC must be given up because federalism is not just about securing an understanding on the division of powers or revenues between impersonal branches of the state. It is also a social compact between diverse communities of active citizens that make up those institutions to grant them, among other freedoms, cultural and religious autonomy to profess and practice their traditions and family laws, subject of course to the limitations of the Constitution.

Any law that seeks to ensnare this civil freedom under the trammels of uniformity will be unviable, and its promotion as a gateway to the Elysian Fields of national integration is as good as chasing an unattainable utopia.

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