

NOT IN THE SPIRIT OF THE CONSTITUTION

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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The founding fathers of the Constitution had “hoped and expected” that the state will act on Article 44 that pertains to Uniform Civil Code but “till date no action has been taken in this regard,” an apex court bench has observed. Though Hindu laws were codified, “there has been no attempt to frame a Uniform Civil Code applicable to all” the bench has said, adding rather curiously: “However, Goa is a shining example of an Indian state which has a Uniform Civil Code applicable to all regardless of religion” (Jose Paulo, September 13). With due deference, I find both the obiter dicta and the ruling of the bench inconsistent with the letter and spirit of Article 44.

Placed in the Constitution among the non-justiciable Directive Principles of State Policy, Article 44 charges the state with a duty to “endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India”. If this can be seen as a clear-cut injunction for “framing” a new comprehensive code at one go, the bench is right in complaining of the state’s inaction, but does the language of the Article mean this? Is endeavouring to secure a law the same as framing and enforcing it straight away? If not, have any endeavours ever been made in this direction?

Codification of the Hindu law in 1955-56, often cited in the context of Article 44, cannot be seen as an “endeavour to secure” a Uniform Civil Code. A Hindu Code Bill was moved in the central legislature four years before the Constitution came in force. It faced stiff opposition from various quarters. Article 44 was, in fact, meant to answer the objection that the majority community’s personal law was being singled out for modernisation and reform. Notably, the proposed Hindu Code had to be fragmented later and eventually took the form of four separate Acts.

The state’s endeavours to secure a Uniform Civil Code are to be found in the miscellany of laws of general application that were sporadically enacted since 1954. Among these are the Acts facilitating civil marriages, banning marital dowries, protecting women from domestic violence, preventing child marriages, ensuring ancestors’ maintenance and protection, and facilitating adoption of ill-fated children. The process has, of course, been slow-paced. But there is abundant scope for enacting more such laws that are applicable to all regardless of religion and personal laws.

Article 44 demands uniformity of family laws at an all-India level — a local law even if applicable to all cannot be seen as a Uniform Civil Code. The state-level code cited by the bench as an instance — the 152-year old Portuguese civil code in force in Goa and Daman & Diu — is not even applied uniformly. The bench, in fact, admits that it applies to all “except while protecting certain limited rights”. Yet, it calls the code a “shining example” of uniformity.

The Portuguese who ruled Goa and Daman & Diu since the 16th century had separately codified local customs of each of these territories. Article 8 of the Royal Decree of 1869, by which the Portuguese had extended their two-year old civil code to their “Indian possessions”, had pointedly subjected its application to the three pre-existing codes of native customs. After

liberating the territories in 1961 and integrating them into a Union Territory, the Indian government ruled that the Portuguese laws would continue until amended or repealed by a competent authority; among these was the Portuguese civil code. In 1987, Goa was separated from the newly formed Union Territory and made a state, but the civil code based on 19th century legal culture of Portugal was not thrown out.

What is the sense in retaining an archaic law of foreign origin in certain national territories, 58 years after their assimilation into the nation? The government seems to have been oblivious of history in this regard, but how about the judiciary? RC Lahoti, former CJI, had once said “where two organs of state fail to perform their duty, the third cannot remain a mute spectator.” Instead of glorifying the archaic Portuguese code, the judiciary should have cared for its ouster.

The court’s view that the supposedly uniform law of Goa cannot be replaced with non-uniform family laws in force in the country ignores the fact that, unlike the former, laws enacted and amended in the post-Constitution era are in keeping with social needs and norms of the time. The majority community along with Buddhists, Jains and Sikhs are predominant in the population of both the state of Goa and the Union Territory of Daman and Diu. It is unfair to keep them deprived of the modern family laws of 1955-56 which are applicable to these communities in the rest of India.

The issue before the bench was if the succession rules under the Portuguese civil code would apply also to properties of Goans located elsewhere in India, and the court answered that in the affirmative. In two earlier cases, the apex court had ruled that Christians of Travancore and Cochin were to be governed by the Indian Succession Act of 1925 in force in Kerala, not by the local laws enacted before the merger of those territories in that state (Mary Roy 1986, CJ Simon 2012). By the same analogy, the Act of 1925, in force in Maharashtra, could have been declared to be applicable to Mumbai-based property of the Goa-domiciled parties to the case before the bench.

Last month, the Jammu and Kashmir (Reorganisation) Act repealed local family laws and replaced them with corresponding central laws. It is high time similar action was taken in regard to the Portuguese laws in force in Goa, Daman and Diu and also for the French Civil Code still applicable to a section of Indians in Pondicherry. Till this is done, the judiciary — as a “competent authority” — should suitably restrict application of these archaic laws of foreign origin whenever it gets a chance. This will be its proper role in leading the nation to the constitutional goal of a uniform civil code.

The writer is former chairman of National Minorities Commission and member, Law Commission of India

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