

“The Politics of Methodology” and Perils of Implementing UCC in India

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The politics of citizenship refuses to die. While the previous debate on the CAA/NRC asked if certain people were entitled to be Indians, the ongoing debate on the Uniform Civil Code (UCC) enquires about the implications of being an Indian. What sort of civil rights can be claimed by the citizens, in what language and manner?

The UCC is not a question of “which law” should govern the civil affairs of the citizens. It is instead a question of which politics should decide the fate of the law, as Partha Ghosh from Jawaharlal Nehru University argues.

Where liberal politics would champion the agency of an individual to choose, right-wing politics would thrust the choices of the majority upon the minorities.

Interestingly, none of these debates appreciate the fact that personal laws demonstrate the agency of the religious communities to claim their identity, as Law Professor Silvio Ferrari argues. Additionally, this claim must also be seen as a matter of right.

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On Codification of Laws

Personal laws were never framed in the majority vs minority context, neither were they shrouded in individual liberty during the Constituent Assembly debates. The "fear" of minorities and the "choice to exit" from these laws were discussed as a matter of fact. Similarly, gender justice and the understanding that it should be codified as standalone substantive legislation, are again debates of a much later period.

Why did the constitution framers incorporate a deeply political question in the legal language of Article 44? After all, they did not define what it could mean? Why was its inclusion felt necessary then?

It seems that the constitution framers had two things in mind – first, that the codification of laws is a progressive step as it leads to clarity and precision in the legal rules, something which is also demonstrated in the Law Commission Consultation Paper (2018) where it proposed "codification" of personal laws; and second, that religious communities could be persuaded to such codification, demonstrated by the promulgation of The Muslim Personal Law (Shariat) Application Act of 1937, and similar other legislations.

Interestingly, the Act of 1937 equated Muslim personal law with religious law. In essence, therefore, personal law was employed as a vehicle to implement religious law.

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Concerns for Minorities

The majority discussion on the Act of 1937 in the *Shayara Bano* case (2017) cements this view. Justice Kurian Joseph succinctly observed that "the 1937 Act simply makes Shariat applicable as the rule of decision in the matters enumerated in Section 2." The then Chief Justice of India Justice Khehar held that "the Shariat Act, in our considered view, neither lays down nor declares the Muslim Personal Law – 'Shariat'. Not even, on the questions/subjects covered by the legislation." He further observed that "what was sought to be done through the Shariat Act, in our considered view, was to preserve Muslim Personal Law – "Shariat", as it existed from time immemorial."

This demonstrated the readiness of the State to accept the agency of the religious communities. Read in this context, the proposal for UCC could be seen as recognising such an agency.

Ambedkar had himself highlighted the twin concerns of the “fear” among the minorities and the need to provide an "option to exit" into the general law. This fear, recognised by Ambedkar, is not only embedded in the codification of a uniform law but also in the codification of personal laws in general (Narasu Appa Mali).

Nevertheless, the question remains, when we talk about codification do we talk in terms of secular laws or religious laws?

A considerable corpus of what we call personal laws is a codified version of religious laws. However, legislation like the Hindu Marriage Act 1955 also demonstrate instances where the State intervened in the religious rules under the pretext of codification.

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Methodology Behind UCC and the 'Logic of Legislation'

The “methodology” of codification, therefore, raises pertinent questions. What interests does the codification process seek to serve? There is a high chance that it injects the "logic of legislation” into the codified law. If that happens the uncodified personal laws which were till now beyond the purview of Part III of the Constitution become subject to its demands. The “logic of tradition” maintained by personal laws, which the framers of the Constitution sought to preserve is then replaced by the logic of legislation.

Some might argue that the superior courts in the country are already judging personal laws against the touchstone of the Constitution. While that is true but that is not what is expected of a Court – to sit as clergy deciding upon matters that should otherwise be mediated through religious expertise.

The methodology of codification is fraught with another concern – the politics of representation. When legislations like the Act of 1937 were passed there were due consultations with the Muslim scholarship. This only helped the State not only navigate through the process but also allowed the community to preserve its agency over such matters. Any codification today will have to employ this method.

If, however, the State employs its high-handedness in handling the religious scholarship or otherwise appropriates the process for its own benefit, the codification will be seen to carry “bad intention”.

The government often quotes the example of Muslim-majority countries to support codification. However, what is often neglected is the fact that these codification processes employed consultation with community representatives, especially religious scholars, at the first instance.

Abd al-Razzaq al-Sanhuri (1895-1971), the famous Egyptian jurist and scholar, guided the method of such codification, routing it through the jurisprudence of comparative law. His methodology sought to preserve the religious rules and not to subject them to the logic of legislation, as argued by Enid Hill. Most of the Muslim-majority countries followed Sanhuri's method in their codification processes.

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The Procedures To Be Followed

There are high chances that the initial codification in the Indian sub-continent also followed a similar method. Unfortunately, the times have changed now.

There is no clarity on what methodology is going to be employed in the codification process. If indeed the intention is to learn from the Middle East and to preserve the logic of tradition, then codification must follow the Sanhuri's method which does not allow substantive tinkering with the religious rules unless mediated through the religious scholarship.

On the other hand, if UCC is intended to introduce a new methodology of "secularising" the religious laws, then it can indeed define the "substantive" rights of the parties along secular lines.

However, the method would then violate the very intention of the framers, and the purpose behind Article 44.

Any codification sans its religious roots would take away the agency of the religious community, which is what the framers avoided by not enacting the UCC in the first instance.

The question of politics defining law remains open. If the politics of the day dictates that UCC must be framed in a different way and through a particular method, what is wrong with that? In the end, in a liberal democracy, all rights must be defined politically before they can be claimed legally.

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The Supreme Court of India has defined the limits to legal tinkering with fundamental rights through the Basic Structure test. Certain legislative interventions are not allowed since they threaten the very core of the Constitution. In a similar fashion, the politics of the day should not be allowed to inject a new methodology to realise any constitutional provision.

While the legislative capabilities have certain limits, the “politics of methodology” must also operate within certain boundaries. It must not only be guided by the black letter of the law but also by the method envisaged by the framers of the Constitution in the first instance.

In the absence of proper legal safeguards for religious minorities, we would take a step further killing their political agency. The latter must, however, be protected at all costs.

*(Dr Nizamuddin Ahmad Siddiqui is Assistant Professor at Jindal Global Law School, O.P. Jindal Global University, Sonapat. This is a personal blog and the views expressed above are the author's own. **The Quint** neither endorses nor is responsible for the same.)*

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