



# THE DISSENT BETWEEN UNIFORM CIVIL CODE (UCC) AND CUSTOMARY LAW: AN OVERVIEW

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## ABSTRACT

Customary law encompasses the age old traditional practices of the people, indigenous or otherwise. These laws are flexible in nature and often ignite debate and leads to certain disagreement at local, regional or national level. The recent debate and discourse on UCC sparked many of the issues mainly concerning gender. This paper tries to highlight the contradictory position of UCC, customary law and women, tribal rights et cetera. The tribal population of the country are often thrown in the dilemma of functioning with the current issue.

**KEYWORDS:** Uniform Civil Code, customary law, women rights, tribal rights, traditional practice.

### Introduction:

At the present day context, inclusion of customary law into Uniform Civil Code (UCC) is inapprehensive. The UCC is a common code which connotes the idea of a similar set of civil rules regardless of their religion, caste, sex, etc. and has propounded much of the controversies in the recent times. The notion of UCC is the manifestation of the contemporary progressive nation, which shows that the nation has elevated from religion, race, caste, and sex. Here the UCC tries to treat all the customary and personal laws based on a common law platform and one set of civil law for all citizens. This means that the prevailing age-old practices and traditional belief system among the tribal and religious minorities shall be discarded and emerge and accept the one set of code for the nation. Replacing the age old laws, the UCC would address the laws relating to civil matters like marriage, divorce, maintenance and succession. Post Independence the circumstances under which Article 44<sup>1</sup>, of the Constitution of India, was incorporated in the Directive Principle of State Policy (DPSP) Part IV was that, the framers of the constitution realised it was not feasible to impose UCC on the citizen who are culturally diverse and attached to their own traditions. This incorporation of UCC in the DPSP strengthened it, as those provisions under DPSP are not enforceable in the court of law.

The tribal in India have age-old traditional practices and have their rights over it, which seeks to protect their dying culture, customs and practices. The right has also been enshrined in the Constitution of India in different provisions like, Article 371(b), (c) and (d). The Sixth Schedule to the Constitution of India gives rights to the tribal especially in the Northeast region of the country to practice their traditional system. To be in consonance with UCC means the collapse of the traditional system and the traditional interpretation will perish. Though the customary practices have a lot of defect in the modern world concepts pertaining to marriages, status of women, inheritance etc. it cannot be ignored altogether because these practices are flexible in nature. The question here arises- Will these practices which they have practiced and preserved over the centuries be blown away by the wind? Is the time right for the UCC in India, or will it be in conflict with the customary laws?

### The question of UCC in India:

Initially, while drafting the constitution of India the need for Uniform Civil Code was realized by the framers. However, it was debated on different lines regarding personal laws of the Muslims and other religious minorities on their laws. The framers, including Nehru, the then premiere of the country were convinced that a certain amount of modernization is required before a UCC is being imposed to its citizens. Apart from the problem of modernization, other aspects were also debated. It was realized that an attempt to impose and ignore personal laws of various groups might lead to civil war, wide-scale rioting and social unrest.<sup>2</sup>

When the British came to India, they faced a lot of challenges regulating the Indian society. They came across a highly fragmented society in a state of influx. The British realized that whatever they do, they should never touch the religious beliefs of the society. They intended to have a liberal approach towards the religious belief of the Indian society. They allowed the different personal law to exist from different communities. At the time of framing of constitution, India grappled with various terrible laws based on religious interpretation and ideas of the 19<sup>th</sup> century. While the Hindu code was reformed, other religions were allowed to keep their 19<sup>th</sup>-century laws.

The retention of separate personal laws has led to a contradiction within the constitution. In case the UCC is implemented on personal laws, it is contradicted by the provisions in the Constitution of India, particularly Article 14-19 which guar-

antees equal rights to all irrespective of their caste, creed, religion, sex etc. Personal laws of the Muslim in India has also been a matter of debate in the current UCC debate, as the personal laws of the muslim treats women unequal and by virtue of article 15, it could be seen that the personal law of the Muslim unconstitutional, where article 15 provides for non-discrimination based on gender or sex, and to which the personal laws of the Muslim favour man in many aspects. Therefore the issue remains unsolved even in the legal system.

The landmark judgement delivered by the Indian judiciary in the case of the maintenance of the Muslim women sparks a lot of controversies, both in the state and the personal laws of the Muslim, where the court observed in the *Shah Bano*<sup>3</sup> case, wherein Justice Chandrachud on delivering the judgement stated that Article 44 of the constitution remained a dead letter and has no evidence of any official activity. This strikes the state government to take a view of UCC and re-evaluate the society's personal laws which are traditionally subjected to unjust treatment and the most vulnerable to these laws being particularly women.

The debate on UCC encompasses various areas on the rights of women although the basis of UCC is just a discourse and not yet codified. One instance of the issues that spark debates include, all laws must treat men and women equal and no religious laws should be able to override this fundamental principle. Which means polygamy, unfair inheritance and unfair divorce law of the communities and religious minorities' communities has to dilute their age-old traditional laws.

### Customary law and women:

The tribes in north east *inter se*, there is no homogeneity is customary laws even within their sub-tribes and different class<sup>4</sup>. The customary practices among the tribal in India still remain intact in many forms, though a large percentage of the population are embracing Christianity, Hinduism, and Buddhism. Even in the present days, their personal customary laws are still the core and remain vital as traditional dispute redressing mechanism at the village or community level. The merit of this system can be seen as more efficacious, spontaneous, and free from procedural hurdles and aiming at mutually amicable solutions.

The current discourse on UCC seeks to question the position of women's right in the society and creation of gender equality. There can be important issues pertaining to tribal women's rights such as property rights and practice of polygamy. This can also be argued on different approaches. For example, Meghalaya practices matrilineal society mainly the Garos, Jaintias and the Khasis. It is in their culture that the youngest daughter in the family inherits the property. The Mizo *Hnam Dan* (Mizo Customary Law) is progressive while considering the rights of women; it permits the father to make written will conferring woman the right to inherit the property *per se* the amendment made by the Mizoram legislature.<sup>5</sup>

The practice of polygamy has been an age-old custom practice among some of the tribe in the Northeast. This practice has not been so rampant in the present generation due to modernization. However, in Arunachal Pradesh polygamy is still practiced and readily welcomed by the woman folks but they're bound to accept and fulfil the customary norms while doing so. There has been no historical revolt by the women against this practice. This may be due to patriarchy and also because of the supreme position enjoyed customarily by the first wife.<sup>6</sup>

Other instances which show the hidden aspect of customary law can be in the form of interpretation of the law. Since it is not codified it may be misinterpreted, misused and perpetuate gender inequalities. The pretext of getting away with act and crimes committed in the system is also high, as the customary head may be partial in his decision and interpret according to his discretion. The courts in

India recognize custom as a source of law, but it cannot go against the spirit of Constitution<sup>7</sup>.

### The Customary law as rights

Though the customary law has certain advantages and disadvantages, it is important to realize the legal and cultural pluralism in the current discourse. The Constitution of India under Article 371 and the Sixth Schedule protects and legitimate the practice of customary laws as long as it doesn't contravene the constitution. These provisions are the saving grace for certain autonomy and identity of the tribes. It safe guards the age-old practices that have been passed on verbally through generations. What if UCC becomes a reality? What will happen to these provisions? The recent case of Naga women seeking for reservation in the Urban Local Bodies (ULB) intensified situations in Nagaland. Naga bodies have opposed it on the ground that it violates Article 371(A) of the Indian Constitution which says that "no Act of Parliament in respect of religious or social practices of the Nagas, customary law, and procedure, ownership, and transfer of land and its resources- shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides". This provision was incorporated in the Constitution of India at the time of creation of Nagaland in 1963<sup>8</sup>. On the contrary, under Article 14, 19, it gives a lot of scope to Naga women to bargain for their rights.

### Conclusion and way forward:

The position of gender under customary law maybe questionable but it is fast in delivering justice, easy to interpret depending upon the circumstances and needs no state-appointed officials for law interpretation. In this age of modernization law tends to be progressive as compared to the old law which is regressive, as in customary law, which seems unfairly towards women. The customary law if codified becomes a law and makes it rigid in nature. When UCC becomes a reality, a lot of provisions in the constitution have to be amended. The recent debate on UCC should not be politicized by the political parties. However, it is important to understand and promote justice in all spheres of the society.

Contemplating the advantages of customary law, what the traditional leaders can achieve owing to the flexibility (Not codified) is that, it can be modified at any circumstance provided it being accepted by the society at large on reasonable grounds. The fact that, customary law suppresses women was seen only in the present century. It was never realised initially by the womenfolk, and accepted it as a fulfilment of their customary norms. Now, with the issues of gender justice, tribal customary laws have to be progressive according to the need and time. It is to seek into uniformity of law and bring about some changes taking into consideration the rights of the women. At this extant, it is hard to say whether the customary law should be replaced with the UCC, as the question of cultural identity with the grace of the constitutional provisions to safeguard and practice tribal traditions still prevails. Replacing customary laws with UCC will be renouncing tribal rights and the indigenous life practices which will urge unlikeness. Thus looking for conformity, certainty and uniformity in the customary law would be a progressive step in unerring gender disparity, property rights and other loopholes in the customary law.

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### Notes:

1. The Constitution of India, 1950 Art.44, "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".
2. Parminder Kaur, Personal laws of India vis-a-vis Uniform Civil Code a retrospective and prospective discussion, law mantra think beyond others (International Monthly Journal, I.S.S.N 2321 6417) Journal.lawmantra.co.in www.lawmantra.co.in
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