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**Uniform Civil Code and Adoption Laws: A Case Comment on *Shabnam Hashmi v. Union of India***  
*Eklavya Anand & Shailesh Kumar*



**NATIONAL LAW SCHOOL OF INDIA UNIVERSITY  
BENGALURU**

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**National Law School of India University  
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# **JOURNAL OF LAW AND PUBLIC POLICY**

## **UNIFORM CIVIL CODE**

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## FOREWORD

Three critical things essential to democratic renewal and progressive change in any country are-

*Good Public Policy, Grassroot organizing and Electoral Politics.*

National Law School of India University in keeping with its avowed objective which is to focus on the emerging trends with special reference to Public Policy, is releasing the fourth issue of The Journal of Law and Public Policy.

The current number focuses on the legal and policy issues facing the contentious debate on Uniform Civil Code.

As is observed in certain quarters, “has time come when a blueprint of a Common Civil Code (not uniform but common), that culls out the best laws from all religions based on the gender justice is placed for a National Debate?”

I am sure this particular issue of the Journal will enable the stake holders to put the right questions.

While congratulating Dr. Sairam Bhat, Chief Editor and his team for their commendable efforts, I sincerely hope that the readers of the Journal will find all the well-researched articles eminently useful.

***Prof. (Dr.) R. Venkata Rao***  
Vice-Chancellor





## EDITORIAL

We are indeed delighted to publish the fourth edition of the Journal of Law and Public Policy. Our previous issues have been broad based covering different aspects of public policy; the current issue was planned with focused theme on the legal and policy issues facing the debate on Uniform Civil Code in India[UCC]. The papers selected and published in this Journal had the benefit of the two day national seminar on UCC organised at NLSIU on 17<sup>th</sup> and 18<sup>th</sup> March 2017. UCC, under Article 44 in the Constitution of India, touches on a range of issues, like whether must we have a Uniform Civil Code or Common Civil Code; what essentially is meant by the term ‘uniform’ that too in a country like India, wherein diversity of language, culture and religion exists; how the proposed code will address the issues of gender justice, human rights and protection of dignity of women; whether ‘*triple talaq*’ and polygamy are the main concerns to be addressed in UCC; about succession, inheritance, adoption, marriage and maintenance; and likewise. Time and again, either through political commentary, judicial order or as recently, through the Law Commission questionnaire, the topic of UCC has always been brought to public discourse. In light of the above, we have attempted to bring out a special issue of JLPP on this area. The articles in the journal make an attempt to discuss some, if not all of the issues and challenges on UCC and the idea is to discuss, debate, deliberate, argue and agree on how and what process are necessary in this regard.

Prof. [Dr.] Vijendra Kumar and Dr. Naresh from MNLU, Nagpur, evaluate the affordability of UCC. ‘Unity in diversity’ is a well-known term specifically in geographical aspect of the state since time immemorial but the inter-personal law conflicts are unavoidable in the modern society. The society is more influenced by political, social as well as economic conditions. The repeated steps for reformations are initiated by the reformers, political thinkers and economists for the political uniformity as well as economic uniformity except the negligible initiatives of social uniformity. The society is divided in many more religions, sects and sub-sects in absence of effective implementation of methods of uniformity which are leading to the emergence of various kinds of social conflicts. Chiefly,

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the Law of Marriage, Divorce, Maintenance, Inheritance, Adoption etc. if treated under one umbrella of a common statute, a majority of the inter-personal law disputes will be zeroed down since, there is no discrimination on the criminal trial for any particular religion, participation in political activities, running business and educations etc. Everyone is obliged to be governed by Uniform Criminal Procedure but not by Uniform Civil Code which encourages the discrimination amongst the natives and grey areas of violation of human rights and discourage the development. The researchers tried to draw the inferences from their research that if the society is tailored into the single colour and common thread, it would be more beneficial for the development of human beings: socially, economically, politically and legally.

Dr. G.S Rajpurohit from Jagannath University and Dr. Nitesh from Amity Law School, Jaipur, contribute on the challenges which the Muslim community will face if UCC is enacted. The authors state that criminal laws in India apply to all people equally across genders, castes and religions, a similarly uniform civil law, especially, in regards to divorce and succession rights, does not exist. Instead, the personal laws of Hindu, Christian, Parsis and Muslim are allowed to govern the people of those religions. Obviously, these personal laws are not the same and so, one finds a country where different regulations govern people based on their religions. This research paper calls into question the implications on justice and equality that such a system raises. The history of personal laws in India can be divided into colonial, post-colonial times and Independence Era. The existence of personal laws is a prime example of continuity between the colonial and post-colonial Indian States in which the colonial State's legacy still looms large. Law is a "system of rules that a particular country or community recognizes as regulating the actions of its members." Personal refers to anything that "affects or belongs to a particular person rather than anyone else". Therefore, the very idea of personal law is impermissible for a law by nature, cannot be personal. This conundrum begs us to consider the validity of the Indian Personal Law System. Civil law in India is a complex matter, a conglomeration of the various personal laws governing Hindus, Muslims, Parsis, Jews and Christians. A common civil law can be applied

to a legal case if and only if the litigants choose to opt out of their religious community. However, because of the social taboo that usually comes with such opting, very few choose this route and hence, personal laws play almost a complete role in civil matter.

Dr. Sree Sudha from DSNLU, examines the property rights of Women and whether UCC can address the same issue. The topic of inheritance in India is a “concurrent” one, i.e. one over which both the central and the state governments have legislative authority. Like most personal laws in India, inheritance laws too vary by religion. The fundamental law governing present day inheritance rights of four religious communities i.e. Hindus, Buddhists, Jains and Sikhs, called the Hindu Succession Act (HSA) of 1956, was designed to lay down a law of succession whereby sons and daughters would enjoy equal inheritance rights. In reality persistent discrimination against women is common in India and the main source of bias came from joint family property, to which sons enjoyed right by birth to an independent share but daughters did not. Both had equal rights of inheritance to the separate property that their father accumulated during his lifetime. But, due to the fact that a considerable amount of property, especially land in rural areas, is still jointly owned, such biased rights had a crippling effect on the property ownership of women in India. An analysis of these religion based succession laws show that they stem from a fundamental desire to secure and keep control over property in the hands of men and to assert the superiority of one gender over the other. Apart from all the disadvantages faced by property less women, legislative vacuum on matrimonial property has devastating consequences on women and children in the eventuality of divorce, widowhood and desertion. Judicial pronouncements of Hon’ble Supreme Court and Hon’ble High Courts are of vital importance, as they lay down the interpretation of the enactment and the intention of the legislature. Some of the most important recent judicial pronouncements are discussed to ascertain the actual effects of the Amendment Act of 2005. Finally the author strongly argues for Uniform Civil Code for giving better property rights for Indian women.

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Pranusha from TNNLS analyses the issue of multi-culturalism from a feminist jurisprudence point of view. In a democracy, everyone is purportedly equal before the law. The fact that almost three decade ago we had the Supreme court intervention in rights of Muslim women in marriages, but no changes have happened on ground, stands testimony to the “double jeopardy” faced by Indian Muslim women, whose plea for justice are echoing till today at the Supreme Court of India, but have only been met with half-hearted attempts at revamping the Indian Muslim Personal law. So the next obvious question is, that is it only Indian Muslim women who face these legally legitimized discriminations, or Muslim women in general all over the world are victims of this systemic oppression? One fact which might answer this question is that whereas more than 22 Islamic countries the world over have banned the practice of arbitrary triple Talaq, it is in rampant use by Indian Muslim men, with deleterious consequences on the female victims of this egregious act. Adding insult to this injury is the fact that this legal incongruity exists even when arbitrary triple talaq is considered not only un-Islamic, but has also held to be unconstitutional by our Supreme Court. What might be the possible reason for this anomaly has been raised in this article.

Ms. Vini from Manipal University, Jaipur, argues and states that UCC may forge national integration. It is rightly remarked by Von Savigny, “*Law grows with the growth of nation strengthens with the strength of nation and finally dies with the death of nation*”. This statement is very correct in terms of personal laws prevalent in India where followers of personal laws have increased but laws are not yet modernized. India is a country of diversified cultures and different religions. In ancient time every foreign ruler who invaded India has brought something new and in this way enriched the culture of the country. People of different religions and communities have their own personal customs, usages and laws. Now, the problem arises when it comes to the uniformity in laws because a secular nation always requires a uniform civil code. Although Englishmen succeed a bit to bring uniformity in laws through some of the secular laws like guardian and wards Act, 1890; Indian Succession Act, 1925 but very soon they have

realized the religious susceptibilities of the native Indians and thus followed the policy of non- interference in the sensitive matters. After independence the demand of unification of laws again got the momentum and debate was started among the members of constituent assembly but they had diverged opinions. They focused more on nation's strength instead of nation's integration. After a long discussion Article 44 was introduced which provides that "*the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India*" but it is not enforceable in any court of India. Uniform civil code primarily means that a single code governing all the major communities in their personal matters. It will replace every scriptures, customs and usages of every community by one single code. While replacing every single personal law with one single code requires enormous of research because that single code must respect every religion equally without disturbing their true spirits. Personal laws of the country are so multi-layered that it differs even within the community. To overcome this difficulty law commission has recently floated a questionnaire to decide the periphery of uniform civil code. It is very true that in the pre independence era and even at the time of independence it was not possible to draft a uniform civil code because demand of nation was entirely different like to feed the hunger, employment, women education etc. but now the time has ripe where we can think of replacing all personal laws with uniform civil code. Uniform civil code has the potential to bring nation's integration in true sense and it can also remove social disparities from the society.

Shivani from IFIM Law College, brings in comparative study of rights of women in other jurisdictions. In India there seems to be no uniformity in the laws relating to marriage, divorce, maintenance, guardianship and succession. The term uniform civil code acts as a misnomer in India as violating the age old beliefs of different religious groups. It does not mean that it will curtail one's freedom to religion but will promote real secularism where everybody will be treated equally irrespective of one's religion. A comparative study of civil codes as practiced in UK, USA gives a broad idea of how secular laws are applied without hurting one's religious sentiments. The status and the rights of women depend on the personal laws to

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which one is affiliated by religion. The discrepancies faced by women under the personal laws in India certainly does not seem to fulfil the equality principle as inscribed in our Constitution and various other international instruments as ratified by India. The Uniform Civil Code is the need of the hour not only for the uplifting the status of women also for the promotion of national unity and integrity. The author focuses on the study of civil code in UK, USA and India with special reference to the rights of women in the area of marriage, divorce and maintenance.

Lt Col. George Eapen [Retd] argues for establishing the national integration council to resolves the issues relating to UCC. Our country which gained political freedom in 1947 was fortunate to be given a Constitution by the founding fathers. With the political call for one nation there was an effort to include a Common Civil Code as a fundamental principle. However there were dissenting voices in the backdrop of communal riots and religious discord. Uniform civil code was included therefore as Article 44 of directive principle of the State Constitution. It stated that the State shall endeavour to legislate a Uniform Civil Code throughout the territory of India; however here was no time frame set. Over the last seven decades there has been economic growth and development based upon government financial plans. However, social harmony and freedom in society has often been elusive. There have been numerous riots based upon religious animosities. This has affected a harmonious social growth of society. To achieve the enactment of a Uniform Civil Code the government should have made a road map as to the measures to be implemented to create a socially harmonious environment, conducive to legislation. However over the years there has been religious violence often instigated by political compulsions while the directive on UCC remained in limbo. Thus any sudden legal enactment to enforce social justice will be resisted by a wide spectrum of interests. A clear case is divorce by triple Talaq and polygamy in the Muslim community. On the one hand a simplistic approach would be its abolition like that of Sati among the Hindus. But as Talaq is a practice with wide connotations due to the Islamic scholarly interpretations and justification, there will be great discord. The solution lies in a multi-pronged approach. First, the state should encourage inter – religious meetings like the World parliament of

Religions in order to inculcate inter-faith harmony and appreciate the intrinsic unity of religions. Second, the state should encourage Volunteer social groups especially women's groups to further the cause of reforms in society. Women's power was seen in the opening up of the Shani Shingnapur temple and the Haji Ali Dargah in Mumbai. I salute the zeal of Trupti Desai and Bibi Khatoon. Third, Government bodies should play a pro- active role in promoting unity among religious communities and castes with a budgeted expenditure plan. Fourth, Election commission should be empowered to act effectively against politicians who create religious discord. Lastly, National Integration Council be formed with representatives of various communities to advice and facilitate national Integration. Any great reform or change in history has always taken place once the masses are charged with a great idea. The will of the people ultimately reigns supreme.

Preethika, Legal Manager at HAL Ltd, looks at whether the Constitution of India has worked towards the goals of the UCC. While we all continue to witness to heated debates on the question of desirability or otherwise of Uniform Civil Code from various perspectives, the author in this paper analyses Uniform Civil Code from the standpoint of Indian Constitution and Constitutionalism. Essentially the UCC has entangled itself with Indian Constitution and in the whirlpool of Indian politics. The author in this paper begins with an analysis of the background in which Uniform Civil Code found a place in the Indian Constitution. It has been duly pointed out that the Constitution did not define the nature and scope of the UCC; neither did it state the extent of State interference into personal laws. It does add to some confusion whether or not UCC must be attempted by the State. It is pertinent to examine the intermingling of freedom of religion and Uniform Civil Code, in the backdrop of constitutional promises, including, but not limited to Right to Freedom of Religion. In the light of the Constitution, Constitutionalism and a catena of judicial decisions, the author argues that, while getting rid of practices, like triple talaq which run contrary to the principles of equality and fair treatment, are a constitutional compulsion, Uniform Civil Code in the rigid sense that, destroys the diverse fabric of this country can be catastrophic.



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Eklavya and Shailesh from Centre for International Legal Studies, JNU, state the reasoning and objectives necessary for the codification of the UCC especially for the protection of rights. Law has been often been typically seen from a feminist point of view and as a patriarchal tool used to control and regulate the lives of women. This is, in fact, best understood if one analyses the field of personal laws. The authors venture through the domain of personal laws and unpack how the Masculine DNA has shaped and reshaped personal laws to keep the unjust gender equilibrium in the society intact. It further evokes history to unearth the historical deficit in the arguments of majoritarian community when it comes to the reform of personal laws. The majoritarian community, which claims to be progressive in the current debate pushing for a Uniform Civil Code, forgets the past when it showed extreme rigidity with regard to reforms in the domain of personal laws as colonial interventions. The authors highlight the constitutional debates and state-sponsored selectivity, which perpetuates a spiral cycle of status quo. In this process, it is safe to say that the judiciary seems more progressive than the legislature in performing its constitutional duties, though the judiciary also seemed to be in an escapist mode in the past. This legal vacuum as well as an egalitarian desire for equal integration in the unequal social structure of the society has given birth to many movements of socio-political nature. It further emphasizes the political economy of some of the prominent socio-cultural movements to fill this legal vacuum as complex and driven by extra-legal considerations. The aspiration of bringing uniformity in the personal laws is rooted in the nationalistic perspective and is deeply problematic. It contends that the shift towards uniformity to attain national integration should be embedded in the sustenance of the religious diversity rather than forcing religious homogeneity. Putting forth the feminist perspective, it attempts to assure that the abolishment of evil practices from all personal laws would be more successful if the debate on personal laws is shifted from 'religion' and transplanted in 'gender'. The authors conclude by saying that any improvement in the personal laws should be initiated from the points of view of the troika of gender, individual rights and progressive democracy.

Bharath, from Christ University, in his article examines the dichotomies between personal law and human rights. The guarantee of human rights is perhaps the most essential component in the manifest constitutional machinery of modern democratic establishments. In India, this proposition is evidenced by the ostensible primacy of fundamental rights, which are constitutionally recognised, and judicially enforceable. The quiddity of human rights is conceivably, its universality, and as such, the universal implementation of human rights is the primary prerogative of a human rights system. In India, that prerogative is threatened by personal laws that are deeply patriarchal, and are principally abrogative of a woman's right to equality. Whilst a perfunctory analysis would render a conclusion favouring the exclusion of personal laws from India, a deeper inspection demonstrates the intrinsic dichotomy that manifests in a paradigm of human rights and personal laws; "culturally relativistic personal laws as opposed to universally multicultural human rights". Personal laws are, at a theoretical abstraction, symptomatic of a call for cultural relativism in legal systems. Contrastingly, the Uniform Civil Code, which is postulated as a necessary solution to the problem of discrimination of women, is at its crux, a call for a multicultural society that can operate based on a single set of laws. The manifest coalescence of religious freedoms in this dichotomy provides illusory justifications to personal laws, as the constitutional mandate for the right to freedom of religion stipulates the "right to manage its own affairs in matters of religion". To that effect, the primacy of individual rights (which constitutes a significant interest of human rights) is challenged by the religious freedoms of organised religion. Thus, a subliminal dichotomy of the right to religious freedom and individual rights (the right to equality; a human right of significant import) manifests, subsumed into the overarching dichotomy of cultural relativism and multiculturalism. The author in this paper seeks to provide a legitimate justification for the posited dichotomies by advancing a conclusion favouring the implementation of a Uniform Civil Code.

Kiran from Christ University, also look into the UCC versus personal law issues and conflicts. It is an accepted interpretation that whence the phrase, '*conflict of personal laws*' is considered, (in predominantly an Indian context) one is

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under compulsion to consider the underlying causes that explain the origination of the statement, the undeniable religious tension that has been extant in the country since medieval times. The anthropologically interesting march to the independence of India in 1947 and the events of the partition that preceded and post – dated the same, seek to validate the surprising amount of autonomy granted under Article 25 of the Constitution of India, 1950 at the individual level and at the organizational by means of personal laws. It is the belief that is held by a great many citizens of the country that the positing of a Uniform Civil Code, could potentially hold the key to resolving the problems resultant from the presence of conflicting personal laws and judicial hesitation in intervening into the matter, further exacerbated by a contrast that the conventionally active nature assumed by the higher judiciary in India has allowed. While the Law commission has definitely expressed that information aplenty must be rigorously collected and analysed before undertaking the task of framing such a code, it is dismaying to observe the general assumption in the populace including the framers of policy that the possible solution to the situation at hand, is through the route of the passing of a Uniform Civil Code. When a problem that requires the use of human reasoning is approached with a confirmation bias, then the results are tainted by the same. To postulate, the UCC does not resolve the *conflict*, as it does not remove the underlying religious tension and possibly will allow for the fomentation of social circumstances that favour greater religious conflict in the absence of secondary institutional autonomy.

Kriti and Aman from Nirma University, in their article state the reality of achieving one code one Nation. India is a country with vast heritage known to cohabitate multi-lingual and diverse citizenry, multi-religions co-existing, whether it is possible to govern each of them equally for there exists different cultures, traditions, thereby forming different classes of persons. Different people are governed by their separate personal laws as different treatment needs to be meted out to different classes based on their respective needs and traditions. As these sects of society are ruled by their customs and traditions hence arose a need for separate personal laws governing these religious sects of the society. Accruing to this need for

personal laws, different special laws were enacted such as the Christian Marriage Act, Hindu Succession Act, Hindu Adoption and Maintenance Act and various branches of law developed under Family Law - Muslim Law, Hindu Law, Christian Law and Parsi Law. Thus, as classes of law developed it became difficult to administer fair and proper justice ergo; decisive steps were taken towards national consolidation by means of a uniform civil code (herein after referred as UCC) which was for the first time mooted in the Constituent Assembly. Subsequently, a provision was drafted for the same when the Constitution of India came to be enacted as Article 44. However, enforcement of such a law was not mandatory but on State's prerogative as it lies under Part IV 'Directive Principles of State Policy' (herein after referred as DPSP). The idea was that differential treatment contributes to differences among the different people in India. Hence, it aims to arrive at a common measure with regard to such matters and thereby, uniting and welding our nation as a whole India. Dr. B. R. Ambedkar opined that "There already exists common laws and crime for all the people in India" Hence, in virtue, our nation practically has a Civil Code, uniform in its content and applicable to the whole of India.

Samhitha Reddy from TNNLS, analyse the issues on 'Cruelty' in personal law. 'Cruelty' is a term with an ever evolving meaning. It is a matrimonial relief in India which can be claimed for divorce and judicial separation by both men and women. India being a religiously and culturally diverse country has numerous interpretations of the term 'Cruelty' which vary from religion to religion. What maybe cruelty today may not have been cruelty in the past and what is cruelty in one religion, may not be interpreted as cruelty in its other Indian counterparts. The author attempts to analyze the interpretation of the term 'Cruelty' in the different personal laws of the country as well as trace the evolution of the same in each personal law. The similarities and differences of the term in the different laws are analysed extensively.

Siddhartha and Samyak from NLU Odisha, have contributed on the Constitutional challenges to unify religion based personal laws. The Uniform Civil Code is the proposal to replace the personal laws based on the scriptures and customs of

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each major religious community in India with a common set governing every citizen under Article 44 of the DPSPs which makes the implementation of the same as the state duty. The relationship between religion and constitution has become a most contested issue, especially in the context of Fundamental religious rights and Secularism. There is a raging debate between proponents of a UCC and the defenders of distinct legal traditions over the precise meaning of this principle. In this paper, the authors try to contemplate the need of a UCC by doing a status quo analysis on the issue of religion and constitutionalism. The authors ask two important questions: Should plural societies adopt uniform civil laws in deference to the equality of all citizens before law or should the integration of the diverse religious groups be addressed through a pluralist model of law in deference to the concept that a democracy must respect religious freedom? The authors try to bring conceptual precision to the discourse, first by identifying empirically the contexts in which constitutionalism is employed and secondly, through a normative inquiry regarding the role constitutionalism could perform in the making of a 'UCC'. In addition to that attempts have been made to re-define secularism and articulate that secularism is polysemous. The major question here is whether a unified personal law system answer to the problems of religious fundamentalism such as Hindutva, Triple Talaq, Nikah halal etc. Can State mediate between the acceptance of religious laws and universal human rights and explore possible solutions with regards to drafting and implementation of a unified civil code satisfying the challenges of unifying individual and religious rights and retaining the essence of the Constitution.

Zaid and Swagat from GNLU, Gandhinagar, has in their article, raised the challenges that may arise from the codification of Muslim personal law. The Supreme Court has consistently taken up the task of defining secularism and has tried giving it a wide ambit of reasoning and interpretation, but this has also, in a fortuitous misfortune, created the great confusion that exists today. Article 44 of the Constitution mandated the state to 'endeavour' so as 'to secure for the citizens a uniform civil code.' While most of the Civil law has been made uniform, it is the personal law of various communities, particularly Muslims which has been the

major obstacle for the governments in initiating reform. Further, the very personal law of Muslims has become vague and indeterminate, owing to the growing number of sects in Islam. The existence of the controversial practices in Shariah like Triple Talaq, Polygamy, Halala beg the question, “Should social reform be stalled, because of the supposed divine characteristics of the personal laws which the secular state shies away from infringing?” Another question that arises here is whether or not, the State as much as endeavoured towards implementing a uniform code since 1950. With the advent of a majority right wing government in India, the debate of ‘majoritarianism under the garb of social reform’ has been fuelled, because a Codified Muslim Personal law would serve the purpose equally well. The benefits of a codified Muslim personal law, and how that could be an antecedent in enacting a Uniform Civil Code, which is supposed to bring all the communities on a similar platform on matters which do not form the essence of any religion, leading to a national consolidation, which has been so long desired has been described. The authors also discuss whether secularism, in general and Indian Secularism in particular, is compatible with the Islamic principles, which encompass almost the entire private and public aspect of an individual’s life. The authors briefly look into the history of the Shariah vis-a-vis polygamy, triple talaq and halala, and argue that these practices have lost their purpose, and the manner these are practiced today are in direct contravention of the basic tenets of the Constitution, hence should be discontinued with, because the essential principle behind a Uniform Civil Code or a Codified Personal law is that constitutional law shall supersede religious laws in a secular & democratic republic, where the rule of law prevails.

Debajyoti and Sunayna from Christ University, Bengaluru, argue that UCC though inevitable, has many hurdles to crossover. Every religion has its own laws and regulations. In the preamble of our constitution we, the people of India, are stating that India is a secular country. We cannot differentiate between the religions on the grounds of their personal laws. The Constituent Assembly of India was already aware of the situation during the drafting of our constitution. That’s why they put a duty on the State to make “Uniform Civil Code”. Uniform Civil Code is one of

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the directive principles of state policy contained in the Constitution of India. It directs the state “to endeavour to secure for the citizens a uniform civil code throughout the territory of India”. It has created controversy since its inception. The multiplicity of diverse religions caused alarming situations. Religious freedom under Article 25 is not confined to freedom of conscience but its ambit covers right to practice, profess and propagate the religion by its own citizens. The religion is a wide and pervasive concept. It is confined to ‘faith’ only because ‘practice’ and ‘propagate’ are the part and parcel of the religion. The apex court from time to time has reacted sharply, favouring its enforcement even at the cost of its ‘judicial discipline.’ The latest pronouncements in the cases of *John Vallamottom v. Union of India* and *Sarla Mudgal v. Union of India* & others have set example for the ‘judicial activism’. The making of “Uniform Civil Code” will not happen in one day. It has to be done in step by step process. We can take example of the state of Goa which is the only Indian state having “Uniform Civil Code”. Appropriate time will never come if we sit idle. We have to take the risk and face the consequences as it is high time for us to realize the importance of “Uniform Civil Code”.

Nithya and Sera Rose from CUST, Kochi, contribute on the Constitutional challenges under Art 25 with that of achieving the objectives under Art 44. A functioning democracy adheres to the theory and practice of the fundamental principles of equity, justice and inclusion for all. And the aforementioned “all” consists of women, men, young, old, able-bodied and disabled alike, irrespective of race, class, religion and sexual orientation. This is the defining feature of a democracy. And in such a democracy, why not create a common civil code that brings out the best in every religion and society? Why not introduce a common procedure for marriage, divorce, inheritance and right to property; something that does not interfere with an individual’s way of worship, yet have a unification of personal laws? Under Article 44, the State shall endeavour to enact a Uniform Civil Code for citizens throughout the country. Further, Article 25 of our Constitution says “nothing in this article shall prevent the state from making any law” associated with religious practice, so the argument that UCC is a violation

of Article 25 will not hold. By empowering the State to regulate or restrict any laws, as per Article 25, a clear distinction is made between sacred and secular. Thus practices such as witchcraft, sati, and prohibitions against widow remarriage, caste discrimination, Maitri Karar, Natha Pratha, talaq-e-bidat, and polygamy may be and have been banned or regulated. However, whether and where a boundary is to be drawn is debatable. The feasibility and desirability of a UCC has always been mooted for decades by women's rights activists, and the question that keeps recurring is – what is the value of uniformity? Who exactly is the beneficiary? Which sections of people will benefit from this? Is there any suffering due to the absence of a Uniform Civil Code? There is no personal law that is complete in itself. We have succeeded in bringing transitions through secular laws instead of forced legislations in certain instances. Gradual changes made through legislations or judicial pronouncements that assure gender equality and a broader outlook towards marriage, maintenance, adoption and succession by acknowledging the benefit that one community secures from the other will be a good way forward.

Varnika from NLSIU, has contributed a case comment on *Danial Latifi case*. The Supreme Court in the case of *Danial Latifi v. Union of India* upheld the constitutionality of the Muslim Women [Protection of Rights on Divorce] Act, 1986 and interpreted it in a way that ensured general welfare and provided social justice. This became a landmark judgement of the Court, as this democratic interpretation was used in all further Muslim divorce cases. It protected the rights of the divorced Muslim woman, and ensured her Right to Life with personal dignity. The author analyses this landmark decision of the Supreme Court in light of the constitutional principles of equality and secularism. Further, the different interpretations of the Act before this judgement have been discussed. The impact of this decision on the social status and maintenance policy of divorced Muslim women in subsequent cases has also been evaluated and described.

Sregurupriya from NLSIU, discusses the *Shabnam Hashmi v. UOI* case. This comment begins with the legal background and factual matrix of the case, and goes onto analyse the judgment and then conclude. In the process, the various



models of a uniform civil code are also explored. The right way forward is to harmonise conflict between personal and statutory law, the Court was wrong in viewing the opt-in-opt-out approach as an interim measure towards the end of achieving a Uniform Civil Code. It also seeks to show that the court was incorrect and self-contradictory in citing personal law to deny the right to adoption the status of a fundamental right.

The above articles and case comments have been selected from nearly 94 articles received by us. We understand that the articles selected do not cover all the required dimensions of UCC, the publication is only an attempt to document for further research, teaching, practice and deliberations of the topic. I hope that it will be a note worth contribution to our readers.

I am indeed grateful to my Vice Chancellor Prof. [Dr.] R Venkata Rao for his constant encouragement and unconditional support. I also thank the editorial team lead by our young dynamic colleague Mr. Praveen Tripathi, and our Research Scholars Ms. Raagya Zadu and Mr. Ranganath. We look forward to your continued patronage.

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# UNIFORM CIVIL CODE: AN ATTEMPT TO EXPLORE ITS AFFORDABILITY

*Vijender Kumar & Naresh Kumar Vats\**

## INTRODUCTION

India is a country of diversities and different colours not only in its geography but also in its language, culture and religious affairs. This diversity often leads to conflict due to different treatment meted out to different classes of people in their personal laws. Idea of uniform civil code has been opposed by the different communities on a mere plea that the right of a group or community of people to follow and adhere to its personal laws is a part of the way of life of those people following such laws. There can be two different views one is that anything done, affecting the personal laws will tantamount to interference with their way of life and the other view can be that it will help in growth of society and people. “*The government has received certain representations from various quarters for bringing in a Uniform Civil Code as envisaged under Article 44 of the Constitution.*”<sup>1</sup>

In India, we have a criminal code that is equally applicable to all, irrespective of religion, caste, gender and domicile. However, a similar code does not exist especially with respect to divorce and succession and we are still governed by the personal laws. These personal laws are varied in their sources, philosophy and application. Thus, a major constraint arises while bringing people governed by different religions under one roof.

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1 Government received representations backing Uniform Civil Code: Law Minister DV Sadananda Gowda, THE ECONOMIC TIMES, Available at <http://economic.times.indiatimes.com/news/politics-and-nation/government-received-representations-backing-uniform-civil-code-law-minister-dv-sadananda-gowda/articleshow/50027171.cms> (Last accessed on 27/03/2017).

## **UNIFORM CIVIL CODE**

The object of this code is to enhance national integration by eliminating contradictions based on ideologies. It aims to bring all communities on a common platform on matters which are currently governed by diverse personal laws. However, even after 60 years of independence, our law makers are yet to give effect to this provision.

The term civil code is used to cover the entire body of laws governing rights relating to property and otherwise in personal matters like marriage, divorce, maintenance, adoption and inheritance. The demand for a Uniform Civil Code essentially means unifying all these personal laws to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to. Though the exact contours of such a uniform code have not been spelt out, it should presumably incorporate the most modern and progressive aspects of all existing personal laws while discarding those which are retrograde.

The preamble of the Constitution states that India is a “Secular Democratic Republic” this means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. The word ‘Uniform’ according to Chambers 20th century dictionary mean alike or unvarying. The ‘Code’ denotes a more or less systematic and comprehensive written statement of rules on a given subject. The term ‘Civil Code’ is usually limited to compilation of private laws (Contracts, Torts, Property, and Agency, Marriages, Matrimonial property and related matters).<sup>2</sup> The uniform civil code as envisaged in the Article 44 of the Constitution includes inter alia, entire gambit of family laws. As far as the uniform legislation is concerned, we have almost covered every aspect of law except matrimonial laws. There is no uniform civil code of law applicable to the marital relation of all, irrespective of ethnic or religious affiliations. So through

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<sup>2</sup> Crowell and Macmillan, INTERNATIONAL ENCYCLOPAEDIA OF SOCIAL SCIENCE, Vol. 9, (1968), p. 214.

Article 44, the modern State is called upon to perform its onerous responsibility of giving uniform civil code on the above subject, applicable to all the citizens of India.

### ***Constitutional Provisions***

The term Uniform Civil Code and its meaning were discussed during the Constituent Assembly debates. Muslim members were against this provision in Article 35 (now Article 44). Mr. B. Pocker Sahib Bahadur wanted to know ‘what did the term Uniform Civil Code stand for and which particular law of which particular community were the framers of the provision going to take as the standard’.<sup>3</sup> The Indian Parliament discussed the report of the Hindu law committee during the 1948–1951 and 1951–1954 sessions. The first Prime Minister of the Indian republic, Jawaharlal Nehru, his supporters and women members wanted a uniform civil code to be implemented. As Law Minister, BR Ambedkar was in charge of presenting the details of this bill. It was found that the orthodox Hindu laws were pertaining only to a specific school and tradition because monogamy, divorce and the widow’s right to inherit property were present in the Shashtras. Ambedkar recommended the adoption of a Uniform Civil Code. Ambedkar’s frequent attack on the Hindu laws and dislike for the upper castes made him unpopular in the parliament. He had done research on the religious texts and considered the Hindu society structure flawed. According to him, only law reforms could save it and the Code bill was this opportunity. He thus faced severe criticism from the opposition. Nehru later supported Ambedkar’s reforms but did not share his negative view on Hindu society.

The Hindu bill itself received much criticism and the main provisions opposed were those concerning monogamy, divorce, abolition of coparcenary (women inheriting a shared title) and inheritance to daughters. The first President of the country, Rajendra Prasad, opposed these reforms; others included the Congress party president Vallabhbhai Patel, a few senior members and the Hindu fundamentalist parties. The fundamentalists called it ‘anti-Hindu’ and

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3 CONSTITUENT ASSEMBLY DEBATES, Vol. VII, (1949), p. 543.

‘anti-Indian’; as a delaying tactic, they demanded a uniform civil code. The women members of the parliament, who previously supported this, in a significant political move, reversed their position and backed the Hindu law reform; they feared allying with the fundamentalists would cause a further setback to their rights.

Thus, a lesser version of this bill was passed by the parliament in 1956, in the form of four separate Acts, the Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956, Hindu Adoptions and Maintenance Act 1956. It was decided to add the implementation of a Uniform Civil Code in Article 44 of the Directive Principles of the Constitution specifying, “The State shall endeavour to secure for citizens a Uniform Civil Code throughout the territory of India.” This was opposed by women members like Rajkumari Amrit Kaur and Hansa Mehta. According to academic Paula Banerjee, this move was to make sure it would never be addressed. Aparna Mahanta writes, “*Failure of the Indian state to provide a Uniform Civil Code, consistent with its democratic secular and socialist declarations, further illustrates the modern state’s accommodation of the traditional interests of a patriarchal society*”.<sup>4</sup>

Press Council of India, the Chairperson Justice Markandey Katju quote- “*I am fully in support of Uniform Civil Code*” and “*one of the reasons for the backwardness of Muslims is the lack of modernisation of their personal law*”. As usual the Muslim press severely criticised the observations of Justice Katju. In fact there was nothing new in the arguments of either of the two as it was simply a repetition of the sense in the debate of the Constituent Assembly. This debate is still continuing and would continue to be debated in the absence of a strong political will of successive ruling parties.

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4 Samaddar, Ranabir, THE POLITICS OF AUTONOMY: INDIAN EXPERIENCES, SAGE Publications, 56-59 (2005).

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## UNIFORM CIVIL CODE: ACADEMIC REVIEW

The eminent scholar of Arabic named Asaf Ashar AO Fyzee and author of several authoritative books on Muslim law has been in the forefront of the controversy of reform in Muslim law. He has consistently held the view that the Indian brand of Islamic law is quite different from the original Sharia. He describes it as “*Shariat modified by the principle of the English law and equity in the varying social and cultural conditions of India in a discrete system, somewhat at variance with its original source*”.<sup>5</sup> In his classic work,<sup>6</sup> the theme of his views was that Islam should be reinterpreted as a living and creative force in India’s pluralistic and secular society. One of the six principles proposed by him was to carry out such a reinterpretation being separation of law and religion. However, this revolutionary approach of Fyzee was wholly unacceptable to a dominant majority.

In 1970, he published his extremely controversial article “*The Reform of Muslim Personal Law in India*”.<sup>7</sup> The basic theory underlying the article is that India is neither a country inimical to Islam nor Islamic country; it is rather a country where the laws have to be laid down according to the State policy.<sup>8</sup> Again in 1972, Fyzee stressed that Muslim personal law in India is “*by no means to be equated with Sharia*”<sup>9</sup> and that the true position is that “*in the case of Muslim litigants a few rule of law drawn from the Sharia with an admixture of English law are applied, provided they are not against justice and equity*”.<sup>10</sup> Prof. Fyzee was also in favour of securing a Uniform Civil Code for all irrespective of religion to which they belong. Fyzee apparently found nothing wrong in the reform of Muslim personal law in India because this law is far from being the original Sharia.

M. Hidayatullah, former Chief Justice of India, is another eminent supporter of reform. He has always held very progressive views on the subject and in his

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5 A.A.A. Fyzee, OUTLINES OF MOHAMMEDAN LAW 50 (1968).

6 Fyzee, A MODERN APPROACH TO ISLAM, Asia Publishing House, Bombay (1963).

7 A.A.A. Fyzee, *The Reform of Muslim Personal Law in India*, HUMANIST REVIEW 37040 (1970).

8 *Id.* at p. 373.

9 TIMES OF INDIA, Bombay, Jan. 31, 1972.

10 INDIAN EXPRESS, New Delhi, Feb. 12, 1972.

introduction to Mulla's classic work on 'Muslim Law' referring in brief to some of the major reforms effected in family law in certain Islamic countries, he remarked *"If the injunctions of the Quran and Hadith are not lost sight of, it is possible to make changes by legislation in a widening area. The lead is coming from Muslim countries and it is hoped that in course of time the same measures will be introduced in India also."*<sup>11</sup> Mr. M.C. Chagla, a former Minister and a noted ex-judge, while making a vehement plea for Uniform Civil Code wrote, *"Article 44 is a mandatory provision binding the government and it is incumbent upon it to give effect to its provision. The Constitution was enacted for the whole country, and every section and community must accept its provision and its directives."*<sup>12</sup>

Before the concluding speech of Dr. B.R. Ambedkar, K.M. Munshi strongly contested the theory that Muslim Personal Laws were part of religion. He advised the Muslim members that "sooner we forget this isolationist way of life, it will be better for the country". He reminded them saying, "This attitude of mind perpetuated under the British rule, that personal law is part of religion, has been fostered by the British and by British courts. We must, therefore, outgrow it". He further reminded them that "Allauddin Khilji made several changes which went against the Shariat, though he was the first ruler to establish Muslim Sultanate here. The Kazi of Delhi objected to some of his reforms, and his reply was 'I am an ignorant man and I am ruling this country in its best interests. I am sure, looking at my ignorance and my good intentions, the Almighty will forgive me, when he finds that I have not acted according to the Shariat'. If Allauddin could not, much less can a modern government accept the proposition that religious rights cover personal law or several other matters which we have been unfortunately trained to consider as part of our religion". Dr. B.R. Ambedkar said, "I personally do not understand why religion should be given this vast, expansive jurisdiction, so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty

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11 MULLA, PRINCIPLES OF MOHAMMEDAN LAW, (M. Hidayatullah (ed.), Vol. XXXI), (1968).

12 M.C. Chagla, *Plea for Uniform Civil Code*, WEEKLY ROUND TABLE, March 25, 1973, p. 7.

in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights”.<sup>13</sup> After his long speech in favour of the Uniform Civil Code, the motion “that Article 35, stand part of the Constitution” was adopted and added to the Constitution as Article 44. Giving final shape to this Article, Dr. Ambedkar maintained that Directive Principles were binding for the functioning of the democracy. The sense of the argument was to achieve social democracy for a long lasting political democracy.<sup>14</sup> Dr. Tahir Mahmood in his book *Muslim Personal Laws* 1977 edition made a powerful plea for framing Common Civil Code for all citizens of India and argued that many Muslim countries have outlawed polygamy. After the legislation of Hindu Code Bills, Asaf Ashar Ali Fyzee, a noted Islamic scholar “suggested to the Government of India that the personal laws relating to the Muslim community may be examined by a special committee in the light of modern condition as done in case of Hindu”.

Prof. Mohammad Ghouse wrote that “Marriage, divorce, inheritance and other aspects of the personal status are, despite the sources of the Muslim law regulating them, social or secular activities surrounding religion and the State can validly enacted measures of social welfare and reform in respect of matters governed by the Muslim law.”<sup>15</sup> Thus from the above it is clear that, by and large, academics and scholars have no doubt regarding the subject matter of the uniform civil code.

### UNIFORM CIVIL CODE AND JUDICIAL OPINION

From *State of Bombay v. Narsu Appa Mali*<sup>16</sup> case to the latest *John Vallamatom v. Union of India*<sup>17</sup> case the Supreme Court and the various other High Courts

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<sup>13</sup> *Ibid.*

<sup>14</sup> R. Upadhyay, *Uniform Civil Code- It is Time to Revisit* this issue, Available at <http://www.southasiaanalysis.org/node/1564>, (Last accessed on 08/07/2014).

<sup>15</sup> Md. Ghouse, *PERSONAL LAWS AND THE CONSTITUTION OF INDIA*, (Tahir Mahmood (ed.), *Islamic Law in Modern India*), 54-55 (1972).

<sup>16</sup> AIR 1952 Bom 84: (1951) 53 BOMLR 779.

<sup>17</sup> 2003 AIR (SC) 2902: (2003) 6 SCC 611.



in numerous cases emphasised that the steps be initiated to enact the uniform civil code as envisaged by the Article 44. Reviewing the various laws prevailing in the areas of marriage in India, the court held in *Jorden Diengdeh v. S.S. Chopra*<sup>18</sup> “The law relating to the judicial separation, divorce and nullity of marriage is far from uniformity. Surely, the time has now come for a complete reform of the law of marriage and makes a uniform law applicable to all people irrespective of religion or caste; we suggest that the time has come for the intervention of the legislature in these matters to provide for the uniform code of marriage and divorce”.<sup>19</sup>

Another landmark judgement called for the implementation of Uniform Civil Code. In this case, a priest from Kerala challenged the Constitutional validity of Section 118 of the Indian Succession Act, which is applicable for non-Hindus in India. *Mr. John Vallamattom*<sup>20</sup> contended that Section 118 of Indian Succession Act 1925 was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purposes by will. The bench struck down the section as unconstitutional. It called for the parliament to take concrete steps to enact a Uniform Civil Code. It was stated that a common civil code will help the cause of national integration by removing the contradictions based on ideologies.

The Supreme Court has directed the Parliament to frame a Uniform Civil Code in the year 1985 in the case of *Md. Ahmed Khan v. Shah Bano Begum*<sup>21</sup> popularly known as the Shah Bano case. In this case, a Muslim woman claimed for maintenance from her husband under Section 125 of Code of Criminal Procedure after she was given triple talaq pronouncements by her husband. The Supreme Court held that Muslim Women have a right to get maintenance from her husband under Section 125 and commented that Article 44(3) of the Constitution of India has remained in the dead light. However, the then Rajiv

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18 AIR 1985 SC 935; 1985 SCC (3) 62.

19 *Ibid.*

20 2003 AIR (SC)2902; (2003) 6 SCC 611.

21 1985 AIR 945; 1985 SCR (3) 844; 1985 SCC (2) 556.

Gandhi led government has overturned the *Shah Bano*'s case decision by Muslim Women (Right to Protection on Divorce) Act 1890 which curtailed the right to maintenance of a Muslim Woman.

The Second instance was in the case of *Sarla Mudgal v. Union of India*<sup>22</sup> where the question of whether a Hindu husband by embracing Islam can solemnise a second marriage? The court held that this would amount to nothing but merely abusing the personal laws. It was held that a Hindu marriage can be dissolved under the Hindu Marriage Act 1955 only and by converting into Islam and marrying again does not dissolve the marriage under Hindu Marriage Law and thus, it would be an offence under Section 494(5) of the Indian Penal Code 1860. The judge in this case opined that it is high time that a uniform civil code to be introduced and that Article 44 to be taken out of cold-storage.

In *Lily Thomas etc. v. Union of India*<sup>23</sup> the Court held that "The desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statement amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change". The word "uniform" should not mean the same law for all but it should mean similar laws for all and similarly should be regarding equality and gender justice. In *Pannalal Bansilal v. State of Andhra Pradesh*<sup>24</sup> it held that a uniform law though highly desirable, the enactment thereof in one go may be counter-productive to the unity and integrity of the nation. Gradual progressive change should be brought about. Similarly, in *Maharishi Avadhesh v. Union of India*<sup>25</sup> the Supreme Court dismissed a writ petition to introduce a common Civil Code on the ground that it was a matter for the legislature and in *Ahmadabad Women Action Group v. Union of India*<sup>26</sup> the Supreme Court showed reluctance to interfere in matters of personal law.

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22 1995 AIR 1531; 1995 SCC (3) 635.

23 AIR 2000SC 1650; (2000) 6 SCC 224.

24 1996 AIR 1023; 1996 SCC (2) 498.

25 1994 SCC, Supl. (1) 713.

26 AIR 1997, 3 SCC 573.

## **BASIS OF UNIFORM CIVIL CODE AND SACRED REVELATION**

In spite of the fact that some religions have religious texts<sup>27</sup> which they view as divinely or supernaturally revealed or inspired. For instance, Orthodox Jews<sup>28</sup> Christians<sup>29</sup> and Muslims<sup>30</sup> believe that the Torah<sup>31</sup> was received from Yahweh<sup>32</sup> on biblical Mount Sinai<sup>33</sup>. Most Christians believe that both the Old Testament and the New Testament were inspired by God. Muslims believe the Quran<sup>34</sup> was revealed by God to Muhammad<sup>35</sup> word by word through the

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- 27 'Religious Texts' Religious texts (also known as scripture, or scriptures, from the Latin scriptura, meaning writing") are texts which religious traditions consider to be central to their religious practice or set of beliefs. Religious texts may be used to provide meaning and purpose, evoke a deeper connection with the divine, convey religious truths, promote religious experience, foster communal identity, and guide individual and communal religious practice, Available at [https://en.wikipedia.org/wiki/Religious\\_text](https://en.wikipedia.org/wiki/Religious_text) (Last accessed on 26/03/2017).
- 28 'Orthodox Judaism' is the approach to religious Judaism which subscribes to a tradition of mass revelation and adheres to the interpretation and application of the laws and ethics of the Torah as legislated in the Talmudic texts by the Tannaim and Amoraim. Orthodox Judaism includes movements such as Modern Orthodox Judaism and Ultra-Orthodox, Available at [https://en.wikipedia.org/wiki/Orthodox\\_Judaism](https://en.wikipedia.org/wiki/Orthodox_Judaism) (Last accessed on 26/03/2017).
- 29 'Christian' is a person who follows or adheres to Christianity an Abrahamic monotheistic religion based on the life and teachings of Jesus Christ, Available at <https://en.wikipedia.org/wiki/Christian> (Last accessed on 6/03/2017).
- 30 'Muslim' is someone who follows or practices Islam a Monotheistic Abrahamic religion. Muslims consider the Quran (Koran), their holy book, to be the verbatim word of God as revealed to the Islamic Prophet and messenger Muhammad. They also follow the teachings and practices of Muhammad (Sunnah) as recorded in traditional accounts, Available at <https://en.wikipedia.org/wiki/Muslim> (Last accessed on 26/03/2017).
- 31 'Torah' is the central reference of 'Judaism', Available at <https://en.wikipedia.org/wiki/Torah> (Last accessed on 26/03/2017).
- 32 'Yahweh' was the national God of Iron Age, Available at <https://en.wikipedia.org/wiki/Yahweh> (Last accessed on 26/03/2017).
- 33 'Biblical Mount Sinai' is the mountain at which the Ten Commandments were given to Moses by God, Available at [https://en.wikipedia.org/wiki/Biblical\\_Mount\\_Sinai](https://en.wikipedia.org/wiki/Biblical_Mount_Sinai) (Last accessed on 26/03/2017).
- 34 'Quran' a revelation from God, Available at <https://en.wikipedia.org/wiki/Quran> (Last accessed on 26/03/2017).
- 35 'Muhammad' is a Prophet of Islam, Available at <https://en.wikipedia.org/wiki/Muhammad> (Last accessed on 26/03/2017).

angel Gabriel<sup>36</sup> (*Jibril*). In Hinduism,<sup>37</sup> some Vedas<sup>38</sup> are considered *apauruseya*,<sup>39</sup> “not human compositions”, and are supposed to have been directly revealed, and thus are called ‘*Sruti*’,<sup>40</sup> “what is heard”. The 15,000 handwritten pages produced by the mystic Maria Valtorta<sup>41</sup> were represented as direct dictations from Jesus, while she attributed ‘The Book of Azariah’<sup>42</sup>

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36 ‘Gabriel-Jibril’ Gabriel is mentioned in both the Old and New Testaments of the Bible. In the Old Testament, he appears to the prophet Daniel, explaining Daniel’s visions, Available at <https://en.wikipedia.org/wiki/Gabriel> (Last accessed on 26/03/2017).

37 ‘Hinduism’ a religion, or a way of life, found most notably in India and Nepal. Hinduism has been called the oldest religion in the world, and some practitioners and scholars refer to it as Sanatana Dharma, “the eternal law,” or the “eternal way, beyond human origins. Scholars regard Hinduism as a fusion or synthesis of various Indian cultures and traditions, with diverse roots and no founder. This “Hindu synthesis” started to develop between 500 BCE and 300 CE following the Vedic period (1500 BCE to 500 BCE), Available at <https://en.wikipedia.org/wiki/Hinduism> (Last accessed on 26/03/2017).

38 ‘Vedas’ are a large body of knowledge texts originating in the ancient Indian subcontinent. Composed in Vedic Sanskrit, the texts constitute the oldest layer of Sanskrit literature and the oldest scriptures of Hinduism Hindus consider the Vedas to be *apauruseya*, which means “not of a man, superhuman” and “impersonal, authorless, Available at <https://en.wikipedia.org/wiki/Vedas> (Last accessed on 26/03/2017).

39 ‘*Apauruseya*’ *Apaurusheya* is a central concept in the Vedanta and Mimamsa School of Hindu Philosophy. These schools accept the *Vedas* as *svatahpramana* (“self-evident means of knowledge”). The Mimamsa School asserts that since the Vedas are composed of words (*shabda*) and the words are composed of phonemes, the phonemes being eternal, the Vedas are also eternal. To this, if asked whether all words and sentences are eternal, the Mimamsa philosophers reply that the rules behind combination of phonemes are fixed and pre-determined for the Vedas, unlike other words and sentences, Available at <https://en.wikipedia.org/wiki/Apauru%E1%B9%A3ey%C4%81> (Last accessed on 26/03/2017).

40 ‘*Sruti*’ in Sanskrit means “that which is heard” and refers to the body of most authoritative, ancient religious texts comprising the central canon of Hinduism, available at <https://en.wikipedia.org/wiki/%C5%9Aruti> (last updated Mar. 26, 2017).

41 ‘Maria Valtorata’ Roman Catholic Italian writer and poet.

42 ‘The Book of Azariah’ a book by the Italian author and Roman Catholic mystic Maria Valtorta, Available at [https://en.wikipedia.org/wiki/The\\_Book\\_of\\_Azariah](https://en.wikipedia.org/wiki/The_Book_of_Azariah) (Last accessed on 26/03/2017).

to her guardian angel<sup>43</sup> Aleister Crowley<sup>44</sup> stated that ‘The Book of the Law’<sup>45</sup> had been revealed to him through a higher being that called itself Aiwass.<sup>46</sup>

The debate for a Uniform Civil Code dates back to the colonial period India. The Lex Loci Report of October 1840 emphasised the importance and necessity of uniformity in codification of Indian law, relating to crimes, evidences and contract but it recommended that personal law of Hindus and Muslims should be kept outside such codification. According to their understanding of religious divisions in India, the British separated this sphere which would be governed by religious scriptures and customs of the various communities (Hindus, Muslims, Christians and later Parsis). These laws were applied by the local courts or panchayats when dealing with regular cases involving civil disputes between people of the same religion; the State would only intervene in exceptional cases. Thus, the British let the Indian public have the benefit of self-government in their own domestic matters with the Queen’s 1859 Proclamation promising absolute non-interference in religious matters. The personal laws involved inheritance, succession, marriage and religious ceremonies. The public sphere was governed by the British and Anglo-Indian law in terms of crime, land relations, laws of contract and evidence—all this applied equally to every citizen irrespective of religion.

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43 ‘Guardian angel’ an angel that is assigned to protect and guide a particular person, group, kingdom, or country. Belief in guardian angels can be traced throughout all antiquity, *Available at* [https://en.wikipedia.org/wiki/Guardian\\_angel](https://en.wikipedia.org/wiki/Guardian_angel) (Last accessed on 26/03/2017).

44 ‘Aleister Crowley’ was an English occultist, ceremonial magician, poet, painter, novelists and mountaineer. He founded the religion of Thelema, identifying himself as the prophet entrusted with guiding humanity, *Available at* [https://en.wikipedia.org/wiki/Aleister\\_Crowley](https://en.wikipedia.org/wiki/Aleister_Crowley) (Last accessed on 26/03/2017).

45 ‘The Book of the Law’ the central sacred text of Thelema, allegedly written down from dictation mostly by Aleister Crowley, *Available at* [https://en.wikipedia.org/wiki/The\\_Book\\_of\\_the\\_Law](https://en.wikipedia.org/wiki/The_Book_of_the_Law) (Last accessed on 26/03/2017).

46 ‘Aiwass’ the name given to a voice that English occultist Aleister Crowley claimed to have heard on April 8, 9, and 10 in 1904. Crowley claimed that this voice, which he considered originated with a non-corporeal intelligence, *Available at* <https://en.wikipedia.org/wiki/Aiwass> (Last accessed on 26/03/2017).

Throughout the country, there was a variation in preference for scriptural or customary laws because in many Hindu and Muslim communities, these were sometimes at conflict. Such instances were present in communities like the Jats and the Dravidians. The Shudras, for instance, allowed widow remarriage-completely contrary to the scriptural Hindu law. The Hindu laws got preference because of their relative ease in implementation, preference for such a Brahminical system by both British and Indian judges and their fear of opposition from the high caste Hindus. The difficulty in investigating each specific practice of any community, case-by-case, and customary laws has made it harder to implement. Towards the end of the nineteenth century, favouring local opinion, the recognition of individual customs and traditions increased.

The Muslim Personal law or Sharia law was not strictly enforced as compared to the Hindu law. It had no uniformity in its application at lower courts and was severely restricted because of bureaucratic procedures. This led to the customary law, which was often more discriminatory against women, to be applied over it. Women, mainly in northern and western India, often were restrained from property inheritance and dowry settlements, both of which the Sharia provides. Due to pressure from the Muslim elite, the Shariat Law of 1937 was passed which stipulated that all Indian Muslims would be governed by Islamic laws on marriage, divorce, maintenance, adoption, succession and inheritance.

### **EFFORTS TO MEET THE CONSTITUTIONAL PROVISION**

Once again the brave fight put up by Muslim women against the practice of triple talaq focusing the lack of a Uniform Civil Code in India.<sup>47</sup> The BJP government has now asked the Law Commission to examine the issue. This is hopefully the first step towards the implementation of something that has been delayed for far too long.

India needs a uniform civil code for two principal reasons. *First*, a secular republic needs a common law for all citizens rather than differentiated rules based on

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<sup>47</sup> Result of 2017 five States Assembly Elections of which Uttar Pradesh being majority of Muslim has supported the BJP party in forming BJP Government in Uttar Pradesh.

religious practices. This was a key issue debated during the writing of the Constitution, with passionate arguments on both sides. The Indian Constitution was eventually stuck with a compromise solution, a directive principle that says that “*The state shall endeavour to secure for citizens a uniform civil code throughout the territory of India.*” There is a *second* reason why a Uniform Civil Code is needed for gender justice. The rights of women are usually limited under religious law, be it Hindu or Muslim. The practice of triple talaq is a classic example. It is important to note that B.R. Ambedkar fought hard for the passage of the Hindu Code Bill because he saw it as an opportunity to empower women. The great Muslim social reformer Hamid Dalwai also made the rights of women a central part of his campaign for a Uniform Civil Code.<sup>48</sup>

The Supreme Court of India, in a thought provoking judgment in *Sarla Mudgal's case*<sup>49</sup> once again, stressed the need for a Uniform Civil Code. The courts epoch making decision has forcibly drawn the moribund attention of the Government of India towards the sorry plight of Article 44 of the Indian Constitution. The dynamic and opposite attitude adopted by the Supreme Court has certainly sent right signals by sending shock waves into the camps of power monger political tribe and religious fundamentalists. The Constitution came into force in 1950. Since then, Article 44 has been gathering dust with no government at the Centre ever having any guts and wisdom to touch it. Figuratively speaking, it has remained a dead letter. The tragic situation certainly buries the spirit of the Constitution a thousand fathoms deep. The sensational verdict has stolen the show by throwing light on the unused area of the Constitution. Albeit the court's observation vis-à-vis Article 44 is only obiter dictum in nature, it has drawn the attention of the nation towards the unfinished agenda of the Constitution. The Government of India under the chairmanship of former Justice Dr. B.S. Chauhan (Supreme Court of India) formed a law commission of India to reform the family law as per Article 44 of Indian constitution. On the 7<sup>th</sup> of October, 2016 and the Law

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48 Shyamlal Banerjee, 'Why India Needs Uniform Civil Code' LIVEMINT, Available at <http://www.livemint.com/Opinion/YJFZY1zt2IN3lkOlljLjfO/Why-India-needs-a-uniform-civil-code.html> (Last accessed on 26/03/2017).

49 1995 AIR 1531; (1995) 3 SCC 635.

Commission of India welcomes all concerned to engage with us on the comprehensive exercise of the revision and reform of family laws, as the Article 44 of the Indian Constitution as provided that “the state shall endeavour to provide for its citizen a Uniform Civil Code throughout the territory of India” and the members of the commission said “we do not want anybody, be it a political party or religious party, to feel that a conscious and genuine attempt has not been made to reach out to them. Hence, the commission took a decision to approach all political parties. The commission has already written to all state chief ministers urging for a wider consultation”.<sup>50</sup>

### CONCLUSION

Those who are willing to reform the Muslim Personal law have often cited Muslim countries as examples that such reform is possible. Terence Farias in his book ‘*Development of Islamic Law*’ points out that the 1961 Muslim Family Law Ordinance of Pakistan “makes it obligatory for a man who desires to take a second wife to obtain a written permission from a government appointed Arbitration Council”. Mushir Al-Huq in his book ‘*Islam in Secular India*’ and Tahir Mahmood, both have pointed out the reforms meted out in Tunisia and Turkey where polygamy was abolished. Most writings on the subject point to the small number of Muslim intelligentsia such as Tahir Mahmood who are in favour of either doing away with the personal law or reforming it. Mushir-Ul-Haq in his treatise *Islam in Secular India* identifies three groups, the fundamentalist, moderate and radicle. In the radical camp are those who would do away with the personal law in total, and replace it with a Uniform Code. Farias describes them as “a very small minority of Muslims are mostly western trained.” In the Modernist camp, we find men, such as A.A. Fyzee, who believe that Shariat law is malleable and can be changed, given the consent of the community or ijma. The fundamentalists or orthodox, as previously mentioned, rely on the arguments of

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50 Raghav Ohri, *Law Commission invites view on Uniform Civil Code*, THE ECONOMIC TIMES, Available at <http://economictimes.indiatimes.com/news/economy/policy/law-commission-invites-view-on-uniform-civil-code/articleshow/55058894.cms> (Last accessed on 26/03/2016).



MushirUl-Huq who argues in *Islam in Secular India* that the Laws of countries such as Tunisia and Turkey or Iraq were “thrust down their throats by authoritarian rulers” and that “there is hardly any Muslim country which has so far denied the authority of the sources of Shariah”.

The debate in India itself seems to have gone the way of the secularists in this respect and the recent rulings by the Supreme Court. The calls for a Uniform Code have not witnessed the protests and alarms that took place following the *Shah Bano case*<sup>51</sup> in 1985. It is quite possible that the Muslim community sees a Uniform code as a *fait accompli* after almost 60 years of Indian independence. The personal law has three options to it. It may stay as it is, intact and dating primarily from the Shariat Act of 1937, but in many respects resembling the Anglo-Mohammedan law of the 19th century. The law may be reformed but since this would require activism from the conservative Muslim organisations, it is unlikely, as they have expressed little willingness to do so and in fact have fought reforms by claiming that Muslim culture in India will be destroyed by them. The last option, that a Uniform Code will be passed seems increasingly likely. However, given that people in the 1970s were saying the same thing and Shah Bano got their hopes up in 1985, it may be decades away. The major legal themes of the reformists focus around polygamy, women’s rights to divorce and women’s rights to maintenance upon divorce. The feeling is that polygamy should be banned outright, that women should have an easier time petitioning for a divorce, that husbands should not be able to use the triple talaq method of divorce, and that maintenance be granted as it is with non-Muslims. Basically, what they are arguing is for the application of the Special Marriage Act of 1954 to be applied to Muslims, rather than it being optional for the people to marry under the Act.

The present government of India is now, a major force in many parts of India, particularly, the ‘Hindi Belt’ that runs across North and Central India. Islamic law thrived in India for 850 years. The advent of a Hindu majority professing secular values should have ensured that Islamic law would be delegated to the

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51 (1985) 2 SCC 556: AIR 945 1985.

Mosque and the ceremony. However, in its contradictory and in, many places hypocritical attempts to assuage the minority, the Indian government enacted a Constitution that at one time allowed discrimination in the personal law and at the same time upheld equality. It was only a matter of time before the courts and politics caught on. Today, the Muslim community with the hope of passing bill of revoking triple talaq, have openly accepted the present BJP government in Uttar Pradesh Assembly Election 2017, which have formed the government with huge majority. The essence reformation is reflected contrary to the claims made by Kazi and Mullahs against the Uniform Civil Code. This is not only supported by many people outside the Hindu, but other Nationalist wing, such as rationalists and humanists. India need not to find out the Model Law for Uniform Civil Code but to extent the application of the serene, surf-washed beaches of Goa, a Uniform Civil Code is alive, well and flourishing, as it has been for almost 500 years. In the sensationalism and sentiment surrounding the controversial religious and personal laws in the country, a working model of a Uniform Civil Code, one that exists under our very noses has largely been ignored. Surely, the Goan family laws are not a national secret. That they have been kept under wraps, either explicitly or implicitly only undermines the seriousness and credibility of the entire Uniform Civil Code debate.<sup>52</sup>

The most valuable living legacy left in Goa by the Portuguese is a codified system of law: the Portuguese Civil Code of 1867 and the Code of Civil Procedure of 1939, which encompass the entire spectrum of Civil Law. Therefore, it is the high time that Government shall shoulder the responsibilities to the Law Commission of India draw the guidelines based on which the Draft Bill for Uniform Civil Code may be introduced in the Parliament. The Bill shall uniformly deal with marriage, divorce, succession, inheritance and maintenance matters.

Implementing a Uniform Civil Code in the country should be viewed through the prism of upholding human dignity, a fundamental right and not merely is an exercise in enforcing directive principles.

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<sup>52</sup> Vargo, Naeem and Goldfaden, Robin, "THE GOA UNIFORM CIVIL CODE- ALIVE AND KICKING" in Vol. 10, The Lawyers Collective, 21,(1995).

## **SUGGESTIONS**

The researchers after drawing the inference from the above study propose the following suggestions for the consideration:

- (a) The Uniform Civil Code shall cover the broader interest of all the religions;
- (b) To constitute a committee of Eleven members-
  - (i) under the Chairmanship of NHRC;
  - (ii) two retired Chief Justice of India out of which one shall be Muslim or non-Hindu,
  - (iii) one representation from Muslims,
  - (iv) one representation from Christians,
  - (v) one representation from Parsi,
  - (vi) one representation from Hindus,
  - (vii) one representation from Scheduled Tribes,
  - (viii) one representation from feminists i.e. Chairperson NWC,
  - (ix) Chairman Law Commission of India and
  - (x) One representation from eminent jurist/Advocates/academician.
- (c) It is their moral duties academicians to promote the feelings of secularism and to create conducive environment for educating the benefits of Uniform Civil Code.
- (d) To exclude the gender/ caste/ race/ column from all the applications/ forms of school admission/ employment etc in tune with 'Don't ask don't tell policy' as applicable in United Kingdom, which will help in eradication of discrimination and if needed inclusion of 'volunteer disclosure of gender/ caste/ race' column and

- (e) Immediate cessation and eradication of 'Reservation Policy' in education/employment or any other beneficial schemes.

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# **NEED AND CHALLENGES TO UNIFORM CIVIL CODE IN INDIA: A SPECIAL REFERENCE TO MUSLIM ETHOS**

*Dr. G.S. Rajpurohit & Dr. Nitesh Saraswat\**

## **INTRODUCTION AND HISTORICAL BACKGROUND**

In early Hindu history, the laws the people followed could be called law of nature being based on custom, ascertained by experience as being the best for the community in the long run. At that point religion was the governing force and consequently the priest class or the Brahmins enjoyed supremacy and expounded the religion and law. This is how the code of Manu came into being. Muslim period marks the beginning of a new era in the legal history of India. The old Hindu Kingdom began to disintegrate gradually. An atmosphere of great mutual distrust was created amongst the contending States, which prevented their political unity against the common enemy<sup>1</sup>. With the establishment of Muslim rule in India, Muslim law also became the law enforceable through the machinery of State.<sup>2</sup> However, Hindu law was also allowed to be reserved for the Hindu and the Mohammedan rulers did not interfere with the system in any appreciable way so far as its civil aspects were concerned. Thus, the Muslims followed their Muslim law and the Hindus were allowed to stick to their own system of law with respect to civil law only.

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1 Deshta Kiran, "UNIFORM CIVIL CODE – IN RETROSPECT AND PROSPECT" Deep & Deep Publications, New Delhi (1999), Pg.12.

2. M. Rama Jois, "LEGAL AND CONSTITUTIONAL HISTORY OF INDIA," Universal Law Publishing Co. Pvt. Ltd. (1990), Vol.-II, Pg.4.

But in case of criminal laws, tribunals made no distinction between the Hindus and the Muslims. Hence, the Hindus enjoyed under the mussulman government, a complete indulgence with regard to the rites and ceremonies of their religion as well as with respect to various privileges and immunities-in matters of property and all other temporal concern. The Muslim law only gave the rule of decision in case where both parties were Hindus and the point was referred to the judgment of the pundits or Hindu lawyers.<sup>3</sup> Later on during the British regime by Regulation of 1781, the personal laws of Hindus and Muslims were made applicable in matters of inheritance marriages etc. Lord Warren Hastings was of opinion that it would be a great evil to impose on Indian people a foreign legal system; But the British rulers began with policy of non-interference and generally allowed the then existent system of law to prevail; but gradually they began to assert themselves being of course backed by a strong fraction of the public opinion. Later they enacted few laws which governed family relationships irrespective of the religion of the parties, i.e. The Caste Disabilities Removal Act, 1850, The Special Marriage Act, 1872, Indian Majority Act, 1875, The Indian Succession Act, 1925, The Child Marriage Restraint Act, 1929, Muslim Personal Law (Shariat) Application Act, 1937 etc. were passed, but they did not show any pursuit to encourage the environment of uniformity of laws in India.

The founding fathers of the Indian Constitution also had in their mind the diverse civil laws applicable to Indians in the matter of inheritance, adoption, succession and divorce etc. that were largely based on personal or religious laws of various communities. The Hindu had series of different laws based on different schools of thought, Muslims were subject to Shariat, which depend on, whether the individual was Shia or Sunni, whereas their own personal laws governed the Christians. Due to the prevalence of multicultural personal laws there was great difficulty in administration of justice. For this reason, the idea of common civil code was put forward, which provided, for common laws for all Indians irrespective of their religion and region, but during the debate on the said clause

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3. V.C. Sarkar, "EPOCHS IN HINDU LEGAL HISTORY", V.V.R. – Hoshiarpur (1958), Pg.200-201.

the members for and against the uniform civil code expressed different views. While participating in the debate Dr. B.R. Ambedkar pointed out that we have uniform civil code on all matters namely contract transfer of property, partnership, civil procedure, crime except of those marriage, adoption and succession. The object of incorporating Article 44 in the our Constitution is to govern all relationships of life by uniform system of law for the reason that human relationship and human requirements do not differ by the mere fact that different persons belong to different religions. The true object of its endorsement in our nation character is to use it as a weapon of national integration. Thus, while recognizing the need of ethnic and religious groups to affirm their distinctive religious identities, the constitution does not treat personal laws as religion through they may have been derived from it.

The Hon'ble Supreme Court of India has observed that "the legislation, not religion being the authority under which personal laws were permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing the uniform civil code. In this view of the matter, no community can oppose the introduction of uniform civil code for all the citizens in the territory of India."<sup>4</sup>

### **CONSTITUTIONAL IMPERATIVE FOR COMMON CIVIL CODE IN INDIA**

India is a land of diversities, Hindus, Muslims, Parsis, Bodhs, Jews and Christians etc., follow their own personal laws in family matters which to a great extent differ from one another.<sup>5</sup> Such type of laws instead of serving the purpose of unity and integrity of the country encourage separatists tendencies, which are detrimental to any growing democracy.<sup>6</sup> Thus, keeping in view, the national interest, the founding fathers of the Constitution, by incorporating Article 44 in the Constitution of India which provides for the establishment of uniform civil

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4. Deochand v. State of Maharashtra (1974) 4 SCC 610, 611:1974 SCC (Cri.) 646,647: 1974 Cr.LJ 1089: Sarla Mudgal v. Union of India, AIR 1995 SC 1531.

5. See, B.R. Sharma "A Uniform Civil Code for India" CIVIL AND MILITARY LAW JOURNAL (1985) Vol.21 No.3-4, Pg.21.

6. Deshta Kiran, "UNIFORM CIVIL CODE – IN RETROSPECT AND PROSPECT" Deep & Deep Publications, New Delhi (1999), Pg.43.

code, mooted the idea to have a common civil law for all the citizens of this country.<sup>7</sup> Article 44 of the Constitution provides for a uniform civil code for the citizens of India. It states, “The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India”. What does uniform civil code mean here? We already have a uniform criminal code-one that applied to all in the territory of India. We also have a number of civil laws which are uniform – like The Contract Act, The Transfer of Property Act, and The code of civil procedure, etc. So, this uniform civil code really referred to family laws sometimes called personal laws.

The Muslim members of the Constituent Assembly who spoke on the uniform civil code were all men. Except for Tajmul Hussain from Bihar, all of them fought relentlessly to exclude the Muslim Community from this Article. At the other end of the spectrum were three stalwarts for special change and equality for women – Minoo Masani, a Parsi, Raj Kumari Amrit Kaur, a Christian and Hansa Mehta a Hindu who wanted it to be made a fundamental right. Neither view point was accepted and it was made a directive principle of state policy-postponing the problem to be sorted out by a future government.

It is more than half a century since Article 44 was enacted. But successive government have not shown the necessary gumption and courage to act upon it. Though off and on the need for a uniform civil code is detected a small but vociferous section of the Muslim community. India’s largest minority-opposes it on grounds of religious interference; and the large but quieter voice of gender justice is dispelled resulting in uncertainties and continued discrimination. It is then that one remembers the word of Acharya Kirpalani, a congressman, spoken when the Hindu personal laws were being radically reformed in 1955-56 (despite the violent opposition of an orthodox president and Hindu religious leaders).<sup>8</sup> He said “we call our state a secular state – A secular state goes neither by scripture nor by custom. It must work on sociological and political grounds. If we are a democratic state, we must make laws not for one community alone.

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7. CONSTITUENT ASSEMBLY DEBATES (1948) Vol. VIII Pg. 548.

8. Leila Seth – A UNIFORM CIVIL CODE EQUAL RIGHTS FOR ALL WOMEN – CONSTITUTIONALISM HUMAN RIGHTS FOR THE RULE OF LAW– Edited by Prof. M.C. Sharma-2008 at Pg. 115.



Discrimination against women enshrined in the law exists just as acutely in the Muslim personal law in India. What is worse is that here attempts by the courts to improve their position have roused the wrath of sections of the community. In the Shah Bano case, impoverished divorced woman denied maintenance by her ex-husband, was granted it by the Supreme Court in 1985 on grounds other than those of Muslim personal law. The subsequent uproar compelled the pusillanimous, note-seeping government of the day to rush a bill, the speciously titled “Muslim Women (Protection of Rights on Divorce Act, 1986, through parliament in order to nullify the judgment and deny Muslim women this protection. It was a shameful capitulation.

Hindu law governs all Hindus, as also Buddhists, Jains and Sikhs. Muslim law applies to Muslims, Christian law governs Christians, and parse law applies to parse’s. Jews have their own personal law. There is an secular civil law that the parties may opt for, the Special Marriage Act of 1954 under which persons professing any faith or differing faith can marry. If they are married under the Special Marriage Act, the determination of their heirs and right to inheritance or succession is then governed by the Indian Succession Act, 1925 which applies to all who marry under the Special Marriage Act except Hindus. Therefore, Hindu as well as Muslim law has within it, several schools which may prescribe, for example, differing sets of legal heirs. These religious laws are derived originally from religious texts and their interpretations by scholars or courts, interspersed with customary law, which, may differ in different parts of the country. These laws have also been modified by legislation from time to time. Now, with the exception of the Muslims and the Jews matrimonial law for almost all the other communities in India is statutory. These statutes, however, often make only piecemeal changes in the original religious laws, thus retaining vestiges of an older discriminatory system.<sup>9</sup> These personal laws go with an individual across the states of India where they are the part of the laws of the land and the individual is entitled to have the individual’s own personal law applied and not the

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9. Available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/127714/18/10\\_chapter%205.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/127714/18/10_chapter%205.pdf), Justice Sujata Manohar, “Inter-personal Laws in India” ([indiacode.nic.in/coiweb/fullact1.asp3Tfinm=00+56](http://indiacode.nic.in/coiweb/fullact1.asp3Tfinm=00+56)). (Last accessed on 24/09/2007).

law which would be applied in the local territory.<sup>10</sup> Thus, the religion and personal laws in India are more or less closely intertwined. The idea of a common civil code, therefore, strikes at the heart of custom and orthodoxy of the various religious communities.

The Framers of Indian Constitution clearly indicated the meaning of the word personal law in Entry 5 of list III (concurrent list) of the 7<sup>th</sup> Schedule of Constitution, which says:

*“Marriages and divorce; infants and minors, adoption, wills’ intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.”*

The matters specified in entry 5 of list IIIrd of the Constitution were the matters which were governed by personal law under the Government of India Act, 1935. Thus, the matters enumerated in this item are subject to legislation by the State, which include the personal laws. Article 246(2) clearly provides that parliament or the state legislature have power to make laws with respect to any of the matter enumerated in list IIIrd of the seventh schedule. Moreover, in a secular State personal laws relating to such matters as marriage, succession and inheritance could not depend upon religion but must rest on the law of the land. A uniform civil code is accordingly necessary for achieving the unity and solidarity of the nation which was envisaged by the very preamble to the constitution of India.<sup>11</sup>

In this regard, the word ‘Endeavour’ and ‘Secure’ are of most important. These two words indicate that State can apply the liberal approach as well as can adopt inter-mediatory arrangement for securing a uniform civil code for the citizen

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10. Justice Rumapal, “Religious Minorities And The Law” in J. Duncan M. Derrett., Newyork; THE FREE PRESS, (1968) P.34.

11. Prof. Bhatia. K. L; “A TEXT BOOK ON LEGAL LANGUAGE AND LEGAL WRITING,” P.418. And Deshta Kiran, “UNIFORM CIVIL CODE – IN RETROSPECT AND PROSPECT” Deep & Deep Publications, New Delhi (1999), Pg.44.

of India. The word 'State' used in Article 44 is of wide amplitude and has a close reference to Article 12 of the Constitution of India. The in depth study of Article 12, the judicial interpretation given from time to time makes it abundantly clear that the States includes, Government and Parliament of India, Government and State Legislature of each of the States and all local or other authorities either within the territory of India or under the control of the government of India. In this way, all authorities functioning within the territory of India/under the Constitution are under obligation to make efforts towards one civil code.<sup>12</sup>

### **CONTROVERSIES ON THE HINDU CODE AND OTHER PERSONAL LAWS IN INDIA**

The process of reform began in 1948 when Dr. B.R. Ambedkar of the Select Committee wrote the first draft of a Hindu Code Bill that would codify and reform Hindu Personal Law. This edition was comprised of eight sections: part one delineated who would be considered a Hindu and did away with the caste system. Significantly, part one stipulated that the Hindu Code would apply to anyone who was not a Muslim, Parsis, Christian, or Jew, and asserted that all Hindus would be governed under a uniform law. Part two concerned marriage; part three adoptions; part four, guardianship; and part five: the policy on joint family property. This last clause was quite controversial as it included the untraditional allocation of property to women. Part six concerned more policies regarding women's property, and parts seven and eight established policies on succession and maintenance.<sup>13</sup>

Controversy arose with certain elements of the first draft. For example, Ambedkar's version of the Hindu Code Bills conflicted with traditional Hindu Personal Law by allowing divorce. "To a Hindu, marriage is sacramental and as

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12. CONSTITUENT ASSEMBLY DEBATES (1948) Vol. VIII, *Available at* [http://www.kit.nl/gender/wp-content/uploads/publications/529\\_bwGenderP.pdf](http://www.kit.nl/gender/wp-content/uploads/publications/529_bwGenderP.pdf). (Last accessed on 24/09/2016).

13. Said by Mukut Biharilal Bhargava, Ref:- Chavan Nandini and QutubJehan Kidwai, "Personal Law Reforms and Gender Empowerment, A debate on Uniform Civil Code," Published by hope India Publications, Delhi. Pg, n. 108.

such indissoluble”.<sup>14</sup> Marriage was not a contract, as the newly reformed Code Bills made it out to be. The Bills also “established one joint family system of property ownership for all Hindus,” doing away with regional rules<sup>15</sup>. It also allotted part of the inheritance to daughters, while giving widows complete property rights where they had previously been restricted. The draft also established “Hindu” as a negative category, defining it by the exclusion of Muslims, Parsis, Christians, and Jews. Those who practiced Sikhism, Jainism, and Buddhism, as a result, felt under these codes. However, they argued they were members of different religions with their own customs, traditions, and values. Moreover, such a broad designation ignored the tremendous diversity of region, tradition, and custom in Hinduism. Nehru claimed that in his attempt to unify the Hindu community, it made sense to define Hindu in the broadest possible sense. This, though, led to devastating consequences as will be highlighted later. For these reasons, conservative Hindus in the Constituent Assembly immediately opposed the draft. Realizing that he needed to make important concessions, Nehru split the Bill into different sections. He asked the Assembly to consider only the first fifty-five clauses that concerned marriage and divorce. Even after weeks of debating, disagreement was still ripe. Ambedkar eventually resigned because of his frustration with the standstill in Parliament.

In the next election, the Indian Congress Party won sweeping victories and so, Nehru began a comprehensive effort to devise Hindu Code Bills that could get passed. He separated the last draft of the Code into four separate bills, the Hindu Marriage and Guardianship Bill, the Hindu Succession Bill, the Hindu Minority and Guardianship Bill, and the Hindu Adoption and Maintenance Bill. These were all met with significantly less opposition and they were all passed between the years 1952 and 1956.<sup>16</sup>

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14. The Hindu Code Bill, Ref:- Joanna de Groot & Sue Morgan, “SEX, GENDER AND THE SACRED: RECONFIGURING RELIGION IN GENDER HISTORY,” Blackwell Publishing Ltd. U.K.

15. Available at [https://www.revolvy.com/main/index.php?s=Hindu%20Code%20Bill&item\\_type=topic](https://www.revolvy.com/main/index.php?s=Hindu%20Code%20Bill&item_type=topic). (Last accessed on 02/12/2016).

16. “Betrayal of A Nation: Sharia Law in the UK,” Dr. Riccardo Privitera, Available at [http://rprivitera.newsvine.com/\\_news/5566316-betrayal-of-a-nation-sharia-law-in-the-uk](http://rprivitera.newsvine.com/_news/5566316-betrayal-of-a-nation-sharia-law-in-the-uk). (Last accessed on 02/12/2016).

Indian Muslim Personal Law is largely based on the Sharia, which is a system based on the Qur'an, hadith (sayings and doings of Muhammad and his companions), Ijma (consensus), Qiyas (reasoning by analogy), and centuries of debate, interpretation, and precedent (Jahin and Kahlmeyer, 2007). Sharia has been defined as a "long, diverse, complicated intellectual tradition rather than a well-defined set of specific rules and regulations that can be easily applied to life situations".<sup>17</sup> Codification and reform of the law has been attempted several times in India, most notably in the 1980s. However, the Congress Party of Rajiv Gandhi flip-flopped on the issue in reaction to the perceived erosion of Muslim electoral support. Therefore, the Muslim Personal Law is still unreformed as of yet. Indian Muslims are the most adverse to any steps towards a uniform civil code. They argue that such would infringe upon minority rights.

Christian Law covers the entire spectrum of family law so far as it concerns Christians in India. It is, to a great extent, based on English law but there are laws that originated on the strength of customary practices and precedents as well. Christian Law in India has undergone significant changes in recent years. The Indian Divorce (Amendment) Act of 2001, for example, brought in considerable changes to the grounds available for divorce.<sup>18</sup>

### ***Judicial Advancement and Uniform Civil Code***

#### ***Court's Circuitous Course in the Absence of Uniform Civil Code:***

The absence of Uniform Civil Code has led the Supreme Court to follow a circuitous course in its attempt to do substantial justice. At the very outset, for deciding a bunch of writ petitions before it, the court posed the following questions for the resolution of the problem. It was held in the case of *Sarla Mudgal v. Union of India*.<sup>19</sup> 1. whether a Hindu husband, married under Hindu law, by

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17. Available at <http://cyberadvocate.in/mod/page/view.php?id=1008>: (Last Accessed on 02/02/2016) Tina M. Thomas - A Uniform Civil Code In India : The Flaws Of The Personal Laws System and Goa As A Model For Common Law, INT. AFFAIR JOURNAL, Vol.5, No.1, FALL 2009 at p.8&9.

18. 1995 AIR 1531, 1995 SCC (3) 635.

19. AIR 1982 SC 1261 (1983) SCR (1) 32.

embracing Islam, can solemnize a second marriage. 2. whether such a marriage without having the first marriage dissolved under the law would be a valid marriage que the first wife who continues to be a Hindu and 3. whether the apostate husband would be guilty of the offence under section 494 of the Indian Penal code, 1860.

The judiciary have shown its concern over contradictions in the personal laws of various communities and emphasized the need to enact a uniform civil code for all the citizens of India. In *Reynold Rajamani and Anr. v. Union of India*<sup>20</sup> the Supreme Court of India rejected a prayer to remove the discrimination between men and women under section 10 of the Indian Divorce Act 1869. Hence it is applicable to Christians, the court based its approach on the limit of the courts' jurisdiction. It was held that when a legislative provision enumerated the grounds of divorce, those grounds limit the courts jurisdiction and the court cannot rewrite the laws, so add grounds of divorce not permissible under the section.

In the high lighted case of *Mohd. Ahmed Khan v. Shah Bano Begum*<sup>21</sup> the Supreme Court has drawn the attention of the parliament with full realization of the difficulties involved in bringing persons of different faith and persuasion on a common platform. In this case the court held that a common civil code will help the cause of national integration by removing disparate loyalties to law which has conflicting ideologies while awarding maintenance to a divorced Muslims Women under section 125 of the Code of Criminal Procedure, 1973 held that this section is truly secular in character because the liability impose by section 125 to maintain close relatives who are indigent is formed upon the individual obligation to the society to prevent vagrancy and destitution. This is the moral edict of the law and morality cannot be clubbed with religion. But lot of objections and protest was raised against this decision of Hon'ble the Supreme Court by fundamentalists. Major opposition came from a section of the Muslim Community. It was criticized on erroneous ground that Supreme Court had no power to interpret Quarnictents

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20. AIR 1983 SC 1261.

21. AIR 1985 SC, 945.

and that the ruling interfered with their personal law which was claimed to be immutable. They objected even the slightest reform or change in their personal law in the name of religion or in the name of immutability of the law as ordained by the Allah or prophet. Therefore, the Government had to frame, Muslim Women (Protection of Rights on Divorce) Act, 1986, which deprived Muslim, divorced women of the benefit of a secular law given in famous Shah Bano's case. This law does not give any benefit to divorced Muslim women, but on the contrary is unconstitutional as it discriminates the divorced women on the grounds of religion, and dignity of women, equality and equal opportunity for all as given in the preamble of the constitution is also not saved. A Muslim Women get maintenance during the Iddat period, but later on she is not entitled to get maintenance from her husband after the completion of Iddat period. So for this purpose Muslim Woman (Protection of Rights on Divorce) Act 1986 was passed by the parliament.

In *Maharishi Avadhesh v. Union of India*<sup>22</sup> the Supreme Court dismissed a petition seeking a writ of Mandamus against the Government of India to introduce a Common Civil Code. The court took the view that it was a matter for the legislature. The court cannot legislate in these matters. In the same petition, the Apex Court declined to grant a declaration nullifying the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court also dismissed the prayer to direct the Government, not to enact a Shariat Act so as to affect the rights of Muslim Women.

In *Pannalal Bansilal Pitti & Ors. Etc v. State of Andhra Pradesh & Anr*<sup>23</sup> the Supreme Court (with reference to the A.P. Hindu Religious and Charitable Endowments Act, 1987) rejected the challenge based on the argument, that the law should apply to per sons professing all religions.

Then in *Sarla Mudgal v. Union of India*<sup>24</sup> the Division Bench of the Supreme Court comprising Kuldeep Singh and Mr. R.M. Sahai J.J., shown their concern

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22. (1994) 1 Supp. SCC 713.

23. AIR 1996 SC 1023 : (1996) 2 SCC 498 : AIR 1996 SCW 507.

24. 1995 AIR 1531, 1995 SCC (3) 635.

over contradictions in the personal laws of various communities and observed that Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Article 25 of the Constitution guarantees religious freedom whereas Article 44 seeks to divest religion from social relation and personal law. The matters of secular character such as marriage, adoption, succession and guardianship etc. cannot be brought within the guarantee enshrined under Articles 25, 26 and 27 of the Constitution of India.

In *Ahmedabad Women Action Group v. Union of India*<sup>25</sup> the Supreme Court stated at the very outset that the petitions mentioned above did not deserve disposal on the merits, as the issues involved were matters of policy with which the Supreme Court would not ordinarily have concern (the court cited numerous earlier cases, adopting the same approach). Further, the issue regarding Muslim Women etc. Act was already pending before another Bench.

After the bold decision in *Sarla Mudgal's* case a review petition was filed by women's organization 'Kalyani'. The writ petition and review petition were disposed of in *Lily Thomas and others v. Union of India*.<sup>26</sup> Here again the question involved was whether a hindu who is already married and having wife living gets converted into Islam and marries again commits bigamy or not under section 494 of the Indian Penal Code 1860. The court clearly held that till the time of marriage of a Hindu is dissolved under the Act none of the spouses can contract second marriage. Further, the supreme court has emphasized that in order to curb the tendency on the part of Hindu Males to resort to conversion to Islam, whenever they want to have second wife, the legislature must enact uniform civil code as directed under Article 44 of the constitution of India.

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25. (1997) 3 SCC 573: AIR 1997 SC 3614.

26. 2000 (2) ALD Cr 686, 2000 (1) ALT Cr 363, 2001 (1) BLJR 499, 2000 CrLJ 2433, II (2000) DMC 1 SC, JT 2000 (5) SC 617, 2000 (4) SCALE 176, (2000) 6 SCC 224, 2000 (2) UJ 1113 SC.



In another landmark judgment in case of *Danial Latif v. Union of India*<sup>27</sup> a five judges constitutional bench of the Supreme Court uphold the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and held that a Muslim divorced women has right to maintenance even after Iddat period under the Act of 1986. The court said that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife, which clearly extends beyond the Iddat period in terms of section 3(1)(a) of the Act. Also a divorce women who has not remarried and who is not able to maintain herself after completion of Iddat period can proceed as provided under section 4 of the Act against her relations who are liable to maintain here in proportion to the properties which they may inherit on her death according to Muslim have from such divorced women including here children and parents. If the relatives are found unable to pay her maintenance the magistrate may direct to State Wakf Board established under the Wakf Act, 1913 to pay such maintenance.

In *John Vallamottom v. Union of India*<sup>28</sup> – This case was hit the headlines in the national media. The Supreme Court has emphasized the need to enact uniform civil code as envisaged under Article 44 of the Constitution. This evoked a public debate in the country. In the instance case the Constitutionality of section 118 of the Indian Succession Act, 1925 was in question. It was contended that the said section was discriminatory to the Christian community because it prevented a Christian from bequeathing his property for religious and Charitable purpose. While delivering the decision justice V.N. Khare then the Chief Justice of India has made reference to Uniform Civil Code and two judges who heard the case also seem to have agreed with the learned Chief Justice. The Chief Justice confirms and fortified this approach by abstracting a statement from justice Benjamin Cardozo that the “Old order may change yielding place to new” and as Albert Campus said that stability and change are the two sides of the same law coin. Bearing this dynamism in mind the Chief Justice Khare evaluated the provision of

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27. (2001) 7 S.C.C. 740, 742.

28. Writ Petition (civil) 242 of 1997.

Section 118 of the Indian Succession Act 1925 and declared it discriminatory to the Christian community.<sup>29</sup>

In *Pragati Vargis and etc. v. Cyril George Vergis and etc.*<sup>30</sup> In this case Sec. 10 of the Indian Divorce Act, 1869 was challenged on ground of illegal declaration. A Christian woman for the purpose of divorce from her husband, she can prove adultery altogether cruelty and desertion such condition was impose in section 10 of the Act. The Bombay High Court held that Section 10, 17 and 18 of the Indian Divorce Act are illegal and unconstitutional and these sections clear cut violating the Article 21 of the constitution of India.

In *Noor Saba Khatoon v. Mohammad Kasim*<sup>31</sup> – The Supreme Court held that children are entitle to get maintenance from his father. Divorced Muslim woman is entitled for custody and guardian of her children until age and majority. Husband is liable to pay maintenance under Muslim Personal Law and The Code of Criminal Procedure.

Thus, Judiciary has played a very dynamic role by stressing upon the need for the enactment of Uniform Civil Code under Article 44, which is part of Directive Principles of State Policy of the Constitution of India. The judiciary has gone to the extent of holding that the time has now come for a complete reform of personal laws and make a uniform law applicable to all people irrespective of their sex, religion and caste. Now it is the obligation of the State to endeavour to secure a Uniform Civil Code so that national unity and stability is maintained and the personal laws are reformed in the light of changing values of modern society. The Uniform Civil Code is required not only to ensure uniformity of law between communities but uniformities of laws within communities ensuring equality between rights of men and women.<sup>32</sup> In fact the absent of uniformity in laws governing these vital

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29. Varinder Kumar, “Uniform Civil Code Revisited : A Judicial Analysis Of John Vallamottom,” JILI 2003 V-4-5 at Pg.315.

30. AIR 1997 Mumbai 349.

31. AIR 1997 SC 3280.

32. F. Angel, Hindu Men Monogamy And UCCXXX(50) ECONOMIC AND POLITICAL WEEKLY 32, 1995.

inter-personal relationships has resulted in the denial of Constitutionally mandated equality of all citizens before the law and equal protection of laws.

### ***Academic Response to Uniform Civil Code***

It is very regrettable and unfortunate that even today 63 years after the commitment of the Constitution we have nothing like uniform civil code which was considered by our constitution makers as a golden thread for the nation's unity and Integrity. It is very important to know the opinion of various religious communities and the persons who have some recognition and identity on behalf of such religious sects. The purpose to study the public response is that whether it is the opposition from the side of general public or a small portion of total population of the country which is opposing this directive. Due to some limitations of the study it has been, difficult to conduct All India-Survey to elicit the general public opinion therefore; the author has tried to make critical evaluation of the available material in this regard.

### **Views of some Muslim great thinkers:**

Muslims are the largest minority group in India. Muslims are divided on the question of reform of the personal laws. The Orthodox Muslims oppose the reform about personal law while secularists are in its favour. The advocates of retaining existing Muslim personal law argue that their personal law is a comprehensive code of life. It has its origin in divine revelation and is therefore, immutable. Muslim law relating to marriage, divorce and inheritance, it is claimed by the critics of a common civil code, have been handed down by the prophet and are in this sense, divine and must, therefore, be unquestionably obeyed.<sup>33</sup> If we trace but the history of this notion of Muslim community, we can find it in the constituent assembly itself, when the provision for the uniform civil code was being deleted in the Assembly it was strongly opposed by members representing the Muslim community.<sup>34</sup>

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33. See, H.A. Gani, REFORMS OF MUSLIM PERSONAL LAW (1938), Pg.58.

34. Available at <http://164.100.47.132/LssNew/constituent/vol7p11.html>. (Last accessed on 02/02/2017).

Thus Buddhists and Jains were subsumed under Hindu (general constituency). It is to be noted that with the exception of Muslims, all other minorities either acquired silently to the notions of a uniform civil code or vigorously supported it.<sup>35</sup>

Mr. Bukhari of Muslim League in July, 1972 stated on the floor of Maharashtra Legislature Assembly that Indian Muslims would never concede to parliament or any State legislature, the power to legislate on matters relating to Islam. He feared that if attempts were made to infringe Muslim Personal Law through legislation, it might endanger peace. In the same session, Mr. Banatwala also of the Muslim League said “Polygamy was not a rule among Muslims, but an exception. He further contended that the government had no right to pass any law to regulate, Muslim Marriage.<sup>36</sup> Mr. Banatwala also spoke against the government and people who wanted change Muslim Personal Law in public meeting held on September, 25, 1973, at Aurangabad referring to the Constitutional provision relating to Common Civil Code.<sup>37</sup>

### **Views of Minority Communities in India:**

The Christians and parsis have taken noticeable objection to the merger of their separately codified personal laws into a Common Civil Code. Nothing is known about the reaction of the Small Jewish Minority in India to the idea of reforming their religious law or replacement of it by a common civil code. The Young Women’s Christian Association and the joint women’s programme have taken considerable trouble to organize debates and discussion on uniform civil code both within the Christian community and with non-christian members of Young Women Christian Association. They have passed several resolutions demanding reform of personal law as well as uniform civil code. The national Convention of

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35. See, Vasudha Dhangambar, *Towards the Uniform Civil Code* (1989), Pg.6, Available at <http://journal.lawmantra.co.in/wp-content/uploads/2015/05/17.pdf>. (Last accessed on 02/02/2017).

36. See, TIMES OF INDIA July 1972, H.A. Gani Op cit pp.58-59, Vasudha Dhangamwar Op cit, pp.49, Also See, V.R. Krishna Kyer, on the *Muslim Women (Protection of Rights on Divorce) Act 1986* (1987 ed.) p.1.

37. See, Tahir Mahmood, “*Common Civil Code Personal Minorities*” in Mohammad Imam ed. *MINORITIES AND LAW* (1972), Pg.467.

the Young Women Christian Association held in 1982 and in 1986 a resolution in favour of the uniform civil code was passed.

The joint women programme had been holding meetings and conventions with regards to the uniform civil code since 1975. In 1982, after the communal riots against the Christian Fisherman in Kanyakumari and against converts to Islam in Meenakshipuram, the joint women programme began to think about the causality of communal riots. They arrived at the conclusion that communal riots take place because different communities do not have the same status in law and uniform civil code will go a long way towards, “disciplining the personal lives of all people and reduce communal tension.” A National meeting on “Need For A Uniform Civil Code” was held in 1983. Its resolution in favour of uniform civil code was sent to the Prime Minister of India. But these Christian organisations are the exception to the rule. Even the Young Men’s Christian Association has not thought over the subject of a uniform civil code. There are two main reasons for which the effective Muslim majority say they fear the uniform civil code viz., (i) interference with their personal law which they perceive as divine in origin, and (ii) loss of their cultural identity. The laws of all communities started out with the sanction of being divine. This is as to of Hindus, as of Christian, Parsis and Jews. What is particularly and deeply alarming is the fact that the very individuals who had argued the case of reform of the Muslim Personal Law are not talking in terms of the pure state of Islam.<sup>38</sup>

### **Views of Non-Muslim Communities in India:**

Mr. Mani Shanker Aiyar says in his recent book “Confessions of a Secular Fundamentalist” that there is one and only one factor standing in the way of the reform of Muslim Personal Law and it is the demand for “immediate imposition by brute majority, of a uniform civil code on the Muslims by a political party. Which is communalist and anti-muslim and who in the guise of a uniform civil code want to impose a Hindu Civil Code. But Mr. Aiyar fails to note that Indian

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38. See, Tahir Mahmood, “Shah Bano Judgment-Supreme Court Interprets Koran”, *Islamic Comparative Law Quarterly*, (1985), Pg.110.

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women are not asking for a Hindu Civil Code but a uniform civil code, one that is just and most fair to women.

Professor Upendra Baxi, Rajni Kothari and Mr. V.M. Jarkunde (Supreme Court) saw the desirability of the uniform civil code but they were uneasy about passing it without the consent of the Muslims. They also flat that an enough though had gone into it that it was an issue for threatening the Muslim.<sup>39</sup> The conceptualization of uniform civil code has always proved to be difficult. Justice Chagla's tentative suggestion was under stated.<sup>40</sup> "One community might be prepared to accept and work social reform, another may not yet be prepared for it and article 44 does not lay-down that any legislation that the state may embark upon must necessarily be of an all-embracing character. The state may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise."

Justice V.R. Krishna Iyer, Former Supreme Court Judge opines that a uniform civil code is not only desirable but necessary when viewed from the angle of national integration. He further stated that one country, one nationality; one citizenship and one legal system is axiomatic and we cannot think in terms of personal laws that vary with communities, religious and sects.<sup>41</sup> If advocated that the uniform civil code should contain the best elements of the different civil laws of the country, instead of being just a replica of the Hindu Code Bill. Hindus, who are secularist, should advise the Muslims to insist upon the acceptance of Shariat as the basis of the uniform civil code on rational grounds, rather than oppose the evolution of the uniform civil code on communal considerations.<sup>42</sup>

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38. See, Tahir Mahmood, "Shah Bano Judgment-Supreme Court Interprets Koran", *ISLAMIC COMPARATIVE LAW QUARTERLY*, (1985), Pg.110.

39. See, *ENPRESS MAGAZINE*, June 29, 1986.

40. See, Chagla quoted in Vasudha Dhagamwar. *Op. Cit.* Pg.4 also see Narasu Appa Mali's Case AIR 1952 Bom. 85-87.

41. See, V.R. Krishna Iyer, "One Country, One Nationality, And One Legal System," *EXPRESS MAGAZINE*, June 29, 1986.

42. See, *RADIANCE*, Sept. 10, 1972 at Pg.3.

### ***Muslims Should Consider Uniform Civil Code***

High court of judicature for Kerala at Calicut Justice Kamal Pasha has urged Muslims organisations in the country to rethink their opposition to having a uniform civil code or the same law for all citizens irrespective of their religion. India has separate laws for its citizens, depending on which religion they profess. For example, inheritance divorce and marriage are all governed by different laws for different citizens, depending on whether they are Hindu, Christian or Muslim. Some practices that can input jail term in certain cases such as polygamy for Hindus are not punishable for people belonging to other communities, pasha pointed out that the current Muslim personal law is based on the compilation called 'Mohammedan Law', which was created by M. Mulla who was a Parsi who lived during British times. The community should rethink whether all provisions in this code are to be considered sacrosanct. Justice Pasha said the emphasis should be to find out best laws from all the different codes and compile them into a single code that can be applied to everyone. A uniform civil code is post of the long term goals enshrined in the Indian constitution and is one of its directive principles.<sup>43</sup>

Mr. Arun Shourie, noted Journalist and Former Central Minister, also addressed the seminar on Uniform Civil Code held in Cochin on December 8, 1985. He stated that the task of drawing up a common civil code should be entrusted to modern secular jurists and not to clergies or theologian of any religion, for this the best form, the code of different communities in the country as well as the codes in force elsewhere in the world be garnered.

Former Attorney General of India Mr. Soli Sorabjee, Senior Advocate of Supreme Court, feel it would be unwise at this stage, to have a mandatory code for all citizens and the best course would be to adopt the best and most acceptable principles in all personal laws in preparing the draft code and public opinion could be built to support this code.<sup>44</sup>

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43. Muslim should consider uniform civil code, Justice Kamal Pasha Judge, Kerala High Court Calicut, accessed on 10 Nov. 2013 (wikileaks).

44. Quoted by M.J. Antony, "Should Secular Law be a personal choice" EXPRESS MAGAZINE, June 29, 1986.

### **NEED FOR UNIFORM CIVIL CODE IN INDIA**

The need for a comprehensive legislation is to effect an integration of India by bringing all communities into a common platform, which is at present governed by personal laws that do not form the essence of any religion. There should be a uniform civil code irrespective of all religions as far as social ethics are concerned.

It is interesting to note here that even the most homogenous societies have to look for a way to deal with the differences between and amongst the people. The quest for uniformity begins when it becomes no longer desirable to keep the diverse personal laws of the various communities, which are unjust and discriminatory especially to women when it relates to the matters relating to the marriage, divorce and children guardianship, adoption, succession and the ownership of the property. The only concern is to create justice amongst all people of all per situations.<sup>45</sup> In all this, laws play a critical role in giving objective expression to such religious personal laws, stating them in explicit terms and rendering them enforceable. Therefore, the only possible solution is to codify all personal laws and merge them under a uniform civil code. A small step in this direction is to provide a secular law of marriage, divorce, guardianship, succession, adoption, and so forth that could be adopted for by adherents of any or every faith.

Further, there is also need to reform all or any of the personal laws by enacting legislation to the effect. Thus, it is the imperative duty to each and every part of the governance to work towards one common code. A single law for all the citizens will provide social justice to the all sections of the society. Even the preamble to the Constitution also clearly provides for social justice (political, economical and social), which we can achieve only when we have one common law for all citizens of India.

There is universal agreement that personal laws, regardless of the community are skewed against to women. A universal civil code will most affect these issues

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45. Dr. Tejinder K. Soni, Personal Laws : 'Need for a Uniform Civil Legislation' ILJ V.1 Pg.35.



relating to the marriages, divorce, maintenance, succession and so forth. In almost all recent cases where the need for a uniform civil code has been emphasized women were at the receiving end of torture in the garb of religious immunity. Apart from the famous Shah Bano and Sarla Mudgal's cases, there have been several other pleas by wives whose husbands converted to Islam only in order to get married again without divorcing the first wife. A single citizenship one flag and a common law applicable to all citizens and India's obligations under International law also require a common civil code in respect to the personal matters of the various religious communities.

India having ratified International Convention on Civil and Political Rights, 1966 and the International Convention on Elimination of All Forms of Discrimination against women, 1979 is bound to enforce the relevant provisions and ensure gender equality under national laws.<sup>46</sup> Moreover, the Uniform Civil Code exists in the State of Goa called Family Law applicable on all communities, which was framed and enforced by the Portuguese colonial rulers through various legislations in the 19<sup>th</sup> and 20<sup>th</sup> centuries. After the liberation of Goa in 1961, the Indian State scrapped all the colonial laws and extended the central laws to the territory but made the exception of retaining the family laws because all the communities in Goa wanted it.

The Times of India, a leading daily National Newspaper of India also conducted a poll for their program titled 'Lead India' to know the opinion of people on this sensitive issue of framing Uniform Civil Code in India. Later on 24<sup>th</sup> December, 2011 in a show telecasted on channel 'Star One' it showed that a vast majority 75 percent answered in favour of enactment of Uniform Civil Code whereas 19 percent said 'no' and 6 percent did not reply.<sup>47</sup> So this report further supports the view that enactment of a comprehensive legislation is a necessary to build integrity and solidarity in democratic country like India. Now is time to redeem

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46. Jyoti Ratan, "Uniform Civil Code In India : A Binding Obligation Under International & Domestic Law" JOURNAL OF THE INDIAN LAW INSTITUTE, Vol.-46:4, See page 577.

47. Telecasted on 24th December, 2012.

the pledge of equality given to the women of India and enshrined in the our constitution.

### CHALLENGES IN THE ENACTMENT OF UNIFORM CIVIL CODE

The question of adopting a uniform civil code is a legal question because it is mandate addressed to the State by Article 44 of the Constitution; which is the highest law of the land.<sup>48</sup> Furthermore, the object of incorporating Article 44 in the Constitution of India is to govern all relationship of life by uniform system of law for the reason that human relationships and human requirements do not differ by the mere fact that different group of persons belongs to different relations. The success of a democratic process lies in harmonizing these group interests leading ultimately to common good.<sup>49</sup> The anxiety of the minorities about their personal law does not relate to the laws themselves but rather to their privileged position as minorities in a country.<sup>50</sup> The Bhartiya Janta Party (BJP), principal party in the coalition in 2000 has been supporter of a uniform civil code over the post many years. The biggest obstacle in Implementing the uniform civil code apart from obtaining a consensus is the drafting of a common civil code. Many parsis also argue that without separate personal law system the result would be a uniform civil code that would inevitably reflect mainly Hindu Interests.<sup>51</sup> The contest over the uniform civil code is not new. It came into being since the inception of the Indian Constitution. But unfortunately this Article 44 is very often opposed by one section of the community or the other.

- (i) *Role of the media:* The contribution of the press has been unfortunate. Even the national press has to give its readership good stories. Disastrous events and outrageous opinions make better copy sell more. But the

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48. D.D. Basu, "UNIFORM CIVIL CODE FOR INDIA" Prentice Hall of India Pvt. Ltd., New Delhi (1996).

49. Crereld James Larson; RELIGION AND PERSONAL LAW IN SECULAR INDIA : Social Science Press Delhi (2001), pp.32-33.

50. Mohammad Imam, "MINORITIES AND THE LAW" N.M. Tripathi Pvt. Ltd. Bombay (1972) See page 386.

51. Reema Pal, "RELIGIOUS MINORITIES AND THE LAW in J. Deencan M. Derett. "RELIGION, LAW AND THE STATE IN INDIA" Newyork : The Free Press : (1968) See page274.

other responsibilities too, not least of which is to state the truth however dull it may be. Dr. Mehar Master Moos was a person who was strongly opposed to the idea of uniform civil code.

So National Press and it has failed to communicate with the masses on the uniform civil code. The persons interviewed infavour of the code were all Hindus. All those persons interviewed were not leaders of their community.

- (ii) *Role of Politicians:* The role of the politicians has also been most unfortunate. It is an exercise in brinkmanship of the worst possible kind, while members of avowedly communal parties can be expected to take certain positions. Mr. Banatwala is even on record for demanding an Islamic Criminal Law more sophisticated minority leaders also expressed similar opinions on the Muslim Women Bill. Politicians have so far not taken any strong effort in the field of Uniform Civil Code. The politicians, therefore, are silent on this important issued.
- (iii) *Role of the Government:* The Government has not done anything to discharge this burden. No steps have been taken to explain the contents and significance of Article 44. no measures have been adopted to fight the obscurantists who opposed the Uniform Civil Code. In 1963 the government had expressed its intention of appointing a committee to study how the problem of family law reforms was tackled in the contemporary Muslim countries. On September 26, 1986 the then Prime Minister, Mr. Rajiv Gandhi directed the Law Ministry to speed up work on drafting a Uniform Civil Code and bring the Bill before the parliament at the earliest.

In 1986, the Muslim Women (Protection of Rights on Divorce) Bill was introduced by the Government with a view to alenogate Shah Bano case judgment. It appears that parliament wanted to codify and clarify the personal law of Muslim and accord protection to Divorced Women so that there may not be any controversy over it in future of course, a

government committed to democratic ways may not like to stifle the sentiments of any section of the electorate.

- (iv) Role of Society, Communities and Associations (NGOs) are very relevant for common civil laws for Indian citizens.

### **CONCLUSION AND SUGGESTIONS**

India is land of religions, Hindu, Buddhists, Jains, Christians, Muslims, Parsis, and Sikhs from the nation. They co-exist as separate and distinct Identities. Each community has its own personal laws. It appears to be absolutely essential in the interest of the unification of the country for building up one single nation with one single set of personal laws in the country. Thus, a comprehensive legislation in the form of Uniform Civil Code is must for the unity of a nation like India, which is applicable to everybody living within the territory of Indian Union Irrespective of caste, creed or religious persuasions. It is disappointing that various governments in power failed to fulfill their promise of implementing one such code. Although judiciary has shown their concern for the enactment of one such code but our governments are not bothered to enact and implement one such code. Therefore, to summarize it can be said that a secular India needs a uniform civil code for the protection and promotion of national unity, and solidarity for its citizens. Accommodating person laws of all religions under such a code may be an uphill task and may require time and it will be urgent need of every societal life, so common civil code require urgent need of singing time.

The debate over a uniform civil code is ripe in India, but perhaps this essay highlights some of the main considerations that should take place. First of all, law is important for it delineates how and when the state exercises its authority. A state that is governed by a system of religious personal laws obviously has a different power structure than one governed by a common law. India's system is taking power away from the state and placing it in the hands of religion, whereas a unified civil code could possibly do the opposite. In a country wreaked by instability, it would be in their best interest to place power where it belongs. Moreover, the blatant violation of rights under such a system should be rebuffed

in the world's largest democracy. As India moves forward into the next century, it is often hailed over China for its democratic governmental structure. But, this means nothing if the key foundation of democracy – individual rights is jeopardized. So, it is my hope that the opinion and recommendations outlined in this essay can steer my peers in India down a just path and towards a prosperous future.

Chagla, J. (as he then was) also unfolded the liberalised approach of the *Shariat Act* (XXVI of 1937) when he pointed out that the rule of decision in various cases enumerated in section 2 of the said Act, which includes marriage and dissolution of marriage, shall be that the Muslim personal law apply only where the parties are Muslims. In other words, according to the enlightened judge, the Act does not stipulate that the Muslim personal law shall necessarily apply when only one of the parties is a Muslim.

Thus, for doing substantial justice according to the clear rule of law in all such cases as are posted before the Supreme Court, it is indeed imperative to have a common civil code. In *Sarla Mudgal*, if on the one hand Sahai, J., “considering the sensitivity and magnitude of the problem, both on the desirability of a uniform or common civil code and its feasibility,” suggests a strategy of rationalisation coupled with a mediate measure of *Conversion of Religion Act*, Kuldip Singh J., on the other hand builds up a case for moving in that direction without any more delay by having “a fresh look” at article 44 for its implementation. It is in the context of realising this objective, he seems to have adopted a precipitate approach, directing the government to “file an affidavit” by the stipulated date, letting the court know the steps taken and efforts made towards moving in the direction of securing the uniform civil code for all its citizens. The present analysis finds that the bench of the Supreme Court in *Lily Thomas* tends to dilute this emphasis by treating all such observations as if those were “incidentally made.”

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# UNIFORM CIVIL CODE: A QUEST TOWARDS ENSURING UNIFORM PROPERTY RIGHTS FOR WOMEN

*Dr. P. Sree Sudha\**

## INTRODUCTION

Right to property is well recognized as an important instrument of freedom and development of human beings in general and women in particular throughout the world. It is not merely a symbol of a dignified living but also significantly affects the life-style of the individual concerned as well as the society as a whole.<sup>1</sup> Presently, no one can deny the fact that in law women are equal to men, not only in enjoying the property right, but also in all walks of life. But, one can also not deny the fact that in reality, apart from a few exception of the elite class, the women's right to property is still a long lasting dream in the Indian society.<sup>2</sup> At present the most material and controversial issue is regarding women's property rights under succession laws. Whether, the law of succession in India is biased against women or not is a very important aspect of the ongoing debate on their economic equality with man. In the age of gender equality, the debate has laid emphasis on women lacking the economic independence in the area fully dominated by male. The important role played by the laws of succession with regard to facilitating or impeding economic independence is generally ignored. Succession

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1 M.P. Jain (2006), "OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY," Lexis Nexis, India, ed. p 470.

2 Flavia Agnes (2012) "His and Hers", ECONOMIC AND POLITICAL WEEKLY Vol. XLVII, No. 17 pp10-12.

laws deals with the passing of property from one generation to another, if they are biased against woman, they lose a great chance of acquiring property in a manner, which is available to males, and thus their chance of being economically independent is greatly hampered.<sup>3</sup> As the succession matters are governed by personal laws and India is known for the multiplicity of personnel laws, hence succession laws are diverse in their nature, owing to their varied origins.<sup>4</sup> In this article an attempt was made to analyze the evolution of succession rights of Hindu woman from pre independence to present era, also discussed case laws interconnected with succession and finally argues for need for uniform civil code for giving uniform property rights to Hindu woman.

### **EVOLUTION OF HINDU WOMAN PROPERTY RIGHTS FROM PRE INDEPENDENCE ERA TILL DATE**

Women were not recognized as coparceners in the family under ancient Hindu law. The object of not giving such rights to a widow under Shastric Hindu law was to avoid division of property and separation of joint family. Under Shastric law a woman was entitled to an equal share on partition between sons or between father and sons but she had no right to claim partition. There are two schools of Hindu Law namely Mitakshara School and Dayabhaga School will govern succession of a Hindu. The Dayabhaga School (even known as Bengal School of Hindu Law) prevails mostly in Bengal area, while Mitakshara School prevails in the rest parts of India. Both schools differ in two main particulars, namely, the law of inheritance and the joint family system. Mitakshara School recognizes two modes of devolution of property, namely, survivorship and succession.<sup>5</sup> The rules of survivorship apply to the joint family property and the rule of succession applies to property held in absolute severalty by the last owner. However the Dayabhaga School recognizes only one mode of devolution and that is succession.

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3 Vinay Reddy (2000) “*Women and Succession Laws in India—A Critical Analysis*,” INDIAN SOCIO-LEGAL JOURNAL, Indian Institute of Comparative Law, Jaipur, Vol. 26, p19.

4 “*Towards Equality*”, Report of the Committee on the Status of Women in India, Ministry of Education & Social Welfare Department of Social Welfare, Government of India, December 1974.

5 B. Sivaramayya (2011), “*The Indian Succession Act, 1925*”, in K. D. Gangrade (ed.), SOCIAL LEGISLATION IN INDIA VOL. II, p 89 , Concept Publishing Company Pvt. Ltd., New Delhi.

A joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters.<sup>6</sup> However, a Hindu coparcenary<sup>7</sup> is a much narrower body than the joint family and includes only those persons, who acquire by birth an interest in the coparcenary property. A property inherited by a Hindu from other relations is Hon'ble Supreme Court has laid down the incidents of coparcenary in the case of *Hardeo Rai Vs. Shakuntala Devi and Ors*<sup>8</sup> it was held that, “*The incidents of coparcenership under the Mitakshara law are :*

- *first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person;*
- *secondly that such descendants can at any time work out their rights by asking for partition;*
- *thirdly that till partition each member has got ownership extending over the entire property conjointly with the rest;*
- *fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common;*
- *fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and*
- *sixthly, that the interest of a deceased member lapses on his death to the survivors.”*

*(Emphasis Added)*

The most important of the coparcenary is that a female cannot be a coparcener under Mitakshara School. Even a wife, though she is entitled to maintenance out

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<sup>6</sup> Dr. Poonam Pradhan Saxena (2012), “FAMILY LAW II” Lexis Nexis , 3rd ed, p 77.

<sup>7</sup> “Coparcenary property” means property where only certain person, they being the sons, grandsons, and great-grandsons of the holders of the property, acquire by birth an interest in the property, for the time being. These persons, termed to be “coparceners”, enjoy a coparcenary right, i.e a right by birth in the coparcenary property, a right of ownership and possession over the entire coparcenary property.”

<sup>8</sup> AIR 2008 SCC 2489.



of her husband's property, and has to that extent an interest in his property, is not her husband's coparcener. A mother is not a coparcener with her son. There can be no coparcenery in between a mother and a daughter. While considering the position of a woman in the family, a reference must also go to the concept of stridhana.<sup>9</sup> The position of a female member in the joint Hindu family was minimal in nature. She had no independent rights and was mostly dependant on the male counterparts of the family. She had no absolute rights in the joint family much less in the coparcenery, wherein she was not even recognized. But certain enactments in the pre independence era did try to change this poor scenario and important amongst them are:

### ***The Hindu Widow's Remarriage Act, 1856***

A Hindu widow cannot remarry under the customary Hindu Law. But this enactment brought a radical change in this situation and removed the obstacle in the way of remarriage.<sup>10</sup> This Act also provides that on her remarriage, she will forfeit her right and interest in the estate and the estate would pass to the next heirs of her deceased husband, as if she were dead. This was one of the major reasons for the failure of this.

### ***The Indian Succession Act, 1925***

This enactment modified the Hindu Law to some extent and Section 57, 214 and schedule III deals with the Will executed by a Hindu and prescribe certain formalities in respect thereto. The provisions of this Act are made applicable to the "Wills and codicils" made by any Hindu on or after 01.09.1870 within the territories of Bengal and within the original jurisdiction of the High Courts of Judicature at Madras and Bombay.<sup>11</sup>

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9 Poonam Pradhan Saxena (2008) "*Succession Laws and Gender Justice*" in Archana Parashar and Amita Dhanda (eds), *REDEFINING FAMILY LAW IN INDIA: ESSAYS IN HONOUR OF PROF SIVARAMAYYA* (New Delhi: Routledge) P 282.

10 Accessed from the web site: [lawcommissionofindia.nic.in/51-100/report81.pdf](http://lawcommissionofindia.nic.in/51-100/report81.pdf), (Last accessed on 10/03/2017).

11 Accessed from the web site: [districtcourtsnamchi.nic.in/laws/indian\\_succession\\_act\\_1925.pdf](http://districtcourtsnamchi.nic.in/laws/indian_succession_act_1925.pdf), (Last accessed on visited on 29/03/2017.).

***The Transfer of Property Act, 1882***

This Act supersedes the customary Hindu Law as to transfer of property.

***The Hindu Inheritance (Removal of Disabilities) Act, 1928***

This Act was intended to remove the difficulties in the way of a Hindu relating to inheritance and enables him to receive share in partition.

***The Hindu Law of Inheritance (Amendment) Act, 1929***

The Act admits the son's daughter, the daughter's daughter, the sister and the sister's son as heirs next after father's father and before The Hindu Women's Rights to Property Act, XVIII OF 1937. It gave new rights of inheritance to widows, and strikes at the root of a Mitaksharacoparcenery. It gave better rights to Hindu women in respect of property but gave her a limited estate, which is held by her only during her lifetime and it then reverts back to her husband's heirs. She had no right to dispose of such property.

***The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946***

This enactment involved certain rights in Hindu married woman to claim separate residence and maintenance in given circumstances. These are some of the instances, which show attempts of law makers in the pre independence era to codify the vast and vivid Hindu Law. But these attempts were not enough to recognize the rights of the female Hindu in a family. Even after these enactments a female Hindu had no independent and substantial rights barring few or to say fewer instances provided under the above mentioned codified parts. They had minimal impact in uplifting the basic women's right in the family. Post independence era did witness major overhaul in the system. While considering the rights of women, a reference to Article 14, 15 and 16 of the Constitution of India is a must and crucial.<sup>12</sup>

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<sup>12</sup> Article 14 guarantees equality before law and equal protection of the law. Article 15 prohibits the discrimination on the ground of religion, race, caste, sex and place of birth. Article 16 as well guarantees equality of opportunity and prohibits discrimination in matters of employment.

### ***The Hindu Succession Act (HSA) - 1956***

The Hindu Succession Act enacted in 1956 was the first law to provide a comprehensive and uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance. The preamble<sup>13</sup> of the Act speaks only of the law relating to intestate succession. The Act applies to Hindus. The enactment brought some radical changes in the law of succession without abolishing the joint family and the joint family property. It does not interfere with the special rights of those who are members of Mitakshara Coparcenery. Section 6 of the Act recognizes the rights upon the death of a coparcener of certain of his preferential heirs to claim an interest in the property.

Every coparcener is held to be entitled to the share upon partition. A wife cannot demand partition but if a partition does take place, she is entitled to receive share equal to that of her son and can enjoy the same separately even from her husband. Section 6 of the Act provided that the devolution of interest will be by survivorship. However it also came with a proviso that if such Hindu has left surviving female relative specified in Class I or a male relative specified in that class, who claims through such female relative, his interest shall devolve by testamentary or intestate succession and not by survivorship. It created the theory of notional partition.

As such HSA<sup>14</sup> gave rights<sup>15</sup> to the female relative of a Hindu to some extent and she was entitled to succeed the interest in the property. Section 14 of the Act has one of the path breaking provision, whereby the female Hindu was given the absolute ownership in the property acquired before or after the commencement of this Act.

Any movable or immovable property acquired by a female Hindu by inheritance or partition or in lieu of maintenance or by Gift or by her own skill or in any other manner was included in the scope of this section. The rights of female Hindu

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<sup>13</sup> The Preamble of HSA 1956 "An Act to amend and codify the law relating to intestate succession among Hindus."

<sup>14</sup> Hindu Succession Act of 1956.

<sup>15</sup> Section 6 and 8 of HSA.

were tried to be recognized by this effort. Hon'ble Supreme Court in the case of *V. Tulasamma vs. Sesha Reddy*<sup>16</sup> held that, a Hindu widow is entitled to maintenance out of her deceased husband's estate irrespective whether that estate may be in the hands of male issues or coparceners. She can follow the estate for her right of maintenance, even if it is in the hands of third person having notice of her rights.

This Act is applicable to all the Hindus, Buddhists, Jains and Sikhs by religion. It applies to both the Mitakshara and the Dayabhaga systems.

### ***The Hindu Succession (Amendment) Act, 2005***

Based on the Law Commission's recommendations,<sup>17</sup> the Parliament of India passed the Hindu Succession (Amendment) Act, 2005 (IND) (Amendment Act, 2005), for granting the same coparcenary rights to daughters in the Hindu Mitakshara coparcenary as apply to sons.<sup>18</sup> The Hindu Succession (Amendment) Act, 2005 seeks to make two major amendments in the Hindu Succession Act, 1956. First, it is proposed to remove the gender discrimination in section 6 of the original Act. Second, it proposes to omit section 23 of the original Act, which disentitles a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares therein. Section 6 of the Hindu Succession Act, 1956 has been restated for convenience- Devolution of interest in coparcenary property. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. The Act provides that if the deceased had left him

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16 AIR 1977 Supreme Court 1944.

17 Law Commission of India, "174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law" (May 2000).

18 Under the Mitakshara School of Hindu law sons have a right by birth in coparcenary property and are joint tenants; whereas, under the Dayabhaga School, after their father's death, sons inherit his property and form coparcenary but are tenants-in-common and not joint tenants.

surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be and not by survivorship. The Hindu Succession (Amendment) Act, 2005 is a landmark. After 50 years, the Government finally addressed some persisting gender inequalities in the 1956 Hindu Succession Act (1956 HSA), which itself was path-breaking. The 2005 Act covers inequalities on several fronts: agricultural land; Mitakshara joint family property; parental dwelling house; and certain widow's. The amendment has come into operation from 2005.

### ***State Amendments to The Hindu Succession Act***

The concept of the Mitakshara co-parcenary property retained under section 6 of the HSA of 1956 has not been amended ever since its enactment. Though, it is a matter of some satisfaction that five states in India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka have taken cognizance of the fact that a woman needs to be treated equally both in the economic and the social spheres. As per the law of four of these states, (Kerala excluded), in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. Kerala, however, has gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. In fact, it has abolished the Joint Hindu family system altogether including the Mitakshara, Marumakkattayam, Aliyasantana and Nambudri systems. Thus enacting that joint tenants be replaced by tenants in common.

Legislations passed by the five states are given below:

- The Joint Hindu Family System (Abolition) Act, 1975, Kerala.
- The Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

- The Hindu Succession (Tamil Nadu Amendment) Act, 1989.
- The Hindu Succession (Karnataka Amendment) Act, 1994.
- The Hindu Succession (Maharashtra Amendment) Act, 1994.

The policy of these State Legislatures to confer upon daughters the hitherto denied right in coparcenary property has been lauded widely, yet the amendments have been criticised for ambiguous language and interpretational difficulties. Doubts have also been expressed regarding

their constitutionality, particularly in the exclusion of daughters married before such amendment came into force. So this exclusion of married daughters again became a big hurdle for the female Hindu and still their rights were not fully recognized.

### **JURISPRUDENCE ON PROPERTY RIGHTS OF HINDU WOMEN – A SAGA FROM LIMITED ESTATE TO ABSOLUTE ESTATE**

In democratic countries, the judiciary is given a place of greater significance because the courts constitute a dispute-resolving mechanism. And, in case of written constitution the judiciary has more specific and special role to play. In the countries having written constitution, courts are given power of declaring any law or administrative action which may be inconsistent with constitution as unconstitutional and hence void. Like other democratic countries the constitution of India is also a member of the family of written constitutions. It seeks to establish a secular polity founded on social justice. But at the same time it also guarantees to all persons equally freedom of conscience and the right to profess, practice and propagate religion and to religion denominations; the right to establish and maintain religious and charitable institutions, manage their religious affairs and own property and administer property according to law. Although their rights are subject to reasonable restrictions but if they come in the way of the government while implementing the constitutional mandate contained in Article 44 of the Constitution, it is the judiciary who has empowered to decide the dispute between

the two. Though it is quite implicit from the spirit of Article 44 that the State<sup>19</sup> is under constitutional obligation to make earnest efforts towards the establishment of one civil code for all persons yet if these provisions come in direct conflict with related provisions in Part III, then the judiciary has been given regulatory power under Indian Constitution. The courts have not only regulatory power but it has very wide powers to expound the provisions of the Constitution and bring into practice the basic philosophy of the Constitution and bring into practice the basic philosophy underlying the provision.

In *Vaddeboyina Tulasamma v. Vaddeboyina Shesha Reddi*,<sup>20</sup> Supreme Court held that under sastricHindu law a widow has a right to be maintained out of joint family property and her interest in joint family property was absolute and not limited.<sup>21</sup> Though earlier in *Gummalapura Taggina Matada Kotturuswami v. Seta Veeravva*,<sup>22</sup> SC had construed the words “possessed of” in sec. 14(1) of The Hindu Succession Act, 1956 in a widest sense yet it took Bhagwati J. to interpret the intendment of legislature. He stated:

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19 Article 12 (Part III). Article 36 says that State in Part IV has the same meaning as in Part III.

20 1977 SCR (3) 261, 1977 AIR 1944.

21 Like many earlier cases this case was referred to S.C. for interpreting sec. 14(1) & sec. 14(2) of The Hindu Succession Act, 1956. Hitting at the inapt draftsmanship of the statute, Bhagwati, J opined “It is indeed unfortunate that though it became evident as far back as 1967 that subsections (1) and (2) of section 14 were presenting serious difficulties of construction in cases where property was received by a Hindu female in lieu of maintenance and the instrument granting such property pre- scribed a restricted estate for her in the property and divergence of judicial opinion was creating a situation which might well be described as chaotic, robbing the law of that modicum of certainty which it must always possess in order to guide the affairs of men, the legislature, for all these years, did not care to step in to remove the constructional dilemma facing the courts and adopted an attitude of indifference and inaction, untroubled and un- moved by the large number of cases on this point encumbering the files of different courts in the country, when by the simple expedient of an amendment, it could have silenced .judicial conflict and put an end to needless litigation.

22 3[1959] Supp. 1 SCR 968.

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*“.....the legislature was brought to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Sastric Law, to abridge the stringent provisions against the proprietary rights and to recognize her status as an independent and absolute owner of the property. And that sub-section (2) of section 14 must be read in the context of sub-s. (1) to leave as large a scope for operation as possible to sub-s. (1).....”.*<sup>23</sup>

Hon’ble Supreme Court in the case of *Ganduri Koteshwaramma vs. Chakiri Yanadi*<sup>24</sup> held that, “The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.”

The issue of devolution of the property of a Hindu widow who died issueless recently came before Rajasthan High Court in *Umrao Devi v. Hulas Mal* (2015).<sup>25</sup> The widow had inherited property from her husband on his death who had died prior to the passing of the HSA, 1956. Under un-codified classical law prevalent before the HSA, 1956, women enjoyed only limited rights in the inherited property. Once the HSA, 1956 came into force, the limited rights of property in the hands of a widow under classical law before 1956, were immediately converted to absolute rights. The HSA, 1956 lays down separate rules for the devolution of property for Hindu males and females dying intestate. According to the rules of

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<sup>23</sup> 1977 SCR (3) 261, 1977 AIR 1944.

<sup>24</sup> AIR 2012 SC 169.

<sup>25</sup> *Umrao Devi v. Hulas Mal*, 2015 (2) WLN 267 (Raj).



devolution for a woman dying intestate, in the absence of her husband and children, the heirs of the husband inherit her property<sup>26</sup> as if the property belonged to him. The HSA, 1956 lays down different categories of heirs for males dying intestate as: Class I, Class II, Agnates<sup>27</sup> and Cognates.<sup>28</sup> The order of succession is hierarchical and the heirs under Class I and Class II are mentioned expressly in Schedule of the present Act, the agnatic and cognatic heirs are not expressly mentioned.

The widow in *Umrao Devi* had become the absolute owner of the property upon the coming into effect of HSA, 1956, but died issueless. In the absence of her husband's Class I and Class II heirs, the other relatives of her husband – two relatives related to her husband by blood and another relative related to his brother's family by marriage – claimed rights in her property. Referring to the definition of agnates and cognates, the order of succession among agnates and cognates, computation of degrees and also the rules of devolution of property of females dying intestate as mentioned under HSA, 1956, the Court held that only the two relatives related by blood to her husband fell within the definition of agnate and thus were entitled to share in her property. In the matter of the devolution of property of a Hindu female, the law still favours the husband's

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- 26 Hindu Succession Act, 1956 (IND), s 15 – General rules of succession in the case of female Hindus: The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16:
- firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
  - secondly, upon the heirs of the husband;
  - thirdly, upon the mother and father;
  - fourthly, upon the heirs of the father; and
  - lastly, upon the heirs of the mother.
- 27 Hindu Succession Act, 1956 (IND), s 3 – Definitions and interpretations:  
In this Act, unless the context otherwise requires– “agnate” – one person is said to be an “agnate” of another if the two are related by blood or adoption wholly through males.
- 28 Hindu Succession Act, 1956 (IND), s 3 –Definitions and interpretations:  
In this Act, unless the context otherwise requires–  
(...)  
(c) “cognate” – one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males.

close or distant relatives, whom wife may have never seen in her life, over her own parents, to have legal claim over her property. The legislature needs to re-examine the law in this regard as it is illogical and discriminatory.

The issue of whether an allotted property with restricted interest, given to a wife in lieu of her consent for her husband's second marriage, was enlarged into an absolute estate<sup>29</sup> by virtue of s 14(1) of the HSA, 1956 came before the Madras High Court in *Jayalakshmi Ammal v. Kaliaperumal*.<sup>30</sup> In that case, the husband, married to his first wife for 26 years, had no issue from her, and wanted to marry for a second time but with the consent of his first wife. After consent was given, the husband executed a settlement deed including recitals that the allotted property was settled in the first wife's favour as he wanted to lend support to her. She was to enjoy the property only for her lifetime and, upon her death, the property would revert back to the husband if no issue was born to her. Contrary to the terms of the settlement deed the first wife alienated the property by way of sale. The High Court took note of various constitutional provisions prohibiting discrimination on the basis of sex and provisions that provide protective discrimination in favour of women. It ruled that social justice demands that a woman should be treated equally both in the economic and the social sphere.

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29 Hindu Succession Act, 1956 (IND), s 14 – Property of a female Hindu to be her absolute property: Any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation: In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act. (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

30 *Jayalakshmi Ammal v. Kaliaperumal*, AIR 2014 Mad 185.

31 *Santosh Popat Chavan v. Sulochana Rajiv*, High Court of Bombay, Second Appeal Nos 119 and 405/2013 decided on 12 December 2014.

The right of a widow to claim partition of her husband's ancestral property was questioned recently in *Santosh Popat Chavan v. Sulochana Rajiv* (2014).<sup>31</sup> The issue was whether the widow could file a partition suit to claim partition of her husband's share in ancestral property. AB Chaudhari J of the Bombay High Court in that case looked into the Shastric Hindu law and various other statutory laws with respect to a widow's right to claim partition of joint family property belonging to her husband's family. The Court noted that the HWRPA, 1937 gave a widow a right to claim partition in order to provide her with some source of income for her survival and maintenance; but the progressive reason behind the HSA, 1956 was to provide a full right to a widow in her husband's share in ancestral property. It further held that by virtue of a widow being a Class I heir in the Schedule under the HSA, 1956, she is entitled to succeed to the entire joint family property share of her deceased husband with the same magnitude of estate which her husband would have received had he been alive, ie her right to receive an estate after the death of her husband, like that of other coparceners in the family, has been fully recognised and accepted by the HSA, 1956. It observed that since the HSA, 1956 has abolished the concept of limited right or the concept of reversion, a widow could deal with the property of her husband without any threat of reversion. Referring to the Latin phrase *sui juris*, which means "one's own right", in terms of rights under the HSA, 1956, the Court opined that the right of a widow under the HWRPA, 1937 was of a limited nature, but under the HSA, 1956 she has an absolute right and, hence, she can act *sui juris*. It further held that the HSA, 1956 does not impose any prohibition on her from filing the suit independently. Applying the other doctrine – *ubi jus ibi remedium* – to the HSA, 1956 the Court held that when there is a right there is a remedy, therefore if she has a right in property then she also has a right to claim her share and is independent of other coparceners to demand partition. The Court further pronounced that the right having been given to a woman under the HSA, 1956, she cannot be told that although she has a right to receive a share, she is not entitled to file a partition suit. The Court concluded by holding that it would amount to a retrograde step if a contrary interpretation was given.

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<sup>31</sup> *Santosh Popat Chavan v Sulochana Rajiv*, High Court of Bombay, Second Appeal Nos 119 and 405/2013 decided on 12 December 2014.

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***Property Rights of Hindu Women: Prospective or Retrospective***

The prospective or retrospective operation of Sec. 6 of the HSA, 1956,<sup>32</sup> as amended by the Amendment Act, 2005, had been an issue with different High Courts but has now finally been settled by the decision of the Supreme Court's two-judge Bench, AK Goel and Anil R Dave JJ, In *Prakash v. Phulavati*.<sup>33</sup> While discussing the operation of the amendment the Court made it clear that the text of the amendment expressly provides for prospective application as the right conferred on a "daughter of a coparcener" is "on and from the commencement of Amendment Act, 2005". Further, the Court held that there is neither any express provision for giving retrospective effect to the amended provision nor necessary intention to that effect. Speaking about retrospective application, the Court ruled that even social legislation could not be given retrospective effect unless so intended by the legislature. In the present case, the Court noted that the Amendment Act, 2005 had expressly made the amendment applicable on and from its commencement, and the proviso keeping dispositions, alienations or partitions prior to 20 December 2004 (the day the Bill was tabled for the first time in Parliament) unaffected, did not lead to the inference that the daughter could be coparcener prior to the commencement of the Amendment Act, 2005. The Court stressed the need to read harmoniously the "Explanation" with the substantive

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32 *Hindu Succession Act, 1956* (IND), s 6 – Devolution of interest in coparcenary property: On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—by birth become a coparcener in her own right in the same manner as the son; have the same rights in the coparcenary property as she would have had if she had been a son;

(...) Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation – For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

33 *Prakash v Phulavati*, Supreme Court of India, Civil Appeal No 7217 of 2013 decided on 16 October 2015.

provision being limited to a transaction of partition affected after 20 December 2004. It categorically laid down that the object of giving finality to transactions prior to the said date was not to make the main provision retrospective in any manner. The “Explanation” could not be permitted to reopen any partition<sup>15</sup> which was valid when effected. Finally it has settled the issue that the rights under the amendment are applicable to surviving daughters of living coparceners as on 9 September 2005 – the day of commencement of Amendment Act, 2005 – irrespective of when such daughters were born. Disposition or alienation, including partitions which had validly taken place before 20 December 2004 as per law, is to remain unaffected but the partition effected thereafter is only to be governed by the “Explanation”.

Thus the Supreme Court has finally settled for the prospective application of the Amendment Act, 2005. It has further ruled that statutory notional partition<sup>16</sup> is not required to be registered as it does not fall within the traditional concept of partition. The literal interpretation of the court, though it appears to be logical, has resulted in giving limited rights to daughters in coparcenary property. A daughter born after 9 September 2005 becomes a coparcener by birth in ancestral property where property has not been partitioned. A daughter born before 9 September 2005 does not become coparcener in ancestral property if property had been validly partitioned in accordance with accepted modes of partition before 20 December 2004. The accepted modes of partition under classical Hindu law were by way of notice, filing of suit, appointment of arbitrator, oral partition, family arrangement, making a will of undivided share, etc. As per the Amendment Act, 2005, after 20 December 2004 only those partitions are recognised which have been done either by way of registered deed or by decree of court, ie after the said date, a daughter having a right in coparcenary property could claim reopening of a partition if the partition has not been done either by way of registered deed or by decree of court.

The issue of the prospective or retrospective effect of s 6 had also come before the single judge of the Bombay High Court in *Ashok Gangadhar Shedge v.*

*Ramesh Gangadhar Shedge*.<sup>34</sup> Due to doubt about the correctness of the decision rendered by the Division Bench of the Bombay High Court in *Vaishali Satish Ganorkar v. Satish Keshavrao Ganorkar*,<sup>35</sup> the single judge Bench in *Ashok Gangadhar Shedge* requested that the matter be referred to a larger Bench. The issue was then referred to a larger Bench in *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*.<sup>36</sup> The issue involved in *Vaishali Satish Ganorkar* was whether a daughter, who was born before 9 September 2005 could claim to be coparcener when her father remained alive on and after 9 September 2005. The Division Bench comprising of Mohit S Shah CJ and Mrs Roshan Dalvi J held that on and from 9 September 2005, the daughter of a coparcener would become a coparcener by virtue of her birth in her own right just as a son would be, and she would have the same rights and liabilities as that of a son. Emphasising the words used in the provision such as “shall be”, “on and from” and that vested rights could not be unsettled by imputing retrospectively upon legislation by judicial interpretation or construction, the court ruled in favour of prospective application. Disagreeing with the view expressed by the Division Bench of the Bombay High Court in *Vaishali Satish Ganorkar* the single judge RG Ketkar J, in *Ashok Gangadhar Shedge* went on to hold that even if the daughter of a coparcener has by birth become coparcener in her own right and she has the same rights in the coparcenary property as she would have had if she had been a son, the same shall not affect or invalidate any disposition or alienation including any partition which is duly registered under the *Registration Act, 1908* (IND) or effected by the decree of a court or testamentary disposition of property which had taken place before the 20 December 2004. Considering that the Amendment Act, 2005 is for giving equal rights to daughters in the Mitakshara coparcenary property as those of sons, the court observed that by excluding a daughter from participating in the coparcenary ownership not only contributed to discrimination against her on the ground of gender, but also has led to oppression and negation of her fundamental right of equality guaranteed by the *Constitution*.

34 *Ashok Gangadhar Shedge v. Ramesh Gangadhar Shedge*, 2014 (4) BomCR 797.

35 *Vaishali Satish Ganorkar v. Satish Keshavrao Ganorkar*, 2012 (5) BomCR 210.

36 *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*, AIR 2014 Bom 151.

An appeal against the order of the Division Bench in *Vaishali Satish Ganokar* was dismissed by the Supreme Court but at the same time the Supreme Court held that the question of law would be kept open for consideration. The Full Bench consisting of MS Shah CJ and MS Sanklecha and MS Sonak JJ, was constituted in the case of *Badrinarayan Shankar Bhandari* on the reference in the *Ashok Gangadhar Shedge* case. The questions of law which were referred before the Full Bench were: whether s 6 of the HSA, 1956 as amended by the Amendment Act, 2005 is prospective or retrospective in operation; and whether it applies to daughters born before the commencement of the HSA, 1956 or is limited in application to daughters born after the commencement of the amended Act. The Full Bench went into the history and development of Hindu Law, the Law Commission Report, the Report of the Standing Committee of Parliament and the Statement of Objects and Reasons of the Bill introduced in Parliament to find out the true intent of the Parliament in amending s 6 of HSA, 1956 by the Amendment Act, 2005. The court ruled that a bare perusal of the first part of the new provision showed it to have prospective application to grant coparcenary rights by birth only to daughters born on or after 9 September 2005, whereas the later part of the provision showed the retroactive intent of the legislature by granting rights to daughters who were born before the amendment but were alive on the date of coming into force of the amendment. Hence, if a daughter of a coparcener had died before 9 September 2005 she had not acquired any rights in the coparcenary property and so her heirs had no rights in the property. The court laid down two conditions necessary for applicability of the amended s 6: (i) the daughter of the coparcener (daughter claiming benefit of amended s 6) should be alive on the date of the amendment coming into force; and

(ii) the property in question must be available on the date of the commencement of the Amendment Act, 2005 as coparcenary property.

Before the Supreme Court ruling of *Prakash*, the Bombay High Court's decision in *Badrinarayan* brought in some clarity and entitled daughters to enjoy their coparcenary share. The progressive approach of the Bombay High Court was considered by various High Courts for ruling in favour of daughters. The dilemma

about the applicability of s. 6 of the HSA, 1956 as amended by Amendment Act, 2005 has now been settled after the decision of the Supreme Court in *Prakash*. Even after the Supreme Court's ruling as regards a daughter's right in coparcenary property, the question remains to be answered about the status and share of a child of a living daughter, particularly when a share in coparcenary property is to be reserved for a child of a predeceased daughter. If the right of a daughter is restricted before a certain date then one fails to understand the significance of the birth right given to a daughter born before 20 December 2004. The Amendment Act, 2005 raises other issues. Neither HSA, 1956 nor the Amendment Act, 2005 has defined the meaning of the terms "coparcenary," "coparcenary property," "survivorship," "partition" etc. Continued reliance on the classical meaning of the concepts of a coparcener and his rights and duties, coparcenary property, partition, rules of devolution of coparcenary property on partition etc, has brought in more ambiguity, particularly due to the inclusion of daughters. The Court has also not emphasized the need to define the different terms used under the classical Hindu law.

From the above analysis, it is a sad reflection of our times that women's status in India in some ways has actually regressed in the past one thousand years. For a society which proudly claims to be marching towards socio-economic development and modernity, the value of women in the family and in broader social perception has been steadily eroded as stridhanam has degenerated into dowry and legal disagreements in sharing of property.

### ***Need for Uniform Civil Code (UCC)***

The question of Uniform Civil Code is a very-very sensitive as well as subjective and diversified issue considering the fact that India is a country which has a multifarious race, caste and community.<sup>37</sup> Indian Constitution

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<sup>37</sup> The law relating to marriage, divorce, maintenance, guardianship and succession governing the Hindus, Muslims and Christians etc., is different and varies from one religion to other. There are different laws like the Hindu Marriage Act; the Hindu Succession Act; the Hindu Minority and Guardian ship Act, the Hindu Adoption and



enshrines<sup>38</sup> that the State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. Uniform Civil Code of India is a term referring to the concept of an overarching Civil Law Code in India. A uniform civil code administers the same set of secular civil laws to govern all people (citizen as well as non-citizen) irrespective of their religion, race, caste, sex, place of birth or any of these.<sup>39</sup> This supersedes the right of citizens to be governed under different personal laws based on their religion or caste or tribe. Such codes are in place in most of the developed countries.

The common areas covered by a civil code include laws related to acquisitions and administration of property, marriage, divorce and adoption. This term is used in India where the Constitution of India attempts to set a uniform civil code for its citizens as a Directive Principle, or a goal to be achieved.<sup>40</sup>

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Maintenance Act governing the personal matters of Hindus. The Shariat Act, The Dissolution of Muslim Marriage Act and the Muslim Women (protection of Rights on Divorce) Act etc., which are based on the tenets of Holy Quran, govern the personal matters of Muslims. Similarly the Indian Christians are governed by the Indian Christian Marriage Act, the Indian Divorce Act and the Cochin Christian Succession Act etc. Parsis are governed by a different set of laws. Thus it is clear that there is no uniformity in all personal laws as they confer unequal rights depending on the religion and the gender.

38 CONSTITUTION OF INDIA, Article 44.

39 Article 15 of the Constitution of India lays down a guarantee to every citizen that consists of 'No discrimination on any ground only of religion race, caste, sex, place of birth or any of these. Article 15 (3) provides that for women and children special provision can be made by the state, women empowerment enjoys constitutional protection of this Article 15 (3). Article 39 (a) (d) and (e) lay down certain principles of policy that are to be followed by State. Men and Women citizens shall enjoy equal right to an adequate means of livelihood. There shall be equal pay for equal work for both men and women and that the health and strength of worker's men and women shall not be abused. Article 42 provides for just and humane condition of work and maternity relief.

40 The *Lex Loci* Report on October 1840 emphasized the importance and necessity of uniformity in codification of Indian law relating to crimes, evidences, contract etc., but it is recommended that personal law of Hindus and Muslims should be kept outside such codification.

In the absence of a common civil code, provisions regarding to inheritance rights vary for different religions and communities. Under the Hindu Succession Act of 1956, daughters were given equal rights as sons in their father's self-earned property, if the father died intestate. They, however, had no rights to ancestral property. More progressive legislation was passed in Andhra Pradesh, Tamil Nadu – the Hindu Succession (Tamil Nadu Amendment) Act, 1989 – which gives equal rights to women as men in ancestral property. Daughters can also force a partition of ancestral property, if the share is denied or delayed. While such legislation certainly enhances the rights of women to inherit property, what this has actually achieved needs to be explored. How many women, even educated women, know their legal rights or demand them? Has this legislation resulted in any significant shift in attitudes to women's rights to inherit property, or has it merely led to men making wills excluding daughters from inheritance.

### CONCLUSION

Property Rights of Hindu women in India varies depending upon the marital status, whether the woman is a daughter, married or unmarried, deserted wife or widow or mother. It also depends on the kind of property, whether the property is hereditary/ancestral or self-acquired, land or dwelling house or matrimonial property. The multiplicity of succession laws in India, diverse in their nature, owing to their varied origin made the property laws even more complex. The principal reform was that in succession, there should be a Uniform Civil Code. The perpetuation of female property and inheritance rights helps to mitigate negative economic consequences experienced by women and their households, whilst also helping to promote women's economic security and empowerment, thereby reducing their vulnerability to domestic violence, unsafe sex and other health hazard factors. The supporters of Uniform Civil Code and abrogation of the personal laws put forth an argument that such an abrogation of personal laws and imposition of the said code would promote the cause of national integrity.

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# **MULTI-CULTURALISM OR MALESTREAMISM: A FEMINIST JURISPRUDENTIAL CRITIQUE**

*Pranusha Kulkarni\**

*In politics, nothing happens by accident. If it happens, you can bet it  
was planned that way.*

*- Franklin D. Roosevelt*

## **INTRODUCTION**

“Eleven months ago, there was a small news item that a young Muslim woman Shehnaaz Sheikh had filed a petition in the Indian Supreme Court challenging the Muslim Personal Law in the constitution... By a stroke of luck, members of Forum Against Oppression of Women (FAOW) contacted her for a discussion and this started a long and consistent campaign which continues even today... FAOW launched a signature campaign and drew the signatures of famous film and theater people and editors. Three thousand signatures were collected in the first few months. ... This publicity also brought criticism and threats. Shehnaaz’s life was threatened by fanatic orthodox Muslims including women, who criticized her for tampering with divine religious law. Politicians accused her of being anti-Muslim and being sponsored by Hindu communalists...”<sup>1</sup>

The above extract from 1985 is the living proof of our malfunctioning democracy, where everyone is purportedly equal before the law. The fact that almost three decades have passed by from the date of this incident, but literally no changes

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\* Author is an Assistant Professor at Tamil Nadu National Law University, Tiruchchirappalli.

1 Forum Against Oppression of Women, India: Muslim Family Law, OFF OUR BACKS, Vol. 15, No. 8 (August- September 1985), p. 16.

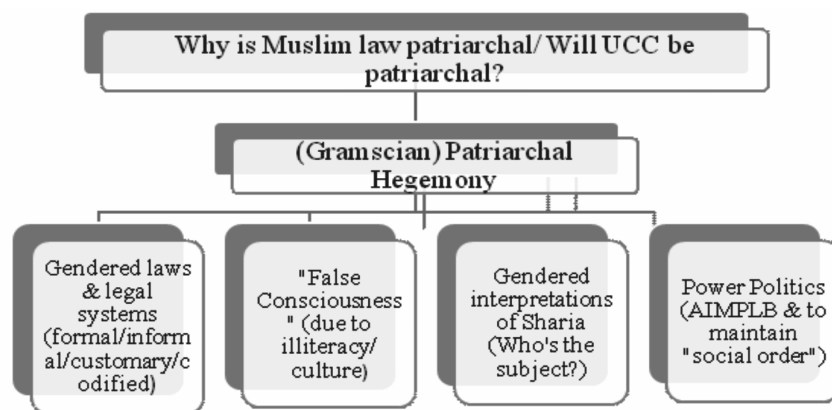
have happened on ground, stands testimony to the “double jeopardy”<sup>2</sup> faced by Indian Muslim women, whose plea for justice are echoing till today at the Supreme Court of India<sup>3</sup>, but have only been met with half-hearted attempts at revamping the Indian Muslim Personal law.<sup>4</sup> So the next obvious question is, is it that only Indian Muslim women face these legally legitimized discriminations, or Muslim women in general all over the world are victims of this systemic oppression? One fact which might answer this question is that whereas more than 22 Islamic countries the world over have banned the practice of arbitrary *triple talaq*,<sup>5</sup> it is in rampant use by Indian Muslim men, with deleterious consequences on the female victims of this egregious act.<sup>6</sup> Adding insult to this injury is the fact that this legal incongruity

- 2 “Double jeopardy” is a term coined by Frances Beale in 1970 to characterise the condition of being both female and black in the USA. By extension of this logic to the context of secular India, the author uses the word to connote the intersectionality of the identities of an Indian Muslim woman being both a woman and a Muslim. Thus, an Indian Muslim woman may as well be considered as the “oppressed within the oppressed”.
- 3 Shayara Bano v. Union of India, Writ Petition No. 118 of 2016. This is the most recent petition against triple talaq filed at the Supreme Court of India.
- 4 The author calls all the reform attempts as half-hearted because they have not brought in any substantial changes in the socio-legal position of the average Indian Muslim woman. One example which is worth quoting is the aftermath of Shah Bano: the legislation of Muslim Women (Protection of Rights on Divorce) Act, 1986, whose regressive maintenance provisions were interpreted in favour of women only in 2001, after a deadly lull of 15 long years during which period, the Indian Muslim woman was arbitrarily treated at the hands of our law. Her rightful claim of maintenance even beyond the iddat period was taken away by the new law, thus defeating her fundamental right to equality. In this situation, Danial Latifi v Union of India, 2001 (7) SCC 740 came in as an exemplary exercise of judicial creativity in conferring equal maintenance rights to Indian Muslim women, at par with Indian women following other religions.
- 5 Firstpost, Banned in more than 20 countries, practice of triple talaq continues to prevail in India, Jul 3, 2016, Available at <http://www.firstpost.com/india/banned-in-more-than-20-countries-practice-of-triple-talaq-continues-to-prevail-in-india-2869988.html> (Last accessed on 07/012017).
- 6 See, Zakia Soman & Noorjehan Safia Niaz, No More “Talaq Talaq Talaq”: Muslim Women Call for a Ban on an UnIslamic Practice, Bharatiya Muslim Mahila Andolan (2016) Available at <https://bmmaindia.files.wordpress.com/2016/01/triple-talaq-report.pdf> (Last accessed on 06/012017).

exists even when arbitrary *triple talaq* is considered not only un-Islamic,<sup>7</sup> but has also held to be unconstitutional by our Supreme Court.<sup>8</sup> What might be the possible reason for this anomaly?

### **PATRIARCHY WEDS POLITICS: PERFECT RECIPE FOR STATE SUBJUGATION OF WOMEN**

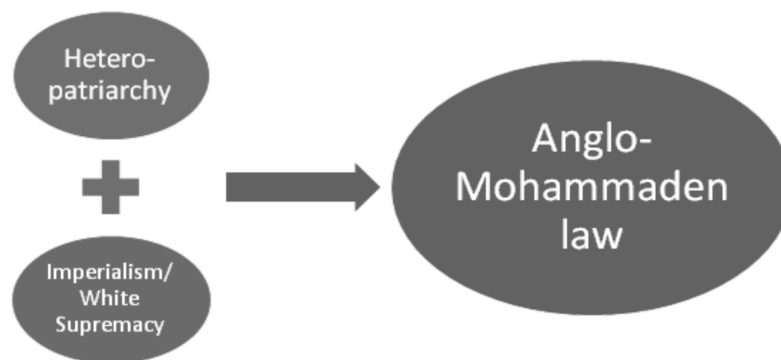
Subjugation of women by the state and its laws is not a new phenomenon in India. It started during the British period and continues till date. For the purposes of this study, the author divides the concepts as per the following map:



7 The chapter on women in the Quran draws attention to the need for arbitration before husband and wife decide to part ways. It commands: And if you fear a breach between the two, appoint an arbiter from his people and an arbiter from her people. If they both desire agreement, Allah will effect harmony between them. (4:35); See, Mohammad Azeemullah, Islam Does Not Sanction Triple Talaq in One Sitting, *The Wire*, Oct. 20, 2016, Available at <https://thewire.in/74520/islam-triple-talaq-one-sitting/> (Last accessed on 07/01/2017).

8 The Supreme Court of India laid down the unconstitutionality of arbitrary triple talaq way back in 2002, in the landmark case of *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518. The Court in this case laid down the test of "reasonable cause" and "prior reconciliation" in tandem with Quranic injunctions; see, Flavia Agnes, Muslim Women's Rights and Media Coverage, *Economic & Political Weekly*, Vol. 51 Issue No. 20, May 14, 2016; See also the recent ruling of the Allahabad High Court in *Hina & Anr. v. State of U.P.*, Writ (Civil) No. 51421 of 2016, wherein the Court has declared the practice unconstitutional. See, Live Law News Network, Personal Laws Can't Claim Superiority over Constitutional Rights: Allahabad HC, Dec 8, 2016, Available at <http://www.livelaw.in/personal-laws-cant-claim-superiority-constitutional-rights-allahabad-hc/> (Last accessed on 08/01/2017).

This paper will accordingly deal with all the four above-mentioned concepts. To begin with, let's start with the study of seeds of patriarchy and identity politics which were sown in the colonial period. The following diagram shows the relation between patriarchy, politics, and the birth of what is known as "Anglo-Mohammedan law", which is now called simply as Muslim law.



#### COLONIAL POLITICS VIS-À-VIS MUSLIM PERSONAL LAW

*"Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies."* - Groucho Marx

The above interpretation of politics by Groucho Marx stands true for what the Britishers did to the Indian Muslim law. During the colonial period, the Britishers had started codifying most of the uncoded laws, as per their understanding of what the concerned law was, not so much for the sake of welfare of Indians, but for the benefit of their own selfish economic interests. Michael Anderson in his magnum opus has highlighted this fact that, in their preference for textual sources of law, the Indian courts during the British colonial period were inclined to endorse highly orthodox forms of Islamic law which they started applying more widely and rigorously than in the pre-colonial period, ultimately contributing to a new politics of Muslim identity in the twentieth century.<sup>9</sup>

9 See, Michael R. Anderson, ISLAMIC LAW AND THE COLONIAL ENCOUNTER IN BRITISH INDIA, in David Arnold and Peter Robb (eds.), INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIA READER 65 (Curzon Press, 1993).

It is argued that the making of Muslim Personal Law in India was a British effort to facilitate achievement of two broad goals: to extract economic surplus in the form of revenue from the agrarian economy, and second, to maintain effective political control with minimal military involvement. Thus, the British followed a path of least resistance and exercised power by adapting the contours of pre-colonial political system, including law.<sup>10</sup>

### **COLONIAL CREATION OF A MONOLITHIC MUSLIM IDENTITY WITHIN A PATRIARCHAL LEGAL SYSTEM**

Due to the above-mentioned vested economic interests of the British, an artificial monolithic Muslim identity was created in India, by the artificial “Muslim law” which they enacted. This was done in order to polarise the Indian society so that such divisiveness could facilitate their rule, and yes, it did help them reach their objective.

Razia Patel in her work<sup>11</sup> writes about how diverse Muslims and their personal laws are all over the world. She highlights the fact that though the sources of Muslim law are the same everywhere, there have been considerable regional influences which have moulded the national Muslim laws in various legal systems. To quote her:

*“...Islamic jurisprudence then is better described as an ethical code rather than a uniform legal system. Various countries have different influences, and have modified these laws in their own way. All Islamic countries also do not have uniform legal systems albeit claiming to be Islamic, and the local traditions and influences have been incorporated resulting in diversity...”*

Doesn't this mean, we should analyse our current Muslim law in the larger context of our overall legal system, comprising of other personal laws too? There are

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<sup>10</sup> *Supra* note 15.

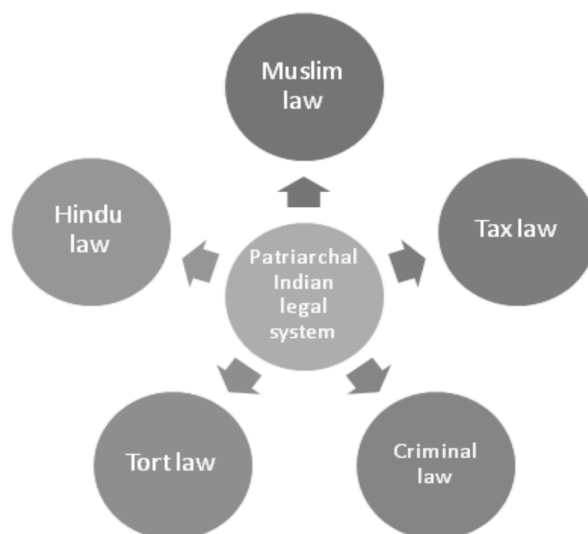
<sup>11</sup> Razia Patel, *Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice*, ECONOMIC AND POLITICAL WEEKLY, Vol. 44, No. 44 (October 31-November 6, 2009), pp. 44-49.

ample studies which have shown that Hindu law is deeply patriarchal and needs amends.<sup>12</sup> Also, we need to consider a general environment in India where there is increasing threat to women's rights in the form of rising violence against women.

The NCRB data shows Delhi in very shocking state of affairs. The number of rapes which have been reported in the previous year is the highest as compared to most cities. With the lowest percentage of 0.5 in Kolkata, a relatively high percent of reported cases has been seen in Mumbai at 7.1% increase. Delhi has seen the highest percentage increase in number of reported rape cases from 2013 to 2014, at 23.9%.

This brings us to the conclusion that Muslim law is patriarchal not in isolation, but is just one part of a juggernaut of a patriarchal legal system.

The following diagram talks about the various facets of Indian legal system that are said to be patriarchal by feminist jurists:



<sup>12</sup> See, Amita Dhanda & Archana Parashar (eds.), *REDEFINING FAMILY LAW IN INDIA*, Delhi: Routledge (2008); Also see, Archana Parashar, *FAMILY LAW REFORM AND WOMEN IN INDIA*, New Delhi: SAGE Publications (1992).



Following is the list of gender discriminatory provisions of each law mentioned above:

1. Hindu law: Succession and Guardianship laws<sup>13</sup>
2. Muslim law: Marriage, Divorce, Guardianship and Succession laws<sup>14</sup>
3. Tax law: Progressive taxation and tax-cutting is based on the idea of “separateness”, with little concept of social responsibility<sup>15</sup>
4. Criminal law: The definition of rape and consent is patriarchal<sup>16</sup>
5. Tort law: is dominated by fiscal, rather than care responsibility, thus furthering the male viewpoint of what constitutes reparation.<sup>17</sup>

Thus, we understand that Indian Muslim law is not living a lonely life out there. This contextualization of the problem will help us in better analysing Muslim law from the viewpoint of feminist jurisprudence.

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13 See, Flavia Agnes, *FAMILY LAW: FAMILY LAWS AND CONSTITUTIONAL CLAIMS*, New Delhi: Oxford University Press (2011).

14 *Ibid*; Also see, Flavia Agnes, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN’S RIGHTS IN INDIA*, New Delhi: Oxford University Press (1999).

15 See, Robin West, *THE DIFFERENCE IN WOMEN’S HEDONIC LIVES: A PHENOMENOLOGICAL CRITIQUE OF FEMINIST LEGAL THEORY*, 15 *Wis. Women’s L. J.* 149-215 (2000); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 *2001 (1996)*; Lawrence Zelenak, *Feminism and “Safe Subjects like the Tax Code”*, *REVIEW OF LAW AND WOMEN’S STUDIES*, Vol. 6:323 (1996).

16 See, Carol Smart, *LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM*, SAGE Publications (1995); See, also, *Sakshi v. Union of India*, AIR 2004 SC 3566, wherein it was recommended to the Supreme Court of India that the definition of rape under section 376 IPC should be amended to include experiences of humiliation, degradation and violation, rather than retaining the current outdated notion of rape as meaning penile/vaginal penetration only; see, *Tukaram v. State of Maharashtra*, AIR 1975 SC 185, wherein the Supreme Court gave a regressive meaning to consent by casting moral judgements on the sexual history of the victim. The Court also acquitted the accused on the ground that absence of physical injury marks on the body of the victim proves the fact that she passively submitted herself “to be raped”, thus constituting consent.

17 See, Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development*, HARVARD UNIVERSITY PRESS (1993).

### ***Seeping of Colonial Patriarchy into Indian Laws***

The relationship between imperialism and patriarchy is well documented. One example of this relationship is the deliberate erasure of feminist scholarly debates on “empire”, its relationship to “home” and its influence in shaping “domestic” and colonial identities.<sup>18</sup> Hence this process deliberately erased women’s lived experiences from the field of imperial history as it developed in the late twentieth century, even as the success of British imperialism itself receded.<sup>19</sup> Hyam<sup>20</sup> is not alone in this maneuver. The impressive series, “Studies in Imperialism” which includes Hyam’s book, infrequently attends to issues of gender or the subject of women, despite the volume of critical theoretical work available that interrogates those topics as they pertain to imperialism from a historical perspective.<sup>21</sup> Needless to say, Indian Personal laws in general, and the Anglo-Mohammadan law in particular are the products of such colonial patriarchal manoeuvring which were based on unwanted and irrelevant reliance on scriptures, that were given a colonial interpretation. The fact that current Muslim personal law is not Sharia law, but Anglo-Mohammedan law has been underscored also by the well-known scholar, Asghar Ali Engineer. To quote him:<sup>22</sup>

*The British Government, after it seized power from Mughals, established its own courts, which also heard cases pertaining to Muslim marriage, divorce, inheritance etc. In most of these courts there were either British or non-Muslim judges who did*

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- 18 See, P. J. Marshall, No fatal impact? The elusive history of imperial Britain, THE TIMES LITERARY SUPPLEMENT, 12 Mar 1993, pp. 8-10.
  - 19 See, S. Perera, REACHES OF EMPIRE: THE ENGLISH NOVEL FROM EDGEWORTH TO DICKENS, New York: Columbia University Press (1991).
  - 20 See, R. Hyam, EMPIRE AND SEXUALITY: THE BRITISH EXPERIENCE, Manchester: Manchester University Press (1990).
  - 21 See, Barbara N. Ramusack & Antoinette Burton, *Feminism, Imperialism and Race: A Dialogue Between India and Britain*, WOMEN’S HISTORY REVIEW, Vol 3 No.4 (1994), pp. 469-481.
  - 22 Asghar Ali Engineer, *Why Codification of Muslim Personal Law?*, COUNTER CURRENTS, 02 May 2009, Available at <http://www.countercurrents.org/engineer020509.htm> (Last accessed on 28/02/2017).

*not know Shari'ah law or if even Muslim judges heard these cases, most of them were trained in British laws.*

*What these judges did was to consult Hidayah, written by Mirghayani, a Hanafi scholar, and translated into English by Mr. Hamilton. Often they also consulted some Maulavi before delivering the judgment. Since the cases were heard in these British courts, the procedural law followed was English law and substantive law was based on Hidayah, it came to be known as Anglo-Mohammedan law.*

Thus, to protect the infringement of fundamental and human rights of Indian women in the name of protecting the “divine” law is meaningless, given the fact that not much “divinity” is left in Indian Muslim law. The All India Muslim Personal Law Board (AIMPLB) comprising almost solely of men, whose credibility is questioned by many Muslims themselves,<sup>23</sup> thus has no stand when it says Muslim law should not be meddled with because it comes under Right to Religion guaranteed by the Constitution of India.

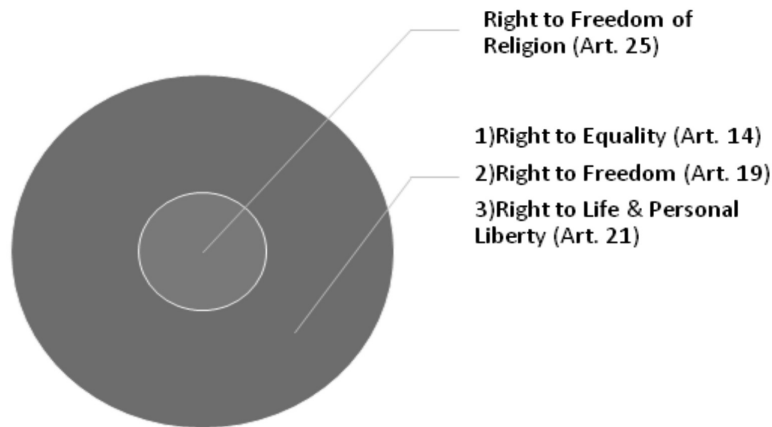
#### **MINORITY RIGHTS VIS-À-VIS EQUITABLE CONSTITUTIONAL PRINCIPLES**

So, does this mean minority rights have no place at all in our Constitutional scheme? What about Right to Religion as a Fundamental Right then? It is submitted here that Right to Religion under our Constitution is not absolute. It is not only subject to public order, morality and health, but also to all the other Fundamental Rights within Part III of the Constitution.<sup>24</sup> This concept can be diagrammatically represented as follows:

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23 See, Sylvia Vatuk, *Islamic Feminism in India: Indian Muslim Women Activists and The Reform of Muslim Personal Law*, MODERN ASIAN STUDIES, Vol. 42, No. 2/3, Islam in South Asia (Mar. - May, 2008), pp.489-518. In this essay, the author has charted the trajectory of the growth of Islamic feminist organizations in India, and has highlighted the non-representative, orthodox and patriarchal characteristics of the AIMPLB.

24 Art. 25(1), Constitution of India: Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.



The above diagram indicates the relationship between religious rights of the minorities and what is called as the “Golden Triangle of our Constitution”, as propounded by the then Chief Justice Y. V. Chandrachud in the case of *Minerva Mills v. Union of India*<sup>25</sup>. Thus it is clear that minorities’ rights of practising and professing their customary laws are subject to the “basic structure” of the Constitution of India, which upholds the Rule of Law and Right against Arbitrariness. This means, all the elements of Muslim Personal Law that are gender unjust are supposed to have been non-existent. Then, what is the reason for this meaningless contradiction? Why do we have things like *triple talaq* and *nikah-halala* as a part of Indian Muslim law, when our Grund Norm, the Constitution itself is an epitome of Equity, Justice and Good Conscience?

<sup>25</sup> AIR 1980 SC 1789. The Bench consisted of Y.V. Chandrachud CJ., N.L. Untwalia, P.N. Bhagwati, A.C. Gupta and P.S. Kailasam JJ. This “Golden triangle doctrine” was in fact an extension of the “Basic Structure doctrine” propounded in *Kesavananda Bharati v. Union of India*, AIR 1973 SC 1461. The Golden triangle doctrine was further built upon in the case of *I. R. Coelho (Dead) by LRs v. State of Tamil Nadu & Ors.*, AIR 2007 SC 861, which solidified the basic structure doctrine, thus upholding the principles of liberty, equality and dignity of life for all.

**CASES OF VIOLATION OF CONSTITUTIONAL PRINCIPLES/  
FUNDAMENTAL RIGHTS: A REALITY CHECK**

Late last year, a young Muslim woman Nasreen from Chennai was distraught when she received a letter from her husband announcing *triple talaq* against her, branding her to be “misfit” and “uninterested” in marriage. Having received a pittance of Rs. 20,000 as compensation in lieu of this unilateral and inhuman form of divorce, she is now running from pillar to post to annul this declaration as she considers it unjust.<sup>26</sup> Up North in Jaipur, a Muslim man allegedly “lost his wife in a bet” and drugged her in order to make her sleep with his friend in the pretext of *nikah-halala*.<sup>27</sup> In yet another appalling case, a 25-year old Muslim woman in Jaipur was shocked to receive *triple talaq* via speed post, and has moved the Supreme Court, to challenge this atrocious practice of unilateral right of Muslim husbands to divorce their wives at their whim.<sup>28</sup>

These are but few of the thousands of cases of Indian Muslim women who have been the unfortunate victims of such traumatizing, impersonal and instantaneous “digital divorces”, wherein their husbands do not mind divorcing them via SMSes, video conferencing apps or E-mails. As if to add insult to the women’s injury, Indian law recognizes this practise as a valid part of customary Muslim law, despite the fact that *triple talaq* was declared unconstitutional way back in 2002 by the Supreme Court of India.<sup>29</sup> The patriarchal All India Muslim

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26 See, Laasya Shekhar, *Woman on Dharna at Hubby’s Home after Triple Talaq*, DECCAN CHRONICLE, Nov. 2, 2016 (Chennai edition).

27 See, Urvashi Dev Rawal, *Man loses wife in a bet, forces her to sleep with friend on pretext of halala*, HINDUSTAN TIMES, 28, Oct.2016.

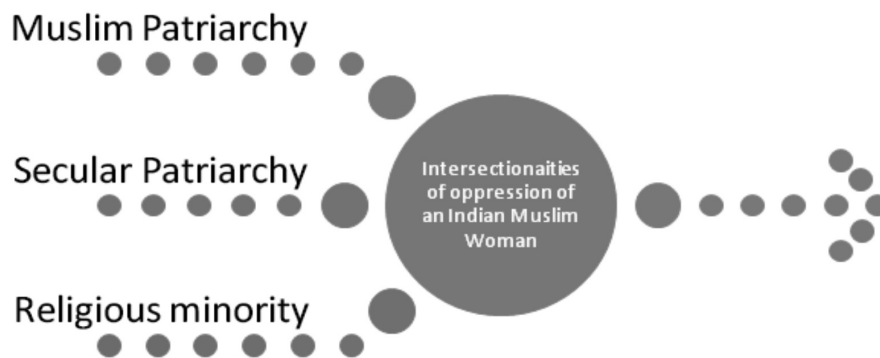
28 See, Mahim Pratap Singh, *Given Talaq via Speed Post, Jaipur Woman moves SC*, INDIAN EXPRESS, 19, May 2016.

29 The Supreme Court of India laid down the unconstitutionality of arbitrary triple talaq way back in 2002, in the landmark case of *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518. The Court in this case laid down the test of “reasonable cause” and “prior reconciliation” in tandem in Quranic injunctions, in order to validate Muslim divorces in India; see, Flavia Agnes, *Muslim Women’s Rights and Media Coverage*, Economic & Political Weekly, Vol. 51 Issue No. 20, May 14, 2016; See also, the recent ruling of the Allahabad High Court in *Hina & Anr.v. State of U.P.*, Writ (Civil) No. 51421 of 2016, wherein the Court has declared the practice unconstitutional. See, Live Law News

Personal Law Board (AIMPLB) has been one of the strongest deterrents for Indian Muslim women to claim their equal citizenship rights, as evidenced in the phallocentric<sup>30</sup> counter-affidavit filed in the ongoing *Shayara Bano* case in the Supreme Court of India.<sup>31</sup>

### INTERSECTIONALITY OF GENDER AND RELIGIOUS IDENTITIES: A FEMINIST JURISPRUDENTIAL ANALYSIS

Being a woman in a country like India is a herculean task. And the task gets even more labyrinthine if it's a Muslim woman, as she has to wage three battles: first, against the Muslim patriarchy, second against the secular patriarchy, and third against her not so helpful religious identity.

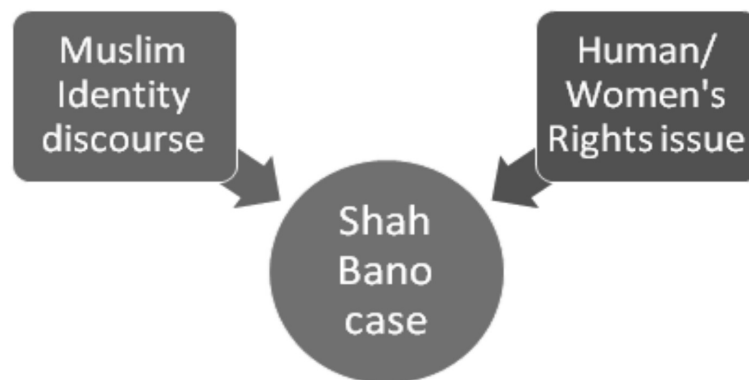


Network, *Personal Laws Can't Claim Superiority over Constitutional Rights: Allahabad HC*, Dec 8, 2016, Available at <http://www.livelaw.in/personal-laws-cant-claim-superiority-constitutional-rights-allahabad-hc/> (Last accessed on 08/01/2017).

- 30 "Phallocentrism" is a thesis first proposed in 1927 by Ernest Jones, a British neurologist & psychoanalyst, in order to critique the Freudian theory of the "phallic stage" of child development, it soon got support from the second wave feminism to highlight the gendered nature of our society. The word essentially connotes that everything (including law) is "male-centric" in the world we live in.
- 31 Counter affidavit of AIMPLB in *Shayara Bano v. Union of India*, Writ Petition No. 118 of 2016, Available at <http://barandbench.com/wp-content/uploads/2016/09/Counter-affidavit-in-Shayara-bano.pdf> (Last accessed on 07/01/2017), wherein the Board has justified the practice of triple talaq. One of its justifications were that its existence prevents setting the Muslim wife on fire by her husband!

The above diagram perfectly captures the travesty of justice that a Muslim woman suffers at the hands of paternalistic justice delivery system. The *Shah Bano* debacle stands testimony to this fact. The way Shah Bano was forced to take back her claim as a woman, and was made to accept her Muslim identity under the aegis of Muslim patriarchy, speaks volumes about the hurdles an Indian Muslim woman needs to cross to get her fundamental right to equality and religion under the Constitution of India.<sup>32</sup>

The following diagram denotes the polarisation of the Indian polity during the *Shah Bano* case. Though the Supreme Court sided with the Women's Rights facet, there was a huge backlash from the Muslim identity polity, which ultimately overpowered the issue of women's rights, when the Muslim Women (Protection of Rights on Divorce) Act 1986 was enacted, which undid the beneficial interpretation given by the Supreme Court to section 125 Cr.P.C.<sup>33</sup>



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32 See, Flavia Agnes, FROM SHAH BANO TO KAUSAR BANO – CONTEXTUALISING THE MUSLIM WOMAN WITHIN A COMMUNALISED POLITY, in: Ania Loomba / Ritty A. Lukose (eds.), *South Asian Feminisms*, Durham (2012); in this article, the author highlights the fact that an Indian Muslim woman faces the patriarchal brunt from four different angles: culture, religion, law and politics. The author then tries to give a solution as to how the women should negotiate this maze of layered oppression.

33 *Ibid.*

So, what do these incidents tell us about subsuming of a Muslim woman's gender identity within her religious identity so as to effectively block her access to equality rights? They clearly highlight the gendered nature of our legal system, which includes customary/religious laws as a valid part of Art. 13 of Indian Constitution.

This way, when all attempts of asserting gender identity are throttled by powerful state/non-state functionaries, a woman's lived experiences are seldom taken into consideration when questions of access to justice, and judicial and/or legislative reforms arise. Of especial importance in this context is Carol Gilligan's thesis on women's cognitive moral development being merely "different"<sup>34</sup> and in no way "inferior"<sup>35</sup> to that of men. Gilligan in her work argues that our laws should be embodiments of not just "ethic of justice" (which is predominantly male construction of moral problems), but also of "ethic of care or responsibility" (which is how females construct moral dilemmas).

The idea of feminist jurisprudence in general, and that of Heather Wishik<sup>36</sup> in particular, that society, and necessarily the legal order, is patriarchal and that law contributes in constructing, maintaining, reinforcing and perpetuating patriarchy<sup>37</sup> is startlingly true in case of Muslim women's rights in India. Enquires into the politics of Muslim law in India and focusing on its role in perpetuating patriarchal hegemony<sup>38</sup> has shown us that the Muslim woman's cause has been abandoned by her motherland, since the Muslim patriarchy, in partnership with patriarchal vote-bank politics of successive governments, has hijacked the system.

In this context, Clare Dalton argues, "we cannot only research what happens to women in the world shaped by law, law language and legal institutions, but challenge even the structure of legal thought as contingent and in some culturally specific

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34 The whole of cultural feminism relies on this principle that men and women are fundamentally different, and law needs not only to accept these differences, but also imbibe them in itself so that it is representative of all human beings, rather making "maleness" as the standard of what is "human".

35 Gilligan came up with her "different voice" thesis only as a response to the work of Lawrence Kohlberg, who had established a scale of cognitive moral development in which men always outperformed women.



sense ‘male’, implying the need for more radical changes than the ameliorative amendments we have offered in the past.”<sup>39</sup> Thus, applying this thought to the reformation of gender unjust Muslim law of India, we are faced with two options:

1. Use Islamic feminism to reinterpret Islamic texts as favourable to women, or
2. Legislate a secular, gender just Uniform Civil Code

Between these two options, the author opines that the first is more viable than the second, because it is in consonance with the constitutional principle of freedom of religion to both men and women. The author uses the post-modern feministic idea here that equality is just a social construct which differently affects women belonging to different communities and classes of India, and thus believes that Islamic feminism would contribute in making Muslim law gender just, thus defeating the dubious “gender justice” claims of the proposed Uniform Civil Code.

### **HURDLES FACED BY THE INDIAN MUSLIM WOMEN: THEORIZING EXPERIENCES**

To paraphrase Catherine MacKinnon, women tend to have ‘false consciousness’ in a patriarchal society, and their choices are unconsciously determined by the very gender ideology they are fighting against. She also asserts that the liberal Rule of Law State is the Rule of Men under the guise of the Rule of Law – its power intensified through the hegemony of subterfuge, and hence, she believes, women cannot trust the State.<sup>40</sup>

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36 Heather Ruth Wishik, *to Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN’S L.J.(1985).

37 See, Michael Freeman, LLOYD’S INTRODUCTION TO JURISPRUDENCE, 9th ed., London: Sweet & Maxwell (2014).

38 See, M. Fineman in Fineman & Thomadsen (eds.), AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY, Routledge Library Editions (2014), p. 11.

39 Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN’S L. J. (1987).

40 Wayne Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM, Routledge-Cavendish (1995), p.490.

The fact that apart from Muslim law, our legal language, reasoning and legal system in general are gendered in nature, adversely affects any attempt of correcting gender injustice through UCC.<sup>41</sup> Thus, law itself constructing and perpetuating patriarchal hegemony in our society<sup>42</sup> very much plays a negative role against the cause of the Muslim woman.

Additionally, Frances Olsen's opinion that non-interference by the state in family relations, amounts to affirmation of the existing skewed power relations<sup>43</sup> is the apt counter-argument to what AIMPLB is trying to do. Since India purports to be a secular country which affords equal protection of all its citizens from human rights violations, such selective application of equality and justice principles is deleterious to our conception of a secular democracy.

Robin West is right when she says that, as a result of the patriarchal hegemony<sup>44</sup>, law merely gets reduced to a social construct and an objective abstraction, which is far away from women's lived experiences; an abstraction so remote from women's lived experiences that women's injuries will more often than not, not be recognized or compensated as injuries by the "public" legal culture.<sup>45</sup> Maybe this explains the Indian state's unwillingness to criminalise *triple talaq*!

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41 See, Chapter XIV *Feminist Jurisprudence* in Michael Freeman, *Lloyd's Introduction to Jurisprudence*, London: THOMSON REUTERS (9th ed: 2014)

42 See, Catherine MacKinnon, *Feminism in Legal Education*, (1989) 1(1) LEGAL EDUCATION REVIEW 85; Leslie Bender, *Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575 (1993).

43 See, Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835 (1985).

44 Antonio Gramsci, Quention Hoare & Geoffery Smith (trans. & eds.), *SELECTIONS FROM THE PRISON NOTEBOOKS*, New York: International Publishers Co. (1971). In this magnum opus, Gramsci has developed the concept of "hegemony" to mean "*the means by which a system of attitudes and beliefs, permeating both popular consciousness and the ideology of elites, reinforces existing social arrangements and convinces the dominated classes that the existing order is inevitable*". In the current study the author has used the concept to inspect whether it is at work in sustaining the gendered nature of Indian Muslim law.

45 See, Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L. J. 149-215 (2000). This is one

### **RAWLSIAN VEIL OF IGNORANCE AS APPLIED TO INDIAN MUSLIM LAW: A WORTHWHILE SOLUTION**

John Rawls has been one of the most influential jurists of the 20<sup>th</sup> Century. His theory of social justice gives us fresh insights to solve the predicaments of the Indian Muslim woman. His presupposition that “only a rights-based theory of justice that respects our desires for equal respect and rational acknowledgement fits with our liberal conceptions”,<sup>46</sup> has direct implications on reforming our gendered Muslim law. What happens if our Muslim law is interpreted from this *original position* located behind the *veil of ignorance*? What happens if all our personal laws are subjected to such *original position* interpretation? Won’t it solve all problems of gender injustice? Won’t it also permanently end the threat of Hindu nationalism looming large in the garb of Uniform Civil Code?

#### ***Rawlsian Principles of Justice: Justice as Fairness***

The answer to the above question is that Rawlsian idea of social justice will be realised due to the fact that the person interpreting the laws from the original position will do it in such a way that everyone gets their fair share of justice.<sup>47</sup> In his theory of justice Rawls states that, in the original position, people would choose two principles:

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
2. Social and economic inequalities are to be arranged so that they are both:

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of reasons why “public” offences against women, like rape, molestation, street sexual harassment, etc. get strong protests, but “private” offences – despite the fact that this public-private dichotomy is a mere social construct – like triple talaq, nikahhalala, etc. rarely attract the wrath of the public at large.

46 Wayne Morrison, *JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM*, Routledge-Cavendish (1995), p. 392.

47 See, John Rawls, *A THEORY OF JUSTICE*, Harvard University Press (2005).

- a. To the greatest benefit of the least advantaged, consistent with the just savings principle, and
- b. Attached to the offices and positions open to all under conditions of fair equality of opportunity.

Thus, it is evident how fruitful this interpretation will be in furthering our Preambular goals of equality, justice and fairness.

### ***International Law and Indian Muslim Law***

It would be beneficial at this juncture to look at what International law has to say about Indian Muslim law as it is today, since in today's age of dynamic positivism and increasing standardisation of legal norms across jurisdictions, it wouldn't augur well for India as world's largest democracy to set such bad precedent with respect to protecting its women.

There are many Conventions and Declarations in International law that talk about protection of rights of women and minorities. Some of the most important ones as are relevant to the present study are:

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|----|---|
| 1. | Universal Declaration of Human Rights (1948)  |
| 2. | Convention on the Political Rights of Women (1952)  |
| 3. | International Covenant on Civil and Political Rights (1966)   |
| 4. | International Covenant on Economic, Social and Cultural Rights (1966)   |
| 5. | Declaration on the Elimination of All Forms of Discrimination against Women (1967)                              |
| 6. | Convention on the Elimination of All Forms of Discrimination against Women (1979)                               |
| 7. | Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992) |

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| 8.  | Declaration on the Elimination of Violence against Women (1993)  |
| 9.  | Universal Declaration on Democracy (1997)  |
| 10. | Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999) |

All these international conventions and declarations avowedly declare that all forms of discrimination, exploitation and oppression of women and minorities is to be actively disincentivised by all states, and effective national legislations are to be brought into force to ensure that human rights violators in this respect are prosecuted.

But, the sad reality in India is that not only are Indian Muslim men practising the barbaric *triple talaq* and *nikah-halala* with impunity, the Indian state is also participating in the violation of human rights of women by not doing anything to repeal the archaic laws concerning family affairs. What must be the reason for this selective application of Right to Equality?

**ROBIN WEST AND HER INTERPRETATION OF JURISTS:  
DISCOVERING THE PATERNALISTIC PHENOMENOLOGY OF LAW**

Robin West has been instrumental in discovering the latent gender bias hidden within the seemingly gender neutral conceptions of justice, fairness and equality. She has done this using her “Separation-Connection” thesis. According to her, male legal theorists exhibit a specific form of reasoning because they experience the world firstly and fundamentally as separate, autonomous individuals, and hence the foundation of both traditional and ‘critical’ masculine jurisprudence is ‘separation’ thesis.<sup>48</sup> To quote her<sup>49</sup>:

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48 Wayne Morrison, *JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM*, Routledge-Cavendish (1995), p.504.  
49 Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV., 1 (1988), pp.2-3.

*“...conversely, women are not essentially, inevitably, always and forever separate from other human beings...[but] are in some sense ‘connected’ to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and ‘connecting’ experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding...”*

This insight of West allows us to reflect upon the reason behind patriarchal interpretations of our personal laws. It’s as if being a “human being” in order to claim “human rights” is only about being a “male”. Hence, it is said that the entire phenomenology of law is patriarchal, effectively leading to stratified gender injustice which is many times latent in our laws and their interpretations.

So what is the solution? How do we juxtapose this feminist reading of Muslim law in particular and our legal system in general, with minority rights vis-à-vis our Constitution? Is a Uniform Civil Code (UCC) good for Indian Muslim women? Will UCC be secular and gender just?

The author opines that, in light of all the observations made above, the proposed UCC carries a high probability of being Hindu nationalistic and patriarchal, because as we saw, our legal system as a whole is gendered.

The following diagram represents the various facets of our legal system that carry the gender bias within them, as evident in the prominent thought of Hobbesian liberalism. In this context, it is impossible for the proposed UCC to be favourable to women in general and especially to Muslim women.



Hence the only practical solution is to protect minority rights, but on the same hand, to criminalise violation of human rights of the members of the minority community. How can this be achieved?

### **MULTI-CULTURALISM, MINORITY RIGHTS AND CONSTITUTIONALISM**

Is multi-culturalism bad for women?<sup>50</sup> This is the question asked by Susan Okin in her seminal work. The world over, the identity of minority women as *women*

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<sup>50</sup> See, Susan Moller Okin et al., *IS MULTICULTURALISM BAD FOR WOMEN?*, New Jersey: Princeton University Press (1999).

is often masked behind their identity of belonging to the *minority* community. This not only dehumanises them, but also takes away from them all their basic rights which treats them as equal citizens. So here, the conception of citizenship itself is at stake if we confer fundamental rights to all citizens, but not to women!<sup>51</sup>

Observations of Will Kymlicka,<sup>52</sup> the foremost contemporary defender of cultural group rights are relevant here. He opines that only those minority groups that are internally egalitarian and liberal enough to provide equal rights of freedom to all their members deserve special rights. But, Susan Okin adds that very few cultural minority groups in the world pass this “no sex discrimination” test and hence, this idealistic outlook will be difficult to implement.<sup>53</sup> So a midway solution is proposed that grants group rights to only those cultural and religious minorities that are willing to reduce their internal subordination of women by men.

That is nothing but, granting special religious rights to minorities only if they make sure that human rights and principles of constitutionalism are not violated in the name of religion and personal law. To use the famous rallying slogan of the second-wave feminism, “personal is political”. Hence, even as multiculturalism is not *per se* bad for women, where we draw the line between culture and human rights violations has the key.

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50 See, Susan Moller Okin et al., *IS MULTICULTURALISM BAD FOR WOMEN?*, New Jersey: Princeton University Press (1999).

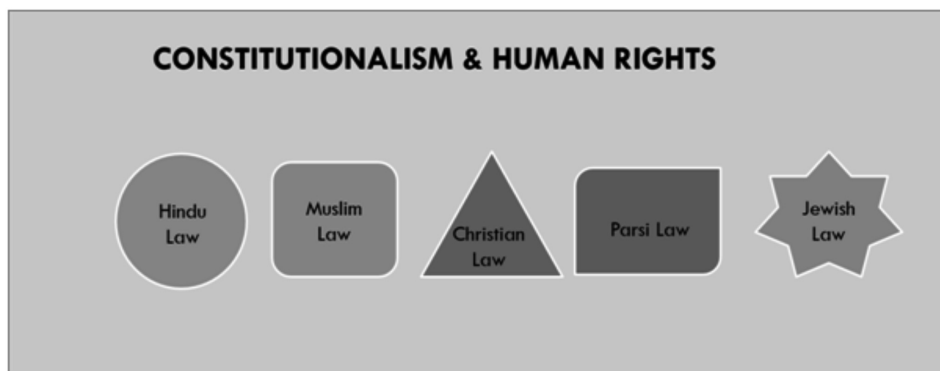
51 See, Ayelet Shachar, on *Citizenship and Multicultural Vulnerability*, *POLITICAL THEORY*, Vol. 28, No. 1 (Feb., 2000), pp. 64-89.

52 See, Will Kymlicka, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS*, New York: Oxford University Press (1995).

53 See, Susan Moller Okin, *et al*, *IS MULTICULTURALISM BAD FOR WOMEN?*, New Jersey: Princeton University Press (1999).



## CONCLUSIVE REMARKS



The above diagram perfectly concludes this study by proposing that UCC is just a mirage in the dreary desert of patriarchal Indian legal system. Instead, we should focus on criminalising all kinds of human rights violations carried out in the name of freedom of religion, so that the phenomenology of law no more remains male-oriented.

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## UNIFORM CIVIL CODE: A WAY TO NATIONAL INTEGRATION

*Vini Kewaliya\**

It is rightly remarked by Von Savigny, “*Law grows with the growth of nation strengthens with the strength of nation and finally dies with the death of nation*”. This statement is very correct in terms of the personal laws in India. Personal laws of different communities in India always strengthens in terms of their followers but has not grown or modernize with the passage of time. However, it is equally correct to say that in the past centuries India has witnessed rulers from different regions and religions of the world. No matter how much they have tormented upon the wealth of India but in one or the other way they have diversified and enriched the culture of the country. Every ruler who ruled India came with a new ideology which has changed and influenced the way of living of the people. Different rulers inculcated the thought of importance of women education, widow remarriage, abolition of sati pratha, incorporated rules of trade and commerce etc. Ruler from a particular religion has tried to develop and protect its own religion but while doing so, he was influenced from the existing customs in the country. Exchange of cultures has made a great impact on Indians but the main problem was that no community or religion has accepted the cultures of other religion *in toto*. India always remained a land of diversified cultures but these diversified cultures and scriptures of India also posed a serious threat when it came to the uniform civil code for India. It is pertinent to say that Muslim rulers never accepted the rules of vedas and customs of Hindus and in the same tone Hindus always opposed the principles of other religions. No ruler from a community within India gathered courage for bringing uniformity in laws and modernity in thoughts. However, to a certain extent Britishers gathered courage to make secular laws like Guardian and Wards Act, 1890; Indian succession

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Act, 1925; Transfer of Property Act, 1882 etc. The Indian Contract Act enacted in 1872 abridged the Hindu and Muslim law in respect of matters governed by the Act. Before the passing of this Act, the Hindu law of Contract applied to Hindus and Muslim Law of Contract applied to the Muslims. Even today in the cases not provided for by the Act or any other legislation, the Hindu law of contract applies to Hindu and the Muslim law of contract applies to Muslim. Thus, while enacting these laws they came to know about the religious susceptibilities of the native Indians and thus followed the policy of non- interference in the sensitive matters. Much prior to this also they have adopted the policy of non-interference during 1772 to 1864 but apply the Hindu personal laws to the Hindus with the mere idea to expand the British rule in India. The important Dharmashastra texts were compiled and translated by various British administrator-scholars including William Jones, Henry Thomas Colebrooke, J.C.C. Sutherland, and Harry Borrodaile<sup>1</sup>. The court pandits were used in the British courts to aid the British judges with the interpretation of the Dharmashastra texts and implementation of the Classical Hindu Law. Further, the British adopted (especially during 1864 and 1947) the modern law or the English legal system and replaced the existing Indian laws, except for laws related to family or personal matters like marriage, inheritance and succession of property. Though Indian legal system is much influenced by the English laws and English precedents but the demand for uniformity in laws never faded.

After independence the demand of unification of laws again got the momentum and debate was started among the members of constituent assembly. The constituent assembly debates witnessed a division of opinion and this division was based upon communal lines. Mohammed Ismail, a member of constituent assembly asserted upon adding a proviso to the Uniform Civil Code that personal laws can be followed if a particular group is unwilling to follow the uniform civil code but by majority this view was rejected. Dr. B.R. Ambedkar, tried his best to solace the Muslim members on the issue of the Uniform Civil Code by stating

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1 Historical evolution of Indian legal system, *Available at* [http://cbseacademic.in/web\\_material/doc/Legal\\_Studies/XI\\_U3\\_Legal\\_Studies.pdf](http://cbseacademic.in/web_material/doc/Legal_Studies/XI_U3_Legal_Studies.pdf). (Last accessed on 02/02/2017).

that though State has power to do away with the personal laws but will not immediately execute the same.

After a long discussion Article 44 was introduced which provides that “*the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India*”. However, because of Article 37 this provision is not enforceable in any court of law but it is fundamental in the governance of the country. The deep rooted diversification in culture of India never allowed the constitutional authorities to draft and execute a uniform civil code for India. The diversified personal laws of Hindus, Muslims and Christians never allowed the unification process to be started. It is not even the matters of these communities only but the other major concern is of tribes also. There are so many tribes in India who are not even governed by the basic laws of the country. There is difference between unification of laws and uniform civil code. Uniform civil code primarily means that a single code governing all the major communities in their personal matters. By the uniform civil code all the customs, scriptures, usages of different communities will be replaced by the one single rule. However, it is also not easy to devise such a mechanism for all because the issue of uniform civil code is so complex and multilayered. While drafting the Constitution B R Ambedkar was in favor of drafting the uniform civil code but looking at the nerve of the nation, the then Prime Minister Pd. Jawahar Lal Nehru opposed it and supported the nations strengthening instead of nation’s integration. The major concern of the politicians at the time of independence was to feed the people of India so, the decision was quite correct at that point of time. Further, the term “uniform civil code” is so vague in itself that it is not possible to draft a concrete code without deciding its periphery. India is a secular nation which means that nation has no religion but it respects every religion equally. The purpose and spirit behind Article 44 of the Constitution must be appreciated which provides that the “State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” To respect every religion equally is something which is easy to state but difficult to execute. It is a difficult task for India to draft a non-discriminatory uniform civil code. Before devising a uniform civil code for India we actually need to understand that what is the need of uniform civil code?

India needs uniform civil code *firstly*, to bring uniformity in personal laws; *secondly*, to protect the rights of all women and to ensure gender justice; *thirdly*, a secular republic nation needs uniform civil code; *fourthly* to integrate Indians in true sense; *fifthly*, uniform civil code will ensure modernity in thoughts. There may be other reasons also for example it will promote the inter-caste marriages, honour killings will be lessened. However, it is too early to analyze its impact because again the major concern is that how this uniform civil code will be drafted.

Recently, the present government has taken the initiative to draft this code. Law Commission, headed by the retired Supreme Court Judge Balbir Singh Chauhan, was asked to examine the implications of enacting a uniform civil code. In response to that the commission has released a questionnaire, covering a set of issues, to seek comments from the public. In law, certain preferential treatment has been given to certain communities or religion and this will likely to end after this code was enacted. So, *prima facie* opposition from all major religions and tribes are likely to arise. However, if we look at the questionnaire then in the initial notes it has been cleared that the “*Law commission hopes to begin a healthy conversation about the viability of uniform civil code and will focus on family laws of all religion and the diversity of customary practices, to address social injustice rather than plurality of laws.*”<sup>2</sup> In the second question the Law commission has taken opinion on the scope of uniform civil code. Marriage, divorce, adoption, guardianship and child custody, maintenance, succession and inheritance are the matters which will likely to cover under this code. Now, if we discuss about the marriage then the marriage ceremonies varies from community to community even it varies among hindus. For example although section 7 of the Hindu Marriage Act, 1955 mentions that saptpadi is required and marriage is complete only after taking the seventh step around the sacred fire but it is customary practice in certain hindus that marriage is considered as complete even after taking the fourth step. For, Muslims and Christians the marriage ceremonies are completely different and even the marriage solemnizing timings are prescribed under the obsolete personal laws. Monogamy and polygamy is in itself a biggest

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2 Dr. Chauhan BS J., Chairman Law Commission of India, Available at <http://lawcommissionofindia.nic.in/questionnaire.pdf>. (Last accessed on 02/02/2017).

question to be tackled under this code. Christian, Parsis, Jews and Nayers happened to be already monogamous. If a similar provision for monogamy has been made for Hindus also, legislation is to be deemed for the benefit of class of persons to whom the Hindu Marriage Act is applicable and the argument that it is in fact directed against that class, making discrimination, cannot hold water. The personal laws called for amendment in the larger interest of the class of persons following that Personal Law. It cannot be treated as sacrosanct, which would not permit of any change.<sup>3</sup> Even in a case court opined that in process of applying the personal laws of the parties, the judges of the High Court ‘could not introduce their own concept of modernity’.<sup>4</sup> It is quite difficult to draft this code but it is high time when this code is required. At the time of independence it was much more difficult task to even think about this code because the horizons of the mentality of people were so narrower at that time. Low education level, poverty, limited rights to women were the main hurdles on the way to uniform civil code. In the present scenario problems will arise definitely but will be tackled more sensibly by the citizens of India because people have started thinking rationally. Recently much hue and cry has been raised on the issue of triple talaq among Muslims but one thing which is to be appreciated here is that certain people of that community opined in a very reasonable manner. It will be futile to say that if earlier under any Personal Law bigamy was permitted, it should continue for times immemorial and no change in such law can be made. The rules of bigamy are unfair to the fair sex, i.e. female when even Personal Laws would not permit the wife to have a second husband in the life time of first husband in absence of dissolution of that marriage. Monogamy on the other hand is a right step towards the advancement of the Society.

In the case of *Reynold Rajamani and another v. Union of India and another*<sup>5</sup>, the Supreme Court observed, “... A man and woman married under the Christian Marriage Act are not entitled to a decree of divorce by mutual consent,..... history of all matrimonial legislation will show that at the outset conservative

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3 Kamla Kumari v. Mohan Lal, Allahabad High Court, decided on 09.03.1984.

4 Krishna Singh v. Mathura Ahir, AIR 1980 SC 707.

5 AIR 1982 SC 1261.

attitudes influenced the grounds on which separation or divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the adult parties directly involved.

In the plethora of cases Supreme Court and High Courts have refrained from interfering in the personal laws of people. Even they have gone to the extent of saying that personal laws are immune from the fundamental rights mentioned under the Constitution. But the Constitution of India mandates that protection of the interest of the people is the prime concern of the State. Thus, trivial concerns of the society cannot stop the State from enacting the uniform civil code. As fear and reform cannot go hand in hand so, now we have created that congenial atmosphere where reformation in family matters can be brought. In case of *State of Bombay v. Narasu Appa Mali*<sup>6</sup>, Gajendragadkar J. observed that “..the framers of the constitution of India wanted to leave the personal laws outside the ambit of Part III of the constitution (viz., fundamental rights). They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code”. The integration and modernization of personal laws, Hindus Muslim or other, is the need of the hour. It is true that in past decades demand for uniform civil code has got much momentum and in various judgments court also opined the same. Despite of many objections from the different segments of the society it is the right time where State should use its sovereign power and replace all the personal laws with one uniform civil code. It is equally important that while enacting this code the fundamental right of ‘Freedom of conscience and free profession, practice and propagation of religion’ guaranteed under Article 25 of the Constitution of India should not be violated. People should start thinking about tragic issues like honour killing, unreasonable verdicts of khap panchayats, violation of fundamental rights of women and then they will realize the importance of uniform civil code. It is the only way to integrate India in true sense.

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6 AIR 1952 Bom.84.

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# **A CRITICAL STUDY OF CIVIL CODE IN UK, USA AND INDIA WITH SPECIAL REFERENCE TO RIGHTS OF WOMEN**

*Shivani Dutta\**

## **INTRODUCTION**

Gender Justice is one of the important issues in India which has been highlighted time and again through the demand of enactment of a Uniform Civil Code. The existence of patriarchy as one of the important feature of the Indian society gives the power to the male members of the family to decide all important matters. The system of patriarchy finds its validity across many religious beliefs. The famous saying by the ancient law giver Manu “Women are supposed to be in the custody of their father when they are children, they must be under the custody of their husband when married and under the custody of her son in old age or as widows. In no circumstances she should be allowed to assert herself independently” depicts the dependence of the women on the men folk from cradle to grave. In India, there are various religious personal laws governing matters relating to marriage, divorce, maintenance, guardianship and succession on basis of the religion affiliation of the individual. Some of the provisions of the religious texts are gender bias which acts as a contrary to the basic ideology under Article 14 of the Indian Constitution to treat all individuals equally irrespective of religion, race, caste, sex or place of birth. To live a life with dignity and self-respect which is also a principle under Article 21 of the Indian Constitution, women have to fight against the inequalities. An insight into the gender gap is provided by the Global Gender Gap Report 2016 conducted by the World Economic Forum (WEF)<sup>1</sup>. India has

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been ranked 87th out of the total 144 countries. Although, India has climbed 21 spots from 108th position compared to 2015, much work remains to be done to empower women in various fields.<sup>2</sup> The fight against the gender bias laws is not an individual fight rather it is the fight of the nation. Everybody should raise their voice against the injustices suffered by a women and should conceptualize the idea of gender equality in reality.

A uniform civil code incorporates the idea of a common set of secular civil laws to govern all people without any religious affiliation. This acts a supplement to different personal laws in the country. The common area which a civil code governs includes marriage, divorce, adoption and inheritance. Most of the countries such as United States and United Kingdom have a unitary civil code which governs the citizens of their country. In India, although we can find a common criminal law, common civil code does not find its place till present date. The concept of UCC finds its place under Article 44 of the Indian Constitution under Part IV as Directive Principles of State Policy as non-judiciary rights. Though the Constitution does say that directive principles are not enforceable by any court, it also makes it clear that the directive principles are “fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.”<sup>3</sup> The two major objectives which can be fulfilled through the UCC are firstly, uniform laws across all communities irrespective of one’s religion; secondly, gender equality by framing similar laws for all in similar circumstances. This paper focuses to critically study the civil code in UK, USA and India with special

- 1 Through the Global Gender Gap Report, the World Economic Forum quantifies the magnitude of gender disparities and tracks their progress over time, with a specific focus on the relative gaps between women and men across four key areas: health, education, economy and politics, Available at <https://www.weforum.org/reports/the-global-gender-gap-report-2016>. (Last accessed on 06/05/2017).
- 2 GENERAL KNOWLEDGE TODAY, *India Ranks 87th on the WEF’s Global Gender Gap Report*, Available at <http://currentaffairs.gktoday.in/india-ranks-87th-wefs-global-gender-gap-report-2016-10201636685.html>. (Last accessed on 06/05/2017).
- 3 CONSTITUTION OF INDIA, Art.37: The provisions contained in this Part shall not be enforceable by 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.

reference to the rights of women in the area of marriage, divorce and maintenance. The paper also touches upon the ongoing debate in the country over the implementation of the uniform civil code and the public opinions sought by the union law commission.

### ***Religious Laws in India***

India is a secular country which is an abode of a large number of diverse religions and cultures. Along with its diversity parallel runs the personal laws of different religious groups such as Hindus, Muslims, and Christians etc. There seems to be no uniformity in the laws relating to marriage, divorce, maintenance, guardianship and succession of different religious groups. An attempt has been to codify the customary law which is prevalent among Hindus in India by enacting the Hindu Marriage Act, 1955. The Act applies to Hindus in any of its forms and also to Sikhs, Buddhists and Jains. There are different legislations such as The Hindu Succession Amendment Act, 2005, The Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956 which govern the personal matters of the Hindus. The Muslim Personal Law (Shariat) Application Act was passed in 1937 with the aim to formulate an Islamic law code for Indian Muslims. The Act mandates aspects of Muslim social life such as marriage, divorce, inheritance and family relations. The Act also lays out that in matters of personal dispute the State shall not interfere and a religious authority would pass a declaration based on his interpretations of the Quran and the Hadith. Again, the Parsis and the Christians in India are governed by the Parsi Marriage and Divorce Act of 1936 and the Indian Christian Marriage Act, 1872 respectively according to their religious traditions. However, the present paper focuses the position of women only under the Hindu and the Muslim Personal Laws.

### ***Position of Women Under Personal Laws***

For the present paper the position of women under Hindu and Muslim personal law is taken into consideration. Manusmriti is one of the important rule books of Hindu laws. The inherent social inequality and injustices towards women has its genesis in the Manusmriti written at a time when the position of women in society

was that of complete subservience and subjugation. Women were considered to be biologically and physically weaker compared to men and were considered to be a 'distraction' to men.<sup>4</sup> They were considered incapable to protect themselves and from birth they were put under the surveillance of a male guardian. They were expected to be within the four walls of the houses and were discouraged to go beyond that.

Till the codification of the Hindu laws in the year 1955 and 1956, women did not enjoy equal rights as compared with men. Before 1955, polygamy was prevalent and women cannot hold property on themselves except in the case of Stridhan. Even though the laws are codified there exist certain discriminatory provisions. A comparative analysis of the discrimination under the Hindu and Muslim Personal laws along with the laws in U.S.A and UK is reproduced below:

| <b>Area of Law</b> | <b>Status of Women under Hindu Law</b>  | <b>Status of Women under</b> | <b>Muslim Law Status of</b> | <b>Women in UK Status of Women in U.S.A</b> |
|--------------------|---|------------------------------|-----------------------------|---|
| <b>Adoption</b>    | Allows women to adopt at par with men by the Amendment of 2012 to Hindu Adoption and Maintenance Act, 1956. | Is prohibited                | Permitted                   | Permitted                                   |

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4 Prachi Dutta, *Gender Inequality and Hindu Personal Laws*, INDIA LAW JOURNAL, Available at <http://www.indialawjournal.org/archives/volume8/issue-1/article10.html>. (Last accessed on 06/05/2017).

|                        |  |  |  |   |
|------------------------|--|--|--|---|
| <b>Age of Marriage</b> | The age of marriage is fixed at 18 for women and 21 for men. | No age is specified. On attainment of puberty the marriage is fixed. The biological characteristics decides the marriage of the women. | 18Years for both men and women. However, if below 18 parental consent is required. | The age of marriage in the United States is 18, with two exceptions- Nebraska (19) and Mississippi (21). However, most states have exceptions allowing marriage at younger ages with parental consent, judicial approval, in cases of pregnancy, or in a combination of these situations. |
| <b>Inheritance</b>     | Daughter<br>· Daughter's get equal share as son.             | <ul style="list-style-type: none"> <li>Shia: A daughter's share is half as</li> </ul>  | The Married Women's Property Act 1882  | The Married Women's Property Acts are laws enacted  |

|  |   |   |   |   |
|--|---|---|---|---|
|  | <p>Widow</p> <ul style="list-style-type: none"> <li>Under Hindu law, widow of the deceased is a Class 1 heir and she inherits the property of the intestate in equal shares with all other Class 1 category heirs.</li> </ul> | <p>compared to the son.</p> <ul style="list-style-type: none"> <li>Sunni: With the son a daughter inherits as a residuary and takes a share that is equal to half of his share.</li> <li>Shia: If the deceased died leaving a child or the descendant of a son, the widow's share was one-eighth of the estate. If, however, he left no child or descendant of a son, her share was one-fourth of the estate.</li> <li>Sunni: Like the Sunni</li> </ul> | <p>allowed married women to be the legal owners of the money they earned and to inherit property.</p> | <p>by the individual states of the United States beginning in 1839, usually under that name and sometimes, especially when extending the provisions of a Married Women's Property Act, under names describing a specific provision, such as the Married Women's Earnings Act.</p> |
|--|---|---|---|---|

|  |  |  |  |  |
|--|--|--|--|--|
|  | <p>Mother</p> <ul style="list-style-type: none"> <li>• Under the Hindu law mother is again Class 1 category heir.</li> </ul> | <p>law, the traditional Shia law holds that the wife is not entitled to the “Return”. In addition, a childless widow is under a special disability i.e. she is not entitled to share the lands of her husband.</p> <p>Sunni Law: She is not ranked as a residuary.</p> <p>Shia Law: In the absence of children, she takes one-third of the whole estate even if it affects a reduction in the share available to the father.</p> |  |  |
|--|--|--|--|--|

|                    |  |   |   |   |
|--------------------|--|---|---|---|
| <b>Maintenance</b> | <ul style="list-style-type: none"> <li>The husband is entitled to provide maintenance until she remarries or is of unchaste under Section 125 Crpc.</li> </ul> | Is entitled to provide maintenance only during the period of 'Iddat'.                       | The law in this country provides under the Matrimonial Causes Act 1973 that wives as well as husbands may make various claims on divorce - to spousal maintenance maintenance for children, a cash payment (in other words, a lump sum), a property, and also a share of any pension. | The court has the discretion whether to award alimony and if so for how long. Most of the States in USA depends on the Uniform Marriage and Divorce Act, for spousal maintenance. |
| <b>Divorce</b>     | Mutual consent divorce permitted under Section 13B of the Hindu Marriage Act, 1955.  | Right to pronounce Triple Talaq is only on the husband. The process of Halala is prevalent. | Is permissible for both husband and wife under the Matrimonial Causes Act 1973.   | Is permissible for both husband and wife. It is governed by the laws of the individual state.   |

|                 |   |  |  |   |
|-----------------|---|--|--|---|
| <b>Polygamy</b> | <p>Is prohibited. Section 17 of the Hindu Marriage Act, 1955 provides punishment for bigamy.</p> <p>Bigamy is also a punishable offence under Section 494 of the Indian Penal Code, 1860.</p> | <p>The practice is permitted in India. Ironically, Islamic countries like Syria, Tunisia, Morocco, Pakistan, Iran etc have codified the personal law where in the practice of polygamy has been either totally prohibited or severely curtailed to check the misuse and abuse of this obnoxious practice. The tragedy is that a secular country like India is lagging behind in according red carpet welcome to article.</p> | <p>Is a punishable offence under Section 57 of the Offences Against Persons Act, 1861.</p> | <p>Currently, every state has a law outlawing polygamy. Additionally, the federal government has several laws that also criminalize the act of being married to more than one person.</p> |
|-----------------|---|--|--|---|



## **UNIFORM CIVIL CODE: CONCEPT**

The Constitution of India came into force in the year 1950. Since then, Article 44 has been the topic of debate although none of the government at the centre had ever touched upon it. Under Article 44, the state shall endeavor to enact a Uniform Civil Code for citizens throughout the country. The civil code, if enacted will deal with the personal laws of all religious communities relating to marriage, divorce, adoption, custody of children inheritance, succession to property etc. which are all secular in character. But this has never taken the shape as the said Article falls under Part IV of the Constitution which is Directive Principles of State Policy which is a non-justifiable in nature.

### ***Specific Provisions under the Indian Constitution for Empowering Women***

It's pertinent to replicate some of the important provisions incorporated in the Constitution for women empowerment. The Preamble itself starts with "We the people of India. . . . .Justice, Liberty, Equality and Fraternity" which includes men and women, irrespective of their religion, caste or creed. Article 15(3) empowers the state to make special provisions for women and children. Article 39(a) requires State to direct its policy towards securing that the citizens equally have the right to an adequate means of livelihood. Under Article 39(d) State shall direct its policy towards securing equal pay for equal pay. This Article draws its support from Article 14 & 16 and its main objective is the building of a welfare society and an equalitarian social order in the Indian Union. It imposes an obligation under Article 42 upon State to make provisions for securing just and humane conditions of work and for maternity relief. Reservations under Article 243D(3)(4), 243T(3)(4) are meant to empower the women politically.<sup>5</sup>

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<sup>5</sup> Dr. Saroj Bohra, UNIFORM CIVIL CODE, WOMEN EMPOWERMENT AND GENDER JUSTICE, 3 SAJMS 11, 15 (2016).

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## EFFORTS BY INDIAN JUDICIARY FOR UNIFORM CIVIL CODE

The Supreme Court has showed its positive response for a uniform civil code through its various judgements. One of the judgement given by the Apex court of the country in favour of uniform civil code is the case of Shah Bano<sup>6</sup>. In that case apart from extending the claim of maintenance beyond the 'Iddat period' for the Muslim women's, the Bench<sup>7</sup> also criticized the Government of India for reluctance to enact Uniform Civil Code in view of the sensitivity of the Muslim community. Later on, under pressure from Muslim fundamentalists the Parliament passed the Muslim Women's (Protection of Rights on Divorce) Act, 1986, which denied right of maintenance to Muslim women under Section 125 CrPC. This shows the low priority given to women's right in a secular country. The view of *Mr. Justice Kuldeep Singh in Sarla Mudgal v. Union of India*<sup>8</sup> is worth mentioning "Where more than 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the 'Uniform Civil Code' for all the citizens in the territory of India." Thus, the Supreme Court reiterated the need for Parliament to frame a common civil code which will help the cause of national integration by removing contradictions based on ideologies.

After thirty years of the Shah Bano case comes up the case of Saira Banu who is one amongst many victims of the tyranny of triple *talaq*. However, the present case is not about seeking maintenance from the husband but to fight against the validity of her husband's action of whimsically kicking her out, only by uttering the word 'Talaq' thrice. She filed a petition to the Supreme Court of India to declare triple *talaq*, polygamy and *halala*<sup>9</sup> illegal.

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6 Mohammad Ahmed Khan v. Shah Bano, (1985) 3 SCR 844 (India).

7 A Constitution Bench consisting of five judges, Chandrachud, C.J., D.A. Desai, J.O., Chenappa Reddy, J.L.S., Venkat Ramiah, J. and Rangnath Mishra J. Chief Justice Chandrachud wrote and delivered the judgement.

8 AIR 1995 SC 1531 (India).

9 'Nikahhalala' is a practice intended to curb incidence of divorce under which a man cannot remarry his former wife without her having to go through the process of

A 2015 survey of about 5,000 women across 10 states by the Bharatiya Muslim Mahila Andolan (BMMA) found that over 90% wanted an end to polygamy and triple *talaq*. Of the 525 divorced women surveyed, 78% had been given triple *talaq*; 76 of these women had to consummate a second marriage so that they could go back to their former husbands. Saira Banu's case is a great opportunity to usher in a much-needed reform.<sup>10</sup>

Recently, the Modi government has asked the Law Commission to 'examine' the issue of implementing the uniform civil code as it finds a place in their election manifesto. The Law Commission of India is currently seeking public opinion from the stakeholders on the Uniform Civil Code/Family Reforms. According to the Chairman of the Law Commission Justice B.S. Chauhan, any reform shall be in conformity with the principles of the Constitution including that of Secularism, Freedom of Religion and Equality.<sup>11</sup>

On the International front India has been signatory to a large number of treaties to empower women and protect their rights. India has ratified the Universal Declaration of Human Rights, 1948,<sup>12</sup> which is not a treaty in itself but defines

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marrying someone else, consummating it, getting divorced, observing the separation period called 'Iddat' and then coming back to him again, Zee Media Bureau, Triple talaq row: Nikah Halala victims speak about their ordeal-Know what she said, Zee News, Available at <http://zeenews.india.com/india/triple-talaq-row-nikah-halala-victim-speaks-about-her-ordeal-know-what-she-said-1996379.html>. (Last accessed on 07/05/2017).

10 MohdAsim, *Ban Triple Talaq, Declare Muslim Law Board Illegal*, NDTV, Available at <http://www.ndtv.com/blog/ban-triple-talaq-declare-muslim-personal-law-board-illegal-1396658>. (Last accessed on 07/05/2017).

11 Anusha Soni, *Law Commission Chairman on Uniform Civil Code: Each religion would continue to have personal laws*, INDIAN TODAY, Available at <http://indiatoday.intoday.in/story/uniform-civil-code-law-commission-chariman-religion-personal-laws-gender-justice/1/810271.html>. (Last accessed on 06/05/2017).

12 Article 16 (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

‘fundamental freedoms’ which inspired International Covenant on Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights. It has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

### **CONCLUSION**

In our country, personal laws affect the rights and lives of a large number of women belonging to different communities. Although various efforts have been made for the upliftment of their status by ratifying international instrument, changing trends of the judicial pronouncements, recommendation by Law Commission, reforms to the national law the result seems to be unsatisfactory. The Uniform Civil Code is the need of the hour for the promotion of national unity and integrity. One should not misunderstand the term as violating one’s religious belief as it is only a tool for unifying the civil laws of the country, as practiced in many other countries of the world.

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# CONSTITUTIONAL QUEST TO UNIFORM CIVIL CODE - MIRAGE OR COMPULSION

*Lt. Col. Plavelil George Eapen (Retd)\**

## INTRODUCTION

The Constitution of India was enacted by our founding fathers which consisted of a Preamble, Fundamental principles and Directive Principles. In the background of communal discord the subject of a Uniform Civil Code did not find place as a fundamental principle. It was enacted as section 44 of the directive principles of the State Constitution. It stated that the State shall endeavor to legislate a Uniform Civil Code throughout the territory of India. There was no time frame set. The preamble did not initially affirm the nation being secular or socialist but declaration of resolve only stated of the country being a sovereign democratic republic. Subsequently the elders deemed it appropriate and necessary to include in the preamble the character of the nation as being secular and socialist. It categorically implied that the Indian constitution did not ascribe to a two-nation theory but a single nation encompassing all religions, castes and communities. A Uniform Civil code will strive to bring uniformity in all the personal laws of the people of various religions in the country. The majority of the population amounting to about 80 percent is classified as Hindus. Muslims form the largest among the minorities at 12 percent of the population. The remaining minorities consist of Sikhs, Christians, and Jains. Parsis, Buddhists, atheists etcetera. The personal laws cover issues of marriage, divorce, inheritance, adoption and maintenance. The core issue of marriage is deeply rooted in religious texts, traditional practices and cultural norms. As the marriages get endorsement from religion, personal laws can be

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\* Retired Army Officer, currently residing in Bengaluru.

made uniform only if there is mutual regard on core edicts of religion in marriage. Hindu laws may advocate the single wife norm especially after codification by the Hindu marriage act 1955 but fundamentalist Islamic scholars may interpret Quran in a way to justify a Muslim marrying up to 4 wives. The latter practice is not the norm for the majority of Muslims. It is alien to modern day sensibilities in many countries including most of the Islamic states, yet in the Indian context the practice has not been eradicated especially among the lower socio-economic strata. Another is the practice of divorce in the Muslim community by pronouncing Talaq thrice. Though it is antagonistic to modern sense of fairness and justice, it is a practice that is prevalent among particular strata. The Shah Bane case of 1986 in which the Supreme Court ruled in favor of the divorcee woman with regard to financial maintenance was negated when the Rajiv Gandhi government had to take retrograde action and legislate an amendment to maintain the earlier status quo catering to orthodox ideology.

The incident revealed that social justice as enshrined in the preamble of the Constitution was yet a chimera. How deep rooted are the emotions and rage when fed upon religious fundamentalism thriving on cultural abasement, was clearly discernible in the protests of one part of the community. Of course there was religious justification offered by certain interpreters of the Holy Quran. The climb down by the government in upholding the supremacy of law was albeit a tacit acknowledgement of its limitation in enforcing a uniform stand.

Over the last seven decades there has been economic growth and development based upon government financial plans. However, social harmony and freedom in society has often been elusive. There have been numerous riots based upon religious animosities. This has affected a harmonious social growth in society. To achieve the enactment of a Uniform Civil Code the government should have made a road map as to the measures to be implemented to create a socially harmonious environment, conducive to legislation. However over the years there has been religious violence often socio-political compulsions being the catalysis while the directive on UCC remained in limbo.

An analysis of major riots in the country from partition in 1947 till date is a tragic story of bloodletting and bestiality between communities. To recollect there is abroad estimate of 2-20 lacs people being killed in the partition riots involving Hindus, Muslims and Sikhs. In the 1969 Bhiwandi riots there were 512 dead and 1084 wounded. The Nellie massacre on 18 Feb 1980 led to 2191 Muslims in Bengal being killed. The 1984 anti-Sikh riots had 2733 Sikhs murdered in Delhi alone. In the Meerut riots of 1987 when Babri Mosque was reopened for Hindu worship there were clashes between the Hindus, Muslims and the PAC resulting in 346 killed and 159 wounded. In the Bhagalpur riots of 1989 there were more than a 1000 killed. The Hyderabad riots of 1990 based upon the report of part demolition of Babri masjid led to bloody riots resulting in 200 dead. The 1992 Bombay riots as a fall-out of Babri Masjid demolition led to 250 killed. A party of Hindu pilgrims returning from the site of Babri Masjid was burnt to death in train at Godhra which led to the Gujarat riots of 2002 leading to 1044 dead and 2500 wounded. Assam violence in 2012 led to 77 dead. Muzafarpur, UP riots resulted in 62 dead and 93 wounded. The Meerut and Saharanpur riots of 2014 had a death toll of 3 each and wounded 50 and 33 respectively. Thus the 70 year period of our country's political history is a sad story of a series of communal conflagration.

The preamble to the Constitution affirms India as a secular state, which means that the state or the government will not promote or practice religious activities like rituals / rites in any state office, institution or office. Religion is to be a matter of personal choice and practiced in one's own personal space. In theory it is analogous to the concept of Secularism in western democracies like the USA, France or UK. However there is a great difference in practice and the law in India. This is due to the innate religiosity of the Indian masses. Spiritual inclination is natural and deep seated in the psyche of the ordinary Indian. The social ethos of the Indian masses upholds values of truth, justice and compassion. Religious practices, embellishments and cultural trappings are woven with the everyday life of a person.

At the foundation laying ceremony of a public office building or maybe a bridge there is a puja or prayer. At the inauguration of a concert or symposium or public

meeting there is a prayer invocation. At Dussehra, a popular Hindu festival there is consecration or worship of office equipment and vehicles. In the armed forces on the same very day personal weapons and armament is consecrated. Thus religious invocations and practices are closely entwined to the working practice of the people.

Having had the good fortune of working among Hindus who form the majority and especially the Maratha troops in the Indian army, I am quite familiar with their ways. Only thing I realized was that for majority of devotees their perspective of religion is the mythology and the rituals/rites. Very few have moved to philosophy of religion. It is a paradox that the Vedanta espouses the most sublime spiritual thoughts yet the majority remains out of its ambit. It is only by reaching the higher realms of religious practice that one can appreciate the intrinsic unity of all religions. All antagonism and disdain for other religious paths disappear and one starts identifying the commonality among religions. This forms a basis for empathy and consequent realization of the wisdom embedded in all religions. Then the path to national integration and uniformity will become easy.

### **CONCLUSION: THE WAY FORWARD**

The solution lies in a multi-pronged approach. :-

Firstly, the state machinery should ensure that there are no more riots in the country in the name of religion, caste or community. Secondly, each religion should be encouraged to promote a deeper philosophical understanding of religion by its devotees so that the general masses develop a holistic view discarding fanaticism. Thirdly, the state should encourage inter – religious dialogues like the World parliament of Religions in order to inculcate inter-faith harmony and appreciate the intrinsic unity of religions. Fourthly, volunteer social groups especially women’s groups should further the cause of reforms in society. Women’s power was seen in the opening up of the Shani Shingnapur temple and the Haji Ali Dargah in Mumbai. The zeal of Trupti Desai and Bibi Khatoon is to be appreciated. Women’s commission should play an active role in promoting gender equality. Fifthly, government bodies should play a pro- active role in promoting



unity among religious communities with a budgeted expenditure plan. Sixthly, election commission should be empowered to act effectively against politicians who seek favorable mandate in elections by giving a religious slant in their campaigns and Lastly, a National Integration Council be formed with representatives of various communities to effectively act and facilitate national Integration.

Any great reform or change in history has always taken place once the masses are charged with a great idea. The will of the people ultimately reigns supreme. People's active voice and participation can only promote a society where all religions live in peace and harmony in turn facilitating the enactment of a Uniform Civil code.

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# UNIFORM CIVIL CODE, CONSTITUTION OF INDIA AND CONSTITUTIONALISM

*Preethika Piliinja\**

## INTRODUCTION

Since a large part of the civil law in the country was already uniform in its content and application, when Article 44 came to be adopted by the Constituent Assembly, it was concerned with only a small gamut of civil law known as the personal laws. Sixty-six years after our Constitution makers resolved to strive to secure 'Uniform Civil Code', for its citizens, it still remains an unaccomplished dream. While some argue that, Uniform Civil Code was a mandatory obligation to be implemented over a course of time, there are others who maintain that, it was an ideal which the nation can decide on to adopt, if found appropriate. While this debate rages on in civilian circles, the ball is often thrown into the court of the judiciary, where it is pushed upon to decide on pertinent questions from the standpoint of gender justice and overriding principle of non-discrimination, dignity and equality. Hence, this paper is an attempt to understand Uniform Civil Code through the prism of Indian Constitution.

## UNIFORM CIVIL CODE IN CONSTITUTIONAL DEBATES

The idea of Uniform Civil Code was brought up in the Constituent assembly with the following wordings(then article 39): *The State shall endeavor to secure for the citizens Uniform Civil Code.*" Even though it was sought to be introduced only as a Directive Principle of State Policy, it was vehemently opposed on two grounds<sup>1</sup>:

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1 D.C.Manooja, *Uniform Civil Code: A suggestion*, 42 JOURNAL OF INDIAN LAW INSTITUTE, 448,452(2000).

- i. It will violate the freedom of religion ensured in article 25 of the Constitution of India, and
- ii. It will amount to tyranny of the minorities.

In addition, the following exception was proposed to be included: “Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law.”<sup>2</sup> The first objection was rebutted by reference to article 25(2) of the Constitution of India, which stated that, “nothing in this article shall affect the operation of any existing law or prevent the State from making any law, regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.”<sup>3</sup>

With respect to Uniform Civil Code being tyrannical to the minorities several counter arguments were raised. Firstly, it was stated that nowhere in advanced Muslim countries the personal law of each minority has been recognised as so sacrosanct as to prevent the enactment of a Civil Code. Secondly, apart from the North-West Frontier Province, up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu Law in the matter of succession. In order to bring them on the plane of uniformity with regard to the other Muslims who observed the Shariat Law, the Legislature had to intervene in 1937 and to pass an enactment applying the Shariat Law to the rest of India, much to the opposition of several sections of the Muslim community.<sup>4</sup> Hence, Shariat law in India was not immutable. With respect to the exception proposed regarding uniform civil code, it was rejected *inter alia* stating that, if the exception is accepted, then no equality can be given to women. Since the Assembly had already passed a Fundamental Right to that effect and there was an article which lays down that there should be no discrimination on the basis of sex, the exception was not accepted.

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2 Mr. Mohammad Ismail Sahib, in CONSTITUTIONAL DEBATES, Volume VIII, 534.

3 KM Munshi in CONSTITUTIONAL DEBATES, Volume VIII, 542.

4 *Id.* at 543.

***Dr. Ambedkar concluded the debate stating as follows:*<sup>5</sup>**

*[W]e have in this country a uniform code of laws covering almost every aspect of human relationship. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change”.*

Towards the end of the debate, the motion proposing article 35 (present article 44) was adopted. Later on, Pandit Jawaharlal Nehru, while introducing the Hindu Code Bill instead of Uniform Civil Code, in the Parliament in 1954, said, “I do not think that the present moment the time is ripe in India for me to try to push it through.”<sup>6</sup> Uniform Civil Code has ever since, been awaiting its right time.

**UNIFORM CIVIL CODE UNDER ARTICLE 44 OF THE CONSTITUTION:  
ITS MEANING AND IMPLICATIONS**

Uniform Civil Code is not defined anywhere in the Constitution. Hence, there is not much guidance as to what should it precisely contain. Unfortunately, while our Constitution makers have implanted a lofty ideal in the Constitution, all we find in our Constitutional debates is the discussion on whether Uniform Civil Code needs to be made part of the Constitution. Even the wide array of decisions of the Apex Court touching upon the subject do not shed light on what is expected to be contained in the Uniform Civil Code. This has led to people drawing conclusions on constituents of Uniform Civil Code as per their own understanding and convenience.

Civil Code, generally speaking, is a set of laws governing the civil matters of the citizens in the country relating to matters like marriage, divorce, adoption, custody

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5 Dr. B.R. Ambedkar in CONSTITUTIONAL DEBATES, Volume VIII, 547.

6 N.R. Madhava Menon (Ed.), NATIONAL CONVENTION ON UNIFORM CIVIL CODE FOR ALL INDIANS, 7 (1986).

of children, inheritance, succession to property etc.<sup>7</sup> The term ‘Uniform Civil Code’, therefore, denotes a very small field of civil law relating to marriage, succession, maintenance and adoption.<sup>8</sup> A Civil Code, as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters.<sup>9</sup> Uniform Civil Code therefore is understood to be an instrument that, would eliminate differences of personal laws and usher in uniformity in its application.

However, even this idea is not without dissent. SP Sathe, noted scholar states that, what the directive principle of state policy means is that there should be uniform laws but not necessarily a common law.<sup>10</sup> A uniform law would mean not necessarily a common law but different personal laws based on uniform principles of equality of sexes and liberty of the individual.<sup>11</sup>

### **DIRECTIVE PRINCIPLES OF STATE POLICY: THEIR ROLE IN THE CONSTITUTIONAL ARENA**

Uniform Civil Code is placed under the Directive Principles of State Policy. Article 37 of the Indian Constitution states that, the provisions contained in this Part shall not be enforceable by 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. What it would essentially imply is that, though directive principles are not enforceable, the courts are nevertheless bound “to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State

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7 Shabbeer Ahmed, *Uniform Civil Code (Article 44 of The Constitution) A Dead Letter*, 67 THE INDIAN JOURNAL OF POLITICAL SCIENCE, 545, 546(2006).

8 Krishnayan Sen, *Uniform Civil Code*, 39 ECONOMIC AND POLITICAL WEEKLY, 4196, 4196 (2004).

9 Shri Alladi Krishnaswamy Aiyer in CONSTITUTIONAL DEBATES, Volume VIII, 545.

10 S. P. Sathe, *Uniform Civil Code: Implications of Supreme Court Intervention*, 30 ECONOMIC AND POLITICAL WEEKLY, 2165, 2165(1995).

11 *Id.*

12 UBSE Board v. Harishankar, AIR 1979 SC 65 (India).

13 Mohd. Ahmed Khan v. Shah Bano Begum and Ors. AIR 1984 SC 945 (India).

Policy.<sup>12</sup> Hence, what we see in some of the landmark cases such as *Shah Bano*,<sup>13</sup> *Sarla Mudgal*,<sup>14</sup> *John Vallamattom*<sup>15</sup> are a flavor of this principle.

### ***Articles 14 to 18 of the Constitution and Uniform Civil Code***

The Supreme Court has started a trend (which is now considered to be a well settled law) that the Directive Principles and Fundamental Rights ought to be harmoniously constituted, and whenever possible Fundamental Rights should be adjusted in their ambit so as to give effect to the trend which can manifestly be evinced in *ABK Singh v. Union of India*,<sup>16</sup> followed by *Waman Rao v. Union of India*<sup>17</sup> and *Griha Kalyan Kendra Worker's Union v. Union of India*.<sup>18</sup> However, when several portions of Dissolution of (Muslim) Marriages Act, 1939 and Muslim Women (Protection of Rights on Divorce Act), 1986 were challenged in *Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India*,<sup>19</sup> the Court refused to declare them void, stating that the issues raised were fit to be dealt with by the Legislature and not the Courts.<sup>20</sup> SP Sathe states that, Article 44 of the Constitution must be interpreted in conjunction with article 14 of the Constitution which guarantees equality before the law and equal protection of the law.<sup>21</sup> He emphasized on reforms of each personal law so as to weed out gender injustice and outmoded traditions or practices.<sup>22</sup> However, these attempts of the judiciary can only be termed as piece meal as judiciary has been oscillating between being a crusador of uniform civil code and a spectator awaiting legislative initiatives.

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14 Smt. Sarla Mudgal v. Union of India and Ors, AIR 1995 SC 1531 (Indi).

15 John Vallamattom v. Union of India and Ors, 2003 (5) SCALE 384 (India).

16 AIR 1981 SC 298 (India).

17 AIR 1982 SC 232 (India).

18 (1991) 1 SCC 611 (India).

19 AIR 1997 SC 3614 (India).

20 AIR 1997 SC 3614 (India).

21 SP Sathe, *Uniform Civil Code Implications of Supreme Court Interpretation*, 30 ECONOMIC AND POLITICAL WEEKLY, 2165, 2165 (1995).

22 *Id.*

### ***Article 25 and the Uniform Civil Code***

Article 25(1) guarantees to every person, and not only to citizens of India, the “freedom of Conscience” and “the right freely to profess, practice and propagate religion.” The term ‘religion’ has not been defined in the Constitution and it is too fanciful to assume that, the term is susceptible to a very precise definition. In Constitutional language, practice of religion has both tenetary as well as the social sides. While the purely tenetary aspect of religious practice would refer to the rites like verses to be recited at the time of prayer, which is essentially ecclesiastical, the other aspect relates to the manifest effects of an activity on the social set up.<sup>23</sup> Supreme Court has in many occasions attempted to decipher the meaning of ‘religion.’ The Supreme Court has observed in *Lakshmindra*<sup>24</sup> that “Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent first cause.”

Supreme Court in *Sarla Mudgal*<sup>25</sup> went a step ahead and held that, Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured inner aspects of religious belief. And external expression of it were protected by guaranteeing right to freely, practice and propagate religion. Reading and reciting holy scriptures, for instance, Ramayana or Quran or Bible or Guru Granth Sahib is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to a temple, mosque, church or gurudwara.

Supreme Court in *Sardar Syadna Taher Saifuddin Saheb* stated that the protection in article 25 is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral

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23 VP Bharatiya, *Religious Freedom and Personal Laws*, 63 In N.R. Madhava Menon (Ed.), NATIONAL CONVENTION ON UNIFORM CIVIL CODE FOR ALL INDIANS (1986).

24 Commissioner Hindu Religious Endowments v. Lakshmindra Thirtha AIR 1954 SC 282 (India).

25 AIR 1995 SC 1531.

parts of religion.<sup>26</sup> The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.”<sup>27</sup>

Supreme Court in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*<sup>28</sup> held, in deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. This brings us to the million-dollar question as to what constitutes essential parts of the religion. Whether the most contentious questions of polygamy etc., do fall can get the immunity under article 25 of the Constitution of India is the next question.

Bombay High Court in *Narasu Appa Mali's case*<sup>29</sup> in which two of India's most versatile judges namely, Chief Justice Chagla and Justice Gajendragadkar (who later became the Chief Justice of India) upheld the Bombay Prevention of Bigamous Marriages Act, 1946 on the ground that the prohibition of polygamy among Hindus was not a different treatment to the Hindus on the ground of religion but was because of the different traditions, history of social reform and culture.

26 Sardar Syadna Taher Saifuddin Saheb v. The State of Bombay, [1962] Suppl. S.C.R. 496 (1) (India).

27 *Id*

28 AIR 1963 SC 1638 (India).

29 State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84 (India).



In *Badrudin v. Aisha Begum*<sup>30</sup> it was contested that, a Muslim's fundamental right to have more than one wife is protected under article 25 of the Constitution of India. Oak J decided-

*"It may be that under the personal law of Muslims a Muslim may have as many as four wives. But I do not think that having more than one wife is a part of religion. No authority was cited to show that it is obligatory upon a Musalman to have more than one wife."*

In *Mohd. Ahmed Khan v. Shah Bano Begum*<sup>31</sup> Supreme Court stated that, Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27.

From the above, it is very clear that some of the most contentious issues of personal laws do not get the immunity under article 25. However, as per the tests laid down by the Supreme Court in *Sardar Saydna* case, what constitutes part of religion needs to be decided on a case-to-case basis. Also, not to forget clause (2) of Article 25 which provides an exception to the effect that any existing or future social welfare and reform shall not be affected by the operation of this article. Hence, one thing is clear. Not every religious practice can be brushed under the carpet of article 25 of the Constitution.

### **ARTICLE 253 AND INTERNATIONAL OBLIGATIONS**

India has ratified the International Covenant on Civil and Political rights 1966 and International Covenant on the Elimination of all forms of Discrimination against Women, 1979 and is bound to enforce the relevant provisions and ensure gender equality under its laws. Prevalence of discrimination against women under personnel laws of different communities was openly accepted by India in its

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30 1957 ALLAHABAD LAW JOURNAL, 300 (India).

31 Mohd. Ahmed Khan v. Shah Bano Begum and Ors. AIR 1984 SC 945 (India).

periodic report before the United Nations Committee on the Elimination of Discrimination against Women when it admitted, “The personal laws of the major religious communities had traditionally governed marital and family relations, with the Government maintaining a policy of non-interference in such laws in the absence of a demand for change from individual religious communities.”<sup>32</sup>

India has been submitting periodic compliance reports vis-a vis the implementation of the CEDAW to this Committee. This Committee has noted that, “steps have not been taken to reform the personal laws of different religions and ethnic groups, in consultation with them, so as to conform to the Convention,” and warned that “the Government’s policy of non-intervention perpetuates sexual stereotypes, son preference and discrimination against women.”<sup>33</sup>

The Committee also “urged the Government to withdraw its declaration to Article 16, paragraph 1 of the Convention and to work with and support women’s groups as members of the community in reviewing and reforming these personal laws”<sup>34</sup> and expected the government “to follow the Directive Principles in the Constitution and Supreme Court decisions and enact a uniform civil code that different ethnic groups and religions may adopt”<sup>35</sup> The Human Rights Committee, the international mechanism for monitoring the Compliance of another international instrument, the International Covenant on Civil and Political Rights, 196 at its meeting held on 30 July 1997, after considering the third periodic report of India<sup>36</sup> also observed that women in India have not “been freed from discrimination,” and expressed serious concern that they “subjected to personal laws which are

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32 United Nations, *Report of the Committee on the Elimination of Discrimination against Women*, Supp.No.38, A/55/38, 22nd Session 17 Jan-4 Feb 2000 and 23rd Session 12-30th June 2000, General Assembly Official Records, New York, 2000 at 8.

33 *Id.*, at 10.

34 Article 5(a) and 16(1) of the Convention.

35 *Supra* note 1 at 10.

36 India’s Third Periodic Report (CCPR/C/76/Add.6) considered at its 1603rd to 1606th meetings on 24 and 25 July 1997 and subsequently adopted at 1612th meeting of the Humana Rights Committee Available at <http://www1.umn.edu/humanrts/committee/india1997.html>. (Last accessed on 02/02/2017).

based on religious norms and which do not accord equality in respect of marriage, divorce and inheritance rights,” and stressed that “the enforcement of personal laws based on religion violates the right of women to equality before the law and non-discrimination.” In this light, the Committee strongly recommended laws to be enacted which are fully compatible with the Covenant.<sup>37</sup> It needs to be noted that, Supreme Court in a number of occasions<sup>38</sup> has held that, international obligations undertaken, particularly, International Covenants, Treaties etc., those to which India is a party or signatory, become part of Domestic Law in so far as there is no conflict between the two, placing reliance on article 51 of the Constitution of India. Hence, there is an obligation on the Parliament to enact laws for fully implementing the above-mentioned Conventions.<sup>39</sup>

### **CONCLUSION: TAKING THE DEBATE FORWARD**

In a number of decisions including Shah Bano’s case Supreme Court has expressed regret that, Uniform Civil Code has remained a dead letter. But, the reality is that judiciary has also not taken an initiative till the date of this work to examine the practices that run contrary to the tenants of the Constitution and declare them void. While the requirement of positive steps towards realizing the aspirations given in article 44 is not understated, we cannot ignore the role that judiciary can play in declaring practices that run contrary to the tenants of the Constitution as unconstitutional and thereby void. This is very well in the domain of the judiciary given that, Supreme Court has in a number of cases strongly asserted that, though directive principles are not enforceable Courts are bound to adopt such interpretation that will further the goals set out in the Directive principles. On the other hand, as noted by Supreme Court in Shah Bano case it is true that, there is no evidence of any official activity for framing a common civil code for the country. Probably for the said reason, the challenges

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37 Jyothi Ratan, Uniform Civil Code in India: A Binding Obligation under International and Domestic Law, 42 JOURNAL OF INDIAN LAW INSTITUTE, 577,578 (2014).

38 In Re Berubari Union and Exchange of Enclaves, AIR 1960 SC 845; Ali Akbar v. U.A.R. AIR 1966 SC 230; Magnabhai v. Union of India, AIR 1969 SC 783(India).

39 CONSTITUTION OF INDIA. Art. 253.

of accommodating all the personal laws into a unified code has been understated. For example, the rules regarding the prohibited degrees of relationship are different in the Muslim Personal Law from those in the Hindu Law. A Muslim can marry his first cousin or should a Hindu be permitted to marry a first cousin whereas such a marriage is totally forbidden for the Hindus. Should a Muslim be prohibited from marrying the first cousin or should a Hindu be permitted to marry a first cousin? Why should we really do that? We have no real answers on the questions of how do we accommodate multitudes of personal laws into a common code. Hence, the need of the hour is a comprehensive legislative exercise that, would first weed out the various practices that run contrary to the tenants of the Constitution. In the subsequent phases attempts should be made to bring in uniformity in the various personal laws. Doing this as a knee jerk measure would do more damage than good. Hence, what is important is that, all communities must be governed by uniform principles of gender justice and human justice. Bringing a uniform civil code can happen over a period of time.

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# **PUBLIC DOMAIN OF PERSONAL LAWS: AN INQUIRY FROM THE PERSPECTIVES OF CONFLICT OF INTERESTS AND IDENTITIES**

*Eklavya Anand & Shailesh Kumar\**

## **INTRODUCTION**

In this Paper, the authors take up one of the most perplexing questions of our time that how should Indian Republic deal with the situation of creating a public domain of personal laws, particularly for Muslims. In personal laws, personal is mere verbatim. Personal Laws are product of larger social framework of society, and accordingly, it develops customary practices. Needless to say, society appears as a factory and produces culture, and this production cycle is not neutral to power. In this space, the central argument appears that it is no other but God that makes personal laws. Therefore, God is the final legislator, and his commands, as personal laws shall not be challenged. Needless to say, this is the central theme for even public laws in theocratic countries.

It is a question to examine that whether merely one's belief of the sacrosanctity of personal laws should lead to their being not challenged. If this is the case, then what is the commitment and demands or arguments of different groups, that they seek legal intervention in the domain of personal laws to fill the legal vacuum and surgically examine some anti-women practices? Such practices range from the right to divorce, alimony, question of maintenance, inheritance, and qualification for witness etc. So, these demands create a situation of binaries, where one group seeks to protect practices relating to personal laws based on the cultural

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rights or even minority rights, to preserve and protect, practice and propagate their culture. On the other hand, a group seeks to revisit the unsettled question of past, and give them their adequate due to entitlement for citizenship. However, this debate takes an interesting turn when cultural groups from Hindu background argue, not on the ground of persuasive logic, but others' personal laws as breach of equality for themselves, such as their incapacity to perform polygamy, and link personal laws as lubricant for personal growth. With these motives in mind, these groups argue to regulate the personal laws so that Muslim's male privilege could not be there. This argument is rooted in prejudice than anywhere remotely linked with rationality and sex equality<sup>1</sup>. This underpinning views women as product and tools of reproduction. Resultantly, fundamentalist groups' arguments run opposite to the females' emancipation movements. In light of the aforementioned issues and concerns, both historical and topical, this paper attempts to present an analysis and evaluation of personal laws in India. It begins with the investigation of history of personal laws in the context of Republican idea of India. Thereafter, it moves towards the constitutional, ideological and philosophical deliberations over personal laws, including those in the Constituent Assembly. In the third part, the paper looks at the judicialisation and politicisation of personal laws by all the three pillars of the world's largest democracy. Lastly, the paper delves into the current political developments and debates on the decades old issue of unification of personal laws of different religious communities in India, and concludes by arguing that the unification shall be thought of in the direction of rationalisation of all personal laws and from the perspective of unifying the form rather than the substance of the laws. A feminist perspective in this direction may serve as a boon for tilting the scales of codifying personal laws from a nationalistic idea towards an idea of gender justice by making a case for optional application of cluster of reformed legislations as per women's consent.

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1 This is the term used by Mac Kinnon in her work that suggests that social inequalities of women should be seen from the lens of substantive equality rather than that of formal equality. *See*, CATHARINE A. MAC KINNON, *SEX EQUALITY* (West 2001).

## **HISTORY OF PERSONAL LAWS AND IDEA OF REPUBLIC**

British, for many reasons, showed cold shoulder to touch the religious and cultural space for the native Indians. However, this is not completely true in case of all diverse groups in Indian Society. This precisely happened due to the following two reasons. First, when British were trade entity, they were keeping restrain to indulge in local laws of native and in fact apart from few transgressions they always religiously left Indians to be governed by local customs. However, this practice or indeed attitude as policy was not long lived. As soon as the British gained the territorial control of the empire, they started to follow a policy to modernize the legal space. In initial years, orientalism was pursued which advocates that oriental laws must be the regulating instruments for orient people not anything else. However, this policy was challenged by the evangelist or early Benthamites who themselves believed that the colonial state is not the product of ‘might is right’. In order to give legitimacy to the colonial state, they constructed a theory of *Pax Britannica*, which means it is the duty of British Empire to rationalize the culture and laws of colonies.<sup>2</sup> Secondly, the exercise to rationalize the cultural practices has predominantly happened with Hindus. It is the Anti Sati Act 1829, Caste Disabilities and Removal Act 1856, Widow Remarriage Act 1856, Jail Reforms, Age of Consent Act 1891, and Sarda Act 1929 that were enacted, and attempts were made to rationalize the practices of Hindus. In this process, there are objective facts to believe that these reforms relating to the personal laws more or less remained confined to the Hindu Community and left Muslim from its purview.

What Muslims and Hindus have in common, which makes any reform of personal law very delicate, is their certainty that this law is religiously founded and thus cannot be reformed by human will. In this respect, it seems that Muslims are, probably much more than the Hindus, convinced of the sacred character of their personal law: the Quran is, amongst all texts, far more “sacred” (if one may say)

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<sup>2</sup> See, Carl P. Watts, *Pax Britannica*, in *ENCYCLOPEDIA OF THE AGE OF IMPERIALISM, 1800-1914*, Vol. II, 547-550 (Carl C. Hodge ed., Greenwood Press: 2007).

than the dharma treaties, which is why the Hindus of the Constituent Assembly managed to behave the way they did.<sup>3</sup> However, it is difficult to agree with this argument. It is safe to say that today's temperament or rational normalcy about certain reforms in Hindu personal laws is more or less British construction as their agenda was to constantly provide legitimacy to the colonial rules in the colonies.<sup>4</sup> This nowhere should be considered as an attempt to show colonial intervention in good light but just to highlight that they had two prominent agendas in mind. One is economic exploitation, which was many a ways unofficial religion of the empire, and secondly, to intervene in social space of natives and paint it in bad light and seek legitimacy of colonial rules to carry their official agenda of civilizing mission. In this context, reforms in Hindu laws were experimented with the Benthamites ideas that good law will make good society. So in this process, initially native resisted, however after 1857, reforms were laid down in a piecemeal manner. Therefore in order to get to see the true glimpses of personal space of Hindus, we need to venture in pre-colonial intervention. Prior to 1829, when Sati was legal by cultural practices, it was considered as divine practice and people obeyed it as matter of rituals with divine force.<sup>5</sup>

Even Raja Ram Mohan Roy argued to abolish Sati on the basis of the Shastric texts that there is no valid Hindu scriptures that enjoin self-immolation on Hindu widows.<sup>6</sup> He argued that Sati is not a Vedic Practice.<sup>7</sup> In this light, it is important

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3 Olivier Herrenschmidt, *The Indians' Impossible Civil Code*, 50 (2) EUROPEAN JOURNAL OF SOCIOLOGY 332, 309-347 (2009).

4 TANIKA SARKAR, *HINDU WIFE, HINDU NATION: COMMUNITY, RELIGION AND CULTURAL NATIONALISM* (Permanent Black, New Delhi: 2001).

5 Kindly see, *Primary Source Packet*, Roy Rosenzweig Center for History and New Media, George Mason University, Available at <https://chnm.gmu.edu/wh/modules/lesson5/pdfs/primarysourcepacket.pdf> (Last Accessed on 03/1/2017). For a detailed understanding, see, FRANCOIS BERNIER. *TRAVELS IN THE MOGUL EMPIRE, AD 1656-1668*. Translated by Archibald Constable on the basis of Irving Brock's version. Edited by Vincent A. Smith. 1934 (Reprint, Delhi: Low Price Publications 1994) (Burnier was a French traveler, who came during Aurangzeb's reign and extensively wrote on the then contemporary situation of sati practices and provides the details about the state policy on this particular practice).

6 *Ibid.* at 5.

7 *Ibid.* at 7.



to reiterate that he failed to argue the inhumane aspect of Sati and that how a widow is burnt alive takes away the right of an individual, a woman. In this regard, change in the cultural space of the Hindus was considered as a local phenomenon confined to the subcontinent. However, change in the domain of Muslim personal laws might have had extra territorial effects.<sup>8</sup> In this light, there was a growth of publication of personal laws, and due to this reason the colonizer, for their scrutiny, opened many Shastric laws, and accordingly they brought changes. So, Hindu got first training in their respective areas.

Ambedkar made it clear that country has practically a Civil Code<sup>9</sup>, uniform in its content and applicable to the whole of the country and it was marriage and succession only that remained last bastion to conquer.<sup>10</sup> The Brahmanical treaties, thus, ceased to be the foundation of personal and property laws in modern independent India, and so do the various customs. However, at least 200 years of colonial rule have constructed a public space, which is religion neutral. Dr. B. R. Ambedkar, who was spearheading the similar campaign of codification of personal laws for Hindus and make suitable changes according to need of Republic, had to resign as the law minister. At that point of time the agendas of reforms met with severe opposition from conservative nationalistic leaders and Congress party Brahmins who opposed divorce as well as property rights to women as it violated the Hindu ethos. They apprehended that if Hindu women were granted the right of divorce and inheriting property, they would go astray and the Hindu social fiber would break. Even the then President Rajendra Prasad refused to sign the said Bill.<sup>11</sup>

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8 There were some British colonies having Muslim population such as Jordan, Iran, Yemen, Saudi Arabia, Palestine, Egypt etc. about which British were concerned and were fearful of the possibility of bringing disaffection there.

9 The civil domain also consists of *inter alia* issues of transfer of property and contract, and these were already codified for the entire India through legislations like Transfer of Property Act, 1882 and Indian Contract Act, 1872 etc. Thus, one can argue that a larger part of civil domain was already codified till this time.

10 Herrenschmidt, *supra* note 3, at 333.

11 *Id.* at 330.

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### ***Theoretical Underpinnings of Personal Laws***

It is virtually unknown to see work on the encounter between Islamic law and Western liberal legal systems lavish so much attention as Fournier does on the realistic possibilities as manifested by what has actually already happened.<sup>12</sup> Instead, we debate women's equality versus their choices, the value of recognizing minority cultures versus the value of integrating all citizens into liberal values, the authenticity of experience and the trap of false consciousness, etc. Across all these big questions, we see theory loaded itself with prescription, before it even begins to describe. Fournier has managed to suspend moral judgment, to defer principled determination, to avoid polemical conclusion so that she can describe the field of judicial options and marital outcomes that are actually within the scope of her big question.<sup>13</sup> She argues that if liberalism is committed to the individual and individual choice, it is also conventionally taken to be committed to freedom and equality.<sup>14</sup> Different personal laws govern marriage, divorce, inheritance, guardianship and adoption for Hindus, Muslims, Parsees and Christians. Hindu personal law has been reformed in the 1950s, while Muslim Personal Law has not been amended since the middle-19<sup>th</sup> century, except few instances in 1930s. Perhaps, the public domain of personal laws are colonial construction or at least they had set and triggered the agendas for their larger construction of seeking the space of legitimacy for their rule in the colonies. In this regard, Legal terms and

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12 See, Pascale Fournier, *The Reception of Muslim Family Laws in Western Liberal States*, in WOMEN LIVING UNDER MUSLIM LAWS, DOSSIER 27, 65-79 (December 2005); Pascale Fournier & Pascal McDougall, *False Jurisdictions? A Revisionist Take on Customary (Religious) Law in Germany*, 48(3) TEXAS INTERNATIONAL LAW JOURNAL, 435-463 (2013); Pascale Fournier, *In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment*, 44(4) OSGOODE HALL LAW JOURNAL, 649-677 (2006); Pascale Fournier, *Transit and Translation: Islamic Legal Transplants in North America and Western Europe*, 4(1) THE JOURNAL OF COMPARATIVE LAW, 1-38 (2009); Pascale Fournier, *Calculating Claims: Jewish and Muslim Women Navigating Religion, Economics and Law in Canada*, 8(1) INTERNATIONAL JOURNAL OF LAW IN CONTEXT, 47-72 (2012).

13 Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24(1) INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, 67-94 (2010).

14 See, PASCALE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION*, Routledge (2016).

concepts, particularly family law has thus penetrated by colonizer with loaded value of Western legal systems. Maine, a jurist and historian, was the author of ‘Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas (1861)’. In Ancient Law, historical and comparative methods worked side by side as Maine conducted an inquiry into the origins of modernity through a study of the development of primitive law. He proposed a “law of progress”—that societies progress from co-ownership to private property and “from Status to Contract,” that is, from “a condition . . . in which all the relations of Persons are summed up in the relations of Family . . . towards a phase of social order in which all these relations arise from the free agreement of Individuals.”<sup>15</sup> He argued, “as societies do not advance concurrently, but at different rates of progress, there have been epochs at which men trained to habits of methodical observation have really been in a position to watch and describe the infancy of mankind.”<sup>16</sup> John Stuart Mill argued that the English did not pay enough attention to customary law in their administration of India; he indicted the British failure to recognize “the customs of the country” in matters of land ownership and claimed that the injustices arising from this failure had been perpetrated “by the English rulers of India, for the most part innocently, from sheer inability to understand institutions and customs almost identical with those which prevailed in their own country a few centuries ago.”<sup>17</sup> These rulers, Mill suggested, were in need of just the sort of education in the history of ideas offered by Maine’s comparative work in Ancient Law and Village Communities. Modern Hindu Laws are the replica and give larger vision of the *Vox Populi* to release the masses from subjugation and provide an egalitarian space and rational practices which in

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15 HENRY SUMNER MAINE, ANCIENT LAW, 45, Available at <http://www.encyclopaedia.com/ebooks/07/2.pdf> (Last accessed on 13/12/2017).

16 *Id.* at 99 (The study of India in the nineteenth century provided the opportunity for such an exercise in the comparative method, and Maine asserted the importance of the Indian village community for understanding “the infancy of law,” which he believed to be characterized “by the prevalence of co-ownership, by the intermixture of personal with proprietary rights, and by the confusion of public with private duties).

17 John Stuart Mill, *Mr. Maine on Village Communities*, 15 FORTNIGHTLY REVIEW 550 (1871) [To know about Mill’s own role in the administration of India, see, ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA, Oxford, (1959)].

effect should not conflict with the constitutional spirit.<sup>18</sup> This was perhaps a historic moment when the debate around UCC became petrified into a debate around individual rights, citizenship and national integration on the one hand, and minority rights, and cultural diversity on the other hand. In the 1930s, the process of codifying Muslim personal law was initiated at the behest of members of the community, and the Shariat Act, 1937, and the Dissolution of Muslim Marriages Act, 1939 were passed. The purpose of these acts was to apply Muslim Personal Law (MPL) to Muslim men and women who were governed by customary laws. In the perception of those initiating these laws, these were progressive steps, giving Muslim women rights denied to them under 'customary law'. The Shariat Act brought all Indian Muslims under the Shariat laws in matters related to inheritance, divorce, marriage and guardianship.

### CONSTITUTIONAL AND IDEOLOGICAL DELIBERATIONS

As has been stated in previous sections, the legislative measures taken in the pre-independence era by the British, to regulate personal laws of the Hindus, was an attempt to provide a personal space to Hindus, women in particular, who did not want to be governed by the Shastric laws.<sup>19</sup> Perhaps, one can say that bringing a modernistic approach to Hindu personal laws and not reluctance to do so with the Muslim personal laws might have created a dogmatic division between the two dominating religious communities of colonial India. Although, it has been argued<sup>20</sup> that the British were reluctant to interfere with private and religious affairs in India and did so under the pressure of Brahmanical elite, it seems faulty considering the aforementioned arguments. In the 1940s,

18 In the decade following independence, the political focus was on the reform of Hindu personal laws, namely the Hindu Code bill. The bill, which aimed to codify and reform Hindu Personal Laws, faced tremendous opposition, both within and outside parliament. The bill was divided into four separate parts, and passed as the Hindu Marriage Act, 1955; the Hindu Minority and Guardianship Act, 1956; the Hindu Adoption and Maintenance Act, 1956 and the Hindu Succession Act, 1955.

19 Varsha Chitnis and Danaya Wright, *The Legacy of Colonialism: Law and Women's Rights in India*, 64 WASH. & LEE L. REV. 1315, 1317 (2007) (noting that "throughout the Victorian period, colonial authority was largely premised on an ideology of the civilizing mission, both in Indian and English terms").

20 Herrenschmidt, *supra* note 3, at 312-315.

while the debate was going on the issue of Uniform Civil Code, there had been a shift from the women's rights-based perspective of the British to the nationalistic perspective.<sup>21</sup> This nationalistic perspective was to reflect the argument of national integration<sup>22</sup> of different religious communities through unification of their personal laws that too in a country that saw bloodbath grounded in religion-based partition. Such an attempt was expected to face opposition from different religious communities as in a nation in making, as Herrens Schmidt has argued, the problem of unification of personal and property laws within a uniform civil code is doomed to be confronted by local non-written traditional customs and written laws.<sup>23</sup> Further, the political party in power had to postpone the enactment of the UCC in order to mitigate the anxiety among the Indian Muslims post partition.<sup>24</sup>

The adoption of a Uniform Civil Code has been said to be legitimate for a new and grand democracy.<sup>25</sup> Perhaps, it is this reason that led the independent India-in-making, in the year 1941, to appoint Rau Hindu Law Committee to look into a comprehensive legislation covering all Hindu laws. Due to war, this committee ceased to function after sometime. It was revived in 1944 under the chairmanship of Sri B.N. Rau and its recommendations were given effect by a series of acts passed in 1955 and 1956, to regulate marriage, succession, guardianship and adoption, through the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoptions

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21 *Reversing the option: Civil Codes and Personal Laws*, ECONOMIC AND POLITICAL WEEKLY 1180, 1180-83 (May 18, 1996) ("Since the UCC was seen to be a corrective for divisive policies and a formula for integrating people into one nation in the 1940s and 1950s, this approach has made it possible to underplay the question of women's rights").

22 Peter Ronald Desouza, *Politics of the Uniform Civil Code in India*, ECONOMIC AND POLITICAL WEEKLY, vol. L. no. 48, 54, 50-57 (November 28, 2015) (Desouza has argued that one of the three phases through which the evolution of the normative grounds for a UCC has gone through is the aspiration for 'national integration'. The reason for this aspiration, Desouza argues, was the consolidation of the emerging nation). See, *Reversing the option*, *supra* note 18, at 1180 ("The idea of the UCC rested on a mechanical notion of the integration of different communities through uniformity of laws...").

23 Herrens Schmidt, *supra* note 3, at 312-313.

24 Desouza, *supra* note 19, at 54.

25 Herrens Schmidt, *supra* note 3, at 312-317.

and Maintenance Act, 1956.<sup>26</sup> In this case, it is interesting to note that during colonial intervention, many nationalist leaders such as Tilak objected to it as interference in the Hindu culture.<sup>27</sup> However, after the independence of India, the Constitution itself provided a space of progressive codification of the customary laws. In many ways, it is an accepted fact that most of the customary practices in personal laws are anti-women. When the debate on the issue of the UCC begun in 1948, there were plethora of arguments based on the premises of source of personal laws, space for religious laws, state intervention and social justice. Though the Muslim members in the Constituent Assembly were completely against any sort of codification of their personal laws, the troika of B.R. Ambedkar, K.M. Munshi and A.K. Iyer were of the opinion to put the UCC in the domain of directive principles.<sup>28</sup> Moreover, Ambedkar was of the view that state's intervention is completely justified when it comes to promoting social justice. It has been argued that his statement in the closing stages of the Constituent Assembly debate was a clear acknowledgement of the role of law as an instrument of social reform, which also reflected a modern<sup>29</sup> approach towards aspiring equal citizenship in India.<sup>30</sup> This signifies the prevalence of Pound's sociological school of thought in understanding of law in Ambedkar's arguments.<sup>31</sup> It has been argued

26 Indira Jaising, *Women and Law – An Assessment*, LAWYERS COLLECTIVE, Available at <http://www.lawyerscollective.org/updates/women-and-law-an-assessment-indira-jaising> (Last accessed on 08/01/2017).

27 Herrenschmidt, *supra* note 3, at 312-315 (“...resistance from the most traditionalist Indians and, in particular, the open opposition from the most important Brahmins of the Congress Party, such as Lokamanya Tilak (1856-1920), a political hero of independence and a socially very conservative Brahmin”).

28 Desouza, *supra* note 19, at 52.

29 *Reversing the option*, *supra* note 18, at 1180 (arguing that the idea of the UCC also linked integration to the achievement of a modern nation-state).

30 Desouza, *supra* note 19, at 52.

31 Linus J. Mc Manaman, *Social Engineering: The Legal Philosophy of Roscoe Pound*, 33 (1) ST. JOHN'S LAW REVIEW, Article 1, 17, 1-47, (December, 1958) (McManaman has argued that Pound expressly denies that law is a reflection of divine reason governing the universe or of a God-given order but is a process of social adjusting). Karl Kreilkamp, *Dean Pound and the End of Law*, 9 (2) FORDHAM LAW REVIEW 196-232, 1940 (Kreilkamp has argued that Pound's preliminary characterization of the end of law is the service of the social interest). For a general history of evolution of sociological jurisprudence, see generally, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence. I. Schools of Jurists and Methods of Jurisprudence*, 24 (8) HARVARD LAW REVIEW 591-619 (Jun., 1911).

that the placement of the UCC in article 35 of the draft Constitution and article 44<sup>32</sup> of the final Constitution was because of the assurance given by Nehru and Gandhi to the Ulema that UCC will remain in abeyance, through its postponement, as an aspiration of the state.<sup>33</sup> Such an assurance was, as has been argued earlier, to contain the fear of Muslims, and in the hope of securing the loyalty of Muslim leaders.<sup>34</sup> This reminds of an incident, recently quoted by Mustafa, when he narrated the story of an old man reading from the newspaper that if the uniform civil code is enacted, then Muslims will not be allowed to bury their dead and they will be forced to burn them just like Hindus.<sup>35</sup> Further, Ambedkar was of the view that as for most of the facets of human relations were already being governed by codified laws, there is no need to extend general protection of law to family and marriage issues.<sup>36</sup>

The consideration given to the Muslims of the independent India left the Constituent Assembly to reform and codify only the Hindu personal laws. Also, as the Indian Constitution vowed for a secular<sup>37</sup> state, rather than a religious one, it also gave an impetus to the government of the time to not codify the Muslim personal laws.

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32 Article 44, The Constitution of India, 1950. It states: The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

33 PARTHA GHOSH, *THE POLITICS OF PERSONAL LAW IN SOUTH ASIA: IDENTITY, NATIONALISM AND THE UNIFORM CIVIL CODE*, 72, (New Delhi: Routledge 2007).

34 Siobhan Mullaly, *Feminism and Multicultural Dilemmas in India*, 24 (4) OXFORD JOURNAL OF LEGAL STUDIES 677, 671-692 (2004).

35 Faizan Mustafa, The importance of piecemeal reforms, July 2, 2014, *The Hindu*, Available at <http://www.thehindu.com/todays-paper/tp-opinion/the-importance-of-piecemeal-reforms/article6168044.ece>. (Last accessed on 28/12/2016) See, Ishita Mishra, UP Assembly Elections 2017: Kabariaan-Shamshaan; Don't need graveyards, everyone should be cremated; Sakshi in Etah, March 1, 2017, *The Indian Express*, Available at <http://indianexpress.com/elections/uttar-pradesh-assembly-elections-2017/up-polls-kabariaan-shamshaan-dont-need-graveyards-everyone-should-be-cremated-sakshi-in-etah-4548807/> (Last accessed on 03/03/2017) (Such issue though becomes relevant and fear out of it real, as recently the Unnao BJP MP Sakshi Maharaj opined that Graveyards should not be built at all in India).

36 See, Constituent Assembly Debates, Vol. VII, 550-552.

37 Unlike Pakistan, which became Islamic Republic of Pakistan, India chose to become a secular state through putting the provisions pertaining to freedom of religion under the domain of fundamental rights. See, articles 25-28, The Constitution of India, 1950. Even the preamble to the Indian Constitution imbibed the 'liberty of thought, expression, belief, faith and worship'.

The issue of the Hindu Code Bill was so problematic, especially considering the disagreements of the Congress stalwarts like Acharya Kripalani and Dr. RajendraPrasad, that such attempt by Nehru was even considered as one in haste and thoughtless.<sup>38</sup> Nehru, though, was eager to get the Bill passed as he wrote to Ambedkar of his being convinced of the Bill's necessity for India.<sup>39</sup> Nehru decided to divide the Bill into two parts, so as to first vote on the 'preliminary' part that dealt with marriage and divorce, and brought the same before Parliament on September 17, 1951, but it could be dealt with only in the year 1952 with the new Assembly that was more daring than the previous one.<sup>40</sup>

Even though there were different kinds of oppositions from people belonging to varied ideological grounds, be it the 'conservative Brahmins or feminists'<sup>41</sup>, the Hindu Code Bill came into existence through a series of Acts from the year 1955 to 1956. This, perhaps, in some way also reflects Maine's status to contract theory, wherein he has argued that progressive societies, for social and legal evolution, must move from status towards contract.<sup>42</sup> Though, the opposition by conservatives, by arguing for giving primacy to customs over written law, in someway, reflects the jurisprudential aspect wherein the presence of strong principles/ customs do not speak of any legal void even if there are no written laws.

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38 The Hindu Code Bill, *ECONOMIC WEEKLY* (December 24, 1949).

39 Herrenschmidt, *Supra note 3*, at 317-318 (noting that "Nehru's intentions were sincere and there were enough "progressives" in the Assembly wanting to give India a personal and property law that would no longer be ruled by traditional religious texts, nor by far too diverse customs").

40 *See, id.* at 318.

41 Herrenschmidt, *Supra note 3*, at 322 ("...the Brahmins and their devotees fought for the defence of "customs" and "usages" for over four years at the *Lok Sabha*"). *Reversing the option, supra note 13*, at 1180 ("...while demanding the UCC in the Constituent Assembly, M.R. Masani, Hansa Mehta and Amrit Kaur- who dissented from the decision of the sub-committee to not include UCC in Fundamental Rights and took admirable positions on several issues- bemoaned the continuance of personal laws as keeping India back from advancing to nationhood").

42 R.H. Graveson, *Movement from Status to Contract*, *MODERN LAW REVIEW*, 261-272 (April 1941).



With articles 25<sup>43</sup> and 26<sup>44</sup> providing right to freedom of religion to all persons and to all religious denominations or sections of India respectively, they were found to be in tussle with article 44. Though, under article 25, the restrictions can be made even if religious practices are violating any of the fundamental rights, the right to manage the religious affairs freely under article 26 has no restriction on the ground of violation of fundamental rights. So, it can be argued that the attempt by the state to enact a Uniform Civil Code violates article 26, if not article 25. The dispute, though, can arise as to the interpretation of the term ‘morality’, that is there in article 26. Again, it becomes open to the court to interpret this term and answer whether gender-discriminatory practices in personal laws of religious minorities in India, can be done away with on the ground of ‘morality’, being immoral in nature.

### **DIFFERENT JUDICIAL ATTITUDES: ESCAPISM, CONSERVATISM AND PROGRESSIVISM**

Personal laws are by and large non-statutory, traditional systems of law having some affinity with the concerned religion.<sup>45</sup> Being ancient systems of law, there are several aspects of these systems of laws, which are out of time with the modern thinking and may even be incompatible with some fundamental rights. The courts have adopted the policy of non-interference keeping in view the susceptibilities of the groups to which these laws apply. Courts have adopted two strategies. One, the courts have ruled that the challenged features of personal laws are not incompatible with the fundamental Rights. Reference to this aspect is made in the course of the following discussion on specific Fundamental Rights, especially, under Articles 14, 15, 25 and 26. Two, the courts have denied that the personal laws fall within the coverage of Article 13, and thus, these laws cannot be challenged under the Fundamental Rights.

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43 Article 25, The Constitution of India, 1950. It gives freedom of conscience and free profession, practice and propagation of religion to all persons equally, subject to public order, morality and health and other part III provisions.

44 Article 26 (b), The Constitution of India, 1950. It gives freedom to manage religious affairs subject to public order, morality and health to every religious denomination or any section thereof in India.

45 M.P. JAIN, INDIAN CONSTITUTIONAL LAW (6th edition, 2010).

Gajendragadkar, J., observed in *State of Bombay v. Narasu Appa Mali*<sup>46</sup> that the framers of the Constitution wanted to leave the personal laws outside the ambit of part III of the Constitution. They did not wish that the provisions of the personal laws should be challenged by reasons of the fundamental Rights, and so, they did not intend to include these personal laws within the definition of the expression “laws in force” under article 13.<sup>47</sup> In *Ahmedabad Women Action Group v. Union of India*<sup>48</sup>, Public Interest Litigation was filed through a writ petition to declare the Muslim Personal laws, which allows polygamy, as void, as offending articles 14 and 15. The Supreme Court refused to take cognizance of the matter, observing that the issues raised involved questions of state policy with which the Court does not ordinarily have any concern.

In *P.E. Mathew v. Union of India*<sup>49</sup>, section 17 of the Indian Divorce Act, a central pre-constitutional Law was challenged as being arbitrary, discriminatory and violative of article 14. But, the Kerala High Court adopted the ratio of the Supreme Court cases cited above, that the personal Christian law lays outside the scope of fundamental rights. The Court left the matter to the legislature to amend the law adopting the plea that personnel laws are outside the scope of article 13 (1) as they are not laws as defined in article 13 (3) (b).

Judicial pronouncements on the paramount welfare consideration of the child and the decision in the *Githa Hariharan*<sup>50</sup> case have largely straightened the slant and recognised the pre-eminent importance of a mother as a guardian irrespective of the age of the child. In this case, a Hindu guardianship rule that provided that a mother can be a child’s guardian only ‘after’ the lifetime of the father, was challenged. Though, here the court interpreted ‘after’ to mean ‘in the absence of’ to hold the mother as guardian in this case, MacKinnon argues that such an interpretation did not solve the sex inequality embedded in the provision,

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46 AIR 1952 Bombay 84.

47 S. P. Sathe, Uniform Civil Code: Implications of Supreme Court Intervention, 30 (35) ECONOMIC AND POLITICAL WEEKLY 2165-2166 (Sep. 2, 1995).

48 (1997) 3 SCC 573.

49 AIR 1999 Kerala 345.

50 *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

as the court's judgment held that the mother can be the child's guardian only in lieu of the father and not in her own right.<sup>51</sup>

Where there have been seeming inequities in the application of laws for provision for maintenance being restricted only for the period of iddat for divorced Muslim women and the ease of dissolution of marriage through pronouncement of talaq, they have changed largely due to judicial pronouncements. The Constitutional bench of five Judges has, in *Mohd. Ahmad Khan v. Shah Bano Begum*<sup>52</sup>, opined on the UCC while it was not the issue before the Supreme Court for Judicial treatment. The Court held that, it is also a matter of regret that Article 44 of our Constitution has remained a dead letter.<sup>53</sup> India has a number of personal laws applicable to people according to their religion. These personal laws were rooted in tradition, and religion had become incompatible with the notions of social and gender equality, which the Constitution has visualized. Family law comes under the concurrent list of the Seventh schedule of the Constitution. On the UCC, which is a directive principle under article 44, the Supreme Court has, through its interpretation of section 125 and 127 of the Criminal Procedure Code, extended the benefit of maintenance to Muslim wives.

This judgment met with an uproar and protest by the Muslim community. The then Congress government, in order to prevent any communal tensions and to pacify the Muslim community passed the Muslim Women (Protection of Rights on Divorce) Act 1986. This actually negated the effect of the *Shah Bano* judgment by restricting the time period of providing the maintenance to a Muslim divorced woman to only the iddat period. Shah Bano's advocate, Danial Latifi filed a petition before the Supreme Court challenging the constitutional validity of the Act, contending that it violates 'right to equality'.<sup>54</sup> The court, in a balancing mode, did

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51 Catharine A. MacKinnon, Sex equality under the Constitution of India: Problems, prospects and 'personal laws', 4 (2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 191, 181-202 (2006).

52 AIR 1985 SC 945; (1985) 2 SCC 556.

53 Shabbeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, 67 (3) THE INDIAN JOURNAL OF POLITICAL SCIENCE 545 (July-Sept. 2006).

54 Article 14, The Constitution of India, 1950.

not hold the Act unconstitutional, but held that the divorced Muslim wife is entitled for maintenance for her entire life or until she gets married and this amount can be given in the iddat period. Therefore, now under the law of the land, a divorced Muslim woman is entitled to provision for maintenance for a lifetime or until she is remarried, which shall be made within the period of iddat.<sup>55</sup>

A long distance had been travelled from the attempt to annul the effect of the Supreme Court judgment in *Shah Bano*'s case by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In *Sarla Mudgal* case, the Supreme Court, declared the second marriage of a former Hindu man who converted to Islam as void on statutory ground, raising the issue of enactment of a Uniform Civil Code.<sup>56</sup> With respect to this decision too, MacKinnon argues that the court could not decide the case on sex equality ground, by holding it void in the absence of polyandry or mutual consent of all.<sup>57</sup> Later on, in the *Shamim Ara* case, the Supreme Court has held that Talaq shall not be valid unless preceded by an effort at rapprochement and strict rules of evidence about the pronouncement itself.<sup>58</sup> These judgments have blunted the injustice against whimsical acts of husbands though not exactly from a sex equality perspective.

### CURRENT POLITICAL DEVELOPMENTS

Some moments of crisis for the members of the Muslim community in India are the partition of India in 1947, communal riots, the demolition of the Babri Masjid in December 1992–93 and anti-Muslim riots in Gujarat in 2002. Perhaps this is why the debates centered on personal laws played a prominent role in shaping the identity of the Muslim community and the Hindu community, and this happened at specific moments of crisis, such as the *Shah Bano* controversy, and the ways in which members of these communities understood and articulated personal law in their daily lives. There are discriminatory provisions present within codified personal laws of other religious communities too. Until 2005, the Hindu Succession

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<sup>55</sup> Danial Latifi v. Union of India, (2001) 7 SCC 740.

<sup>56</sup> Sarla Mudgal v. Union of India, (1995) 3 SCC 635.

<sup>57</sup> MacKinnon, *supra* note 48, at 192.

<sup>58</sup> Shamim Ara v. State of U.P., Appeal (crl.) 465 of 1996, decided on October 1, 2010.

Act, 1955 offered Hindu women limited rights over inheritance, especially over ancestral property, and it has been demonstrated that in practice Hindu women were often deprived of these limited rights through a variety of legal and social pressures.<sup>59</sup> The Indian Divorce (Amendment) Act was brought in 2001 to remove the inequalities in law for the Christian women.<sup>60</sup>

Marital rape is legitimised and condoned in criminal and civil law, which legitimises social norms of male superiority within marriage. This is strengthened in other clauses of marriage laws. For instance, civil marriage laws have differential minimum age of marriage for women and men (18 years for women and 21 years for men), which confirm the socially maintained hierarchy of age and experience. The mainstream Hindu cultural expectation in marriage is that of male hypogamy and female hypergamy, therefore men are expected to be older, have social experience, maturity, and hence can be dominant in relation to their wives. The law also reflects the social and cultural concern for confining the sexuality of young women within marriage as soon as she attains sexual maturity.<sup>61</sup> So, the inequalities for women can be found embedded in the legal domain, passing through the social domain. One can observe that more and more women from different religious communities are fighting against this embedded biasness, be it the temple entry incident or the knocking of the door of court by Muslim women groups.

The Law Commission of India was asked to look into the matter of enactment of Uniform Civil Code by the central government. Their questionnaire offered to the public suggested more focus on Muslim personal laws, thereby ignoring the discriminatory practices being perpetuated by personal laws of other religious communities. Such acts by an institution, expected to reflect neutral stand, seems not to reflect the same, which might lead to loosing of its public legitimacy.

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<sup>59</sup> Herren schmidt, *supra* note 3, at 312-319.

<sup>60</sup> This was the result of the 164th Report on the Indian Divorce Act, 1869 by the Law Commission of India in the year 1998.

<sup>61</sup> L. FRUZZETTI, *THE GIFT OF A VIRGIN: WOMEN, MARRIAGE RITUAL AND KINSHIP IN BENGALI SOCIETY*, (Delhi: Oxford University 1993).

### CONCLUSION: SUGGESTIONS TO REFORM PERSONAL LAWS

Law is not neutral to the culture. It is true that it still needs to go far and many provisions in these laws are problematic from the eyes of feminist jurisprudence. It has been suggested by a feminists' group that there needs to be a conceptual shift in envisioning family laws, through a terminological change in the debate on civil codes and personal laws.<sup>62</sup> The group, contextualizing it in a political situation where culturally right groups are in power, has further argued that in such situation there occurs subordination of women's rights between the fight of majoritarianism and minoritarianism.<sup>63</sup> However, it will be cynicism to refuse to accept the merit of the codification of Hindu laws and bringing it in tune with the democratic spirit of the constitution. Religion is the first affinity at birth and it is carried through at one's Will through the laws that we recognise as personal to him or her. If we withdraw the personal laws by force, we trench upon the most intimate emotion of an individual. The argument often offered is that every other country does not have different personal laws, so why do we have it? We should rather ask the question: we have different personal laws, how does it denigrate our national solidity? Any talk on Uniform Civil Code must come at such a time and in such a way that we have gradually moved towards assimilation of the very best from each of the personal law systems that exist in India. Part III of the Constitution duly protects Muslim Personal Laws, being the part and parcel of the religion and culture of the Muslim Community. In such Constitutional scenario, if the state enacts any Law, which takes away or abridges the Personal Law of the Muslim community, it shall attract Articles 13(2) of the Constitution. Not only religious belief, but, acts done in pursuance of religious performance or practice: rituals, rites, ceremonies, observances and modes of worship are protected under Article 25(1) and 26(b) of the Constitution. These Constitutional provisions embody the principle of religious tolerance and serve to secular nature of Indian democracy.

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<sup>62</sup> *Reversing the option*, *Supra* note 18, at 1180.

<sup>63</sup> *Id.*

It is very much visible from the election manifesto of the BJP that other than its ideological commitment it has its electoral commitment for the UCC and Article 370.<sup>64</sup> One thing which appears from the aggressive attempts of the BJP, RSS and similar organisations is, that somewhere down the line, tendencies of the secular parties have been to refrain themselves from engaging in any thought of change and reforms in this respect. In effect, it has strengthened the Hindu fundamentalists and has weakened the Muslim reformists. In past also, Maharashtra Anti Bigamy Bill 1995 was introduced to penalize Muslim for their second marriages. Criminalization of social norms without understanding it, and making a holistic consensus, certainly indicates deep-seated hatred in the form of politics of communalization. Even in the *Sarla Mudgal*<sup>65</sup> case, Justice Kuldeep Singh spoke to protect Hindu marriage. The judgment has discussed the secondary condition of female in general, and plight of Muslim in particular, thus reflecting the patriarchal agenda of preserving and glorifying marriage at any cost.<sup>66</sup>

Many people, including the Indian judiciary, look at the UCC with the sense of national unity. We should understand that the first step should be to rationalize personal laws and develop social bonds among different communities. The dynamics of social transformation through the instrument of law from diverse civil code to uniformity shall be gradual and cannot happen in a day. We cannot perhaps set a time limit but India shall be stronger by its multi-cultural, multi-religious differences and our national identity would be more secure in its diverse form than through a forced homogeneity of all personal laws. That shall take place by borrowing freely from laws of each other, making gradual changes in each of the pieces of legislations, making judicial pronouncements that assure gender equality, and adopting expansive interpretations for broadening the outlook relating to marriage, maintenance, adoption and succession by specifically

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64 Nivedita Menon, A Uniform Civil Code in India: The State of the Debate in 2014, 40 (2) *FEMINIST STUDIES* 480 (2014).

65 *Sarla Mudgal*, President, Kalyani & Ors. v. Union of India & Ors., 1995 SCC (3) 635.

66 Dhananjay Mahapatra, Why is political class afraid of taking steps to enforce uniform civil code?, *THE TIMES OF INDIA* (January 19, 2016), Available at <http://timesofindia.indiatimes.com/india/Why-is-political-class-afraid-of-taking-steps-to-enforce-uniform-civil-code/articleshow/55021221.cms>. (Last accessed on 18/12/2016).

acknowledging the benefit that one community secures from the other. The Supreme Court constitutional bench, that will sit in this summer break, will have to take into consideration all the aforementioned factors while deciding such a significant matter that lies at the core of the social fabric of the entire country.

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# EXAMINING THE FUNDAMENTAL DICHOTOMIES OF PERSONAL LAWS AND HUMAN RIGHTS WITH REFERENCE TO A GROWING CONSENSUS FOR A UNIFORM CIVIL CODE

*Bharath Gururagavendran\**

## INTRODUCTION

In a post-colonial setting such as India, the guarantee of rights is conceivably the most significant priority of a functioning government.<sup>1</sup> The drafters of the Indian constitution have toiled to rid the nation of the deeply damaged historical roots of slavery, regressive state actions, and arbitrary exploits by power groups<sup>2</sup>. The reasons for the allocation of importance to human rights, become evident when conceptualising the Indian constitution utilising an intentionalist doctrine. To that effect, a liberal democracy that behaves as the purveyor of rights constitutes an ideal philosophical template for the development of human rights.<sup>3</sup> And the construction of such a template is justified when the nation's history is retrospectively observed with an end to analysing possible factors that might have aided in imbibing in the people: a moral proclivity to progressive institutional reform.

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1 Makauwa Mutua, *Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State*, 89, AMERICAN SOCIETY OF INTERNATIONAL LAW, 487, 490 (1995).

2 K.H. Cheluva Raju, *Dr. B.R. Ambedkar And Making of the Constitution: A Case Study of Indian Federalism*, 52, THE INDIAN JOURNAL OF POLITICAL SCIENCE, 153, 153, (1991).

3 Edward Osei Kwadwo Prempeh, *Review: Globalizing Democracy and Human Rights*, 38, CANADIAN JOURNAL OF POLITICAL SCIENCE, 814, 815, (2005).

This relatively new founded recognition of the import of human rights can only be understood, if analysed via a historical road map encompassing relevant events and shifts in ideology. It is evident that the events of World War II shocked the moral conscience of the world, and American inaction to the ostensibly horrifying developments spurred a reactionary phase of western action that led to the creation of international models seeking to recognize moral claims in humanity.<sup>4</sup> The Universal Declaration of Human Rights, is perhaps the best representation of the aforementioned moral claims. This internationalisation of the theoretical abstraction of human rights is particularly relevant in the Indian context, as the Declaration was tremendously impactful on the members of the Drafting committee, and as a consequence, several elements of the UDHR can be visualised in the Indian Constitution.<sup>5</sup>

The nature of the influence that the UDHR had, on the Indian constitution, is best evidenced in the primacy of fundamental rights (part III). The relationality between the international document and the Indian constitution can be understood by observing the remarkable congruity between the governing premises of both constructions. The core foundations of *universality & inalienability*<sup>6</sup> are visibly embodied in part III of the Constitution, as it possesses the additive feature of enforceability, thus guaranteeing its recognition and protection. The Indian constitution ascribes a fundamental character to the substantive element of human rights, and through judicial protection, it stands as a tall testament to the unwavering courage of the drafters of the constitution, in providing to ourselves: a well ordered liberal democracy.

A fundamental cause for concern is the effect that organised religion has on individual rights and liberties. The right to religion usually, and especially in India,

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4 Shaun Kelner, REVIEW: THE HOLOCAUST AND MEMORY IN THE GLOBAL AGE BY DANIEL LEVY; *Natan Sznaider*, 86, 873, 874, (2007).

5 Surendra Chopra, *Universal Declaration of Human Rights- A Study*, 20, INDIAN JOURNAL OF POLITICAL SCIENCE, 371, 375, (1959).

6 Louis Henkin, *Universality of the Concept of Human Rights*, 406, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, 10, 11-12, (1989).

is not perceived by the legal system in vacuum. The right to freedom of religion is observed in conjunction with:

- a) The right to propagate one's faith<sup>7</sup>,
- b) The right to establish institutions either of a religious, or charitable character<sup>8</sup>,
- c) The right to manage one's own religious affairs (without expounding what constitutes a religion's primary affairs<sup>9</sup>); and
- d) The right to own property and lawfully administer it.<sup>10</sup>

The person(s) of inherence of the rights listed here, are not merely limited to individuals, but also include religious associations, and to that effect conflict usually ensues between the latter and citizens practicing the faith (i.e. faith espoused by the religious association), as the nature of a particular religious practice may result in violations of the latter's human rights. The irreconcilability of the setbacks with the human rights (i.e. fundamental rights, in an Indian context) is exacerbated by the fact human rights are premised on a philosophical (universality and inalienability) and pragmatic (enforceability against the State) grounding of irrevocability<sup>11</sup>. Therefore, the choice that a Government has, is between advocating for the primacy of human rights under all circumstances, and advocating for religious and cultural practices to persist under all circumstances.

Apart from the constitutional (and legal) objections that arise from examining the detrimental effect that personal laws have on human rights, their position can be traced to an overarched construct of cultural relativism. The dichotomy of universality and cultural relativity is analogous to the dichotomy of human rights

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7 CONSTITUTION OF INDIA. Art 25, cl.1 .

8 *Id*, See Art.26, cl. (a).

9 *Id*, See Art.26, cl. (b).

10 *Id*, See Art.26, cl. (b), (c).

11 Madhav Khosla, *The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure*, 42, ECONOMIC AND POLITICAL WEEKLY, 3203, 3204, (2007).

and personal laws. Therefore, an extrapolation of the nature of cultural relativity shall be utilised in cognising the nature of personal laws.

### ***The Positional Dynamics of Personal Laws***

In India, personal laws play a significant role in the legal system, as the country does not enjoy a common civil code (i.e. article 44 of the constitution- uniform civil code<sup>12</sup>) that can overarchingly govern the following<sup>13</sup>:

- a) Marriage & divorce
- b) Adoption & maintenance
- c) Inheritance & succession
- d) Minority & guardianship

These areas govern interpersonal relationships. And these domains are governed, not by the State's secular legal system, but by different religions and religious organisations. That is, members of different faiths are governed by different laws, and the foundation of these laws are religious texts and doctrines as opposed to the principles of a common legal system.<sup>14</sup> In a particularly important interpersonal relationship (marriage), the State does offer some recourse in the development of a Special Marriages Act<sup>15</sup>, but its usage is restrictively minimal for a host of reasons. India being a largely conservative and patriarchal society<sup>16</sup>, is impervious to any kind of progressive liberal development that was envisaged by the drafters of the Constitution. Therefore, the principal perception engendered by the common public is that of apprehension and hatred towards the Special Marriages Act, as its controversial elements that allow inter-caste and inter-religious marriages are not observed in a positive light.

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<sup>12</sup> *Supra* note 7, *See*, Art. 44.

<sup>13</sup> Dinshaw Fardunji Mulla, *MULLA PRINCIPLES OF MOHAMMEDAN LAW*, 4-7, (20th edition, Lexis Nexis) (2014).

<sup>14</sup> *Id*, *See*, 30-3.

<sup>15</sup> The Special Marriages Act 1954, No. 43, Acts of Parliament, 1994.

<sup>16</sup> Suparnaa Chadda, *Is India a patriarchal society? - Youth Survey*, WOMEN ENDANGERED ORGANIZATION, April 22016.

As stated above, in a liberal democracy (principally, at the very least), human rights should be given the utmost priority.<sup>17</sup> In a world where feminist jurisprudence is gaining necessary traction, patriarchy and its associated evils must be identified and brought to a halt.<sup>18</sup> And this prerogative is even more serious in India, which is historically patriarchal, as the call for social change, which has already garnered ample recognition, now requires implementation in the form of constructive transformations by legal and political institutions.<sup>19</sup> Personal laws, however, regrettably provide the impetus for the regressive factions of society to perpetuate their fundamentally unjust and unconstitutional practices, under the substantial umbrella of personal laws.<sup>20</sup> Hindu personal law has significantly undergone internal reform, by outlawing certain practices that are abrogative of women's rights, and has also amended (by way of addition) the Hindu Succession Act to ensure that women can also become coparceners.<sup>21</sup> Muslim personal law, on the other hand, has resolutely remained entrenched in its religious and cultural roots, and has showed no signs to promote a uniform civil code or internal reform. Talaq-ul-biddat<sup>22</sup> and polygamy are two such regressive and detrimental customs that are fundamentally violative of the women's right to equality, and hinder the meaningful fulfilment of their right to life. In light of growing information dissemination, the country is slowly growing consensus on the possibility of a Uniform Civil Code.<sup>23</sup> All things considered, it becomes pertinently clear that two fundamental priorities require resolution (and these priorities that seek resolution, shall be attempted under a common template of Islam):

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17 *Supra note.*

18 Janet Rifkin, *Review: Feminist Jurisprudence. By Patricia Smith*, 23, AMERICAN SOCIOLOGICAL ASSOCIATION, 713. 713-714, (1994).

19 Gerard Roland, 'Understanding Institutional Change: Fast Moving and Slow Moving Institutions', Econometrics Laboratory, UC Berkeley, Available at <http://eml.berkeley.edu/~groland/pubs/gr3.pdf> (Last accessed on 29/11/2016).

20 Nalini Rajan, *Personal Laws and Public Memory*, 40, ECONOMIC AND POLITICAL WEEKLY, 2653, 2654, (2005).

21 The Hindu Succession Amendment Act 2005, No. 39, Acts of Parliament, 2005.

22 *Supra* Note 13, *See*, 390-421.

23 Aakar Patel, *Why Hindutva wants a Uniform Civil Code*, THE DECCAN CHRONICLE, October 16, 2016.

- a) Does the right to freedom of religion (in particular 26(b)) allow personal laws to subsist in society, whilst they continue to violate women's rights? That is, an examination of the dichotomy of the right to freedom of religion (when constitutionally accorded to organised religion) and individual rights (human rights/fundamental rights [part III]) in light of the overarching question of the constitutional validity of personal laws.
- b) Is a culturally relativistic society amenable to the constitutional philosophy of India? And therefore, does the pragmatic consideration of cultural relativity (of Islam) impede the fulfilment of the standing conception of human rights?

### **Is Religion Truly, A Defence of Personal Laws? A Critical Examination of The Validity of Personal Laws**

#### ***Constitutional Philosophy***

Though the conceptualisation of a common civil code may not seem to be in alignment with the constitutional philosophy of India, it is in fact the converse that is justifiably manifest in the constitution. While personal laws lack explicit mention in the Constitution, a common civil code is directly referenced in part IV of the constitution.<sup>24</sup> An intentionalist study of the constitution displays the clear motives of the drafting committee, and the exact motives of the drafters can be cognized from the constituent assembly debates. In the words of Shri Alladi Krishnaswamy Ayyar<sup>25</sup>,

*“Therefore, when there is impact between two civilizations or between two cultures, each culture must be influenced and influence the other culture. If there is a determined opposition, or if there is strong opposition by any section of the community, it would be unwise on the part of the legislators of this country*

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<sup>24</sup> *Supra* note 12.

<sup>25</sup> CONSTITUENT ASSEMBLY DEBATES (*Proceedings*), Government of India, Available at <http://parliamentofindia.nic.in/ls/debates/debates.htm>. (Last accessed on 20/01/2017).

*to attempt to ignore it. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.”*

The drafters did not ignore the practical realities of the country, as can be observed from the fact that even supporters of a UCC were not ready to argue for its immediate implementation (as of 1950). But the principle of having for its people, a uniform civil code, was completely justified and this belief system can be substantiated by observing the argumentation posited by the opposition to the Code. In the words of Mr. Naziruddin Ahmed<sup>26</sup>,

*“But would you invalidate a marriage which is valid under the existing law and under the present religious beliefs and practices on the ground that it has not been registered under any new law and thus bastardise the children born? This is only one instance of how interference can go too far. As I have already submitted, the goal should be towards a uniform civil code but it should be gradual and with the consent of the people concerned.”*

Therefore, a historicising of the philosophical origins that engendered the constitution demonstrates the aspirational directive of the drafters to formulate, for themselves, a uniform civil code. Another crucial element in ascertaining the constitutional philosophy of personal laws is the inherent conflict between State action and religious rights (that manifest as personal laws). In order to comprehensively conceptualise these above-mentioned constructs, the philosophical underpinnings of the right to freedom of religion needs to be construed. And thus, the constitutional position on secularism requires expounding. As a broad overview on religious rights, two distinct types of secularism can be identified.

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<sup>26</sup> *Ibid.*

The first variant of secularism can be identified as the philosophy embodied by a State that respects all religions and strives to recognize and protect all the customs of a religion. And in stark contradiction, the other variant of secularism can be identified as the philosophy embodied by a State that makes a categorical distinction between religion and itself.<sup>27</sup> This distinction is analogous to the separation posited by Thomas Jefferson in his address made to the Danbury Baptist Association where he declared that “*the legislature should make no law respecting an establishment of religion or prohibiting the free exercise thereof*”.<sup>28</sup> A sociological account of India’s history in the subject matter of secularism will render an outcome that favours the former (i.e. an accepting and inclusive secularism), as it bears a large degree of similarity with the established concept of *Sarva Dharma Sambhava*.<sup>29</sup> In the matter of ascertaining the nature of secularism, the Preamble to the constitution plays a pivotal role in the extrapolation of its philosophical origins. It states “*Liberty of thought, expression, belief, faith and worship*”.<sup>30</sup>

In a rationalist society where the only manifest belief systems are ones that are epistemologically verified, an irreligious secularism is justifiable. However, in a culturally relativistic society such as India, any suggestion of an irreligious law would be perceived by society to be morally reprehensible at best, and unacceptable at worst. Therefore, a “religiously inclusive secularism” is the foundation of the right to freedom of religion, as guaranteed in article 25<sup>31</sup> of the Constitution of India.

Therefore, it is evident that the constitutional philosophy of India is geared towards an inclusive form of secularism, and towards a uniform civil code. While the

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27 Shefali Jha, *Secularism in the Constituent Assembly Debates*, 37, ECONOMIC AND POLITICAL WEEKLY, 3175, 3175-3176, (2002).

28 Thomas E Carney, *Review: Separation of Church and State by Philip Hamburger*, 23, SOCIETY FOR HISTORIANS OF THE EARLY AMERICAN REPUBLIC, 110, 110-113, (2003).

29 Harsh Sethi, *Review: Contesting Communalism*, 33, ECONOMIC AND POLITICAL WEEKLY, 894, 894-895, (1998).

30 *Supra* note 7, *See*, Preamble.

31 *Id*, *See*, art. 25.



conclusion engendered from the constituent assembly debates would suggest that the drafters of the constitution were apprehensive of implementing a UCC, the drafters nursed a long-term objective of accomplishing the same. Proof of this aspirational directive can be observed in the text of Article 44 of the UCC<sup>32</sup>, “*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.*” However, the implicature of a UCC on the religious rights (under articles 25-28) of religious individuals & groups must be examined. (This examination shall be conducted in a later section of the paper that assesses the constitutional validity of personal laws)

### **A PHILOSOPHICAL ACCOUNT OF THE NECESSITY OF STATE INTERVENTION IN THE DOMAIN OF PERSONAL LAWS**

Whilst society is a large, complex abstraction that is considerably hard to define, a functional definition for the same could possibly be: *society is the amalgamation of all manifest social interactions, in a definite geographical location.* In deriving a meaningful conception of the legal system, the law’s functional perspective must also be taken into consideration, and its aspirational directive of harmonious societal order must be considered<sup>33</sup>. Societal order would by way of logical congruity, be best represented by regulating the social interactions that make up societal systems, and if social interactions are segregated and categorised under distinct domains, (e.g. criminal justice systems which check criminal activity in society) the domain of personal laws would be especially significant, as interpersonal relationships comprise of a considerable proportion of social interactions, ergo, social order. Therefore, it is only logical to assume that the secular legal system of the country retains control over these domains.

Another substantially important reason for why the State should retain control over the domain of personal laws is that transferring control of this domain to organised religion, accelerates the propensity of occurrence of human rights violations.<sup>34</sup> Discrimination of human rights can occur under three distinct grounds: *institutional discrimination, organisational discrimination, social*

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32 *Supra* note 12.

33 Russell Hardin, *Law and Social Order*, 11, PHILOSOPHICAL ISSUES, 61, 71-80, (2001).

*discrimination*. This categorisation of human rights amounts to justified knowledge, as society is essentially an amalgam of three fundamentally discrete elements: *individual elements, groups (communities, and organisations), and the State*. Therefore, in the interests of safeguarding human rights, their violation must be estopped at three distinct levels: *Institutionally, organisationally, and socially*.

In the arena of human rights, institutional protection (legal and political institutions) offers two different defences. At the first instance, it ensures that the State does not commit actions amounting to human rights violations, seeing as to how fundamental rights (as guaranteed under part III) are enforceable against the State, and the right to constitutional remedies is also guaranteed under a separate fundamental right.<sup>35</sup> At the second instance, institutional protection, through the form of legal and political institutions also institutes a manner of enforcing an individual's rights, as judgments and bills passed by the courts and the legislature, are a way to ensure that the legal rights of individuals are actualised (these legal rights can pertain to distinct human rights). The State therefore, protects human rights.

Organisational behaviour (i.e. relating to different groups in society, e.g. cultural, economic associations, social outfits) is also regulated by the State, and the crux of a regulatory policy is the setting up of dictates that prescribe normative standards (i.e. ascriptions of legitimacy and illegitimacy) to practices. To a considerable degree of influence, the State does exert its control in the domain of interpersonal relationships in the social sphere. For e.g., the Indian legislature has enacted provisions to curb practices such as dowry and domestic violence, which were once perceived in the nation, as acceptable.<sup>36</sup> This just goes to show how the Government possesses the locus standi to draft legislation that relates to personal laws. The relationality that must be cognized to conceptually

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34 Razia Patel, *Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice*, 44, ECONOMIC AND POLITICAL WEEKLY, 44, 44-49, (2009).

35 *Minerva Mills Ltd. & Ors v Union of India & Ors*, AIR 1980, SC 1789, (India).

36 Sonia Dalmia & Pareena G. Lawrence, *The Institution of Dowry in India: Why it Continues to Prevail*, 38, THE JOURNAL OF DEVELOPING AREAS, 71, 73-74, (2005) .

understand the necessity for State intervention in the domain of personal laws, is as such:

- a. **Premise:** Society can be conceptualised as an amalgam of social interactions
- b. **Premise:** A considerable proportion of social interactions is decidedly constituted by interpersonal relationships.
- c. **Premise:** Interpersonal relationships are essentially governed by personal laws.
- d. **Premise:** Guaranteeing societal order and human rights, constitutes two extremely significant functions of a State.
- e. **Premise:** The State has transferred the power to regulate interpersonal relationships (i.e. marriage, divorce, succession etc.) to religious groups that establish religious dictates for the members of their faith.
- f. **Premise:** Cultural and religious groups regulate interpersonal relationships via the application of well-established customs and usages authorised qua personal laws.
- g. **Premise:** The advocacy for continuance of unconstitutional and patriarchal practices (such as polygamy, talaq-ul-biddat) by religious organisations that are entrusted with governing interpersonal relationships is the cause for several human rights violations. And considering growing social consensus on the unconstitutional nature of certain practices in personal laws, societal order is also compromised.

**Insight derived from above premises:** The State clearly possesses justifications to intervene and produce reform. The domain comes under their functional ambit, as the direct impicature of personal laws heavily affects two of their greatest functions. The transference of control is impeding a primary priority of the State (guaranteeing the citizenry their rights), providing even more grounds to intervene. Since successful outcomes are not emanating from the transference of power to the religious groups (i.e. social order isn't being benefited, and human rights violations (mainly to women) occur), the reclamation of authority and control over the domain of personal laws, to the ends of generating a secular legal system is the only justifiable alternative.

### CONSTITUTIONAL CHALLENGES OF PERSONAL LAWS

One of the chief arguments presented by the advocates of personal laws is that the formulation of the UCC is violative of the right to freedom of religion. Article 26(b) of the constitution of India guarantees the “right to manage its own affairs in matters of religion”.<sup>37</sup> A cursory inspection of this right showcases the constitutionality of a custom or usage, prescribed by and found in personal laws of a particular religion come under the purview of “matters of religion”. Therefore, for a judiciary to decide on whether customs or usages amount to a matter of religion, there are several different avenues to be explored, and multiple tests to be examined. And spanning almost seven decades of a rich judicial and constitutional history, the question of personal laws and the right to freedom of religion take on several new dimensions.

The courts of India have had a diverse history in dealing with the validity of religious practices (including personal laws), and since the origination of the constitution, in a post-colonial independent India, the position of the courts has changed considerably. In the words of the honourable Chief Justice of the Supreme Court K.G. Balakrishnan, “*The Courts have evolved the binary categories of ‘essential practices’ and ‘secular’ activities of religious*

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<sup>37</sup> *Supra* note 7.

*denominations in order to identify the permissible domain for governmental regulation over these activities”*.<sup>38</sup> Cognizing the meaning of ‘essential practices’ is of utmost import in obtaining conceptual clarity over article 26(b), which subsequently aides in understanding whether the formulation of a UCC is in violation of the same. To decidedly stipulate whether a custom can be equated with the label of “matters of religion” requires an identification of the nature of the religion, and in specific, the relationality between the particular custom or usage and the religion. Therefore, it becomes increasingly necessary to comprehend the essential practices test.

In the prolific case, *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*<sup>39</sup>, the court held that Mutts did not come under the description of a religious denomination, and it also went ahead to stipulate that even if it did come under the ambit of a religious denomination, article 26’s purview extends only to those activities that are essential practices of the religion. The term *religion*’s etymological interpretation should be such that 26(b) is not inclusive of all secular activities associated with religion, but rather just applies to essential practices. The test of essential practices and its delineation from secular activities associated with the religion emanated from this case. This same view was reaffirmed in several cases following it. A notable case being, *Ratilal v. State of Bombay*.<sup>40</sup>

However, in the case of *Ram Prasad v. State of UP*<sup>41</sup>, the constitutional position of article 26(b) changed drastically. This was an interesting case for a number of reasons, the most important of them being the metamorphosis of the etymological construction of “essential practices”.<sup>42</sup> The appellant in this case was an orthodox

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38 K.G. Balakrishnan, Individual Rights in India: A perspective from the Supreme Court by Hon’ble K.G. Balakrishnan, SUPREME COURT OF INDIA, Available at: [http://supremecourtsofindia.nic.in/speeches/speeches\\_2009/presentation\\_at\\_roundtable\\_-\\_university\\_of\\_georgia.pdf](http://supremecourtsofindia.nic.in/speeches/speeches_2009/presentation_at_roundtable_-_university_of_georgia.pdf). (Last accessed on 19/02/2017).

39 The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954, SCR 1005.

40 Ratilal Panachand Gandhi v. State of Bombay, AIR 1954, SCR 1035.

41 Ram Prasad Seth v. State of Uttar Pradesh, AIR 1961, IILLJ 247.

42 *Id.*

Hindu who was of the belief system that a male heir would be necessary for his salvation. And this belief system of his was backed by the Dharma Shastras and other relevant religious texts of Hinduism which stipulate in no uncertain terms that one of the criteria for salvation is to have a male heir, as performance of last rites and other such ritualistic practices require certain acts to be performed by the son. The appellant's wife first bore him a daughter, and thereafter began to miscarry. After several unsuccessful attempts at bringing a son into the world, it was found by valid medical opinion that the wife would be unable to bear a son. The appellant was concerned by the number of religious obligations that would remain unfulfilled due to his lack of a male heir.

The appellant therefore, decided to marry again, and enter into a bigamous union in the hope of being a father to a boy. It was recognised by the appellant and his father that this was a customary practice in Hinduism when the husband does not have a son. While the wife initially did, consent to it, she later changed her mind. It must be noted that this case predated the Hindu Marriages Act (which explicitly outlaws the practice of bigamy), and as a consequence, the husband was tried under the Government Servants' Conduct Rules.<sup>43</sup> The Government of UP directed the appellant to not marry the second wife without the permission of the first wife, and this was challenged by the appellant and his father on the grounds of it violating their right to freedom of religion. The contention was that remarriage for the purposes of bearing a son amounted to an essential practice of Hinduism, as prescribed by the Dharma Shastras.

The court took an interesting shift from their usual policy on article 25 of the constitution. The court took the position that the practice of bigamy is not essential to the religion, and alternative means such as adoption could have been utilised as a viable alternative (as adoption was allowed in Hinduism). This shift from "essential of" to "essential to" might be a grammatical variation, but it has significantly far reaching implications. The article makes two distinct reservations.

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43 Government of India, Governments Servants Conduct Rules 1960, Government of India, Available at: <http://gectcr.ac.in/wp-content/uploads/2016/07/government-servant-conduct-rules1960-in-nutshell-1.pdf>. (Last accessed on 02/02/ 2017).

The right to freedom of religion is subject to public order, morality, health and other provisions of the part, and this is important on two levels. The first level is a practical one that enshrines the limitations on the right, and the second level is of a symbolic importance, as it signifies that the constitutional philosophy (i.e. intentions of drafting committee) was geared towards recognising the qualified nature of the right to freedom of religion. The court in this instance, stipulated that bigamy was not essential to the Hindu faith, and this shift is of utmost import in constitutional and judicial history, for the uncomplicated reason that it represented the judiciary deciding what was essential *to* the religion.

Assessing the existential criteria of a religion based on doctrines and texts is representative of minimal judicial supremacy, and in stark contrast, one of the greatest instances of judicial supremacy lies in assessing the functionality of a religion, and passing value judgments that declare what is required and what isn't<sup>44</sup>. This judicial approach has been used in several cases, since.

In *Qureshi v. State of Bombay*<sup>45</sup>, the court ruled that cattle slaughter during the festivities of Eid was not declared an essential practice of Islam following the same principle laid down in *Ram Prasad v. State of Bombay*. And judicial authority became even more pronounced in the case of *Mohandas Embranthiri v. Travancore Devaswom Board*<sup>46</sup>, where the court went ahead to declare who a 'Hindu' was. And the principle behind the above-mentioned cases, that is, "that an act was constitutional so long as it regulated the secular activities associated with the religion", was propounded in the case, *Shri A.S Narayana Deekshitulu v. State of Andhra Pradesh and Ors.*<sup>47</sup> And in the foreign judgement, *Adelaide Co of Jehovah's Witnesses Inc v. Commonwealth*<sup>48</sup>, which has been relied upon in several Indian cases, it was declared that legislation for social welfare

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44 Mathew John, Decoding Secularism: Comparative Study of Legal Decisions in India and the US, 40, ECONOMIC AND POLITICAL WEEKLY, 1901-1906, 2005.

45 Mohd.Hanif Qureshi & Ors v. State of Bihar & Ors, AIR 1958, SCR 629.

46 Ram Mohandas Embranthiri v. Travancore Devaswom Board O.P. No. 5546 of 1972.

47 Shri A.S Narayana Deekshitulu v. State of Andhra Pradesh and Ors, AIR 1996, JT 482.

48 Adelaide Co of Jehovah's Witnesses Inc v Commonwealth, (1943) 67 CLR 116.

and reform can be enacted so long as it only regulates secular activities associated with the religion and not its essential practices.

However, after the court's assistance in the Shah Bano case, the prolific judgment that dealt with a women's right to maintenance was diluted by the legislature in the Muslim Women (Protection of Rights on Divorce) Act.<sup>49</sup> While the Hindu faith has undergone internal reform to retain consistency with constitutional provisions.<sup>50</sup> Customs such as triple talaq and polygamy are fundamentally abrogative of a women's rights, as it violates equality before law and equal protection before the law.<sup>51</sup> Apart from the ostensibly obvious fact that Muslim women are disparaged in terms of status compared to Muslim men, Muslim women are disadvantaged in comparison to women of other faiths as well, as *they* are not subjected to evils of unilateral and arbitrary divorces. They are also not accorded the same protection when several of their rights (such as maintenance, divorces, polygamy) are violated as a result of these fundamentally violative religious practices and customs. It is only logical to expect that the law treats Islam as an organised religion, analogous to its treatment of other faiths. This discrepancy is what fundamentally abrogates the rights of women in Islam.

### **CULTURAL RELATIVITY & ISLAM**

Perhaps the most divisive tool in any philosophical discussion on human rights is cultural relativism. From a functional perspective, cultural relativism is a doctrine that stipulates the relativity of moral claims (which are assumed to possess universality). It is principally founded in the consideration that any system seeking to set normative standards of behaviour should be fundamentally rooted in social interactions. And thus, the doctrine of cultural relativity contends that there is a fair degree of cultural variability, and as such, universal standards across all social systems suffer from the logical fallacy of possessing unverified premises. Strong cultural relativists contend that "*culture is the sole source of the validity of a*

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49 Muslim Women (Protection of Rights on Divorce) Act 1986, No. 25, Acts of Parliament (India).

50 *Supra* note 21.

51 *Supra* note 7, *See*, Art. 14 & 15.



*moral right or rule*".<sup>52</sup> This revelation is particularly problematic for advocates of a universal human rights system, for the simple reason that human rights are existent in people based on their humanity, and that consequently, constitutes grounds for its universality. Cultural relativity possesses differing premises of communal autonomy, and self-determination<sup>53</sup>, and these premises are antithetical in nature. To that effect, the competing claim of cultural relativity has been utilised liberally, as the primary line of argumentation by traditionalists and distinct religious and cultural groups ever since the conception of a universal human rights system. The quiddity of the arguments presented by the opposition to universality, can be aptly surmised in one pithy proposition: *assimilation sans acceptance renders social disorder*.

Islam as a religion, both internally (Quran and Hadiths) and externally (practice of organised religion) promotes radical cultural relativity. In the book of Fiqh<sup>54</sup>, it can be observed that Muslim scholars discuss obligations and duties as opposed to rights. As a religion, the promise of pleasure in the afterlife is contingent on living a life of piety (taqiy).<sup>55</sup> And a man/woman is said to be pious if he/she performs all obligations (wajibat)<sup>56</sup> and eschews all prohibitions and evils. The problem with cultural relativity in Islam lies in the fact that the religion makes explicit declarations to the effect of derecognition of anything outside of its ontological modalities. Evidence of this problem can be traced to the words of the Prophet, when he states, "*We reject that which is introduced into this religion of ours when it is not from it*".<sup>57</sup> The problem with Islam is that even utilising interpretive devices to internally assess the religion in the hope of effectuating reform is ruled out, as it is laid out that loyalty and obedience are to

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52 Jack Donnelly, *Cultural Relativism and Human Rights*, 6, HUMAN RIGHTS QUARTERLY, 400, 401, (1984).

53 *Id.*

54 S.A Farrar, *An Islamic Response to the Human Rights Discourse*, in CONTEMPORARY ISSUES IN ISLAMIC LAW, (Abdul Haseeb Ansari ed, Serials Publications, 2011); See pg. 31.

55 *Id.*

56 *Id.*

57 *Id.*, See pg.35.

the laws and values which “belong” to Islam, and those values are understood to be based in Ayats of the Qur’an, the Mujtahidun, and their reasoning (Ijtihad). The notional construction that the practitioners of a particular faith can ignore facets of a religion, and imbibe the rest is disallowed in Islam, as the Quran explicitly states as follows: “*Do you believe in a part of the Book and reject a part?*”.<sup>58</sup>

This version of a radical cultural relativity is essentially problematic, because any religion seeking to strengthen cultural practices that are ostensibly detrimental to sections of society, is inherently in dire need of internal reform. The maintenance of a static equilibrium, in the face of growing social consensus favouring internal and external reform (judicial and legislative reform) is cause for state intervention in the matter.

A strong, almost radical cultural relativity is clearly being advocated by advocates of personal laws, and a resolution of the conflict must be reached. Radical universality and radical cultural relativity are both deeply problematic, and the answer rests somewhere along the continuum between both these theoretical abstractions.<sup>59</sup> And in light of the severely violative nature of certain Islamic practices, and the richly inclusive nature of India’s constitutional philosophy, the equilibrium of this continuum needs to be identified, and on that premise, a UCC needs to be established.

## CONCLUSION

After thorough analysis of the right to freedom of religion and cultural relativism, in conjunction with the antithetical establishments of personal laws and a uniform civil code, conceptual clarity regarding the necessary reasons for implementing a UCC. In view of the questions requiring resolution in the last part of the section (the section being Positional Dynamics of Personal Laws) detailing the objectives (i.e. the research questions), the resolution of those priorities are as follows:

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<sup>58</sup> *Id.*

<sup>59</sup> *Supra* note 52.

- a) The right to freedom of religion does not allow personal laws to subsist in society whilst they continue to manifestly violate human rights. The justification for such a proposition, was gathered from analysing the constitutional philosophy and validity, and relevant judicial history on the subject matter.
- b) *Strong* (or radical) cultural relativity is incongruous with the constitutional philosophy of India. Therefore, a middle ground between universality and cultural relativity that takes cognizance of the importance of human rights must be identified, and the UCC must be established on those grounds. (Andis the patently detrimental effects that Islamic radical cultural relativity has on human rights engenders this conclusion).

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# UNIFORM CIVIL CODE AND THE CONFLICT OF PERSONAL LAWS

*Kiran Suryanarayana\**

## INTRODUCTION

Operating under the substantiated assertion that humans are essentially social beings,<sup>1</sup> (similarly, in a system that engenders a higher level of complexity, if one considers communities (sharing identity through similarity in usages) as the

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1 If one were to consider the following primitive individuals [x], [y], [z], [a], [b] as being rational and Predicating the entire hypothetical onto a primitive, pre – societal setting would posit that the immediate surrounding or environment to which [x], [y]... belong is a hostile one, involving no constant source of food and requiring the individuals in question to hunt for the meat or gather food from the surrounding edibles. The drawback with the latter being that gathering edibles from nature sans the scientific technology required in order to ascertain the lack of toxicity within these ‘edibles’ the threat of dying from being poisoned would be significantly increased. The drawback with the former form of sourcing food, was the inherent risk in hunting prey, That allowed for a small selection of animals, of the right size, not possessing any other trait that would allow for quick escape from a primitive man and the tools that he utilized in order to hunt. Taking cognizance of the state of affairs, if [x] were to come into contact with [a] in an accidental fashion during the course of the work that constituted the daily lives of primitive men, that it the practical benefits of an association between the two would automatically become evident. There would a higher chance of survival when hunting, an easier and faster gathering of food, and most importantly an individual capable of acting as one of record, i.e. on the issue of gathering food, if a berry is consumed and it is responsible for an illness then staying from berries that are shaped like coloured the illness – causing is reinforced. This has an effect of staggering importance in ensuring the long – term survival of large groups, i.e. utilizing individual members in order to act as beacons for maintenance and upkeep of health within larger groups.

individuals [x], [y]... as in the footnotes below, the assertion that cohesion with the overarching group structure holds true, provided that the eventual goal of human survival and other ancillary goals be modified to reflect modern human desires)<sup>2</sup> it is imperative for individuals who play an active role in the shaping of policy measures that are targeted at resolving societal disagreements or disputes that an analysis into the root causes that underlie all human actions in any given set of social facts, would prove highly efficacious as it allows the legislator to craft targeted legislation in an attempt to eradicate the problem at the root, as opposed to superficial uniformity,<sup>3</sup> which can in a favourable set of ensuing circumstances only ensure a superficial redressal that obfuscates the problem as opposed to effectively resolving the same.

The primary focus of this paper would be an exposition on the reasoning behind the assertion stipulated in the abstract, and the same can be posited as follows, does the drafting/framing and implementation of a Uniform Civil Code in India, truly resolve the conflict of personal laws<sup>4</sup> relative to one another? (Which in turn is a conflict reducible to one with the constitution)

At an ancillary level, the paper will seek to provide an explication on the notion of underlying causes and the role that the same play in gleaning understanding of any social conflict that would allow for legislators and policy – makers to direct their policy in a manner best described as being specific, so as to effectuate the greatest possible degree of modification. (Whilst still retaining societal identity)<sup>5</sup>

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2 In this case, the paper refers to a gradual shift of the end - priority of the self- preservative instinct, i.e. from survival to ensuring a reasonable standard of living and in other instances an existential perception of the possibility of meaning and a happiness lingering beyond one's grasp.

3 Kimmo Jokinen, *Cultural Uniformity, Differentiation, and Small National Cultures*, 8(2), JOURNAL OF CULTURE STUDIES, 208, 208 – 210, 1994.

4 *What are personal laws?* BLACK'S LAW DICTIONARY, Available at <http://thelawdictionary.org/personal-law>. "The portion of law which constitutes all matters related to any individual, or their families." (Last accessed on 24/02/2017).

5 Turner, John, Oakes, Penny, *The significance of the social identity concept for social psychology with reference to individualism, interactionism and social influence*, 25 (3) BRITISH JOURNAL OF SOCIAL PSYCHOLOGY, 237, 237–252, (1986).

It will also concern itself with, understanding the historical precedent that demonstrates the roots of the conflict that is manifest as an underlying cause in the overarching problem of personal laws and the conflict that stems from an application of them.

### A PRELIMINARY UNDERSTANDING OF THE CONFLICT OF PERSONAL LAWS

Considered from the perspective of taxonomical interpretation, one would experience a degree of confusion in examining the nature of the term, *conflict of personal laws* as it appears to manifest closely associated with the well – used phrase, *conflict of laws*.<sup>6</sup> A clarification is to be noted, that the term under consideration in the instant case is one that regresses to a far more colloquial and central definition of the term conflict, it refers to the problems that are usually observable when different communities (delineated on a sectarian basis) are conferred with the right to autonomy on issues considered closely linked with the religious identity of said communities. The problems are fundamentally linked with inequity<sup>7</sup> and are exacerbated in principle in cases wherein the overarching legal structure or rule of law imposed within the state via the means of a *constitutional grundnorm*<sup>8</sup> advocates for the advancement of a pro – equality imperative. Hence, for the purposes of contextual unambiguity the phrase *conflict of personal laws* will refer exclusively to two ideas and they are as follows,

- The concerns that originate from the *over – delegation* of authority<sup>9</sup> to regulate societal interactions; (The primary concern being one that vitiates

6 Ulrich M. Drobnig, Max Rheinstein, Peter Hay, *Conflict of Laws*, Encyclopedia Britannica, 2011, Available at - <https://www.britannica.com/topic/conflict-of-laws>. (Last accessed on 17/02/2017).

7 The term used here is denotative of its corresponding definition as prescribed by Oxford Dictionary, *Definition of inequity*, Oxford English Living Dictionary, Available at - <https://en.oxforddictionaries.com/definition/inequity>. (Last accessed on – 24/02/2017).

8 Kelsen, Hans, *GENERAL THEORY OF LAW AND STATE*, (1st Edition, 1949).

9 David Schoenbrod, *Delegation and Democracy: A reply to my critics*, 20, CARDOZO LAW REVIEW, 731, 1999.

sovereignty paving the path for further instances of violation, a dangerous precedent that would threaten the rule of law<sup>10</sup> upheld on the foundation of state supremacy within the field of behavioural regulation of members of the concerned society)

- Stemming from a cursory analysis of regulations that are already enforced within these communities, showing signs rife with inequalities are directly violative of the fundamental rights enshrined in Chapter III of the Constitution of India, 1950<sup>11</sup> that casts a positive duty<sup>12</sup> (such a duty can only be labeled as being positive when considered in a categorical<sup>13</sup> manner) on the state towards preserving and protecting said rights;

### CONFLICT IN THE MODERN PERSPECTIVE

Let us examine the current conflict that has ensued in India post its independence in 1947,<sup>14</sup> and the granting of autonomy to communities to regulate themselves.

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- 10 Waldron Jeremy, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, 2016, Available at - <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=rule-of-law>; “The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society. The procedural principles concern the processes by which these norms are administered...” (Last accessed 24/02/2017).
- 11 Constitution of India. Chap. III, Art. 12 – 35.
- 12 Marcus G Singer, *Negative and Positive Duties*, 15(59), THE PHILOSOPHICAL QUARTERLY, 97, 97, 1965.
- 13 Johnson, Robert & Cureton, Adam, *Kant’s Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, 2017, Available at - <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=kant-moral>; “Immanuel Kant (1724–1804) argued that the supreme principle of morality is a standard of rationality that he dubbed the “Categorical Imperative” (CI). Kant characterized the CI as an objective, rationally necessary and unconditional principle that we must always follow despite any natural desires or inclinations we may have to the contrary. All specific moral requirements, according to Kant, are justified by this principle...” (Last accessed on 24/02/2017).
- 14 HT Correspondent, *Independence day: Newspaper clippings around Aug 15, 1947*, THE HINDUSTAN TIMES, 2015, Available at - <http://www.hindustantimes.com/india/independence-day-newspaper-clippings-around-aug-15-1947/story-KGCdP23GmEVIHAtHYu8NkO.html>, (Last accessed on 24/02/2017).

At the outset, it must be observed that the goal of the paper is showcase a causation and not a correlation, however in the case of personal laws and the religious tensions underlying the same, the logical consistency for deriving an explicit causation is one of doubtful authenticity, seeing as to how the incidences of divisive events and the laws that are closely linked with them form an aspect within the vast framework of socio – economic causes that comprise of the religious tensions that exist between the various communities domiciled in India. (The issue of religious conflict being the *root cause* for the problem, and being the flashpoint for the origination of personal laws and then those said laws placing impediments in the path will be discussed in detail in sections IV & V) Contemporaneously, it is sought to provide instances that serve as valid proof to validate the second of the aforementioned issues pertinent to the constitutional violations. The issue that exemplifies the conflict and must be examined in order to substantiate the assertion made above is as follows, (a singular issue will be considered by the paper, owing to a paucity of words) the controversial *Triple Talaq*<sup>15</sup> problem within the Muslim community as being representational of the problems that plague the institution of personal laws. The issue of *arbitrary divorce*<sup>16</sup> is one that has long been debated in the country; post its independence in 1947, with recordings of several instance wherein discriminated sections (primarily women, with specific reference to Muslim women)<sup>17</sup> have approached the courts of law in an effort to secure some relief from having their constitutionally guaranteed rights enforced. It is quite dismaying to note that in a vast number of cases, the Supreme Court has actively departed from its position of subscribing to *judicial activism* to prescribing restraint.<sup>18</sup> It is to be noted that religious

15 Ashwaq Masoodi, *The Thorny Issue of Triple Talaq*, THE LIVE MINT, 2017, Available at –<http://www.livemint.com/Politics/lal1al8yQxmyuAjDDNKhGJ/The-thorny-issue-of-triple-talaq.html>; (Last accessed on 24/02/2017).

16 A. S Parveen Akthar v. Union of India, W.P. No.744 of 1992; “She has stated that this form of divorce is unilateral, arbitrary and gives no chance for reconciliation between the parties. She has also stated that men not to pay maintenance very often use it as a weapon...”.

17 *Id.*

18 T. R. Andhyarujina, *The Disturbing Trends in Judicial Activism*, THE HINDUSTAN TIMES, 2012, Available at - <http://www.thehindu.com/opinion/lead/Disturbing-trends-in-judicial-activism/article12680891.ece>; (Last accessed on 24/02/2017).



differences, cited as being irreconcilable were the reasoning behind the non – framing of a Uniform Civil Code for the country in 1947 and the resultant converse, i.e. the authorization of communities to regulate their inter personal relations in a manner that was perceived to be in consonance with the unique, and varied culture and religion.<sup>19</sup> The primary question before the courts of law for interpretation was not of origins or the reasoning that was cited as being authoritative to take up the course of action as proposed, (a fundamental fallacy in hindsight, yet in consonance with the spirit of judicial enquiry) but rather one of far greater importance. When faced with questions of law that were comprised of issues that were potentially in violation of the Constitution of India, especially with the provisions contained in Chapter III,<sup>20</sup> the actual question that begged judicial reasoning happened to be either a pronouncement of violative character (thereby implying an unconstitutionality that would invoke the *doctrine of severability* stipulated under Article 13<sup>21</sup> of the same document) or a justification that was grounded in substantive law that would illustrate to the aggrieved parties as to why the judiciary would be unable to provide relief. It would be specious to even play the Devil’s Advocate<sup>22</sup> when considering the possibility of a truth embedded into the or condition in the question stipulated above, which would leave the first aspect of the question to be answered, (regarding the constitutionality of such practices) and precisely one that Courts have resolutely refused to answer in the past.

A case of central importance to the issue at hand, was the case of *Ahmedabad Women’s Action Group v. Union of India*<sup>23</sup> as in the judgment the two – member

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19 Archana Parashar, Gender Inequality and Religious Personal Laws in India, 14(2), THE BROWN JOURNAL OF WORLD AFFAIRS, 103, 103 – 104, 2008.

20 *Supra* note 12.

21 *Supra* note 31, *See*, Cl. 2; “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.”

22 Henry D Ephron, *Advocatus Diaboli*, 27(6), THE CLASSICAL OUTLOOK, 66, 66 – 67, 1950.

23 *Ahmedabad Women Action Group ... v. Union Of India* W.P. (C) No. 494/96; “So far as the challenge to the Muslim Women (Protection of Rights on Divorce) Act, 1986 is concerned, we understand that the said issue is pending before the Constitution Bench. We, therefore, do not see any reason to multiply proceedings in that behalf. In

bench consulted the judgments rendered by the apex court in several decisions wherein a similar conclusion had been drawn, one of *exclusion* of issues of personal law from the original writ jurisdiction under Article 32,<sup>24</sup> aimed at redressing the wrongs committed by the state violating the provisions contained in Chapter III of the Constitution of India. The author of judgment, Justice Venkataswami observed that in the several cases, such as *Maharishi Avadesh v. Union of India*,<sup>25</sup> *Reynold Raimani & Another v. Union of India*,<sup>26</sup> *State of Bombay v. Narasu Appa Mali*<sup>27</sup> and *Krishna Singh v. Mathura Ahir*<sup>28</sup> amongst others the Supreme Court had arrived at the singularly definitive conclusion that the subject matter of personal laws and any superficially violative clauses included therein would be the concern of the legislature and any amendments proposed to the same would have to be taken up by the legislature, as the making of laws is a

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the result and having regard to the earlier decisions of this Court noticed above, we decline to entertain these writ petitions. Accordingly, these writ petitions are dismissed.”

24 *Supra* note 12, *See*, Art. 32 (1) the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed...”.

25 *Maharishi Avadesh v. Union of India* (1994) Suppl. (1) SCC 713; “The third prayer is to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and right of Muslim Women and against their protection. These are all matters for legislature. The writ petition is dismissed.”

26 *Reynold Raiamani and Another vs. Union of India and Another* (1982) 2 SCC 474; “If grounds need to be added to those already specifically set forth in the legislation, that is the business of the legislature and not of the courts. It is another matter that in construing the language in which the grounds are incorporated the courts should give a liberal construction to it. Indeed. We think that the courts must give the fullest amplitude of meaning to such a provision. But it must be a meaning, which the language of the section is capable of holding and the same cannot be extended by adding new grounds not enumerated in the section...”.

27 *State of Bombay vs. Narasu Appa Mali* 1952 AIR Bombay 84.

28 *Krishna Singh vs. Mathura Ahir and others* 1980 SC 707; “It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judges failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties...”

subject that is outside of the ambit of the authority that is conferred onto judicial bodies in India under the Constitution of India. The bench placed specific importance onto the words of J. Gajendragadkar, who posited the following:

“It was for the Legislature to take into account the social customs and beliefs of the Hindus and other relevant considerations before deciding whether it was necessary to provide for special provisions in dealing with bigamous marriages amongst them. That clearly is the province of the Legislature and with the propriety of their views or their wisdom Courts are not concerned... Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law is not used in Article 13, because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution...”<sup>29</sup>

From the construction of the sentences in the concurring opinion, the justice expresses an unambiguous position as to non – inclusion of personal laws and their normative content under the ambit of Chapter III of the constitution. It is particularly puzzling to note the observation that while he believes that the framers were intent on excluding the jurisdiction of judicial review over personal laws under the expression of *laws in force* mentioned in Article 13,<sup>30</sup> whilst simultaneously holding the view (a majority of the framers, especially Dr B R

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29 *Supra* note 28, *See*, “Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law is not used in Art 13, because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the constitution and so they did not intend to include these personal laws within the definition of the expression laws in force. Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Article 13(i) at all.”

30 CONSTITUTION OF INDIA Art. 13. Cl. 3 (b); “Laws in force includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.”

Ambedkar for whom it was a long incubated desire to put to rest the structural inequities inherent in Indian society, fomented and crystallized over millennia) that it would be most efficacious for India to unify the codes that were in place for different religious communities and adopt a common civil code. Such an interpretation is classically representative of a fallacy, as defined by Bentham sans the mala fide intent in the instant case. The concerns with the interpretation are particularly exacerbated when the fact that a Uniform Civil Code was introduced as an operative clause (Article 35) of the draft constitution of India,<sup>31</sup> before lengthy debate reduced the position of the same to that of a guideline, a non – justiciable clause within Chapter IV i.e. the Uniform Civil Code.

A correct manner in which such an observable/superficial dichotomy can be interpreted as intent (revealed upon the application of an *intentionalist* approach<sup>32</sup> to interpretation) to include the violations of Part III rights by provisions contained within personal laws for two reasons. The *first* being that if they truly believed that the UCC was a long term goal for the state and to extenuate the same end introduced it as an operative clause but were compelled to revise, owing to opposition from certain conservative communities in society then it would be incorrect for individuals performing a historical analysis to stipulate that they intended to place the jurisprudence of personal law beyond the ambit of what was easily considered the *heart and the soul*<sup>33</sup> of the Constitution. The *second* reason is taking cognizance of the importance attached to the fundamental rights

31 Maneesh Chhibber, *Uniform Civil Code debate is not new, divided Constituent Assembly as well*, THE INDIAN EXPRESS, 2016, Available at - <http://indianexpress.com/article/explained/in-fact-uniform-civil-code-debate-is-not-new-divided-constituent-assembly-as-well-3086583/>; “In fact, Article 44 has always been contentious - as Article 35 of the draft Constitution, it was one of the most debated clauses in the Constituent Assembly as it set about the task of drafting a new Constitution for the recently-independent sovereign nation of India...” (Last accessed on 25/2/2017).

32 Richard A Posner, *LAW AND LITERATURE*, (Revised & Enlarged Edition, 1998); Posner explores the role that is essayed by the adoption of differing modes of interpretation such as the *Intentionalist*, *New Critical* and *Deconstructionalist* approach which all render variances in the results of their application to a similar text under consideration.

33 Nirmalendu Bikash Rakshit, *Right to Constitutional Remedy: The Significance of Article 32*, 34(34/35), THE ECONOMIC AND POLITICAL WEEKLY, 2379, 2380, 1999.

by the framers, seeing as to how the country had at the moment gained independence from over two centuries of highly repressive ruled marked by constant and flagrant violations of human rights and a highly exploitative behaviour adopted towards the natives of the subcontinent, the importance so attached would be significantly ostentatious. With such an importance being placed on the concept fundamental, inalienable rights except under circumstances of the gravest nature were considered a self – evident truth ingrained within the constitutional fabric. (This was particularly supported by the criticism faced by the apex court following the erroneous decision rendered by the court in the case of *ADM Jabalpur v. Shiv Kant Shukla*,<sup>34</sup> a judgment that sought to abrogate the right to life and the right to seek judicial remedy in cases wherein Article 352 – Emergency was in operation in the country.) On the backdrop of such circumstantial evidence it would indeed be crass misinterpretation to propose that the framers were of the view that potential abuses of the fundamental rights be forgone from judicial reprieve and subject to base vote – bank motivated political aspiration.

It is however, uplifting to note that recent developments in the field have shown marked improvements with a recent judgment rendered by the Allahabad High Court wherein Justice Suneet Kumar has noted that the practice of *Triple Talaq* is a most *cruel* practice that is repugnant the *judicial conscience*<sup>35</sup> and while the constitutionality of the practice was not examined by the court, per se the statement

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34 Additional District Magistrate, ... v. S. S. Shukla, 1976 SCR 172; “In view of the Presidential Order, dated June 27, 1975, under Clause (1) of Art. 359, no person has any locusstandi to move any writ petition under Art 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order, of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations...”.

35 Omar Rashid, ‘*Triple Talaq*’ a cruel and most demeaning form of divorce practiced by Muslim community: HC, 2016, Available at - <http://www.thehindu.com/news/national/Triple-talaq-a-cruel-and-most-demeaning-form-of-divorce-practised-by-Muslim-community-HC/article16776863.ece1>; “The Allahabad High Court has come down heavily on the practice of “Triple Talaq”, saying this form of “instant divorce” is “cruel” and “most demeaning”, which “impedes and drags India from becoming a nation...”, (Last accessed on 25/02/2017).

is as a stand – alone mode of propagating awareness bereft of benefit, seeing as to how it signifies some change in stance on the part of the judiciary as opposed to a most cold disposition adopted in the past that reeks of a formalism unheard of within the portals of the judiciary, pertinent to the subject.

### ***Conflict Historicized***

This section seeks to achieve two primary objectives, the *first* being an explication of the conservative nature of legal/religious discourse in pre – independent India and the *second* being analyzing the relationships shared between the various religious communities in pre – independent India with specific reference to the Hindus and the Muslims, in order to expose the underlying strife and conflict propagated in part by reciprocal action and in part by British policy and design. Such a correlation (supported by causation) can be linked to the largest impediment in the path of achieving a common civil code, i.e. irreconcilable religious differences. (Such an assertion holds water even in the absence of any direct conflict between the communities in the 21<sup>st</sup> century on the subject of personal laws; the fear of identity assimilation to the extent of expropriating the same in favour of a common identity forms the crux of the opposition to the same code.)

On the issue of the *first* priority, an example concerning the regressive nature of Hindu personal jurisprudence (representative of practices common across all religious communities) would suffice to substantiate the point, and on the same note let us examine the case of *Dadaji Bhikaji v. Rakhmabai/Rukhmabai*, 1885.<sup>36</sup> This legal dispute was instrumental in the passaged of the piece of legislation entitled, the *Age of Consent Act, 1891*<sup>37</sup> and marked an instance wherein an uncharacterically progressive judgment from an English justice was vehemently decried by a conservative Hindu populace, led by several highly prolific leaders of the Indian National Congress. The public outrage that followed the

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<sup>36</sup> Dadaji Bhikaji v. Rakhmabai, ILR Bombay Series, Vol. 8, (1885).

<sup>37</sup> Agnew, William Fischer, THE INDIAN PENAL CODE: AND OTHER ACTS OF THE GOVERNOR-GENERAL RELATING TO OFFENCES, WITH NOTES, (1st Edition, 1898), page no - 212.

pronouncement of the verdict by Justice Robert Hill Pinhey was symptomatic of a commitment to adhering strictly to the words of the scriptures, misconstrued hitherto by a class of Brahmins intent on maintaining their stranglehold over societal hierarchy within which they enjoyed an apex position mired in nepotism. The facts were as such, against the wishes of her liberal, educated (practicing surgeon) stepfather Sakharam Arjun at the age of eleven Rakhmabai was married to one Dadaji Bhikaji, but continued to live in her familial home as she was pre – pubescent. When she refused to move into her husband’s house following the attainment of puberty, a petition was filed for *restitution of conjugal rights*<sup>38</sup> and when the matter was taken up by Justice Pinhey, he refused to apply English law on the issue as the same was designed to take into cognizance the maturity associated with consenting adults as opposed to marriages solemnized when one or both of the parties were infants. Thus, terming the fact situation, a wedding in *helpless infancy* could not condemn the individual to a life in matrimony lacking consent. Bal Gangadhar Tilak, a prominent leader of the Radical wing of the Indian National Congress lead the protests against the decision and following the retirement of Pinhey the case came up for retrial in 1886 and the decision was overturned at both stages of appeal.<sup>39</sup> This communicated that most Hindus were opposed gravely to the idea of institutional authority tampering with pre – set social authority in the form of customs and usages.

Those radical conservative factions undertook a particularly gruesome and scientifically erroneous defence of the position of the Hindu law being declared as repugnant to morals and reason by Justice Pinhey framed lines of argumentation that implicated the female sex as being wholly subservient to the males and four reasons were provided in order to justify the same and they are,<sup>40</sup>

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38 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND: OF THE COGNIZANCE OF PRIVATE WRONGS, (1st Edition, 1753).

39 Sudhir Chandra, ENSLAVED DAUGHTERS: COLONIALISM, LAW AND WOMEN’S RIGHTS, (1st Edition, 2008).

40 The following four points regarding the arguments made in order to condemn the decision rendered by Justice Pinhey, in the aforementioned case, Nalini Rajan, *Personal Laws and Public Memory*, 40(26), ECONOMIC AND POLITICAL WEEKLY, 2653, 2654, 2005.

- *Firstly*, it was opined that women were unable to control their rampant libido which was brought on by the onset of puberty<sup>41</sup> and hence a most efficacious mode of remedying the problem was to have them wedded whilst still pre – pubertal so as to place them under the exclusive control of a singular husband;
- *Secondly*, the right to marry being by choice of the individual being wedded was one that was inauspicious within Hindu jurisprudence as the younglings lacked the emotional maturity to choose life partners of their own, and hence the right to choice was stripped from both parties and vested in the parents and extended familial units;
- *Thirdly*, it was a commonly observed practice that once married the wife's consent to conduction of sexual activities was implicit and overarching thus stipulating that even in cases wherein there occurred no consummation and there was estrangement, the wife was obligated to return to the matrimonial home; (to discharge her duties accorded to her by her spousal station)
- *Fourthly*, women were considered as *vehicles of pleasure* and tools used merely for the purposes of *procreation*, specifically producing male heirs to carry forth the family lineage;<sup>42</sup>

Such repressive rules and practices being enforced as morally appropriate was characteristic of not just Hindu community but rather true for the Muslims, Christian and other religious denominations as well.

On the *second* aforementioned priority, the relationship shared between the communities was never *harmonious* (although at no point were certain period marked by extensive conflict until the latter Mughals) at the point of origination seeing as to how most early encounters between said religious groups was in the form of *war* or *invasion* aimed at securing plunder mostly in the Indian subcontinent

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<sup>41</sup> *Id.*

<sup>42</sup> *Importance of first born child, Indian Custom*, INDIAN NETZONE, 2009, Available at - [http://www.indianetzone.com/27/importance\\_first\\_born\\_child\\_indian\\_custom.htm](http://www.indianetzone.com/27/importance_first_born_child_indian_custom.htm); (Last accessed on 25/2/2017).



owing to the presence of fabled and untold wealth that represented India as an object of desire to most rulers in countries that bordered India in the North – West beyond the Hindu – Kush mountain range. Evidence that can be adduced to substantiate the same, are the multiple Muslim invasions following the 10<sup>th</sup> century AD, with Mahmud of Ghazni,<sup>43</sup> Mohammed Ghori,<sup>44</sup> Timur the Lame<sup>45</sup> after them and finally the with the displacement of the Tomar Rajputs in the early 12<sup>th</sup> century the entrenchment of the Delhi Sultanate commencing with Qutubuddin Aibak engendering the Slave Dynasty.<sup>46</sup> Following from the Delhi Sultanate (a collective comprising of five dynasties)<sup>47</sup> came the Mughals who seized the imperial throne at Delhi in the aftermath of Ibrahim Lodhi's defeat in the *First Battle of Panipat* (1526) by the King of Ferghana and Kabul, Zahir Uddin Muhammad Babur which marked the beginning of Muslim rule in Hindustan that would last in a fairly stable manner<sup>48</sup> (and succeed in uniting most of Hindustan under a single banner) until the meteoric rise of the British East India Company to power following victories in the Battle of Plassey and Buxar.<sup>49</sup> With protracted Muslim rule in

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43 Saunders, Kenneth, *A PAGEANT OF INDIA*, (1st Edition, 1947); Barnett, Lionel, *ANTIQUITIES OF INDIA*, (1st Edition, 1999).

44 John Keay, *INDIA: A HISTORY*, (1st Grove Edition, 2001).

45 Marozzi, Justin, *TAMERLANE: SWORD OF ISLAM, CONQUEROR OF THE WORLD*, (2nd Edition, 2004).

46 The Editors of Encyclopedia Britannica, Qumb al-DînAibak, *ENCYCLOPEDIA BRITANNICA*, 2016, Available at <https://www.britannica.com/biography/Qutb-al-Din-Aibak>; , “When Muçizz al-Dîn was assassinated (1206), Qumb al-Dîn was his logical successor. He was still technically a slave, and he quickly obtained manumission. He married the daughter of Tâj al-DînYildiz of Ghazna, one of the other principal claimants to succeed Muçizz al-Dîn, and, by other judiciously arranged marriages, consolidated his rule...”(Last accessed on 18/02/2017).

47 Peter Jackson, *THE DELHI SULTANATE: A POLITICAL AND MILITARY HISTORY* (CAMBRIDGE STUDIES IN ISLAMIC CIVILIZATION), (1st Edition, 2003); From the same, the list of the five ruling dynasties, when arranged in a chronological manner,

- The Slave Dynasty; (1206 – 1290)
- The Khilji Dynasty; (1290 – 1320)
- The Tughlaq Dynasty; (1320 – 1414)
- The Sayyid Dynasty; (1414 – 1451)
- The Lodhi Dynasty; (1451 – 1526).

48 *Supra* note 51.

place in a country dominated by a Hindu populace sowed the seeds of discord within the majority community as being discriminated against by repressive Muslim rulers, and the situation was particularly exacerbated by two factors,

- *Firstly*, the reign of the last great emperor Aurangzeb<sup>50</sup> was marked by a return to Islamic fundamentalism following over two centuries of tolerance and brokering an uneasy peace between the Hindu and Muslim communities by earlier emperors. Such a vigorous return to a puritan interpretation of the Muslim codes caused great strife within his empire leading to several rebellions from the Rajputs, the Sikhs and finally the paved the path for the rise of the Marathas, who ensured the downfall of the Mughal empire in India;
- *Secondly*, following the suppression of the Mutiny of 1857 by the East India Company and the subsequent disestablishment of the Company's suzerainty over Hindustan and a direct imposition of the Queen's rule in the country via the passage of the Government of India Act, 1858<sup>51</sup> the British Crown proceeded to adopt a policy of *divide and rule* that would allow to retain authority in the subcontinent for the longest possible duration. This policy included the subjective, arbitrary favoring of one community depending on the relative position of strength or weakness possessed by the same.<sup>52</sup> For example, the British encouraged and facilitated the creation of the Indian National Congress in 1885 as a means to contain the demands

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49 Dr. Meena Hareet Kumar, *The Plundered and Sponsored State of Bengal After the Battle of Plassey (1757)*, 5(8), INTERNATIONAL JOURNAL OF RESEARCH IN ECONOMICS AND SOCIAL SCIENCES, 139, 139 – 148, 2015.

50 Mughal Empire (1500s, 1600s), BRITISH BROADCASTING COMPANY, 2009, Available at [http://www.bbc.co.uk/religion/religions/islam/history/mughalempire\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/history/mughalempire_1.shtml); "He no longer allowed the Hindu community to live under their own laws and customs, but imposed Sharia law (Islamic law) over the whole empire. Thousands of Hindu temples and shrines were torn down and a punitive tax on Hindu subjects was re-imposed...". (Last accessed on 25/02/2017).

51 Wolpert, Stanley, A NEW HISTORY OF INDIA, (3rd edition, 1989).

52 Neil Stewart, *Divide and Rule: British Policy in Indian History*, 15(1), SCIENCE AND SOCIETY, 49, 49 – 57, 1951.

of the people into a malleable organization that would take the direct pressure off the government.<sup>53</sup> However, when these intentions failed to materialize and instead the converse were effectuated by the actions of the Congress, the government through the Partition of Bengal plan in 1905 managed to skillfully manipulate the Muslim community into establishing the Muslim League by leading them to the conclusion that the Hindu – dominated Congress would only be able to provide inadequate representation for Muslims and their interests leading to an abrogation of the same;<sup>54</sup>

Needless to state, the pursual of such a policy for a period of seven to eight decades permitted a deep perfusion of distrust between the two communities that culminated in the bloody Partition of 1947, the largest man – caused migration in history that killed an atrocious number of people solely due to religious considerations.<sup>55</sup> This is the primary impediment on a subject of personal laws linked to religion in the 21<sup>st</sup> century, with the general clime of distrust and possible identity loss that precludes both communities from even approaching a table of negotiations in order to practically implement a common civil code.

### ***What are Underlying Causes and the Relative Role they Play***

All social conflicts manifest in a layered manner,<sup>56</sup> in such a way so as to include a multitude of causes and effects forming a causal loop, wherein a superficial cause as perceived to have provided the explicit causation for the observable

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53 *Safety Valve Theory of Indian National Congress*, GENERAL KNOWLEDGE TODAY, 2011, Available at - <http://www.gktoday.in/safety-valve-theory-of-indian-national-congress/>, (Last accessed on 25/02/2017).

54 Al Masum, Abdullah, *Partition of Bengal (1905) and Its Impact on Muslim Education in Eastern Bengal*, JOURNAL OF THE PAKISTAN HISTORICAL SOCIETY, 2012, Available at - <https://www.questia.com/read/1P3-2736912071/partition-of-bengal-1905-and-its-impact-on-muslim>; (Last accessed on 25/02/2017).

55 William Dalrymple, *The Great Divide: A violent legacy of the Indian Partition*, THE NEW YORKER, 2015, Available at - <http://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple>. (Last accessed on 25/02/2017).

56 The term *layered* in the above context is one that refers to a causal manner of manifestation that allows for multiple causes to produce a singular effect. In other words, while it would appear that [x] is the cause that produced the effect [y], it is

effect may in reality be an incorrect assessment of available data, seeing as to how there can exist several alternative points of origin. It is particularly imperative to discuss such *underlying causes* in an attempt to arrive at the right diagnosis for the social problem under consideration such that *treatment* so to speak that can effectively alleviate the condition so diagnosed. The converse possesses several marked drawbacks, the most important being, an incorrect or worse an incomplete diagnosis deludes one into the belief that the administered relief is of a morally and legally agreeable/efficacious nature when in practice, the same is highly ineffectual in bringing forth change in the long – run.

To adduce a hypothetical in the manner of evidence, let us consider the case of society [x], within which there exists a constitutional grundnorm that delineates the structure of the state machinery and the manner of it's organization. This grundnorm, so to speak has enjoyed a position of paramount importance. (With judicial support) On the issues of socio – religious affairs pertinent to interpersonal relationships,<sup>57</sup> (such as marriage, divorce, inheritance etc.) the government has provided provisional autonomy to institutions (along sectarian lines) to govern themselves, via the application of customs and practices unique to said communities and it must be noted that the members of these communities actively resist any attempts at diluting the aforementioned power vested in them. Yet, it is observed that when contrasted with the liberal, progressive ideologies enclosed within the constitutional document (as best evidenced by the comprehensive Bill of Rights and the vast powers of judicial review, both in letter and application through subsequent substantive case law) several practices of certain communities appear to be highly regressive and clearly emanate from a fundamentally distinct constitutional/moral philosophy. (One rooted in the command theory<sup>58</sup> and patriarchy<sup>59</sup>) The same is ostensibly violative of the provisions enclosed within

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very permissible to posit that whilst [x] is a primary cause or an initial flash point of [y], a deeper analysis would reveal that in reality it was the causation of [a] that brought forth the effect [y] in a manner wherein the occurrence of the primary or flash – point cause would not elicit a similar effect as in the presence of [a].

57 John D. M. Derrett, *The Administration of Hindu Law by the British for Comparative Studies in Society & History*, 4(1), COMPARATIVE STUDIES IN SOCIETY AND HISTORY, 10–52, 1961.

the Bill of Rights and in a series of puzzling judgments the apex court in [x] has pronounced the subject matter of the violations to be beyond the scope of the court's judicial authority. A singular suggestion to alleviate the conflict (characterized by the violative character of the practices within certain communities, in a nation that swears by the rule of law. An important component of the rule of law is equality in the eyes of the law,<sup>60</sup> evidenced in the wording of Equality clause in the Bill of Rights) has been the framing of a common civil code, that seeks to unify previously unique cultural practices into a single code of conduct in issues pertaining to marriage, divorce and inheritance and the passage of the code would ensure that an female member of community [1] would be afforded the same treatment as a female member of any other community, ergo eliminating the violations of the Bill of Rights in [x]. However, this solution exemplifies the fallacy of incomplete diagnosis,<sup>61</sup> seeing as to how deeper analysis would reveal that the primary motivating factor that hinders societal acceptance to uniformity happens to be two fold, the first being a distrust inured in the psyche of the minority religions that the majority community (one that will play a major role in the drafting the proposed code) will take cognizance of the interests of those previously marginalized and the second being a history of conflict and distrust that ingrains a fear of identity loss within both communities/religions, specifically the minorities owing in part to past discrimination. This analysis exposes the underlying cause to be a conflict of religious normative content, or distrust owing

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58 Brian Bix, *John Austin*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, 2016, Available at - <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=austin-john>; (Last accessed on 26/02/2017).

59 Barbara Smuts, *The Evolutionary Origins of Patriarchy*, 6(1), HUMAN NATURE: AN INTERDISCIPLINARY BIOSOCIAL PERSPECTIVE, 1, 1 – 25, 1995.

60 An example of the same when translated into pragmatic reality can be found for Instance in the Constitution of India, Constitution of India, 1950, Art 14; "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

61 The term *incomplete diagnosis* refers to a scheme or policy provision that is aimed at partial alleviation or superficial alleviation of the problem at hand, as the policy does not target or even identify any of the *underlying causal links* that would allow the legislator to extrapolate the necessary information to ensure that the problem is nipped at the bud, so to speak.

to past differences viewed as being irreconcilable. The passage of a common civil code does not remove these differences, unless absolute consensus can be attained and if [1] and [2] share several differences integral to their identity as being [1] and [2], without compromise it is task of monumental difficulty if not impossibility to effectuate reconciliation.

For these reasons, it is imperative that a solution that targets a resolution of the underlying causes be effectuated, in order to resolve the social conflict in the long run in an efficacious manner.

### ***The Implications of Adopting A Uniform Civil Code***

The purpose of this section is to illustrate via the means of employing a hypothetical scenario, two elements that seek to provide evidentiary support to the assertion of the common code's non-viability. The elements are, *firstly* to demonstrate the various structural forms that a proposed UCC would opt to, in order to maximize the impact that its introduction would possess on the various communities directly affected, and *secondly* provide a cogent form of reasoning aimed at demonstrating the failure of the common code, to resolve the conflict engendered by the existence of the underlying causes, i.e. in the instant case crippling levels of religious distrust ingrained in the psyche of the constituents of these communities owing to rampant past practice of discrimination and conflict.<sup>62</sup> Let us consider the hypothetical as follows,

For the background on society [x], refer to the previous section. It is possible to make the observation that three alternative scenarios can manifest whilst undertaking a process to draft a common code, and they are –

- **Scenario – I [Repressive]**

This refers to a situation wherein the code has succumbed to the bias that influences its drafters, rooted in majoritarianism<sup>63</sup> and general degree

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<sup>62</sup> *Supra* note 52.

<sup>63</sup> Nicholas Capaldi, *Majoritarianism*, ENCYCLOPEDIA BRITANNICA, 2016, Available at - <https://www.britannica.com/topic/majoritarianism>; (Last accessed on 26/02/2017).

of neglect towards the interests of the minorities. Such a code is one that doomed to fail from the point of its conception, and provided that the same does make it all the way to pragmatic application it is bound to exacerbate the religious tensions between the different communities paving the way for communal violence,<sup>64</sup> a mutually assured destruction of life and property, inefficacious to the achievement of the eventual ideal social harmony;

- **Scenario – II [Stagnant/Secular]**

A condition wherein a code is drafted upon drawing from differing sources in an equitable manner,<sup>65</sup> (however sans attempting to unify the codes and resolve extant internal inconsistencies as those require alterations to grundnorms of religious practice) in order to supposedly accommodate the interests of the different communities in question. Such a scenario is one that is most likely to be implemented seeing as to how the attainment of overall consensus is highly unlikely and compromise in inevitable in pragmatic application. If that is the case, it fails seeing as to how it succumbs to the fundamental fallacy, i.e. it's non – addressal of the underlying religious tensions which would escalate into conflict post the passage of the law. Though, it would represent a marked improvement over the tensions that would arise from the passage of a code as posited in Scenario I, it would still cause significant harm/damage to the secular fabric of any society, especially [x];

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64 HT Editorial Committee, *Chronology of Communal Violence in India*, HINDUSTAN TIMES, 2011, Available at - <http://www.hindustantimes.com/india/chronology-of-communal-violence-in-india/story-jJtcgvxFYh5N3jhSw7H4KN.html>; (Last accessed on 26/02/2017).

65 This refers to a superficial attempt to reconcile conflicting provisions provided for within separate codes that are currently extant, governing the conduct of the members of those communities in an authoritative manner.

- **Scenario – III [Progressive/Irreligious]**

An ideal scenario would be one that could reconcile the underlying causes and establish the Uniform civil Code and through the same effectively construct a homogenous society. However, it is quite impossible to perform such a feat of social engineering as the current generation of individuals populating the planet has undergone childhood conditioning regarding the religious and cultural differences that form crucial aspects of their identity, both social and personal. Hence, the only avenue for a common code that still approaches the ideal is a code stripped off religion, which does not borrow from the personal laws of any extant systems and is representative of pure legal positivism. However, such a code fails as well, as a separation between the church and state<sup>66</sup> (in this case the institutions of marriage and personal property from religion) would be invocative of resistance against the proposed state action in a manner that expresses potential for violence.

### CONCLUSION

By way of conclusion this paper posits a singular alternative, (owing to a severe presence of substantive matter regulation) and said alternative is the extension of judicial mandate guaranteed under Article 13 to oversee the proper implementation of Part III rights by the Government of India. If such protection were extended so as to include under its ambit the substantive provisions of law posited by the personal laws, it would ameliorate the currently deteriorated condition of women, especially under Muslim Personal laws. In the long run, with the apex judiciary overseeing the constitutional validity of applied customs, the provisional autonomy granted to individual communities to self – regulate can be preserved. Attainment of an end – goal such as homogeneity within overarching

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<sup>66</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); “The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. ... but the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”



societal structures (represented via states) can only be actualized through the recognition of *distinctness* of the its constituent members (inclusive of communities delineated along sectarian or economic lines) and the delegation of qualified authority to them, attempting to forge social cohesion amidst isles of *unique thought*: an *asymptotic* approach at the very least.

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## ONE CODE, ONE NATION: REALITY OR A SPECULATION

*Kriti Rathi & Aman Tolwani\**

*“I personally do not understand why religion should be given this vast, expansive jurisdiction, so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for?”*

-Dr. B. R. Ambedkar

### INTRODUCTION

India is a country known for its vast heritage of culture and a multiverse of religions co-existing. India is also, the only country on the world map to not have an identity associated with only one religious calling but with its inclusivity and capability to orchestrate the needs of a variety of religious beliefs. Although, a majority of the nation's populace is identified as Hindu, yet it focuses on inclusion of Christianity, Islam, Zoroastrianism, Sikhism, Jainism, Buddhism and many others. A country with such diversity of religious beliefs, comes to be associated with difference of opinions, lifestyle, customs, traditions and priorities, since religion intrinsically governs our lives. Therefore, in order to facilitate to the co-existing ideologies, one needs to have different laws governing different needs. As result of this belief, we today see various Acts in place like Hindu Marriage Act, Muslim Adoption Laws, Hindu Adoption & Maintenance Act, Dissolution of Muslim Marriage Act passed by the Indian Legislature. Consequently, customs have come to attain a high pedestal in the Indian legal framework. Hence, as a

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result of such pluralism, it is excruciatingly important to analyze the viability of Uniform Civil Code seeing the light of the day and whether such framework would be fruitful given the present discrimination and disaggregation in the Indian citizenry on the basis of caste and religion. As being one of the most diverse countries of the world, the stakes are always high for communal riots, or discriminatory laws which govern only a few. With Uniform Civil Code in power/existence properly the stakes or chances of such issues will submerge, as they all will be governed under one rule one law, and one cannot play the card of different-different ideologies or different laws governing others differently, if we look at it this way, it a big step curbing all the smaller steps of issues based on different laws for everyone, which might create an environment of tension across the country, with Uniform Civil Code we see a future where all co-exists peacefully. The paper, henceforth, shall deal with the core issues and seek to answer the subsisting research questions as to the necessity of personal laws or pluralism, the purpose uniform civil code

aims to achieve along with weighing of pros and cons, and how logical and attainable is the Uniform Civil Code, in the Indian perspective and its aftermath through a comparative study between UCC and Personal Laws in India.

### **HISTORICAL BACKGROUND: 1950 – 1985**

The Constitution framers were convinced that certain modernisation was necessary before a UCC could be imposed on the citizens. At the same time, they also feared that any attempt to ignore the personal laws of various religions, might lead to social unrest and a situation of distress would arise, as the nation was already booming with religious riot and discontent. The Indian leaders wanted a secular constitution, taking in from the western democracies. However, India being way beyond any country in its diversity of religions made this idea a fairly impossible one to achieve. As a result, what came out wasn't the western definition of secularism but a 'secular state' providing for religious laws for various religious sects. However, when Hindu Marriage Act, 1955 came in force it extended to all the Hindus in the territory of India, except Jammu & Kashmir. The exclusion of Parsis, Jews and Christians wasn't a matter as the former two were already in

minority and the latter had an already existing modern law governing them. Ergo, Muslims remained *de facto* the only large religious sect with distinctive unreformed religious laws.

While the period of 1950-85 could be summed up as one where Muslim laws were exempted from legislations, it also opened up the biggest avenue of secularism with the enactment of Special Marriage Act that gave the right to every person to marry outside their personal law, in what we can call a “civil marriage”. This provided for some idea of incorporating UCC.

### **1985 – 2005**

The Indian Supreme Court was famished when in 1985, the *Shah bano case*<sup>1</sup> wherein a 73 year old women demanded that Muslim women shall also be blanketed by the Criminal Code, in order to enable them to maintenance, etc.<sup>2</sup> Despite the Court’s intent to uphold right to equality, the legislature thought to keep the personal laws within limits, and came out with the Muslim Women Act, 1986 providing for maintenance and other post-divorce rights. Soon in 1995, the personal laws, like any other statute, became a subject-matter of misuse as these statutes provided for laws on various traditions. Hence, people started converting to other religions in order to achieve greater benefits. One such instance was faced by the judiciary of this country when a husband converted to Muslim religion from Hinduism as it allowed polygamy, while Hinduism solely relied on monogamy.<sup>3</sup>

### **2005 – Present**

The issue continues to be in debates as this trend of converting to Islam to marry more number of women was followed by numerous husbands. Aggrieved by

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1 AIR 1985 SC 945.

2 UNIFORM CIVIL CODE OF INDIA, Available at <http://www.indialawjustice.com/uniform-civil-law.php>, (Last accessed on 27/02/2017).

3 Sarla Mudgal v. UOI, AIR 1995 SC 1531; See also, <http://timesofindia.indiatimes.com/india/End-polygamy-Muslim-woman-pleads-with-SC/articleshow/41545339.cms>, (Last accessed on 27/02 2017).

this, many first wives finally decided to file a petition through their lawyer collectively.<sup>4</sup> The issue came to be settled in not earlier than 2013, when the court finally held such acts as legally invalid, meaning thereby, converting into another religion solely for the purpose of marrying another woman while having a living spouse was prohibited. Usage of these loop-holes became an issue of concern and UCC became a need of the hour.

### **NEED FOR A UNIFORM CIVIL CODE**

*“A uniform civil code will focus on rights, leaving the rituals embodied personal law intact within the bounds of constitutional propriety.”<sup>5</sup>*

Ours is a nation with a wide array of religions and belief systems. Therefore, personal laws are constantly in controversy and also the sole reason of communal distress within the territory. The acknowledged principle of law is that the Constitution is supreme and all the laws need to be in accordance with the same.<sup>6</sup> Although UCC being in the virtue of DPSP is not enforceable by any court, yet it is nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply the principles in making laws.<sup>7</sup> While the constitution, also, confers the right to manage its own religious affairs, on any religious denomination, in religious matters.<sup>8</sup> Thereby, bringing in what seems to be somewhat contradictory provisions as there cannot cohabit uniform set of laws while also providing religious freedom at the same time, because in order to provide for a uniform set of laws some of the personal religious rights shall have

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4 Lily Thomas v. UOI, AIR 2000 SC 1650.

5 B. G. Verghese, *Who's Afraid of A Uniform Civil Code?*, Available at <http://www.thehindu.com/2003/08/13/stories/2003081300341000.htm>, (Last accessed on 27/02/2017).

6 *Doctrine of Constitutional Supremacy*; See also, *The Position of the Supreme Court under the Constitution of India*, Available at <http://www.yourarticlelibrary.com/indian-constitution/the-position-of-the-supreme-court-under-the-constitution-of-india/5539>, (Last accessed on 27/02/2017).

7 CONSTITUTION OF INDIA, Art. 37.

8 *Id.*, Art. 26.

to be curbed. This shall completely be against the totality of the society's outlook as yet being violative of Article 25<sup>9</sup> under Part III: Fundamentals Rights.<sup>10</sup>

With multiple beliefs come numerous ideological conflicts and a responsibility on the State to ensure peaceful co-existence. To live concurrently with such vast diversity, it is essential to have uniformity and avoid conflicts. What we need is UCC imbibed in a sophisticated, harmonized system of legal regulation that helps maintain a balance and skilfully uses the input of personal laws to the greatest benefit achieving higher strata of uniformity. The code shall act as a mirror to the minds of the framers of the constitution of India as it shall in true essence work to achieve equity, justice and good conscience without any conflicts.

### ADVANTAGES OF UNIFORM CIVIL CODE

It would help accelerate and achieve proper national integration. Sense of oneness, togetherness and the national spirit shall be roused. The nation shall emerge as a new force defeating and driving down the communal and diversionist forces.<sup>11</sup>

1. Shall remove all hindrances of overlapping provisions in law as also personal laws often provide with loopholes. For instance, even today honour killing, female foeticide, child marriage, etc. can be seen in the name of religion of which no repression has been done. We have allowed the existence of alternate judicial system to operate in the name of personal laws until the present.<sup>12</sup>

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9 “...all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”

10 Pannalal Bansilal v. State of Andhra Pradesh, (1996) 2 SCC 498.

11 Aariz Nizam Ansari, WELMUN' 15: *Uniform Civil Code*, Available at [http://www.welmun15.org/uploads/2/7/3/8/27386177/background\\_guide\\_for\\_the\\_all\\_india\\_political\\_party\\_meet.pdf](http://www.welmun15.org/uploads/2/7/3/8/27386177/background_guide_for_the_all_india_political_party_meet.pdf), (Last accessed on 27/02/2017).

12 Special Editorial Note: *On Uniform Civil Code, Legal Pluralism and The Constitution of India*, JOURNAL OF INDIAN LAW AND SOCIETY, 5 (Monsoon) JILS (2014), Available at [http://jils.ac.in/wp-content/uploads/2016/01/jils\\_vol-5\\_monsoon\\_2014.pdf](http://jils.ac.in/wp-content/uploads/2016/01/jils_vol-5_monsoon_2014.pdf), (Last accessed on 27/02/2017).

2. Litigation and conflicts arising out of personal laws shall decrease.<sup>13</sup> It can be seen that even after so much of development and modernisation, yet today there are no. of cases that arise everyday as an outcome of personal laws violation or misuse. The uniform civil code via implementing a merged version of all personal laws shall aim at reducing this misuse and conflicting laws.
3. It helps curb gender bias, existing in every personal law.<sup>14</sup> Its main objective is to not only improving the status of women that entails in the country, but, also of men and children. This gender biases often opens ways and loopholes of escape.
4. Will lead to a more liberal and gender-sensitive civil code that is away from all caste and religious considerations as a UCC shall aim at development of the entire citizenry irrespective of any bias and become a well sensitized democracy that shall be targeted at curbing the various gender offences.
5. It would allow better governance as people and laws shall be at parity, while reducing the vote bank politics. At every election, in this nation, it can be seen that different politicians chose their religions, i.e., some would aim their agendas towards the support of Hindus, while others at Muslim welfare, often causing distress and disturbance in the governance.

### ***Disadvantages of Uniform Civil Code***

1. Will lead to lack of political will due to reasons of sensitivity and complexity to the same issues.<sup>15</sup> There is no urgent need to bring out a code as it merely aims to be a distant social responsibility, for the same may in no manner be able to guarantee national integration. For example, In Nepal a uniform civil

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<sup>13</sup> Adv. Tarunjiyoti Tewari, *Uniform Civil Code: Still Just A Dream of Every Indians*, Available at [https://www.academia.edu/8133853/UNIFORM\\_CIVIL\\_CODE-\\_A\\_DREAM\\_OF\\_EVERY\\_INDIANS](https://www.academia.edu/8133853/UNIFORM_CIVIL_CODE-_A_DREAM_OF_EVERY_INDIANS), (Last accessed on 27/02/2017).

<sup>14</sup> Arguments in Favour of and Against Uniform Civil Code, Available at <https://www.quora.com/What-are-the-arguments-in-favour-of-and-against-Uniform-Civil-Code-in-India>, (Last accessed on 27/02/2017).

<sup>15</sup> *Id.*

code was implemented with this objective however, today the national integration of Nepal has gone nowhere beyond.

2. It would be practically impossible to make a uniform law for personal needs as it has never been given a proper thought as to how the various different customs shall be codified. For example, if a uniform civil code for marriage is to be brought about it shall not work out. Let alone the differences in marriage ceremonies and customs between Hindus and Muslims, there exists a huge amount of disparity within religious as there are numerous communities, each having a different custom related to marriage, within Hindus and the law itself is not so comprehensive so as to pay heed to each of these customs, even in the present law.
3. Shall result in treating the differences equally, i.e. though people might differ in their outlook and belief they shall be treated equally which shall be against the underlying principles of Article 14.
4. Would outcome in civil riots as people in India are very attached to their religion. Therefore, disregarding the significance of the existence of traditions and customs in the legal framework.<sup>16</sup>
5. Might seem to be a majority over minorities rule, a strict no-no for any democracy. The history suffices with enough instances to support that the minorities had always been suppressed in various contexts. As the code provides for merging the laws into one, it poses great threat to many minority communities and religious identities as they fear its extinction in a crowd of majorities.
6. Shall be a direct infringement of Article 25 and wouldn't significantly improve the democratic ideologies of the nation. It depends on the texture of the society and the nation's historical experiences, which in India have also posed a threat to their religious existence.

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<sup>16</sup> Available at <http://confused-ambadi.blogspot.in/2012/06/uniform-civil-code-what-and-why-not.html>, (Last accessed on 27/02/2017).



## **THE ROLE OF INDIAN JUDICIARY**

The argument of implementing UCC arose only in cases where the personal laws of a community had been challenged in the court of law as it being unconstitutional or against the public policy.<sup>17</sup> However, our nation has always deferred from legislating on such issues because they are considered to be controversial or in-conflict for a long time now. But, with the passing time, the judiciary had become more raucous. And with this vociferous intent the court reacted and passed a judgement, in the Muslim divorce case.<sup>18</sup> Herein, the husband had thrown out the ill and elderly wife, whom he continued to pay maintenance for 2 months, post which he stopped and the wife filed a petition u/s 125, CrPC. The husband dissolved the marriage by pronouncing triple talaq and contended that since he had paid the *mahr* and maintenance for *iddat* period, a Muslim woman can no longer demand any maintenance for it being against the principles of Muslim Law. The court decided against the Muslim orthodoxy, and awarded her a maintenance amount and stated that CrPC was a common law of which any women belonging to any religion can make use of.<sup>19</sup> The courts also recognized that the right to maintenance doesn't restrict itself only to *iddat* period in case of Muslim women.<sup>20</sup> This was the judiciary's first step towards a uniform civil code.

Subsequently, this case opened the gates for various cases to arise within this umbrella.<sup>21</sup> The judiciary has always aimed at narrowing down the gap between the personal laws and general laws. In consideration of which, Justice Chinnappa Reddy said –

*“The time has now come for a complete reform of the law of marriage and makes a Uniform law applicable to all people irrespective of religion or caste. Now, it is time for the legislature to take initiative in this direction.”*<sup>22</sup>

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17 Fuzlumbi v. Khader Vali, AIR 1980 SC 1730.

18 Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

19 Bhagwan Dutt v. Smt. Kamala Devi, AIR 1975 SC 83.

20 Danial Latifi v. Union of India, AIR 2001 SC 3958.

21 Mst. Zohara Khatoon v. Mohd. Ibrahim, AIR 1981 SC 1243.

22 Ms. Jorden Diengdeh v. S.S. Chopra, AIR 1985 SC 935.

This view was reiterated in various pronouncements after that.<sup>23</sup>

Another landmark matter that came to lie before the Apex Court was that in the case of *Sarla Mudgal v. Union of India*<sup>24</sup> wherein the nation for the first time saw the cynicism of personal laws when misused. The question so arose that whether a Hindu male married to a Hindu female by law, be allowed to solemnize a second marriage by embracing Islam. The courts succinctly responded to this matter by stating that the husband shall be held guilty of Sec. 494, IPC for marrying again as the first marriage has not been dissolved and the wife continues to be a Hindu. A lot of similar cases arose at that point in time and the courts were able to maintain the same view throughout.<sup>25</sup>

The judiciary has very carefully resolved the sensitive issues of divorce and maintenance wherever there arose a conflict between personal laws and the interest of the community at large. A reading of the judicial verdicts made by the courts in India, evidently portray their numerous struggles to liberate the women society from the shackles of orthodoxy propounded on the lines of religious emotions.<sup>26</sup> After the *John Vallamattom v. Union of India*<sup>27</sup> the Chief Justice of India firmly emphasized that enactment of Uniform Civil Code would end all such problems arising out of ideological conflict as all that matters is a secular character not enshrined under Article 25 and Article 26.<sup>28</sup> The enactment thereof in one go may be counter-productive to the unity and integrity of the nation. But, a gradual progressive change should be brought about.<sup>29</sup>

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23 Begum Sabanu alias Saira Banu v. A.M. Abdul Gafoor, AIR 1987 SC 1103; *see also*, Mangila Biwi v. Noor Hussain, AIR 1992 Cal 92; Bishnu Charan Mohanty v. UOI, AIR 1993 Ori 176.

24 AIR 1995 SC 1531.

25 *Supra* note 10.

26 Aboobaker Haji v. Mamu Koya, 1971 KLT 633; *See also*, A. Yousuf v. Sowramma, AIR 1971 Ker 261.

27 (2003) 6 SCC 611.

28 *Supra* note 17.

29 *Supra* note 16.

### ***Polygamy***

In the first few initial cases that came onto the subject matter of conflict between, freedom of religion versus uniform civil code were destined to be the promoting agents of Art. 44. The judiciary faced issues that came up on polygamy, challenging the constitutionality of the Bombay Preventive of Hindu Bigamous Marriages Act, 1946.<sup>30</sup> The courts held that though there is no parity between the Hindus and Mohammedans marriage laws yet they cannot be called as arbitrary or capricious for their exists different religious beliefs forming part of the transactions. The judiciary opined on the views of other courts in stating that the religion must always be subordinate to the general governance of the State.<sup>31</sup>

While adjudicating matters of restitution of conjugal rights the court had meanderingly focused on uprooting the evils of polygamy from the society.<sup>32</sup> In fact, by the various judgements, the Apex Court has made an attempt to show disregard to polygamy by acclaiming that, the institution of polygamy doesn't stand on necessity.<sup>33</sup>

### ***Property and Succession***

Under Hindu law, the *mitakshara* branch of law held that the no daughter had the right in the property of her father after marriage owing to the concept of temporary belonging of the daughter in her paternal home as she belongs to her husband's family, post-marriage. Though, with amendments, she is today entitled to a share in the paternal property.<sup>34</sup> The Islamic law, in this regard, has also shown no affection to the supremacy/equality of women for it clearly provides that a man share shall be double that of a women,<sup>35</sup> however, unlike the Hindu law, the Muslims had at least attempted to provide some share to the women.

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30 State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

31 Davis v. Beason, (1889) 133 US 637.

32 Itwari v. Asghari, AIR 1960 All 684.

33 *Supra* note 32; *See also*, Srinivasa Aiyar v. Saraswathi Ammal, AIR 1952 Mad 193; Ram Prasad v. State of Uttar Pradesh, AIR 1957 All 411.

34 Smt. Gurdial v. Mangal Singh, AIR 1968 Punj 396.

35 Mohammad Abu Zafar v. Israr Ahmad & Ors., AIR 1971 All 366.

While adjudicating the matters of inheritance and succession the judiciary has intelligently made an attempt to knit together the laws and customs with uniformity in its approach towards justice.<sup>36</sup>

### ***Adoption and Guardianship***

A mother is the statutory subservient of the custody and guardianship of her children, while the father is the first legal guardian of his minor children. The mother becomes a guardian only after the father. However, in Mohammedan law, the father is the whole and sole guardian of his child and his property, for the Muslim women are, culturally, not allowed to adopt a son/daughter. It wasn't until recently, that the judiciary recognised the adoption rights of a Muslim female.<sup>37</sup> This again, was an attempt of judiciary in showing the significance and urgent need of having a uniform civil code in nation. When the judgement was delivered the entire nation applauded, for justice had been served.<sup>38</sup>

This concept of adoption was a legacy of Hindus as all other religions remained alien to this concept, until now. This was another area of personal law that amounted to huge discrimination among women based on their marital status. But with changing times, the position of women has been made more eminent.

### **A WAY FORWARD**

Justice Kuldeep Singh has once quoted, “Where more than 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the Uniform Civil Code for all the citizens in the territory of India.”<sup>39</sup> It

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36 Makku Rawther's Children v. Manapara Charayil, AIR 1972 Ker 27; See also, D. Chelliah Nadar v. G. Lalita Bai, AIR 1978 Mad 66.

37 Shabnam Hashmi v. UOI, (2014) 4 SCC 1.

38 Parminder Kaur, PERSONAL LAWS OF INDIA VIS-A-VIS UNIFORM CIVIL CODE A RETROSPECTIVE AND PROSPECTIVE DISCUSSION, ISSN 2321-6417, Available at [https://www.academia.edu/14295848/Can\\_Rights\\_be\\_Limited\\_under\\_the\\_Garb\\_of\\_Religion\\_Analyze\\_with\\_Reference\\_to\\_Shabnam\\_Hashmi\\_Case\\_and\\_Article\\_44\\_of\\_the\\_Constitution\\_of\\_India](https://www.academia.edu/14295848/Can_Rights_be_Limited_under_the_Garb_of_Religion_Analyze_with_Reference_to_Shabnam_Hashmi_Case_and_Article_44_of_the_Constitution_of_India), (Last accessed on 27/02/2017).

39 *Supra* note 8.

has been over a decade since the debate of uniform civil code, and still continues. Even though an immediate implementation of UCC may not be practical and advisable due to strong opposition, however, as it being under a DPSP, the states can go to extent of adopting such an approach. The live example of the state of Goa stands before us, which has not only enacted a set of family laws but has been successful in peacefully enforcing the same. Although, the Goa Civil Code is hugely based on the Portuguese Civil Code, 1867 due to the strong influence in the state. It deals with matters relating to marriage and divorce, maintenance, adoption, guardianship, succession, domicile, etc. without discrimination on any basis. Today, the situation is so, that an attempt by the State in enacting a Sharia Law had failed, as the citizens insisted on a unified code.<sup>40</sup> Chief Justice Y. V. Chandrachud, on his dream of UCC commented expressing his hope that the Goan Civil Code would one day “awaken the rest of bigoted India and inspire it to emulate Goa.”<sup>41</sup>

Two important aspects of this code which assume great significance in the Indian legal context are –

1. All marriages must be registered. In Goa, about 90 percent of marriages are registered. This helps in proper implementation of laws and governance.
2. All birth and deaths need to be registered.

With this, the central government must gradually aim at securing opinions favouring the code in India. Meanwhile, it is important for the legislative committee to sit and draft a proper civil code taking the minorities and majorities into consideration and the various prevalent customs of different religions and their significance. It is at the same time also important to sensitize different religious communities into building a common nation and generate that sense of belongingness with respect to the nation rather than dividing among sects and cults. Therefore, in order to achieve the dream of One Nation One Code, we need to reduce the hatred that

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<sup>40</sup> Available at <http://www.legalserviceindia.com/articles/ucc.htm>, (Last accessed on 27/02/2017).

<sup>41</sup> *Supra* note 24, see also *Supra* note 19.

exists within religious communities and analyse the truth, i.e. UCC promotes creation of a single nation and not a majoritarian or Hindu nation. Hence, the incorporation and change in personal laws is not an attempt to draw out a religion but rather draw out the evils in every religion to prosper towards a common progressive, modern and accommodating society.

### CONCLUSION

Art. 44 of the Constitution has become an ignored imperative of constitutional law. From the above landmark judicial verdicts it can be easily concluded that the judiciary holds a similar opinion and has again and again reiterated the need of enforcing a uniform code. Today, the subject matter of inheritance, succession, adoption and maintenance, etc. are longer a religious matter but fall under the blanket of Civil Laws. However, a code cannot be brought about in thin air of denial, as until now many communities and religious groups are not willing to accept a uniform code. The utmost goal is to improve the levels on various socio-political issues, social mobility, and, bring about equality and integrity in both men and women. In the light of the present outlook, an implementation of the uniform civil code seems to be a distant dream, considering the regular communal distress, the majority and minority conflicts, and the vote bank politics.<sup>42</sup> Accommodating personal laws of all religions under such a code is an uphill task, but, religion has to keep pace with law. And in the e-age today, the path to progress must be chartered with harmony at home.

The paramount objective of unity and integrity of India as agreed to in the Fundamental Duty under Art. 51A(c) of the Constitution of India and resolved by the People of India in the Preamble, could be achieved only when a uniform civil code is brought into force.

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42 *Supra* note 19.

# CRUELTY:

## INTERPRETATION IN INDIAN PERSONAL LAWS

*Samhitha Sharath Reddy\**

### INTRODUCTION

‘Cruelty’ is a matrimonial relief in India. It is used as a valid ground for judicial separation and divorce and can be claimed by both men and women. Black’s Law Dictionary defines ‘cruelty’ as ‘the intentional and malicious infliction of physical suffering upon living creatures, particularly human beings; or, as applied to the latter, the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage.’<sup>1</sup> Although there are a few definitions of the term ‘cruelty’, in reality, it is very difficult to find an exact definition which includes all the aspects of cruelty as the ambit of ‘cruelty’ is ever expanding and varies from case to case as per the facts. The Supreme Court of India in *Ravi Kumar v. Julmi Devi*<sup>2</sup> has very correctly stated that cruelty has no definition; in fact such definition is not possible. The concept of cruelty is subjective in nature. Situations and circumstances and the facts of each case must be scrutinized before one can decide whether cruelty has occurred.<sup>3</sup> Hence there is no common standard by which cruelty can be measured. But as pointed out in *Gurdev Kaur v.*

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1 BLACK’S LAW DICTIONARY, 9th Ed.

2 *Ravi Kumar v. Julmi Devi*, (2010) 1 DMC 411 SC.

3 *Vishwanath Sitaram Agarwal v. Sarla*, AIR 2012 SC 2586 at 2591: The expression of ‘cruelty’ has an inseparable nexus with human conduct or human behaviour. It is always dependent on social strata or the milieu to which the parties belong, their ways of life, relationships, temperaments and emotions that have been conditioned by their social status; *Kiran Robinson v. Ajeet Robinson*, (2002) 11 DMC 462.

*Sarwan Singh*<sup>4</sup>, cruelty has to be defined with regard to social conditions as they exist in the present day, and not according to the rigid tenets of Manu and other law givers of bygone ages. As there is no static definition of the term ‘cruelty’ in Indian law, the various courts of the country have relied on numerous western cases, logic of a common prudent man and principles of justice, equity and good conscience to decide and interpret what constitutes cruelty and what does not. But as stated in the English case of *Buchler v. Buchler*<sup>5</sup>, cruelty must be something more serious than the ordinary wear and tear of matrimonial life. The same has been stated in *Mamta Namdeo v. Ghanshyam Bihari Namdeo*<sup>6</sup>. Also, the burden of proof is on the petitioner to establish that the respondent has ‘treated the petitioner with cruelty’<sup>7</sup>. Based on the facts of various cases and the situations and circumstances involved, in India, over time, cruelty has evolved to include mental and physical cruelty and intention is not a necessary element in cruelty.<sup>8</sup> This has been stated in *Shobha Rani v. Madhukar Reddy*<sup>9</sup>, “the word ‘Cruelty’ has not been defined. Indeed, it could not have been done. It has been used in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem to determine it. It is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct

4 Gurdev Kaur v. Sarwan Singh AIR 1959 Punj 162; *See also*, Rajani v. Subramonium, AIR 1990 Ker 1; A. N. Saha, Marriage and Divorce, 153 (5th edn., 1996).

5 Buchler v. Buchler, (1947) 1 ALL.E.R.319 (1947, Privy Council).

6 Mamta Namdeo v. Ghanshyam Bihari Namdeo, AIR 2013 Chhattisgarh 88, para 13.

7 V. Bhagat v. D. Bhagat, AIR 1994 SC 710.

8 S. Deshpande, *Cruel Intentions*, THE TIMES OF INDIA, Available at- <http://epaper.timesofindia.com/Default/Layout/Includes/TOINEW/ArtWin.asp?From=Archive&Source=Page&Skin=TOINEW&BaseHref=TOIM%2F2011%2F07%2F26&ViewMode=HTML&EntityId=Ar01300&AppName=1>, (Last accessed on 22/09/2016).

9 Shobha Rani v. Madhukar Reddy, AIR 1988 SC 121.



complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.” Physical cruelty is relatively easier to determine as compared to mental cruelty. Therefore, to be more specific, in *Broja Kishore Ghosh v. Smt. Krishna Ghosh*<sup>10</sup>, the Calcutta High Court further explained that “What act would constitute mental cruelty depend upon the circumstances of each case, e.g. environment, status in society, education, cultural development, local customs, social condition, physical and mental conditions of the parties. Each case depends upon a variety of facts and circumstances.” In *Rayden on Divorce*<sup>11</sup> it is laid down: “To obtain divorce on the ground of cruelty it must be proved that one partner in the marriage, however mindless of the consequences, has behaved in a way which the other spouse could not in the circumstances be called to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury.” In *Evans v. Evans*<sup>12</sup>, it was laid down that “before the court can find a husband guilty of legal cruelty towards his wife, it is necessary to show that he has either inflicted bodily injury upon her or has so conducted himself towards as to render future cohabitation more or less dangerous to limb or life, or mental or bodily health.”

India being a country of diverse cultures, numerous religions and no uniform civil code as stated under Article 44 of the Constitution of India, the different personal laws have different definitions, explanations and interpretations of the term ‘cruelty’. Although the interpretation of cruelty in the personal laws vary, the Allahabad High Court stated that “Indian Law does not recognize various types of cruelty such as ‘Muslim cruelty’, ‘Hindu cruelty’ and so on, and that the test of cruelty is based on universal and humanitarian standards; that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife’s safety or health.”<sup>13</sup>

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10 *Broja Kishore Ghosh v. Smt. Krishna Ghosh*, AIR 1989 Calcutta 327, *See also*, *Shakla Bano v. Ghulam Mustafa*, AIR 1971 Bom 167.

11 *Rayden & William*, *RAYDEN ON DIVORCE*, 148 (1971).

12 *Evans v. Evans*, (1790) 1 Hag. Con. 35 (1790, Consistory Court of London).

13 *Itwari v. Asghari*, AIR 1960 All 684.

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### ***Hindu Law***

The Marriage Laws (Amendment) Act, 1976 made cruelty a valid ground for divorce under Section 13 (1) (ia) as well as judicial separation under the Hindu Marriage Act, 1955.<sup>14</sup> Prior to this cruelty was a ground for judicial separation under Section 10 (b) only.<sup>15</sup> Another change that the 1976 Amendment brought out was the enlargement of the ambit of cruelty. Before the amendment, the scope of cruelty was confined to ‘such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.’ But after the amendment, the petitioner must only prove that the respondent ‘treated the petitioner with cruelty’<sup>16</sup>. When cruelty has occurred, the Hindu Marriage Act, 1955 has enumerated the method to condone such actions and how the court in which such a case is being heard must handle the proceedings in Section 23 (1) (b) of the said Act. Allegations such as an earning wife, not parting with her salary in favor of the husband<sup>17</sup>, inability to cook or speak a certain language as demanded by any one of the spouses, refusal to serve tea<sup>18</sup> are said to be too trivial to constitute cruelty.<sup>19</sup> In Hindu law, Kumkum and Mangalsutra are worn by all married women and are the very symbol of marriage and removing the same can be termed as cruelty. Other instances which constitute cruelty are utter indifference towards the health of the spouse<sup>20</sup>, spouse levelling unsubstantiated claims of adultery etc.<sup>21</sup>, doubting the character of the wife<sup>22</sup>, refraining from having sex and subjecting the spouse to the same (mental cruelty)<sup>23</sup> is termed as cruelty. Any attempts to commit suicide

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14 Ss. 13 & 10, The Hindu Marriage Act, 1955. The State of Uttar Pradesh had made cruelty (and desertion) as a ground for divorce in 1962 vide Hindu Marriage (Uttar Pradesh Sanshodhana) Adhiniyam, 1962.

15 Section 10 (b) of the unamended Act, i.e., prior to 1976.

16 V. Bhagat v. D. Bhagat, AIR 1994 SC 710.

17 Umesh Manohar v. Trupti, AIR 2012 Bom 99.

18 Narinder Singh v. Rekha, AIR 2007 Del 118.

19 Mahesh Sinha v. Yamini, AIR 2013 Chh 150.

20 Rajender Singh v. Tarawati, AIR 1980 Del 213.

21 Shyamlal v. Mathura Devi, AIR 2010 (NOC) 635 (HP).

22 Chiranjeevi v. Lavanya, AIR 2006 AP 269.

23 Abha Gupta v. Rakesh Kumar, (1995) 1 HLR (P&H); Kusum v. Om Prakash, AIR 2007 Raj 5; Shakuntala v. Om Prakash, (1981) 1 DMC 25; Praveen Mehta v. Inderjit Mehta, AIR

or threats to do the same are a form of mental cruelty.<sup>24</sup> In some cases, sexual weakness also constitutes cruelty.<sup>25</sup> Any instance or act which causes mental anguish to a person constitutes mental cruelty such as making false allegations of having affairs<sup>26</sup>, second marriages etc., refusing to maintain conjugal relations with the spouse<sup>27</sup> etc., not allowing the spouse the pleasure of parenthood<sup>28</sup> etc. In the case of *B v. B*<sup>29</sup>, Justice B. P. Jeevan Reddy, speaking for the Supreme Court said that “mental cruelty as under section 13(1)(i-a), Hindu Marriage Act, 1955 can be broadly defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it impossible to live with the other”<sup>30</sup>. The situation needed is that the wronged party shouldn’t reasonably be expected to put up with wrongful conduct or cruelty that is mental in nature and hence continue living with the other party.<sup>31</sup> Further guidelines for what constitutes mental cruelty was laid down in *Samar Ghosh v. Jaya Ghosh*<sup>32</sup> and *Smt. Chanderkala Trivedi v. Dr. S.P. Trivedi*.<sup>33</sup>

In *Neelu Kohli v. Naveen Kohli*<sup>34</sup>, which was overturned by the Apex Court, and in *Nirmala Jagesha v. Manohar Jagesha*<sup>35</sup> the courts were of view that

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2002 SC 2582; Suresh Gurjar v. Usha, AIR 2014 Raj 140; Usharani Lenka v. Panigrahi, AIR 2005 Ori 3.

- 24 Parihar v. Parihar, AIR 1987 Raj 140; A.P. Ranga Rao v. Vijay Lakshmi, (1990) 1 DMC 567 (Mad); Pankaj Mahajan v. Dimple @ Kajal, (2011) 12 SCC 1.
- 25 Srikant v. Anuradha, AIR 1980 Kant 8; Nijhawan v. Nijhawan, AIR 1973 Del 200; Shashi Bala v. Rajiv Arora, High Court of Delhi, F.A.O. No. 185/2001, dt 21.2.2012.
- 26 Sadhana Srivastava v. Arvind Kumar Srivastava, AIR 2006 All 7; Jai Dayal v. Shakuntala Devi, AIR 2004 Del 39.
- 27 Parveen Mehta v. Inderjeet Mehta, AIR 2002 SC 2582.
- 28 KUSUM, DEPRIVATION OF PARENTHOOD: WHETHER AMOUNTS TO MATRIMONIAL CRUELTY, MADRAS LAW JOURNAL, Vol. II, 1978, pp. 28-30; Forbes v. Forbes, (1955) 2 All ER 311; P V. P, (1965) 2 All ER 456.
- 29 B v. B, JT 1993 (6) 429.
- 30 A. Fariswani, *Cruelty as A Ground for Divorce*, JUSTICE FOR WOMEN: PERSONAL LAWS, WOMEN’S RIGHTS AND LAW REFORMS, 137 (Indira Jaising ed., 1996).
- 31 S. J. Hussain, MARRIAGE BREAKDOWN AND DIVORCE LAW REFORM IN CONTEMPORARY SOCIETY, 153 (1982).
- 32 Samar Ghosh v. Jaya Ghosh, 2007 (4) SCC 511.
- 33 Smt. Chanderkala Trivedi v. Dr. S.P. Trivedi, JT 1993 (4) SC 644.
- 34 Neelu Kohli v. Naveen Kohli, AIR 2004 All 1.
- 35 Nirmala Jagesha v. Manohar Jagesha, AIR 1991 Bom 259.

not any and every abnormal act of the other party can be viewed as mental cruelty. The act needs to be of a degree that it can be considered as a matrimonial offence. It should be a conduct, such that, it is of the capacity to render the cohabitation harmful and even injurious.<sup>36</sup> Forcing abortion<sup>37</sup>, terminating pregnancy without the consent of the husband<sup>38</sup>, forcing the wife to undergo sterilization operations<sup>39</sup>, drunk husband beating the wife<sup>40</sup> constitute both mental and physical cruelty to either one of the spouses. In the landmark case of *Manisha Tyagi v. Capt. Deepak Kumar*<sup>41</sup>, the wife made allegations of sodomy on the husband and molestation on the father-in-law. These allegations were found to be untrue and therefore, the husband was granted divorce on the grounds of cruelty. This verdict was later changed to that of judicial separation on the appeal of the wife. There are numerous other case and instances which pertain to cruelty under Hindu law, some are trivial and some are highly serious.

When cruelty by a husband has been proved in the court, the Hindu wife will then be applicable to avail maintenance from the husband under Section 18 (2) (b) of the Hindu Adoptions and Maintenance Act, 1956.

### **Muslim Law**

Divorce laws for Muslims are governed under the Dissolution of Muslim Marriages Act, 1939. Under Islamic law, the husband does not need to have any grounds

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36 Flavia Agnes, FAMILY LAW VOLUME II: MARRIAGE, DIVORCE AND MATRIMONIAL LITIGATION, 35 (2011).

37 Satya v. Siri Ram, AIR 1983 P&H 252; Kuldeep Singh v. Chand Rani, AIR 2010 HP 14.

38 Sushil Kr. Verma v. Usha, AIR 1987 Del 86; Suman Kapur v. Sudhir Kapur, AIR 2009 SC 589; Anjali Bhan v. Ajay Kumar, AIR 2011 J&K 54 case under s. 13 of Jammu and Kashmir Hindu Marriage Act (4 of 1980).

39 Bravery v. Bravery, (1954) 3 All ER 59 (1954, Court of Appeal); Knott v. Knott, (1955) 2 All ER 305 (1955, High Court); Sheldon v. Sheldon, (1966) 2 All ER 257 (1966, High Court).

40 Amrit Pal Singh v. Gurpreet Kaur, 2009 (2) HLR (P&H) 430.

41 Manisha Tyagi v. Capt. Deepak Kumar, 2007 (1) HLR 297 (P&H), this judgement was overruled by the Supreme Court in Manisha Tyagi v. Deepak Kumar, AIR 2010 SC 1042.

or any reason for divorcing his wife or wives. But in the case of the wife, apart from the Khula and Mubarat divorce (divorce by mutual agreement), she has a few other grounds for obtaining divorce as well, as provided by the Dissolution of Muslim Marriages Act, 1939, cruelty being one of these grounds. Cruelty as explained by the Act is as follows<sup>42</sup>:

The husband-

- (i) habitually assaults her or makes her life miserable by cruelty of conduct even if such cruelty does not amount to physical ill-treatment; or
- (ii) associates with women of evil-repute or leads an infamous life; or
- (iii) attempts to force her to lead an immoral life; or
- (iv) disposes off her property or prevents her from exercising legal rights over it; or
- (v) obstructs her in the observance of her religious profession or practice; or
- (vi) if he has more wives than one and does not treat her equitably in accordance with the injunctions of the Quran.

The scope of the section includes mental cruelty and is extremely comprehensive when it comes to covering most of the important aspects that could constitute cruelty.<sup>43</sup> In Muslim law, the grounds for marriage and divorce are entirely different as compared to Hindu law or any other law for that matter as the husband is allowed to have four wives at a given point of time. 'Cruelty' is not defined in the Dissolution of Muslim Marriages Act, 1939 but the Act has specified what acts or instances of the husband would constitute cruelty towards the wife and this makes Muslim law, the only personal law to have an exact outline of the acts that constitute cruelty and the acts that do not.

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<sup>42</sup> S. 2 (ix), Dissolution of Muslim Marriages Act, 1939.

<sup>43</sup> Kalim Uz Zafar Shaikh Hasan v. Razia Kalim Shaikh, (2001) 1 DMC 420 (Bom-DB).

In the Shamsunnissa Begum's case<sup>44</sup>, it was held that, "the test of cruelty is based on universal and humanitarian standards by the husband which would cause such bodily or mental pain as to endanger the wife's safety of health." Even under Muslim law, as it is under Hindu law, both forms of cruelty i.e. physical and mental are accepted and are valid grounds for divorce.<sup>45</sup> As Muslim men are permitted to have more than one wife, the onus falls on the husband to prove that by taking a second wife, he did not mean or intend any type of insult or cruelty to the first wife as there are cases where the first wife claims that her husband was cruel to her due to and after his second marriage.<sup>46</sup> Inequitable treatment of co-wives amounts to cruelty under Muslim law. In the case of *Umat-ul-Hafiz v. Talib Hussain*<sup>47</sup>, the husband went abroad leaving both his wives at home. He provided maintenance for one wife and did not provide anything for the other. The court granted divorce to the aggrieved wife on the grounds of cruelty. In another case, it was stated that it will amount to cruelty if the husband sells or disposes off his wife's property or prevents her from exercising her legal rights over it.<sup>48</sup> In *Siddhique v. Amma*<sup>49</sup> the husband by deceit caused the abortion of his wife two times even when the wife desired to become a mother and it was not necessitated to her own life. Also, she was assaulted physically. The Division Bench of Kerala held that such acts, despite of not being habitual (as stated in sub-clause (i)), constituted cruelty.<sup>50</sup> Some other cases in which the courts rule in favor of the wives are *Munshee Buzloor Rahim v. Shamsoonissa Begum*<sup>51</sup>, *Hussani Begum v. Mohammad Rustom Ali Khan*<sup>52</sup>, *Syed Jafar Hussain v. Mst. Hussan Ara Begum*<sup>53</sup>, *Kadir v. Koleman Bibi*<sup>54</sup>, *Hamid Hussain v. Kubra*

44 *Munshee Buzloor Rahim v. Shamsoonissa Begum*, II.M.I. 551.

45 *Hamid Husaain v. K. Begum*, (1918) ILR 40 All 332.

46 *Itwari v. Asghari*, AIR 1960 All 684; *Raz v. Amina* AIR 1976 Kant 201.

47 *Umat-ul-Hafiz v. Talib Hussain*, AIR 1945 Lah 56.

48 *Zubaidaa v. Sardar Shah*, AIR 1943 Lah 310.

49 *Siddhique v. Amma*, (1996) 1 DMC 87 (Ker-DB).

50 *Supra* note 21.

51 *Munshee Buzloor Rahim v. Shamsoonissa Begum*, (1897) 11 M.I.A. 551.

52 *Hussani Begum v. Mohammad Rustom Ali Khan*, (1907) I.L.R. 29 All. 222.

53 *Syed Jafar Hussain v. Mst. Hussan Ara Begum* (1912) 13 IC 609.

54 *Kadir v. Koleman Bibi*, (1935) 62 Cal. 1088.

*Begum*<sup>55</sup>, *Begum Zohra v. Muhammad Ishaqu Majid*<sup>56</sup> and *Abdul Aziz v. Bashiran Bibi*<sup>57</sup> among many others.

### ***Christian Law***

For Christians, the marriage laws are governed by the Indian Christian Marriage Act, 1872 and divorce is governed by the (Indian)<sup>58</sup> Divorce Act, 1869. Before the amendment of the Divorce Act, 1869, a wife could seek divorce if the husband had been guilty of cruelty coupled with adultery.<sup>59</sup> In the case of the husband, the only ground for divorce which was available to him was adultery. A Christian husband could never file for divorce on the grounds that his wife was cruel to him. In the case of judicial separation though, the grounds of cruelty was applicable to both, the husband as well as the wife.<sup>60</sup> This was held to be ultra vires the Constitution of India, 1950 and therefore, with the Indian Divorce (Amendment) Act, 2001, major changes were brought to the act and the grounds of divorce were made similar to the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955.

In the Tenth Law Commission of India Report on Grounds of Divorce among Christians in India: Section 10 of Divorce Act, 1869<sup>61</sup> of 1983, the same issues were addressed with respect to the inequality among the sexes and the urgent need to address those. Article 14, 15 and 21 thereof were violated and the High Courts of Bombay, Andhra Pradesh, Delhi and Kerala reversed them in a series of judgments and cruelty was made into a ground for divorce independently of any other ground. Some of these cases were *Ammini E.J. v. Union of India*<sup>62</sup>,

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55 Hamid Hussain v. Kubra Begum, (1918) I.L.R. All. 322.

56 Begum Zohra v. Muhammad Ishaqu Majid, (1955) P. Sind 378.

57 Abdul Aziz v. Bashiran Bibi, (1958) P. Lah. 59.

58 The word 'Indian' was omitted by the Indian Divorce (Amendment) Act, 2001.

59 S. 10, Indian Divorce Act, 1869.

60 *Id*, s. 22.

61 19th LAW COMMISSION OF INDIA REPORT, *The Grounds for Divorce amongst Christians in India*, 1983, Available at <http://lawcommissionofindia.nic.in/51-100/Report90.pdf>, (Last accessed on 21/09/2016).

62 Ammini E.J. v. Union of India, AIR 1995 Ker 252.

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*Pragiti Varghese v. Cyril George Varghese*<sup>63</sup>, and *Youth Welfare Federation v. Union of India*<sup>64</sup> among others.

In a 2003 judgment of the Karnataka High Court in *Annie P. Mathews v. Rajimon Abraham*<sup>65</sup> on the basis of severance, the Court decreed a divorce on the basis of cruelty implicit. The Amendment Act, 2001 brought about these changes and in subsequent judgments like in *Johnson M. Joseph v. Aneeta Johnson*<sup>66</sup> where the wife made false report against her husband for which he was prosecuted under S. 498A of the Indian Penal Code, 1860, but was not proven, it was held that the husband went through the trauma of getting arrested and it was cruelty that the husband underwent for which he could file for divorce.<sup>67</sup> Now, the statutory position for cruelty is that a marriage may be dissolved if the respondent 'has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.'<sup>68</sup> The statutory position on cruelty as a ground for judicial separation still remains the same even after amendment.

### ***Parsi Law***

Marriage and divorce laws for the Parsi community are governed under the Parsi Marriage and Divorce Act, 1936. Prior to 1988, cruelty was a valid ground only for judicial separation and not for divorce. Under this act, cruelty was explained as such behaviour 'as to render it in the judgment of the court improper to compel him or her to live with the respondent.' cruelty towards children as matrimonial cruelty for purposes of relief was also mentioned.<sup>69</sup> After the amendment of the act in 1988, cruelty was incorporated as a ground for divorce as well provided that in every suit which was filed for divorce, it was the sole discretion of the

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63 *Pragiti Varghese v. Cyril George Varghese*, (1997) II DMC 407.

64 *Youth Welfare Federation v. Union of India*, (1996) 4 ALT 1138.

65 *Annie P. Mathews v. Rajimon Abraham*, (2003) 1 DMC 582.

66 *Johnson M. Joseph v. Aneeta Johnson*, AIR 2003 MP 271.

67 *Id.*

68 *Id.*, s. 10 (x), after 2001 amendment.

69 Parsi Marriage and Divorce Act, 1936, s. 34, prior to 1988.



Court to grant divorce or judicial separation.<sup>70</sup> Section 32 (dd)<sup>71</sup> of the Parsi Marriage and Divorce Act, 1936 provides for either divorce or judicial separation of the spouses if one of them has indulged in any act of cruelty against the other such that the judgment of compelling them to stay together would be improper.

Even a single act that is grossly cruel could be a ground of divorce.<sup>72</sup> Although the term ‘cruelty’ has not been defined and the scope of the term is rather large under Parsi law, Section 32 (e) states that divorce shall be granted to the petitioner if the defendant “has caused grievous hurt to the plaintiff, has infected her with venereal disease or has forced the wife to submit to prostitution.”<sup>73</sup> Therefore Section 32 (e) of the Act may also be used to help reduce the ambiguity surrounding the term ‘cruelty’ under Parsi law to a certain extent. In Parsi law, aborting of the foetus without the consent of the husband is termed as cruelty.<sup>74</sup> Hence, considering the term ‘grievous hurt’, it can be said that to a certain extent, the actions which constitute grievous hurt also constitute cruelty. The Courts overlooked the provisions of The Medical Termination of Pregnancy Act, 1971 at the time which clearly allowed women to terminate unwanted pregnancies even without the consent of the husband.

### ***Jewish Law***

As per the modern Jewish law or by statutes prevailing in different countries, the wife can obtain a divorce on eight grounds, one of them being cruelty (as described by laws of different countries, such as intolerable severity, injurious treatment indignities making life burdensome, etc.)<sup>75</sup> If a wife manages to obtain divorce on any of the eight grounds, she is entitled to maintenance and marriage settlement

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<sup>70</sup> S. 32, The Parsi Marriage and Divorce Act, 1936.

<sup>71</sup> Inserted by the 1988 Amendment of Parsi Marriage and Divorce Act, 1936.

<sup>72</sup> Cowasji Nusserwanji Patuck v. Shehra Cowasji Patuck, 39 Bom LR 1138.

<sup>73</sup> *Supra* note 30.

<sup>74</sup> Sushil Kumar Verma v. Usha, AIR 1987 Del 86; similarly in Sunil Kumar v. Jyoti alias Meena, AIR 1987 P&H 526.

<sup>75</sup> Flavia Agnes, FAMILY LAW VOLUME 1: FAMILY LAWS AND CONSTITUTIONAL CLAIMS, 2011, Oxford University Press, 247 pp., ISBN: 9780198067900, p.90.

or Kethuba<sup>76</sup>. In India, unlike the other codified laws, the Jewish community does not have any definite statute that governs their marriage, divorce and matrimonial reliefs. Hence, the courts were expected to interpret the ancient sources of the Jewish community which includes some scriptures and ancient texts as well as the Torah. In the earlier days, most of the cases of the Jewish community were spent trying to find out if the courts had the jurisdiction to hear the cases of the Jewish community. In *Rachel Benjamin v. Benjamin Solomon Benjamin*<sup>77</sup>, the wife filed for divorce on the grounds of cruelty and bigamy and prayed for Kethuba. In this case, the Bombay High Court held that the court has jurisdiction over the matters of the Jews and as there are no Rabbis (Jewish priests) in Bombay, the courts have the power to ratify divorce. Therefore, the Court granted divorce to the wife on the grounds of cruelty and bigamy by the husband. But the Calcutta High Court, in 1994 expressed doubts over the jurisdictional issues of Jewish cases.<sup>78</sup> Later, in 2001, the High Court relieved itself of the jurisdiction of such matters and the said jurisdiction was transferred to the family courts of Mumbai.<sup>79</sup> In *Bension Joseph Hayeema v. Sharon Bension Hayeema*<sup>80</sup>, the High Court upheld the decision of the family court of Mumbai dismissing the husband's petition for divorce on the grounds of his wife's cruelty as the same had proved to be false.

### ***Secular Law***

Secular laws in India for marriage and divorce are dealt with under the Special Marriage Act, 1954. Section 27 (1) (d) of the Special Marriage Act, 1954 states that if the petitioner has been treated with cruelty since the solemnization of the marriage, it is a ground for divorce and Section 23 states that cruelty is a grounds for judicial separation as well. The position of cruelty under secular laws is the

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76 *Id.* p. 88-89. As per Jewish traditions, before the nuptials, the groom is required to make a statement in writing that in the case of his death or divorce, the wife is entitled to a certain sum from his estate. This is called Kethuba.

77 *Rachel Benjamin v. Benjamin Solomon Benjamin*, (1926) Vol. 28 Bom LR 328.

78 *Jacob v. Jacob*, (1944) ILR 2 Cal 201.

79 *Romila Shroff v. Jaidev Shroff*, II (2001) DMC 600 FB.

80 *Hayeema v. Sharon Bension Hayeema*, (1996) DMC 546.

same as the position under Hindu law as both the statutes are very similar and the procedure established by law is also similar. But this section of the Hindu Marriage Act, 1955 was added by the Marriage Laws (Amendment) Act of 1976 before which cruelty was not a ground for divorce. It is reasonable to presume analyzing the extent to which both the sections are similar that this was borrowed from the Special Marriage Act, 1954.<sup>81</sup>

### ***Criminal Law***

Apart from the various definitions and interpretations of the term ‘cruelty’ in the statutes of the different personal laws, the term ‘cruelty’ has been specifically defined in the Indian Penal Code, 1860 as well. Section 498A has been added by the Criminal Laws (Second Amendment) Act, 1983. This section protects women from harassment by husbands and their families so as to cause grave danger to their life, limb or health and demand for any property or valuable security. ‘Cruelty’ in this sense includes physical and mental and the same has been explicitly mentioned in the Section. If a wife attempts to commit suicide due to the ill-treatment or torture by the husband and his family or relatives, such a case will not be termed as cruelty on the part of the wife.<sup>82</sup> Under section 498A, the wife herself does not need to file the case, any of her relatives can file the complaint on her behalf. Under the Indian Penal Code, 1860 in Section 304B, death of a woman due to harassment for dowry is also dealt with. It states that if the death of a woman is caused due to the cruelty and harassment her husband and his relatives and there are burns or injuries on her body, it is a criminal act and they will be held guilty and they will be imprisoned. This section is linked to Section 113B of the Evidence Act, 1872.

Other statutes such as Protection of Women from Domestic Violence Act, 2005 and the Dowry Prohibition Act, 1961 have also been brought into force to help women deal with cruelty by the husband and his family and help provide them relief by adopting legal recourse.

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81 S. Sharma, *Cruelty as a Ground for Divorce – A Tryst with Personal Laws in India*, *LEGAL BLOC JOURNAL*, Vol. 1 Issue 5 (Sept. 2015), ISSN: 2395-0277, p. 8.

82 Tapan Chakraborty v. Anjali, AIR 1993 Cal 10 (D.B.).

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### CRITICAL ANALYSIS

‘Cruelty’ is a term with a very wide scope not only in Indian law but the laws all across the world. The meaning and definition is ever changing. In India, as the laws governing marriage and divorce for the various religions are different, codified or otherwise, the scope as well as the interpretation of cruelty is different. The term is interpreted according to the age-old customs as well, along with the laws already in place. Due to the diversity of our country and the different statutes governing the people of different religions, all citizens of India, there are some points that come into question. The researcher has observed that as personal laws governing the different religions are different, discrepancies regarding the judgments of different religions might be contradictory. There are also discrepancies in a single personal law as well. This can be clearly envisaged in *Kalpana Srivastava v. S. N. Srivastava*<sup>83</sup>, the refusal by the wife to serve tea to her husband and his friends amounted to cruelty and in *Narinder Singh v. Rekha*<sup>84</sup>, such refusal did not qualify to amount to cruelty. The above example shows how the scope and interpretation of the term cruelty keeps changing with time. It is observed that the interpretation of the term by people changes as per their beliefs, morals and values. In the early days, a woman was expected to submit herself to her husband and do as he pleases and if she refused to do anything he asked, it would be termed as cruelty. But same cannot be said in the case of the husband. This can be seen in the case of *Holmes v. Holmes*<sup>85</sup>, where the husband used to abuse and assault his wife and on one occasion, he even tried to force himself on her. In this 1755 case, the wife was not granted divorce on the grounds of cruelty. As time changed and the mindset and the thinking of the people evolved, the interpretation of cruelty by people and the courts as well changed as can be seen in many of the cases stated. Before the amendment of the Hindu Marriage Act, the scope of cruelty was confined to ‘such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be

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<sup>83</sup> *Kalpana Srivastava v. S. N. Srivastava*, AIR 1985 All 253.

<sup>84</sup> *Narinder Singh v. Rekha*, AIR 2007 Del 118.

<sup>85</sup> *Holmes v. Holmes*, (1755) 2 Lee : 161 ER 283 (1755, Court of Matrimonial Causes).

harmful or injurious for the petitioner to live with the respondent. It was later changed to the petitioner proving that the respondent treated him/her with cruelty. But as is seen in Christian law, after the amendment, the scope of cruelty was made the same as the position of cruelty as it was under Hindu law, before the amendment. The present position under Hindu law is more open ended as compared to the scope of cruelty under Christian personal law before the amendment but when the said grounds of cruelty was ruled as insufficient and that it limited the scope of cruelty under Hindu law, why has the same been used in another personal law, after amendment? The researcher agrees that the scope of cruelty varies with personal laws but the said statement is insufficient under one law, then it is only logical to believe that the same statement will be insufficient under another law. But it is appreciated that the grounds for divorce and judicial separation for husband and wife are now the same after the amendment of the Christian laws.

Under the Muslim personal laws, it is observed that specific acts of cruelty as a result of which a Muslim wife can file for divorce are stated but the same is not specified for the man. Muslim personal laws are silent on cruelty of the wife on the husband. The husband under Muslim law is given the freedom to divorce his wife without giving her any valid reason but his rights against cruelty by his spouse are not specified. The researcher believes that the rights of the husband against cruelty must also be mentioned. Muslim personal laws are also highly gender biased as to the fact that men cannot claim maintenance and only women can.

The questions that occur to the mind of the researcher at this point do not pertain only to cruelty. As it can be observed, secular laws are governed by the Special Marriage Act, 1954. But this Act is very similar to the Hindu Marriage Act, 1955. When the Special Marriage Act is in place to govern secular laws and uphold secularism, how can it be based on the skeletal structure of the Hindu Marriage Act? This defeats the purpose of having secular laws as the people who get married or divorced under this Act are in a way following the procedures laid down by the Hindu Marriage Act, save the name. Like Flavia Agnes (women's rights lawyer and activist) said in her lecture titled 'Has Codified Hindu Law

changed Gender Relationships?’<sup>86</sup>, ‘There is no getting away from Hinduism in India.’ Another question that comes to mind is why Jewish laws are not codified in India? It is agreed that the Jewish community is a minority in India, but it is not possible to keep relying on case precedents and expecting the courts to reinterpret the Jewish ancient scriptures every time a case comes up. Although a minority, there are Jews who are Indian citizens and this set-up is completely unfair to them. When Hindus, Muslims, Christians and Parsis have their specifically codified personal laws, why not Buddhists, Jains and Sikhs? After all, they are separate religions with their own customs and rituals. Instead, Buddhists, Jains, Sikhs and anybody else who do not fall into the category of any other religion are automatically considered as Hindus in India.<sup>87</sup>

While analyzing ‘cruelty’ in personal laws as a ground for divorce and judicial separation, ‘cruelty’ from the criminal perspective is also analyzed as in some cases, when cruelty exceeds a certain limit, it may cause injury or grievous hurt to the woman and it may also result in death. As soon as there is assault on the person or death, the ensuing investigation or case becomes a criminal one rather than one of cruelty as under family law. Mostly act such as dowry death are considered under this section. Under the Indian Penal Code, 1860, the Sections pertaining to cruelty deal with only women. There are no sections or statues for that matter which provide relief for a man who has suffered cruelty in the hands of a woman. As of today, there are only women-centric laws on this matter in criminal law. Nowadays, violence and cruelty towards men is on the rise. It is comparatively much lesser in magnitude but it still exists. Therefore, some effort must be made to help this class of people as well.

## CONCLUSION

The researcher submits that there can never be a set definition for the term ‘cruelty’ as the meaning and interpretation of the term, in law is dynamic and keeps

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<sup>86</sup> *Discourse: Codified Hindu Law Changed Gender Relationships*, RAJYA SABHA TV, Available at : <https://www.youtube.com/watch?v=SdM9ILEg3TQ>, (Last accessed on 03/03/2017).

<sup>87</sup> S. 2, Hindu Marriage act, 1955.

changing with time. As different laws govern different religions, a uniform system of governance of marriage and divorce issues in India is not possible either. As 'cruelty' is a subjective term, and the interpretation of the same varies from person to person, it is urged that while interpreting 'cruelty, personal bias etc. is kept aside and the same is interpreted in accordance with the principles of justice, equity and good conscience. It is observed that in a few personal laws the position of cruelty for husband and wife vary or varied before the amendments of the personal laws. Even in Indian criminal law, the issue of cruelty against men is not discussed. But as cruelty is not specific to women alone and men also fall prey to cruelty, position of cruelty towards husbands/men must be made more specific in law. India is a culturally and religiously diverse country. There are various personal laws some codified and some, not. There are numerous customs and rituals followed by different religions castes etc. When a case of cruelty occurs, the customs and religious laws are interpreted before a verdict can be passed. This is a very complicated as the interpretation of the same laws and customs are different each time depending on the facts of the cases. Hence it can be said that interpretation of 'cruelty' in the personal laws of India is a highly complex and multi-faceted.

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## UNIFORM CIVIL CODE: UNIFIED LAWS AND DIVERGENT WAYS

*Siddharth Anand Panda & Samyak Mohanty\**

### INTRODUCTION

As mentioned in “Art. 44 of the Constitution of India”: “The State shall endeavor to secure for the citizens a UCC throughout the territory of India.”<sup>1</sup> UCC is a proposition to supplant the laws impacted by religious and sacred texts in India with a solitary, basic set of laws. They are separate from public laws and are connected on issues like marriage, adoption, maintenance, inheritance, and divorce. Since the time India accomplished independence, the issue of presentation of the UCC in India has been wrangled; with the Indian Parliament deliberating and debating on the matter since 1948.<sup>2</sup> The thought is to bring together all existing personal laws, i.e. one arrangement of common laws managing these viewpoints, relevant to each citizen of India, regardless of whichever group they relate themselves to. The purpose concealed in the UCC is to eliminate the contradictions based on religious ideologies and promote the concept of national integration. UCC, as we have understood, may not necessarily seek standardization.

The basis of disputation around UCC has been its contentious adherence to the constitution and the question of constitutionalism. The inception of the controversy is the inclusion of UCC in the DPSPs; the unenforceable provisions of the constitution, which may affect the fundamental and prominent religious rights; a

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1 CONSTITUTION OF INDIA. Art. 44.

2 Sattwik Shekher, Has the time *come for a Uniform Civil Code in India?*, MIGHTY LAWS SIMPLIFIED Available at <http://www.mightylaws.in/278/time-uniform-civil-code-india>. (Last accessed on 07/12/2016).



very enforceable part of the constitution. Also, the preferentiality of the fundamental rights in case of a conflict among them, may play a protuberant role in the solving hullabaloo related to the UCC.<sup>3</sup> So if the UCC has been on the agenda for decades, the question that arises is why the issue has become contentious now. Currently, there are two primary reasons propounded for a UCC. First, that a secular republic should have a common civil law for its citizens, irrespective of their religion. Secondly, to achieve gender justice, as the personal laws of almost all religions are discriminatory towards women and violating their universal human rights. Though the second reason is grounded in logic, the first is suspect. Those for a UCC tend to stress national identity and solidarity, notions of equality, and human rights. Those opposing the UCC stress on flexibility of religion, the privileges of minorities, and communal plurality.<sup>4</sup> The Supreme Court, in the recent case of *John Vallamattom*<sup>5</sup>, reminded the legislature of its constitutional obligation under “Art. 44 of the Constitution” to formulate a uniform civil code (UCC), binding together various personal laws into one single code.<sup>6</sup> Consequently, the judgment has revived the UCC debate altogether and has necessitated a discussion on the issue, in the quest of at least identifying the key concepts and arriving at some definite strategy towards attaining the desired code.

### UCC AND THE APPLICATION OF CONSTITUTIONALISM

“Constitutionalism” is adherence to a constitutional system<sup>7</sup>. The word ‘constitutional’ carries the same connotation as the expression ‘rule of law’. In other words, it means a system which is antithesis of an arbitrary system. The most important aspect of constitutionalism lies in the preposition that the

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3 Neera Chandhoke, *Engaging With Civil Society: THE DEMOCRATIC PERSPECTIVE* (2007).

4 Shimon Shetreet, *Academic Blueprint for the Implementation of a Uniform Civil Code for India*, 1 UTAH L. R. 97, 100 (2011).

5 *John Vallamattam And Anr. v. Union of India*, A.I.R. 2003 S.C. 2902.

6 Yogesh Pratap Singh, *The Constitution's forgotten article*, THE STATESMAN, Available at <http://www.thestatesman.com/supplements/the-constitution-s-forgotten-article-101719.html>. (Last accessed on 05/11/2017).

7 Udai Raj Rai, *CONSTITUTIONAL LAW - I: STRUCTURE* 19 (1st ed., Eastern Book Company 2016).

Constitution is the Supreme *Lex terrae*; other laws & rules are subordinate to it. There are certain other aspects of constitution and its making which sets a Constitution clearly apart from the other laws in the country. Firstly, constitutions are result of many long-term compromises and embody certain values which are fundamental. A chance majority or minority cannot be allowed to erode them which may prove to be irreparably harmful. Thus any governmental act, including legislation inconsistent with the constitution would be void and inoperative. UCC has to stand this test of our constitution and has to amplify it protects religious freedoms as well as uphold the sanctity of individual liberties while its principles are implemented in essence. The same test would decide the fate of all the existing personal laws and their “God-preached” provisions. UCC falls within Part IV of the Constitution titled as “Directive Principles of State Policy” (DPSP) and understood as exhortations to the State to be kept in mind while governing the country. The first substantive provision of the DPSP, Article 37, categorically bars any of these claims from being dragged to the courts for implementation and elucidates the non-enforceable nature of these general appeals. Those opposed to the idea of a unified civil code have used this argument stating that DPSP, their desirability or appeal notwithstanding, cannot be pursued at the cost of fundamental, enforceable and judicially protected individual and community rights manifested in “Part III of the Constitution”. However, to rightfully understand the prominence and requirement of the DPSPs we shall look into the inception point of the idea itself. An endeavor to synchronize the apparently clashing cases of individual freedoms and social equity was made by the founding fathers of the Indian Constitution.<sup>8</sup> It was realized by them, that the fundamental rights would be without much meaning unless socio economic renewal occurred and would be meaningless and remain only paper rights.<sup>9</sup> “The part on fundamental rights is described by its individualistic nature, its accentuation on justiciability and the points of confinement it puts on state action. The DPSPs are an arrangement of

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8 Ram Avtar Sharma, *JUSTICE AND SOCIAL ORDER IN INDIA* 176 (Intellectual Publishing House 1984).

9 Bertus De Villiers, *Directive Principles of State Policy and Fundamental Rights: The Indian Experience*, 8 *SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS*, 29, 49 (1992).

legitimately unenforceable objectives which are basic to the administration of the nation and which put positive obligations on the state”.<sup>10</sup> The fundamental rights of the citizens have a social, monetary, social and instructive character. “The DPSPs give the constitutional framework inside which these rights ought to be understood. While the fundamental rights are basically negative and are the ‘mark of a world in which the administration has no jurisdiction’, the mandates call for positive activity by the state which has a fair political and judicial consequence.”<sup>11</sup> “The Constituent Assembly established an Advisory Committee for the purpose of compiling a list of fundamental rights to be included in the Constitution. The original report of the committee contained a chapter on certain directive principles which were described as follows”<sup>12</sup>: “The principles of policy set forth in this chapter are intended for guidance of the State. While these principles shall not be cognizable by any court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State”. Courts cannot disregard them despite their non-justiciability. Fundamental rights are comprehended and interpreted relying on the vision formulated in the DPSPs. It was reckoned that without a comprehensive socio-economic foundation for the nation, the Constitution would become ‘meaningless & inadequate’.<sup>13</sup> The courts have therefore permitted various administrative confinements on fundamental rights with the end goal of securing the purpose of the DPSPs.

Another constitutional debate related to the implementation of the UCC is conflict of fundamental rights within themselves. Should the Right to equality and prohibition of discrimination have priority over the freedom of religion, disallowing certain major religious practices that may promote discrimination? Or religious rights to be given supremacy in certain practices where someone’s right to live a life with dignity is compromised? Or is it the other way around? Various lawful and societal issues divide popular opinion and political experts alike, on the grounds that

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<sup>10</sup> *Minerva Mills v. Union of India*, A.I.R. 1980 S.C. 1789.

<sup>11</sup> *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 516.

<sup>12</sup> Statement of VJ Patel, CONSTITUENT ASSEMBLY DEBATES 47 (25th August, 1947).

<sup>13</sup> Statement of J.L. Nehru, CONSTITUENT ASSEMBLY DEBATES 316 (22nd January, 1947).

fundamental rights are in question on either side of the situation; the idea of a UCC is one such example. “Fundamental rights normally function as ‘trumps’: despite the fact that most fundamental rights are not total, they have priority over different claims”.<sup>14</sup> However in instances of a contention between fundamental rights, the “trump” viewpoint is no longer significant, and any solution to the contention dangers being seen as arbitrary. By and by, both lawmakers and judges are confronting with the task of fathoming controversies between fundamental rights while making the UCC.<sup>15</sup> The practices like of Triple Talaq, NikahHalala, polygamy or all kinds of violence against Muslims and Dalits in the name of so-called ‘Cow Vigilantism’ or instances of ‘GharVapsi’ instigate such debates. The idea of UCC has been repeatedly cited as arbitrary intervention in the sacred and fundamental laws and rules of one’s religion or faith ultimately abrogating one’s fundamental right to “freely profess, practice and propagate any religion”. But it is to be kept in mind one’s practice of a right is valid only until it does not compromise other fundamental rights of a person. Article 13 specifies that “any regulation that encroaches upon any fundamental right shall be void”<sup>16</sup>, and the acts of polygamy and triple talaq ought to in this manner be announced unlawful, since they disregard the major ideal to fairness.<sup>17</sup> As they say “Your right to swing your arms ends just where the other man’s nose begins.”

Earlier in the Union government had told the Supreme Court that: “triple talaq, nikah halal and polygamy as practiced by the Muslims in India were not ‘integral’ to the practices of Islam or essential religious practices”.<sup>18</sup> Further, in *A S*

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14 Eva Brems, *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 1-2 (1 ed., Intersentia Publishing House 2008).

15 *Id.*

16 CONSTITUTION OF INDIA. Art. 13.

17 Govind Bhattacharjee, *Triple Talaq, Polygamy Violate Fundamental Rights of Indian Muslim Women*, DAWN, October 19, 2016, Available at <https://www.dawn.com/news/1290751/triple-talaq-polygamy-violate-fundamental-rights-of-indian-muslim-women>. (Last accessed on 27/09/2016).

18 PTI, *Centre Opposes Triple Talaq, Polygamy Among Muslims in Supreme Court*, THE FINANCIAL EXPRESS, Available at <http://www.financialexpress.com/india-news/triple-talaq-polygamy-not-integral-to-islamic-practices-sc-told/410415/>. (Last accessed on 07/10/210).

*Narayana Deekshitulu vs. State of Andhra Pradesh*<sup>19</sup>, it was recognized that law's attempt to separate essential religious practice from non-essential was not unlawful but visionary. Even if we accept that they are prominent and integral practices, it cannot be ignored that they are against the Right to Equality (Art. 14) as Muslim women are debarred from the protection Hindu women are entitled to, and right to live one's life with dignity (Art. 21) as, even though the facts confirm that the acts of triple talaq and polygamy influences only a minority of women straightforwardly, it is to be realized that each lady to whom the law applies lives under the dread, or prospect of being victimized by these practices.<sup>20</sup>

Also, the court has taken a broad meaning of 'Hindutva' it signifies a celebration of oneness rather than pluralism and diversity; this is suicidal for minority rights and subsequently the violation of their fundamental rights. T B Hansen argues that "the ideology of Hindutva amounts to a principle of rule by Hindu majoritarianism; it is a strange co-articulation of brahmanical principles of pureness". To support Hindutva as the development of a uniform culture through the obliteration of differences between coexisting cultures negates the constitutional principle of giving each culture its own dignity.<sup>21</sup> It appears to be inescapable that a significant number of contentions won't be susceptible to either disposal or trade off, and may just be comprehended by according priority to one directly over the other. In this regard, it is valuable to inventorize all applicable criteria that may control this exercise. A few cases:

1. A difference between the center and the fringe inside each privilege. In a contention between rights A and B, it is conceivable that understanding A encroaches upon the center of B while acknowledging B would just encroach upon a peripheral zone of A, which would contend for that arrangement;

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<sup>19</sup> A.I.R. 1996 S.C. 1765.

<sup>20</sup> Utkarsh Anand, *Triple talaq not integral part of the religion: Centre in Supreme Court*, THE INDIAN EXPRESS, Available at <http://indianexpress.com/article/india/india-news-india/triple-talaq-not-integral-to-religion-centre-in-supreme-court-3071125>. (Last accessed on 13/11/2016).

<sup>21</sup> T. B. Hansen, *Globalisation and Nationalist Imaginations: Hindutva's Promise of Equality through Difference*, 31 ECONOMIC AND POLITICAL WEEKLY, 1996, at 603–616.

2. The backhanded contribution of different rights, because of the association of outsiders or to the “leverage” impact of a specific right (e.g. the privilege to a reasonable trial goes about as a lever for the implementation of every single other right); if an encroachment on right A by implication brings about encroachments upon rights C and D, there is expanded motivation to avoid the transgression.
3. The bifurcation between negative and positive obligations. Positive obligations are obligations ‘requiring member states to intervene and take action’, imposing an obligation upon states to shoulder affirmative steps to safeguard one’s rights. Negative obligations, on the other hand, ‘essentially require states not to interfere in the exercise of rights’.<sup>22</sup>

### THE CONFLICT OF SECULARISM AND RELIGION

The 42<sup>nd</sup> constitutional amendment, 1976 added the term ‘secular’ to the preamble of our constitution; in essence, the Constitution seeks to promote a secular and plural society based on state objectivity towards existing religions. State intervention in religious affairs was allowed to bring in social reform while guaranteeing religious freedom to all. It declared ‘Secularism’ the rudimentary feature of our polity, but the amendment does not define secularism. Two types of secularism are in tension in India. One is a liberal or Western secularism, which emphasizes detachment of the state from religion. Second, where pundits of Indian secularism maintain that: “Given the inescapable part of religion in the lives of the general population, secularism - as the partition of religion from state - is an alien modernist imposition”.<sup>23</sup> Its defenders contend this is a misinterpretation of the constitutional vision, which orders the state to be similarly lenient to all faiths.<sup>24</sup> This does not imagine a wall between religion and governmental issues but the lack of bias of the state towards all religions. Religious and social multiplicity have made

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<sup>22</sup> *Supra* note 16, at 5.

<sup>23</sup> Thomas Pantham, *Indian Secularism and Its Critics: Some Reflections*, 59 THE REVIEW OF POLITICS 523, 523 (1997).

<sup>24</sup> *Id.*

‘Secularism’ crucial for popular government and national unity. Taking the case of Marriages; It is generally deciphered as a contract in Islam. In Hindus, marriage is a sanskara, and that among the Europeans involves status. It might be a looming errand of rationalizing our customary society and getting the social change that requires state intercession issues of religion. While the Constitution has just enunciated it as an objective and is quiet on its undertone; much has been left to the judiciary in deciding the substance of secularism.

In *Ziyouddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra*<sup>25</sup>, 1975, Justice Beg said – “Our Constitution makers certainly intended to set up a secular democracy. The court set the role of the state as neutral or impartial in extending its benefits to citizens of all castes and creeds and made it the state’s duty to ensure through its laws that disabilities are not imposed based on persons practicing or professing any particular religion”.

In the *Indra Sawhney* case<sup>26</sup>, Judge Kuldeep Singh indicated that: “Secularism envisages a cohesive, unified and casteless society and seems have defined secularism to extend beyond religion and polity”.

In *S R Bommai vs. Union of India*<sup>27</sup>, Justice BP Reddy argued that “in matters of the state, religion was irrelevant. More importantly, here the court strongly held the opinion that secularism undeniably sought to separate the religious from the political”.

In *Keshavanand Bharti*<sup>28</sup> case the court ruled that: “Religion is a matter of one’s personal belief and mode of worship; secularism operates on a different plane. Freedom and tolerance of religion are only to the extent of permitting the pursuit of a spiritual life that is different from the secular life. The latter falls in the domain of the affairs of the state”. Thus, while it supports equal respect for all religions, it also propagates a certain degree of separation of state and religion.

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25 A.I.R. 1975 S.C. 1788.

26 *Indra Sawhney v. Union of India And Ors.*, (1992) Supp(3) S.C.C. 217.

27 *S R Bommai v. Union of India*, A.I.R. 1994 S.C. 1918.

28 *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

In these cases, the court took the stance on secularism that of neutrality and tolerance rather than a separation of the temporal from the religion. In the words of Amartya Sen, “The dominant approach to secularism in India has been ‘a basic symmetry of treatment’ of various religious communities rather than a demand that the state must stay clear of any association with any religious matter whatsoever.”

Given the religious differences among all religions-particularly Hindu and Islam-varied traditions have made it difficult to characterize a solitary code for every group. With the “Hindu Marriage Act of 1955” and different corrections of Hindu personal laws in 1955 and 1956-referred to on the whole as the Hindu Code Bill-the Hindu code experienced a noteworthy redesign to make it more uniform, and furthermore to take part in some restricted changes for women. Regardless of the best endeavors advocates of correspondence, the modified Hindu code is still unequal in its treatment of women. Hindu women have different age-of-marriage rules, different schemes of intestate succession, and different guardianship rights than men, despite some progress toward the primary goal of this reforms-the improvement of women’s status.

The Indian Divorce (Amendment) Act 2001, in order to increase gender equity, amended the Indian Divorce Act 1869, which was created for Christians. A more comprehensive proposed reform-the Christian Marriage Bill 2000-failed over disagreements about the question of interreligious marriages and about maintenance for husbands after divorce. Christians viewed this as an attempt to limit the reach of their law based on undue concern about the growth of minority communities via marriage or conversion. The Muslim code, in contrast, has not been reformed. “State policy with regard to the civil status of Muslims has been generally cautious.” Many Muslim leaders are resistant to initiating reforms-a defensive response in the face of Hindu nationalist critiques of their laws and their community in general. This dynamic marginalizes the issue of reforms for women. Many Muslims believe that the design of a UCC would be orchestrated by the Hindu majority, undermining Muslim personal law. This insecurity may be due to the inordinate attention is given to Muslim women in personal law discussions; in



other words, albeit the victimization of women by each of the personal laws, including that of Hinduism and Christianity; the critiques of personal law in the media, and activists have a tendency to harp on Muslim individual law specifically. Recognizing the overlapping identities of individuals when defining their rights is particularly important in an era in which global debates over Muslim women's rights commonly pit universal and individual women's rights versus particular, group-based religious rights. One way to break this dichotomy is to take seriously the interplay of gender and religion in individual lives. Saba Mahmood, in her work on pious Egyptian women, calls the women "docile agents," who were not resisting tradition, but nevertheless freely practiced in ways that empowered them. Re-conceptualizing freedom itself to encompass both gender and cultural dimensions expands the discussion of freedom of religion in important ways.<sup>29</sup>

### **SAFEGUARDING HUMAN RIGHTS WITH A UCC**

Standards of equality, non-discrimination, and reasonableness which frame a fundamental piece of the human rights discourse are the topic of the open deliberation with respect to the UCC. UDHR (Universal Declaration of Human Rights) preamble states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world". It also states that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of the world in which human beings shall enjoy the freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

Gender Equality is an aspect of uniformity and it is one of the fundamental standards of the Indian Constitution.<sup>30</sup> Besides, the tenet of balance as cherished in Article

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29 Mahmood, S., *Feminist theory, embodiment, and the docile agent: Some reflections on the Egyptian Islamic revival*. 16(2) CULTURAL ANTHROPOLOGY 202-236 (2001).

30 Madhushala, *Need for Uniform Civil Code in India: A human rights perspective*, CENTRE RIGHT INDIA, Available at <http://centreright.in/2011/10/need-for-uniform-civil-code-in-india-a-human-rights-perspective/#.WLRIMPmGPIU>. (Last accessed 13/10/2016).

14 of the Constitution exemplifies the idea of genuine and substantive equality which strikes at all the disparities emerging because of inconceivable recorded, financial and standard differentiation. Thus, we see that Article 15(3)<sup>31</sup> of the Constitution “empowers the State to make special provisions for the protection of women and children”. Article 25(2)<sup>32</sup> mandate that “social reform and welfare can be provided irrespective of the right to freedom of religion”.

The case of *Mohd. Ahmed Khan v. Shah Bano Begum*<sup>33</sup> is the first of many examples about discrimination of women. This was a case which dealt with a husband’s liability to pay maintenance to his divorced wife under Muslim law. Though the Honourable Supreme Court came to a progressive and just conclusion which upheld the rights of women, the effect of the decision was diluted by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which was enacted subsequently.

The ability of the Honourable Supreme Court to safeguard the women’s liberties is, unfortunately, limited. In the case of *Ahmedabad Women Action Group (Awag) v. Union of India*<sup>34</sup>, the Honourable Supreme Court declined to entertain writ petitions wherein it was the prayer of the plaintiff to have Muslim Personal Law which permits polygamy to be void and to have the practice of unilateral talaq as unconstitutional, amongst other things. This is another case in which Muslim women are being denied the protection of the law that protects women from other communities.

Although Talaq is admissible in Islam, the holy Quran says that only in cases of unregulated conflict and quarrel one may avail oneself of the option of divorce by ‘Triple Talaq’. IbneRushid (1126-1198), the great liberal Islamologist, interpreted the scriptures and concluded that this ‘Triple Talaq’ was an ad hoc arrangement,

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31 CONSTITUTION OF INDIA. Art. 15, cl. 3.

32 CONSTITUTION OF INDIA. Art. 25, cl. 2.

33 A.I.R. 1985 S.C. 945.

34 A.I.R. 1997 S.C. 3614.

never valid in Islam. Triple Talaq is not the prescribed way to give Talaq in the Shariah and is itself a violation of the Shariah.

If the rift in the relation between a husband and his wife widens, they may seek divorce with mutual consent. But why should a husband be given absolute right to discard his wife unilaterally by uttering talaq three times? The instant triple talaq which is invariably pronounced in a fit of rage generates a sense of helplessness and trauma in the minds of its victims for they are made to believe that their marriage has broken.

NikahHalala requires the victim of instant talaq to reiterate the whole procedure -“remarry, consummate the second marriage, get divorced, observe the ‘iddat’ period and then come back to him.”<sup>35</sup> This legitimization of instant talaq has led to the abominable circumvention of the Quran. The whole process ruins the woman’s peace of mind, shatters her dignity, ruins the lives of the children and destroys the entire family. Halala is patently unfair and unjust and must be banned and deemed illegal.

However, the difficulties that Muslim women are facing are not a result of Talaq (triple or not) but of the un-islamic customs and practices that we have not only allowed into our marriages but have made them mandatory. Islam prohibits dowry. Islam puts the entire responsibility of incurring all expenses for the marriage on the man but we insist on dumping them on the woman and she, and her family accept this. Islam mandates that marriages must be simple and inexpensive but we insist on expensive, ostentatious wedding. All these are more real reasons why Muslim women are left high and dry and are the victims of the oppression of their men.

The problem is not limited to Muslim women; “The Hindu Succession Act, 1956” did not originally grant daughters coparcenary rights. And this right was not granted until the year 2005. The discrepancy between the different Personal Laws has also given rise to other problems that go against human rights.

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<sup>35</sup> *Supra* note 21.

India has straightforwardly acknowledged the predominance of victimization of women under different individual laws of various groups in India.<sup>36</sup> India in its periodic report before the United Nations CEDAW (Committee on the Elimination of All Forms of Discrimination Against Women) admitted that “The personal laws of the major religious communities had traditionally governed marital and family relations, with the Government maintaining a policy of non- interference in such laws in the absence of a demand for change from individual religious communities.”

This committee expects India’s compliance to the provisions of the said international instrument and noted that “steps have not been taken to reform the personal laws of the different religious and ethnic groups, in consultation with them, so as to conform to the Convention,” and warned that “the Government’s policy of non-intervention perpetuates sexual stereotypes, and discrimination against women.” The committee has also expected the Government “to follow the DPSPs and the Judicial decisions and enact a Uniform Civil Code that different ethnic and religious may adopt.”

### **CONCLUSION: A PLAUSIBLE SOLUTION TO THE IMPASSE**

“When there is an impact on two civilizations or between two cultures; each culture must be influenced and influence the other culture”.<sup>37</sup> UCC shall not be treated as a matter of mere idealism but as harsh realism. The idea of a UCC evidently is to secure harmony through uniformity. It is necessary to emphasize that the word “uniform” in the uniform civil code is not meant to homogenize the lifestyles and identities of Indian citizens for it will harbordisgruntlement and compromise harmony but to ensure that certain fundamental rights to equality and liberty are protected for them by the Indian state.<sup>38</sup>

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36 Sudhansu Ranjan, *Uniform Marriage Laws Required*, THE TRIBUNE, January 17, 2009, Available at <http://www.tribuneindia.com/2009/20090117/edit.htm> (Last accessed 05/04/2017).

37 Statement of AK Ayyar, CONSTITUENT ASSEMBLY DEBATES 548 (23rd November, 1948).

38 Statement of Mohd. Ismail, CONSTITUENT ASSEMBLY DEBATES 549 (23rd November, 1948).

A set of recommendations ought to reduce the doubt of the Muslim minority or the Hindu majority that an UCC will completely expel their customs. Then again, it ought to likewise guarantee that, specific focal qualities and values are kept up by the law, especially to counteract segregation and out of line practices against women in a nation where democracy prevails.<sup>39</sup> “The point, however, is this; whether we are going to consolidate our personal laws in such a way that the way of life of the whole country may in course of time be unified and secular?”<sup>40</sup>

Explicit strategies should be espoused in order to achieve the aspired ambition.

1. There can be a transitional phase of optionality while implementing the code. Subsequently, rather than choking the throats of individuals with a UCC, we should provide individuals an adequate measure of time to welcome the innovation and when a significant portion of the general population acknowledges that, as an interregnum, as a process we make it optional or facilitative, as seen in the wake of receiving the “Indian Succession Act 1925”, an obligation can be imposed.<sup>41</sup> It can be comprehended in two ways. It is possible that one needs to settle on the whole code or one may pick selected areas. One feels that deciding on the Uniform Civil Code ought to be a one-way procedure. There ought to be no pulling back. Once a person chooses it, there will be no quitting. On the off chance that one companion decides on the Code, the other will likewise need to do as such as generally, the choice will be ineffectual. Exceptional get to must be conceived to women and furthermore, extraordinary care must be taken to avoid kindling of the customary man’s interests by underhanded, rabble-rousing strategies, age ought to be determined at which one is qualified for making one’s option.<sup>42</sup>

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<sup>39</sup> *Supra* note 5, at 98.

<sup>40</sup> Question by KM Munshi, CONSTITUENT ASSEMBLY DEBATES 547 (23rd November, 1948)

<sup>41</sup> Krishnayan Sen, *Uniform Civil Code*, 39 ECONOMIC AND POLITICAL WEEKLY, 2004, at 4196.

<sup>42</sup> Vaibhav Choudhary, *A Proposal for Uniform Civil Code for Law of Succession in India*, SSRN ELECTRONIC JOURNAL 1–17, 1-17 (2010), Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669547](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669547). (Last accessed at 02/03/2017).

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2. The second option is a ‘parallel’ use of the common and personal law. Executing an UCC must not refute the likelihood of subjects profiting themselves from one’s personal law on the off chance that they so wish. Additionally, the state must not just take into account the presence of a religious-law framework, yet should aid its implementation if the requirement for such intercession is required and the conditions consider it. The uniform civil law shall be ultimate; the personal laws be parallel.<sup>43</sup>
  3. The third proposal would involve a plodding change towards a uniform law by “incremental” amendments. It requires that consistency is realized by legal choices and concurrent authoritative revisions. Firstly, a law will be declared unfair and unreasonable by the Judiciary. Then, a more impartial and uniform rule would be legislated by the parliament. Consequently, there would a progressive transference from imbalanced and varied laws to an UCC.<sup>44</sup>
  4. The fourth and, perhaps, the direct methodology is set up a Draft UCC and open it for parliamentary deliberation and public inspection. “Parliament may well decide to ascertain the content of the community through their representatives and this could be secured by the representatives by their election speeches and pledges. This may be made an article of faith in an election and a vote on that be regarded as consent”.<sup>45</sup> One of the central reasons why there is such a large amount of dread and tension about a typical code is on account of no one has endeavored to make or draft one. The issues in regards to a UCC must be genuinely valued and settled if there is something more considerable. Subsequently, steps are to be taken towards the definition of a draft code; and after the thoughts, it might, if regarded fit, be sanctioned.

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<sup>43</sup> *Supra* note 37.

<sup>44</sup> Imran Hussain, *A case for Uniform Civil Code*, THE BUSINESS DESTINATION, Available at [http://www.industrialeconomist.com/sector\\_news.php?cid=881 &page=97](http://www.industrialeconomist.com/sector_news.php?cid=881 &page=97). (Last accessed on 01/01/2017).

<sup>45</sup> Statement by Naziruddin Ahmad, CONSTITUENT ASSEMBLY DEBATES 549 (23rd November, 1948).

5. The fifth proposition is “Mediation”. This mediation ought to take two structures: societal intercession and personal intercession. Societal mediation would include making an exchange among the social groups with a specific end goal to propel a settlement upon the utilitarian arrangements of the UCC. Personal mediation includes intervening between people on events where debate emerges in the domain of religious law.<sup>46</sup>

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<sup>46</sup> *Supra* note 39.

# **THE FUTURE OF MUSLIM PERSONAL LAW IN INDIA: CODIFICATION OR A UNIFORM CIVIL CODE?**

*Zaid Deva & Swagat Baruah\**

## **INTRODUCTION**

The Supreme Court has consistently taken up the task of defining secularism and has tried giving it a wide ambit of reasoning and interpretation, but this has also, in a fortuitous misfortune, created the great confusion that exists today. Article 44 of the Constitution mandated the state to ‘endeavour’ so as ‘to secure for the citizens a uniform civil code.’ While most of the Civil law has been made uniform, it is the personal law of various communities, particularly Muslims which has been the major obstacle for the governments in initiating reform. Further, the very personal law of Muslims has become vague and indeterminate, owing to the growing number of sects in Islam. The existence of the controversial practices in Shariah like Triple Talaaq, Polygamy, Halala beg the question, “Should social reform be stalled, because of the supposed divine characteristics of the personal laws which the secular state shies away from infringing?” Another question that arises here is that, “Has the state even endeavoured towards implementing a uniform code since 1950?” This paper will attempt to answer these questions. With the advent of a majority right wing government in India, the debate of ‘majoritarianism under the garb of social reform’ has been fuelled, because a Codified Muslim Personal law would serve the purpose equally well. The paper will describe the benefits of a codified Muslim personal law, and how that could

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be an antecedent in enacting a Uniform Civil Code, which is supposed to bring all the communities on a similar platform on matters which do not form the essence of any religion, leading to a national consolidation, which has been so long desired. The authors will also discuss whether secularism, in general and Indian secularism in particular, is compatible with the Islamic principles, which encompass almost the entire private and public aspect of an individual's life. The paper will also briefly look into the history of the Shariah vis-a-vis polygamy, triple talaq and halala, and argue that these practices have lost their purpose, and the manner these are practiced today are in direct contravention of the basic tenets of the Constitution, hence should be discontinued with, because the essential principle behind a Uniform Civil Code or a Codified Personal law is that constitutional law shall supersede religious laws in a secular & democratic republic, where the rule of law prevails.

### **MUSLIM PERSONAL LAW: A HISTORIC INTROSPECTION**

It is ironical today that a law which reformed a tribal people living an 'animal existence' has become the greatest impediment in ameliorating and modernising the lives of Indian Muslims, because of a very narrow and erroneous interpretation given to it by ill-educated theologians. Justice Iyer commenting on the Islamic family law observed that a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce.<sup>1</sup> A few distortions seem to have crept in dispensing justice in British India and even in the decision of Privy Council, which decreed Muslim husband's right to divorce his wife at whim. Such misguided views have had sustenance in the opinion of ill-educated *maulvis* who had already been serving their clientele with their faulty understanding of the Quranic law of divorce.<sup>2</sup> Countries like Turkey, or Pakistan where Islam is the state religion, have brought about changes in the Muslim Civil Law abolishing the discriminatory practices. Has the Indian government even attempted to make these changes? Does the secularism that India practice allow the state to make

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1 Yousuf Rawther v. Sowramma, AIR 1971 Ker 261.

2 Saleem Akhtar & Wasim Ali, *Repudiation of Marital Tie at the Instance of Muslim Wife: Misgiving and Clarification*, 45 JOUR. OF THE IND. LAW INST., 506(2003).

changes to the religious laws? Can the personal laws as practiced in India be attributed to *Shariah*? These questions will be answered in the subsequent sections, and lastly the questions of codifying the Muslim Personal Law and a uniform civil code will be dealt with.

In this section, we will only be dealing with practices like triple *talaaq*, polygamy, inheritance & succession and *halala* which continue to be the most debated and controversial provisions of the Muslim Personal Law. Before we delve into the intricacies of the subject, it is essential that we look at the backdrop in which these practices came into existence.

### ***A Study of the Pre-Islamic Arabia***

Before the advent of Islam, the life in Arabia especially that of woman's was short, nasty and brutish. In other words, the pre-Islamic Arabia represents the Hobbesian state of nature in its entirety. As there was no common political superior/sovereign who could establish a just and peaceful order, there was a 'constant war of all against all.' There was no idea of a state or a political organization, which would govern the relations between people. Family as a basic institution of a society was non-existent; people had organized themselves in tribes, with a man at its head. It was a patriarchal culture in its absolute form. The male head was responsible for making laws for the tribe, and every other member had to abide by it. Since there were no such things as police, courts or judges, the only protection a man could find from his enemies, was in his own tribe. The tribe had an obligation to protect its members even if they had committed crimes.<sup>3</sup> This period is often referred to as *Jahiliyyah* meaning the age of ignorance, by Muslim scholars. The social structure of Arabs was dominated by men. Women were considered to be inferior, and were used as a means of sexual pleasure. The pagan Arabs used to bury their daughters alive since they were believed to bring bad omen. Women had no independence, could not own property and were not allowed to inherit. In times of war, women were treated as part of the loot. Their

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3 AL-ISLAM, Available at <https://www.al-islam.org/restatement-history-islam-and-muslims-sayyid-ali-ashgar-razwy/arabia-islam> (Last accessed on 14/12/2016).

personal consent concerning anything related to their well-being was considered unimportant and unnecessary to such an extent that they were never even treated as a party to a marriage contract.<sup>4</sup>

Various kinds of marriages were prevalent at that time. Some of them require mention here. A common form of marriage due to constant warfare was marriage by capture under which, women of the defeated tribe were taken captive and then sold into marriage or slavery. Abu Da'ûd, reports four kinds of marriage in pre-Islamic Arabia, in which the fourth is the most gruesome. The fourth kind was that a lot of men would have sexual intercourse with a certain woman (a prostitute). She would not prevent anybody. Such women used to put a certain flag at their gates to invite in anyone who liked. If this woman got pregnant and gave birth to a child, she would send for these men, and choose amongst them one to be the child's father.<sup>5</sup>

There was one more kind of marriage which is called marriage by inheritance, under which a son of the deceased father would inherit the latter's wives irrespective of the wives' will.

Women had no right to ask for divorce, but she could be divorced any time arbitrarily at the whims of the husband. She had no rights in her father's or husband's property. In this landscape, the Islamic law proved to be both reformatory and revolutionary. A just order was set up for women. Now we turn our attention to the aforementioned practices in today's context, and attempt at proving that the manner it is professed is un-Islamic, unreasonable and retrograde.

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4 INTERNATIONAL ISLAMIC WEB, *Available at* <http://www.alahazrat.net/islam/women-before-islam.php> (Last accessed on 12/12/2016).

5 *Supra note 3*. The first was similar to present-day marriage procedures, in which case a man gives his daughter in marriage to another man for a certain amount which has been agreed upon. In the second, the husband would send his wife to cohabit with another man in order to conceive. After conception her husband would, if he desired, have a sexual intercourse with her. A third kind was that a group of less than ten men would have sexual intercourse with a woman. If she conceived and gave birth to a child, she would send for these men, and nobody could abstain. They would come together to her house. She would say: 'You know what you have done. I have given birth to a child and it is your child.'

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### ***Triple Talaaq***

As the name suggests, triple talaaq means uttering the word ‘talaaq’ three times to your wife, to effectuate a divorce. In India, triple talaaq as understood by most of the people who use it, is saying ‘talaaq’ three times in one sitting. With the advent of technology, we are seeing incidents of husbands giving divorce to their wives via WhatsApp, Facebook, e-mail, or a postcard. Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all.<sup>6</sup> Triple Talaaq, so far as it gives unbridled power to a man, is discriminatory, but to say that it is instantaneous and arbitrary is false and ill-founded. It requires the man to pronounce *talaaq* over a period of three months and to use every conciliatory measure possible before finalizing the divorce. So, in essence, it is a reconciliatory measure for a people where instantaneous divorce at the whims of a man was common. What is interesting is that it was disapproved of by the prophet himself. The Quran does not mention it at all. The Quranic divorce not only requires two arbiters, one from the wife’s side and one from the husband’s side, but also two reliable witness for pronouncing a valid divorce.<sup>7</sup> If a marriage requires the consent of both the parties, it cannot be revoked unilaterally, which is un-Islamic and unconstitutional. The Islamic law sought to reform the Arabs, triple *talaaq* the way it is practiced, cannot be allowed to continue as it is hampering reform in the Indian society which has long strived for gender equality and justice.

### ***Polygamy***

In pre-Islamic Arabia, as we have already seen, there was no limit on the number of wives a man could have. The religious law that came into force restricted the

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6 Mohd. Ahmed Khan v. Shah Bano Begum & Ors, AIR 1985 SC 945.

7 Anita Yadav, *Rights of Muslim Women: An Analysis of Indian Muslim Personal Laws*, AFFIRMATIVE ACTION: WOMEN & LAW 35, 45(2015), Available at [https://www.researchgate.net/profile/Anita\\_Yadav6/publication/274702838\\_Rights\\_of\\_Muslim\\_women\\_An\\_Analysis\\_of\\_Indian\\_Muslim\\_personal\\_Law/links/5594e73508ae99aa62c5b94a.pdf?origin=publication\\_list](https://www.researchgate.net/profile/Anita_Yadav6/publication/274702838_Rights_of_Muslim_women_An_Analysis_of_Indian_Muslim_personal_Law/links/5594e73508ae99aa62c5b94a.pdf?origin=publication_list). (Last accessed on 15/12/2016).

number to four, with an injunction that “if the man is not able to do justice to all of them, he should marry only one.” Another verse from the same chapter states that equal justice is humanly impossible. The Prophet or his companions did not have more than one wife at one time. Even he disliked more than one marriages, and the Quran also says that monogamy is the ideal form of marriage. Many scholars also suggest that the reason such a law was introduced was because the sex ratio had dropped drastically due to constant warfare. Be that as it may, such a practice is inhumane and should not be allowed to continue in a civilized society.

### ***Halala***

A plain reading of the verse dealing with *Halala* shows that it is in the form of a reprimand to the man. The verse implies a warning that the conjugal and marital bonds will be cut apart and the return will not be possible.<sup>8</sup> The way it is being practiced today is pre-planned *Halala* and is against the human values. It is strictly prohibited in Islam. It has become corollary to triple *talaaq*. People today divorce their wives in one sitting arbitrarily, and when they want them back, these women are forced to consummate a second marriage. It wouldn't be wrong to call it a lawful rape. Such practices deserve immediate abolition.

### ***Inheritance***

Under Islamic Law, a daughter gets one-third of the father's property, while a son gets two-thirds. This is *per se* not discriminatory considering, a wife is entitled to share from her husband's property, and in case she is a widow, from her son's property. In order to establish a gender just society, this provision also needs reform. In a tribal culture where women were not entitled to a share in the father's property, this law was revolutionary. But today, where women are given equal opportunities in every respect and equal share also in property, this law has

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8 Available at EXPLORE-QURAN, <http://www.explore-quran.com/articles/Halala.html>. And if he divorces her finally, she shall thereafter not be lawful unto him unless if she marries another man. If (by chance this marriage also breaks) and the present husband divorces her, there shall be no sin upon either of them (the first husband and the divorced wife) to remarry. (Last accessed on 15/12/2016).

become obsolete for Muslim women. In the end it can be concluded that Muslim Personal Law in India has become mere personal practices with no religious affiliation whatsoever, and which were borne out of faulty interpretations by a foreign power having no knowledge of the Asian civilization.

### ***The Idea of Indian Secularism***

The Indian Constitution has not created the nation, or its religion, or its institutions. It found them already existing and only plays the role of a protector of its interests. Our founding fathers, although did seek to adopt state neutrality towards all religions; they didn't adopt it in 1950. It was only the 42nd Amendment of 1976 that declared secularism to be a fundamental basic feature of our polity although leaving it undefined. Although the 42nd Constitutional Amendment, through insertion of the word 'secular' in the Preamble of the Constitution asserted that India is a secular nation, the relationship between the state and religion has not yet been defined but only interpreted. A cloud of great confusion still lurks amidst the current debates on religious intolerance and secularism in India as to how the social milieu might interpret secularism. The Supreme Court has consistently taken up the task of defining secularism and has tried giving it a wide ambit of reasoning and interpretation, but this has also, in a fortuitous misfortune, created the great confusion that exists today. There are still grave doubts whether the expression 'secular state' if it denotes a definite pattern of relationship can, with propriety, be applied to India. Only in a qualified sense can India be said to be secular. There are provisions in our Constitution, which make one hesitate to characterize our state as secular. Secularism in the context of our Constitution means only an attitude of live and let live developing into the attitude of live and help live.<sup>9</sup>

The Supreme Court has agreed that our Constitution makers had always intended to make the country a secular democracy, giving the state a neutral status in regard to religious affairs.<sup>10</sup> Although giving secularism the status of fundamental law of the land, the court has always called for a neutral status rather than a

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9 *Supra* note 9.

10 Ziyauddin Burhanuddin Bukhari v. Briujmohan Ram Das Mehra, AIR 1975 SC 1788.

separation of state from religion, existence of a classless, cohesive and unified society.<sup>11</sup> Secularism was held to be the basic structure of the Constitution in the case of *S.R. Bommai v. Union of India*.<sup>12</sup> It held that in matters of state, religion has no place, and that the application of secularism would extend to political parties as well since they were part of the state. But its verdict was more on the lines of defining the relationship between religion and politics, and that the both must never be mixed.

A proper definition of secularism that the Court can rely upon would Bipan Chandra's whose secularism was four-pronged:

“Secularism meant first, separation of religion from political, economic, social and cultural aspects of life, religion being treated as a purely personal matter; second, dissociation of the state from religion; third, full freedom to all religions and tolerance of all religions; and four, equal opportunities for followers of all religions, and no discrimination and partiality on grounds of religion.

### ***Islam & Secularism***

The idea of secularism and Islam poses an interesting question, because with the advent of Islam, a state as understood in the modern sense was established in Arabia. Scholars today have varied opinion on the compatibility of Islam and secularism, with some comparing the secular states to *Jahiliyyah*.<sup>13</sup> The same author says that this *Jahiliyyah* of today is exactly like the *Jahiliyyah* of the past. The differences between Islam and secularism are substantial. The issue at hand is none other than the difference between monotheism and polytheism. He further says secularism, in its very nature, violates the principle of monotheism.<sup>14</sup> In the author's opinion this argument is ill founded. Even during the Prophet's

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11 Keshavanand Bharati v. State of Kerala, AIR 1973 SC 1461; Indira Sawhney v. Union of India & Ors., AIR 2000 SC 498.

12 AIR 1990 Kar. 5.

13 Sheikh Salman b. Fahad al-Oadah, ISLAM AND SECULARISM, Available at [http://www.arriyadh.com/eng/cgi-bin/DwnFile.aspx?f=/Eng/Islam/Left/Books/Islam-and-Secularism-proofread\\_.pdf](http://www.arriyadh.com/eng/cgi-bin/DwnFile.aspx?f=/Eng/Islam/Left/Books/Islam-and-Secularism-proofread_.pdf). (Last accessed on 10/12/2016).

14 *Id.* At 5.

time, Islam was never forced on anyone and people were allowed to profess their religion without any intervention. He never discriminated between people of the book and people who adhered to different faiths.<sup>15</sup> We cannot call it polytheism; it is merely giving respect and recognition to people of other faiths. It is further proved by *Umar*'s pledge to the Christians of Jerusalem, when the city was conquered. *Umar* was the second of the *Rashidun* (rightly guided) caliphs.

*“This is an assurance of peace and protection given by the servant of God to the people of Jerusalem. He grants them safety for their lives, their property, their churches, and their crucifixes, for their ill, their healthy, and their entire community. Their churches will not be occupied, demolished, or decreased in number. Their churches and crucifixes will not be desecrated and neither anything else of their property. They will not be coerced to abandon their religion and none of them will be harmed.”*<sup>16</sup>

It was only done to preserve the city's diverse culture and faiths. Abdullahi an-Na'im writes: “In order to be a Muslim by conviction and free choice, which is the only way one can be a Muslim, I need a secular state.”<sup>17</sup> Under Islam, conformity or passive submission is not encouraged, people of different faiths have to be respected and their rights protected.

### ***Indian Secularism & Islam***

Opposition to reform of personal laws is based on the freedom of religion and conscience, whereas the guarantee to citizens of equal protection from the law and before the law supports a uniform civil code. This issue also raises questions

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15 Brian Whitaker, *Mutual Friends: Secularism & Islam*, THE GUARDIAN (April 14, 2009, 12:30 BST), Available at <https://www.theguardian.com/commentisfree/belief/2009/apr/14/religion-islam-secularism>. (Last accessed on 08/01/2017).

16 DAILY HADITH, Available at <http://dailyhadith.abuaminaelias.com/2015/10/17/umar-at-jerusalem-the-covenant-of-protection-between-umar-and-the-christians/> (Last accessed on 15/12/2016).

17 *Supra* note 13.



concerning the hierarchy of rights- can the right to be governed by personal laws (a component part of the right to freedom of conscience) have precedence over the right to equality - and legal pluralism in a diverse society.<sup>18</sup> Islamic faith is based on the five pillars. For a person to be a Muslim, he needs to profess and practice the five pillars.<sup>19</sup>

The Indian Judiciary has evolved the doctrine of essentiality of religious practices to be the basis of protection of the freedom of conscience and free profession, practice and propagation of religion to manage religious affairs. Religion, as interpreted, was restricted to that which was essential to it and non-essential features were not protected and the state could regulate the same.<sup>20</sup> Only the essential practices are given absolute state protection. It is not every aspect of the religion that requires protection of Articles 25 & 26, nor has the Constitution provided that every religious activity would not be interfered with. "Every mundane and human activity is not to be protected under the Constitution in the garb of religion."<sup>21</sup> The freedom under Article 25 is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality, and collective health of the nation's people.<sup>22</sup>

Article 25 guarantees religious freedom whereas Article 44 divests religion from the social relations and personal law. Marriage, succession and the like "matters of a secular character cannot be brought within the guarantee enshrined under

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18 *Supra* note 16.

19 The five pillars in Sunni Islam constitute: 1) Shahadah- It is the declaration made by a Muslim of his belief in one God and Muhammad as the messenger. 2) Salah – It means a prayer that a Muslim is supposed to perform five times a day. 3) Zakaat – Giving alms to the poor and the needy is Zakaat. It is usually 2.5% of the year's earnings. 4) Fasting – It is obligatory for a Muslim to observe fasts in the month of Ramadaan. 5) Hajj – It is the pilgrimage which Muslims make to Mecca and Medina. As per Shia Islam, three more practices which are Jihad, living a virtuous life, and refraining from vices comprise of the pillars.

20 *Supra* note 17.

21 *Sri Adi Visheshwara v. State of UP*, (1997) 4 SCC 606.

22 *Javed v. State of Haryana*, (2003) 8 SCC 369.

Articles 25 & 26.”<sup>23</sup> Intervention by the state in any form, in the five pillars would amount to infringement of religious freedom. The reason that Islam has such an exhaustive code which encompasses every aspect of an individual’s life is because at the time it was laid down; the Arabs were in immediate need of reform. Merely giving them, the five pillars would not suffice, to escape the clutches of the animal existence. To consolidate the Arabian world, a uniform law was required. The mission of the Prophet was not to destroy the infrastructure of the society, including its culture. He modified many of the existing laws and then ratified them. They had evolved among the Arab people before and during the Prophet’s era, not by God or Muhammad.<sup>24</sup> The Family law or the Civil Code was developed in respect of the practices of the Arabs and the same cannot be extended in its entirety to different societies having different cultures. It was only set as an example for the world to understand the essence of the law, and not just wantonly implement the same elsewhere. The result of interaction between the Islamised Arabia and a matrilineal society in India would have been interesting to note.

A noted Islamic scholar and historian Muhammad Mujib who was also vice-chancellor of Jamia Millia Islamia had described Shariah as a human approach to the divine will.<sup>25</sup> *Fiqh* is the jurisprudence of Islamic law. It is an Arabic word meaning “full comprehension” or “deep understanding.” It deals with various laws laid down in Islam from the penal laws to the civil laws, which are divided under different heads. The scholars of Islam have restricted the use of the word *Fiqh* to the category of Practical laws i.e. which deal with the rules and regulations laid down for certain acts, and also provide guidelines for the way these acts be performed.<sup>26</sup> The four titles in *Fiqh* are *Ibadaat* (Worship),

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23 John Vallamattom v. UOI, (2003) 6 SCC 611: AIR 2003 SC 2902.

24 Akbar Ganji, *Why secularism is compatible with the Quran & Sunnah – and an ‘Islamic’ state is not*, THE WORLD POST Available at [http://www.huffingtonpost.com/akbar-ganji/secularism-islam-islamic-state\\_b\\_6426300.html](http://www.huffingtonpost.com/akbar-ganji/secularism-islam-islamic-state_b_6426300.html). (Last accessed on 27/01/2015).

25 Asghar Ali Engineer, *The Need for Reform & Codification in Muslim Personal Law in India*, WOMEN LIVING UNDER MUSLIM LAWS (Jan. 200), Available at <http://www.wluml.org/node/332>. (Last accessed on 20/12/2016).

26 AL-ISLAM, Available at <https://www.al-islam.org/fiqh-and-fuqaha/part-1-fiqh> (Last accessed on 11/12/2016).

*Uqood* (Contracts), *Iqaat* (Unilateral Pronouncement), *Ahkam* (Rules). The first title comprises of chapters which describes certain practices which are obligatory on a Muslim. The second title consists of Chapters on contracts, sale, mortgage, debts, guarantee, joint ownership, labour & capital, endowments, gifts and wills. Since marriage is a contract in Islam, it also forms a part of *Uqood*. Liberating slaves, admissibility of claims in courts, wages, rewards and procedure of divorce form part of *Iqaat*. The last title deals with matters like property, pre-emption, judiciary, witnesses in claims and penal laws. Laws of Inheritance also form part of the last title.

A plain reading of the preceding paragraph makes it clear that most of the Islamic law has been secularized in India and in rest of the countries also, making the argument of Muslim traditionalists that reform in their Personal Law would amount to infringement of religious freedom, baseless. The only aspect of any religion, including Islam, which has anything to do with managing a society, is its jurisprudence, which in modern society is referred to as the laws. But, they are not necessarily religious or Islamic for the following reasons: (a) they include laws concerning worship and provisions that have nothing to do with religion and have nothing to do with running a society; (b) 99 percent of non-worshipping laws are of ratifying type, i.e. they are the product of the culture and lore of the people of the Arabian Peninsula before the Prophet.<sup>27</sup> Further, Fiqh is not regarded as sacred.<sup>28</sup>

It is pertinent to mention here that certain acts in Islam are *Fard* (obligatory), which form the essence of the faith. These are the essential practices. It is not clear whether the Islamic Civil Code comes under *Mustahab* (recommended, not compulsory) or *Mubah* (religiously neutral), but it is certain that it is not a *fard*. Religion today should be restricted to an individual's private sphere. It is more of a relationship between an individual and his God; whereas law is about

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<sup>27</sup> *Supra note* at 38.

<sup>28</sup> Available at WORLD RELIGION WATCH, <http://www.world-religion-watch.org/index.php/courts-points-for-trasversal-discussion/102-the-foundations-of-islam> (Last accessed on 15/12/2016).

specific rights of an individual as against other individuals or society at large. One is the religious plane which is entirely personal, and the other is the social plane which deals with a person's status and self-esteem as a citizen of the country.<sup>29</sup>

### **CODIFICATION OF MUSLIM PERSONAL LAW**

Under the British or the Mughals, people were given the freedom to manage their affairs by their personal laws, with no state intervention whatsoever. No attempts to codify or unify the personal laws were made. MPL was applied to Muslims in British India as a matter of policy, and not as a matter of religion.<sup>30</sup> The issue of codifying the personal laws has always remained very sensitive, especially with the Muslims who view this as an attempt by the Hindus to impose their majoritarian might, thereby depriving them of their identity. In the previous sections we discussed the history of the Islamic Laws and its compatibility with secularism and Indian secularism. In this section we will be dealing with the question of codifying the Muslim Personal Law, with an aim to reform the Muslims in India, particularly the women who have been thrown into an abyss because of the archaic interpretations which hold no validity today. Before we go into that question, it is necessary to mention here the examples of Muslim majority nations, which have brought changes to the Islamic Laws. These nations include the likes of Pakistan, Turkey, Egypt, Jordan among others. Why is it important for India to look towards these country's modified Muslim laws, is because they could provide a framework for a reformed and modern outlook of these laws.

### **PERSONAL LAWS: A COMPARATIVE ANALYSIS**

Mustafa Kemal Ataturk is considered the pioneer of modernisation in Turkey. He secularized most of the laws of the erstwhile Ottoman Empire leaving religion to the private sphere of the individual. He enacted a new Civil Code based on the Swiss Law, which significantly improved the position of women in the society.

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29 Leila Seth, *A Uniform Civil Code: Towards gender Justice*, 31 INDIA INTERNATIONAL CENTRE QUARTERLY 44, 50(2005), Available at <http://www.jstor.org/stable/23005979>. (Last accessed on 20/12/2016).

30 (Fayzee 1971:12)

S.8 of the new family law abolished polygamy making a new marriage while the first one subsisted, void. S.26 gave equal rights to both the parties to marriage, to sue the other for a divorce on grounds of: a) adultery, b) ill-treatment or threat to life, c) guilty of committing an infamous crime d) desertion exceeding one year, d) insanity, e) straining of conjugal relations to an extent that life together has become intolerable.

The result of this revolutionary legislation in the Muslim world has been to improve the social standing of women. In a survey conducted in a province in 1971, 88.4% believed that a man with a son and a daughter should equally bequeath his estate.<sup>31</sup> Islamic jurisprudence then is better described as an ethical code rather than a uniform legal system. Various countries have different influences, and have modified these laws in their own way.<sup>32</sup>

Like Kemal in Turkey, Ayub Khan in Pakistan initiated reforms in the personal law with the introduction of the Muslim Family Laws Ordinance. It made the registration of a marriage with the state authorities a legal requirement. The most remarkable feature of the ordinance was making polygamy next to impossible, without prohibiting it. It stipulated that a man intending to marry a second time was required to get the consent of the first wife, after which the matter would be heard before an Arbitration Council. The permission for a second marriage rests with the said council. S.7 states that upon pronouncement of *talaaq*, the man is required to send a notice to the Chairman of the council and his wife, informing them about the same, after which an arbitration council will be appointed which will try to bring about reconciliation before the expiry of 90 days. It should be noted that the divorce will only come into effect after the expiry of 90 days. If changes in the personal laws have been brought about elsewhere, why hasn't India even attempted to do the same after partition?

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31 Paul Magnarella, *The Reception of Swiss Law in Turkey*, 46 ANTHROPOLOGICAL Q. 100, (1973), Available at <http://www.jstor.org/stable/3316746>. (Last accessed on 15/12/2016).

32 Razia Patel, *Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice*, 44 ECO & POL. W. 44, (2009) Available at <http://www.jstor.org/stable/25663732>. (Last accessed on 16/12/2016).

### REFORMING PERSONAL LAWS: A CONSTITUTIONAL REALITY

The foremost question that arises here is whether the fundamental rights are applicable to the personal laws. For Part III to be applicable, personal laws should be “law” as defined in Article 13(3).

The implication of Part III being applicable to the Personal laws is that the latter can be amended so as to make them in consonance with the Fundamental Rights. The Supreme Court has held that the true test of validity of a statute must be the effect and consequence of its operation on the fundamental rights of the citizens.<sup>33</sup>

As early as 1952, the Bombay High Court in the famous case of *State of Bombay v. Narasu Appa Mali* held that the personal laws do not come within the term ‘law’ as defined in Article 13(3).<sup>34</sup> Article 13(3) says that law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law. The court based its reasoning on the fact that there was a difference between customs, usages and personal laws. The court relied on S.112 of the Government of India Act, which makes a distinction between customs and personal laws. It says that in suits against the inhabitants of Calcutta, Madras or Bombay, the High Courts, shall, in matters of inheritance and succession to land, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and where the parties are subject to different laws or customs, according to the law or custom of the defendant. The Court argued that the constitution writers had the wording of section 112 before them when they defined “law” in terms of article 13(3)(a), and the mere fact that they omitted personal law from the definition of “law” is an indication of the exclusion of “personal law from the purview of Art. 13. The Court further held that if the personal laws came within the purview of Article 13(3), then that would make Articles 17 and 25(2)(b) redundant. Justice Gajendragadkar gave a different

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<sup>33</sup> Man Singh v. State of Punjab, AIR 1985 SC 1737.

<sup>34</sup> AIR 1952 Bom. 8488.

reasoning for the exclusion of personal laws from Article 13(3). He argued that personal laws do not derive their validity from the fact that they have been enacted by means of legislation. On the contrary, personal laws are derived from “foundational sources.” The foundational sources include the *Shastras* for Hindus and Quran for Muslims.

In the author’s opinion, personal laws are susceptible to the fundamental rights for reasons given below. Firstly, in a constitutional polity, the law of the land i.e. the constitution is supreme, and no law can be in derogation to it, be it a religious law or customary law. A constitution represents the will of the people, and all laws have to qualify the test of the Constitution. AV Dicey commenting on the power of supremacy of the constitution has said that it is a fundamental principle of English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.<sup>35</sup> It is pertinent here to mention Seervai’s criticism of the *Re: Berubari Union*<sup>36</sup>, wherein it was held that the power to acquire or cede a part of territory is an inherent attribute of sovereignty and hence is outside the Constitution. Seervai argued that in India no part of external sovereignty can be outside the Constitution, since the residuary power can cover it i.e. to say that the constitution is supreme. On similar reasoning we can say that the personal laws cannot escape the constitutional scrutiny. Secondly, in India the personal laws do not derive authority because of their divine origin, but because the Constitution grants it so. Without the constitutional guarantee of religious freedom, the personal laws would have held no value in the eyes of law. Lastly, the reasons for incorporation of Article 17 is that, untouchability was a social evil which had plagued the Indian society for a long time and which required immediate reform hence and could not have been left to the reforming of personal laws which at that time was still unclear. In the interest of social welfare and reform, the state can legislate on personal matters.

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<sup>35</sup> A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915, Indianapolis: Liberty Fund).

<sup>36</sup> AIR 1960 SC 845.

Further Entry 5, List III, of the Seventh Schedule gives the powers to the legislature to make appropriate legislations for regulating the personal laws.

### THE WAY AHEAD

A codified Muslim personal law, would give rights to women vis-à-vis divorce, maintenance, custody, and would also abolish the discriminatory practices like polygyny, halala, and triple talaq. The immediate step for the government should be to start the codification process, after consultation with Muslim scholars around the world. Any attempt to codification without roping in the Muslims of India would defeat its whole purpose. If the constitutional vision of a uniform civil code is to fulfilled, the first step towards that is codification of Muslim Personal Law, which has been the greatest obstacle, in unifying all the laws which do not form the essence of any religion.

Owing to the growing number of sects in Islam, the personal law has become very vague and indeterminate. Before unifying various communities' personal laws, it is essential that the government unify the 4 schools of law in Islam and the practices of various sects, in the form of a "uniform" Muslim Civil Code. An example of conflicting laws of two schools in Islam is relating to the period of disappearance of the husband. When Muslim women found it problematic to wait for 90 years if their husbands were missing according to the Hanafi School, the *Ulama*, in order to overcome this difficulty, borrowed the rule from the Maliki School which allows the woman to wait only for a period of four years.<sup>37</sup> Most of the Muslim personal laws outlined by different schools of jurisprudence were not Quranic but were developed through human judicial reasoning (*Ijtihad*).<sup>38</sup>

Looking at the discrimination meted out to Muslim women, a codified personal law or a uniform civil code would be more Islamic in its spirit and reformative in character.

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<sup>37</sup> *Supra* note at 39.

<sup>38</sup> YP Singh & A Alam, *Muslim Personal Law & its Nuances*, LIVE LAW Available at <http://www.livelaw.in/muslim-personal-laws-nuances/>, (Last accessed on 09/09/2016).



## **STEPPING STONE TO NATIONAL CONSOLIDATION: A UNIFORM CIVIL CODE**

Uniform Civil Code doesn't mean equal application of laws for everyone just like equality before law doesn't mean equality for everyone in all circumstances. It means equal treatment among equals. A minor application of the Uniform Civil Code can be seen in Article 25 of the Constitution which clubs Sikhs, Jains and Buddhists along with Hindus. Bhajan Singh, founding director of US based Organisation for Minorities of India (OFMI), writes that, "Article 25 does two things. First, it permits the state to regulate religion and religious institutions for 'public order' and second, it forces the followers of the Sikh, Jain and Buddhist religions to identify as Hindus even though these three separate faiths are completely distinct."<sup>39</sup>

The whole idea behind a Uniform Civil Code is to bring all the communities together on matters which do not form the essence of any religion. In other words, it is for all the citizens, not just one community. No doubt in the author's opinion, that a uniform civil code can only follow when the Muslim personal law has been codified, but the state should not make the debate of a UCC only about the Muslim Personal Law. The civil code that has been enshrined in the Constitution, is based on secular ideals, hence communalizing the issue would defeat the whole purpose of this legislation. Upendra Baxi writes, "It is a sad mistake to think that a UCC is all about Hindu-Muslim relations and identities."<sup>40</sup>

The last moot point of the Article pertains to the territory of India. It has been argued many times that a uniform civil code is supposed to bring about a national consolidation and unity amongst the people. While the statement is not entirely untrue, what most people tend to forget is that Article 371A and 371G makes the parliament incompetent in legislating matters pertaining to religious, social or

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<sup>39</sup> Organization for Minorities of India, *Obama affirms Indian Constitution's Article 25 over objections of South Asian Americans*, SIKH SIYASAT NEWS, Available at <http://sikhsiyasat.net/2015/01/28/obama-affirms-indian-constitutions-article-25-over-objections-of-south-asian-americans/>. (Last accessed on 18/09/2016).

<sup>40</sup> Upendra Baxi, *Securing the Code*, THE INDIAN EXPRESS Available at <http://indianexpress.com/article/opinion/columns/uniform-civil-code-article-44-2924463/>. (Last accessed on 20/07/2016).

customary laws of the Mizos and the Nagas, unless the legislatures of the respective states so resolve. Similarly, as per the sixth schedule, the district and regional councils in tribal areas of Assam, Meghalaya, Tripura have been given the power to make laws regarding the customary and religious practices.

**FROM A FUNDAMENTAL RIGHT TO A DIRECTIVE PRINCIPLE:  
THE CONSTITUTIONAL ASSEMBLY DEBATES IN  
THE PRESENT CONTEXT**

The debate of a uniform civil code continued for almost two years in the Constituent Assembly. Initially, Article 35 in the draft constitution, it was opposed by Muslims and traditionalist Hindus vehemently who claimed that personal laws formed part of their faith, and the state by legislating in these matters would infringe their fundamental right to religious freedom.

The members were sharply divided on this point. Much of the demand for a uniform code came from women like Amrit Kaur who argued that “(o)ne of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life.”<sup>41</sup> Another member, Mohammad Ismail gave the example of Yugoslavia where the Muslims were given the right to make provisions in accordance with the Muslim usages. Referring to all the people who advocated a Uniform Civil Code, he further argued, “Their idea evidently is to secure harmony through uniformity.”<sup>42</sup> Even today, people make their arguments against a civil code on similar reasoning. In the author’s opinion, these statements are flawed. Firstly, diversity in a society does not arise out of diverse laws. It exists because of distinct rituals and practices. Secondly, if a uniform civil code is enacted, it would not deprive the communities of their cultural identity, because the same is given protection in the form of a fundamental right. KM Munshi’s statement in this regard laid the foundations for the Bombay High Court to evolve

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41 Shefali Jha, *Secularism in the CONSTITUENT ASSEMBLY DEBATES 1946-50*, 37 ECO. & POL. W. 3175, (2002), Available at <http://www.jstor.org/stable/4412419>. (Last accessed on 08/01/2017)

42 CONSTITUENT ASSEMBLY OF INDIA, Available at <http://parliamentofindia.nic.in/ls/debates/vol7p11.htm> (Last accessed on 14/12/2016).

the doctrine of essentiality. He said, “Religion must be restricted to spheres which legitimately appertain to religion, and the rest of the life must be regulated, unified and modified in such a manner that we may evolve as early as possible a strong and consolidated nation.”<sup>43</sup>

The two objections which were raised in the Constituent Assembly against Uniform Civil Code are: i) Violative of religious freedom, and ii) Tyrannical to the minorities. So far as the first objection is concerned, the answer lies in the Article which gives religious freedom to Indians. Clause (2)(a) of Article 25 provides for regulation or restriction of any economic, financial, political or other secular activity which may be associated with religious practice. The Mauritius Supreme Court has held that the civil laws and the “personal laws” co-exist but in their own respective spheres. When religion dictates certain requirements on marriage and tries to have those requirements have the force of law, it impermissibly steps out of its sphere. In this case, the Muslim couple’s desire to apply certain Muslim laws addressing marriage, divorce and devolution of property and permitting polygamy is not guaranteed by the constitution, because these practices violate civil laws for protection of the common good and prevention of discrimination against women.<sup>44</sup> The second objection was answered by KM Munshi; giving reference to Khoja & Cutchi Muslims who were forced to conform to the Shariat Act, he said, “When you want to consolidate a community, you have to take into consideration the benefit which may accrue to the whole community and not to the customs of a part of it. It is not therefore correct to say that such an act is tyranny of the majority.”<sup>45</sup>

On continued resistance from most of the Muslim members, Ambedkar contended, “It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary.”<sup>46</sup>

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43 *Id.*

44 *Supra* note at 56.

45 *Supra* note at 56.

Today, on the one hand we have people who want an immediate implementation of a uniform civil code, advocating radical reforms in the society. On the other hand, we have people who are determined to not abandon their obsolete personal laws. Ambedkar's statement proves to be an ice-breaker even in today's context.

### **MAJORITARIANISM UNDER THE GARB OF SOCIAL REFORM?**

Asghar Ali Engineer writes, "All secular forces today have disowned uniform civil code as communal forces have adopted it."<sup>47</sup> Ever since the Shah Bano case, Article 44 has been used as a tool for bringing in radical reforms, and abused by Hindu extremists for their political gains. This has led to a great confusion among Muslims, as to the intentions of the government in enacting a uniform code, with many people hinting that a uniform civil code is an attempt to Hinduize the diverse communities, under the garb of social reform.

Ideally, a progressive civil code should be a part of every nation's legal system. It can play a major factor in modernizing a people, whereas abiding by the old archaic laws can only make a society regressive. Roscoe Pound has remarked that law is a tool for social engineering. If the dream of multiculturalism and fraternity has to be achieved, the redundant customary and religious laws would have to be let go by the respective communities.

A Uniform Civil Code should be a secular code, with no link to any of the religious laws whatsoever. The endeavour for a common civil law must be to end discrimination, and not stamp majority might.<sup>48</sup> The aim of UCC should not be just national consolidation, but also more importantly all round modernisation of the Indian society.

### **CONCLUSION**

We must not let misinformation about Islamic laws permeate us or consume us, for we see how Islamic law had and has made great progress in the past and still

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<sup>46</sup> *Supra note* at 56.

<sup>47</sup> (*Secular Perspective*, 16-31 February 2005).

<sup>48</sup> *Supra note* at 54.

continues to do so in various Islamic countries. To really understand the Islamic spirit the Quran must be read in consonance with the present Islamic scenario and also keeping in mind what steps a moral human being must do in certain circumstances. There are certain spheres of life where morals must weigh heavier than religious thoughts, after all, giving a woman equal rights doesn't make anyone a religious man, all it does is affirm the humanity in him. Hence, Muslim Personal Laws must be codified in India soon enough before the religious texts are thoroughly misused and human goodness disrespected. This will have a strong impact on minority laws in India and also the dynamics between the majority and the minority. This will even pressurise the state governments across the north-east to take up codification of the tribal laws in their respective areas, a political and legal space which is very often ignored and avoided by the north-eastern governments. The reason why UCC lies in the closet today is because there is unwillingness and uneasiness among the politicians of the country to bring it up and solve it, since they stand to benefit hugely from religious and casteist segregations, earning them vote banks. However, to decide on the debate of UCC, one can always take inspiration from the Indian Constitution itself which was inspired and tried to take in the best from various constitutions around the world. A discussion forum on UCC or a government committee must be set up to take up such a task so as to discuss at length the possibility of a common civil code for all which takes in from the best of France's or Turkey's, also keeping in mind the great differences between the countries' cultural, political, social and economic scenarios and milieu. However, the debate must be revived and taken up seriously, to solve the minor differences which people are made to feel through the law of the land and which gives rise to the 'Indian identity crisis.' Sure, we can boast of a diversity which no one else can, we can even go on to the extent of saying that India is not one country but many countries within a country, but that doesn't mean that our laws instead of trying to unite only further divide us, for our minds may owe a dozen allegiances but our hearts all unite in our love for India.

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# UNIFORM CIVIL CODE: AN ORNAMENTAL LEGISLATION

*Debajyoti Saha & Sunayna Bhat\**

## INTRODUCTION

Uniform common code in India is the proposition to supplant the individual laws in view of the sacred writings and traditions of each significant religious with a typical set overseeing each national. These laws are recognized from open law and cover marriage, separate, legacy, selection and upkeep.<sup>1</sup> The Uniform Civil Code is one of the directive principles of state policy contained in the Constitution of India. It directs the state “to endeavour to secure for the citizens a uniform civil code throughout the territory of India”. It created controversy since its inception. The multiplicity of diverse religions caused alarming situations. The apex court from time to time, has reacted sharply, favoring its enforcement even at the cost of its ‘judicial discipline.’ The latest pronouncements in the cases of *John Vallamottom and Anr. v. Union of India*<sup>2</sup> and *Smt. Sarla Mudgal v. Union of India & others*<sup>3</sup> have set example for the ‘judicial activism’.

Individual laws were initially surrounded amid the British Raj, predominantly for Hindu and Muslim subjects. The British dreaded resistance from group pioneers and abstained from further meddling inside this local circle. The interest for a

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1 Nilanjana Bhaduri Jha, “Does India Really Need A Uniform Civil Code?” TIMES OF INDIA, Available at <http://timesofindia.indiatimes.com/india/Does-India-really-need-a-Uniform-Civil-Code/articleshow/103103.cms>. (Last accessed on 25/02/2017).

2 John Vallamottom and Anr. v. Union of India, Writ Petition (Civil) No. 242 of 1997.

3 Smt. Sarla Mudgal v. Union of India & others, AIR 1995 SC 1531.

uniform common code was first advanced by ladies activists to start with of the twentieth century, with the target of ladies' rights, equality and secularism. Till Independence in 1947, a couple law changes were passed to enhance the state of ladies, especially Hindu dowagers. In 1956, the Indian Parliament passed Hindu Code Bill in the midst of huge restriction. Despite the fact that an interest for a uniform common code was made by Prime Minister Jawaharlal Nehru, his supporters and ladies activists, they needed to at long last acknowledge the trade off of it being added to the Directive Principles as a result of overwhelming resistance. The open deliberation for a uniform common code goes back to the pioneer time frame in India. The Lex Loci Report of October 1840 stressed the significance and need of consistency in codification of Indian law, identifying with violations, proofs and contract however it prescribed that individual laws of Hindus and Muslims ought to be kept outside such codification. According to their comprehension of religious divisions in India, the British isolated this circle which would be administered by religious sacred writings and traditions of the different groups (Hindus, Muslims, Christians and later Parsis). These laws were connected by the nearby courts or panchayats when managing standard cases including common debate between individuals of a similar religion.<sup>4</sup>

The State would just intercede in uncommon cases. In this way, the British let the Indian open have the advantage of self-government in their own particular residential matters with the Queen's 1859 Proclamation promising supreme non-obstruction in religious matters. The individual laws included legacy, progression, marriage and religious services. The general population circle was represented by the British and Anglo-Indian law as far as wrongdoing, land relations, laws of agreement and confirmation—this connected similarly to each resident independent of religion All through the nation, there was a variety in inclination for scriptural or standard laws in light of the fact that in numerous Hindu and Muslim people group, these were here and there at conflict; such occurrences were available in

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4 Satyabrata Rai Chawdhuri, "A Common Civil Code: It Is A Constitutional Obligation", KNOW LAW, Available at <http://knowlaw.in/wp-content/uploads/2016/09/F.-Uniform-Civil-Code.pdf>. (Last accessed on 25/02/2017).

groups like the Jats and the Dravidians.<sup>5</sup> The Shudras, for example, permitted dowager remarriage - totally in spite of the scriptural Hindu law. The Hindu laws got inclination due to their relative simplicity in usage, inclination for such a Brahminical framework by both British and Indian judges and their dread of restriction from the high standing Hindus. The trouble in examining each particular routine of any group, case-by-case, made standard laws harder to actualize. Towards the finish of the nineteenth century, favoring nearby supposition, the acknowledgment of individual traditions and conventions expanded.<sup>6</sup>

The term common code is utilized to cover the whole assemblage of laws representing rights identifying with property and generally in individual matters like marriage, separation, support, reception and legacy. The interest for a uniform common code basically implies binding together all these individual laws to have one arrangement of mainstream laws managing these perspectives that will apply to all subjects of India independent of the group they have a place with. In spite of the fact that the correct shapes of such a uniform code have not been spelt out, it ought to probably fuse the most present day and dynamic parts of all current individual laws while disposing of those which are retrograde. The spine of debate rotating around Uniform Civil Code has been secularism and the opportunity of religion identified in the Constitution of India. The introduction of the Constitution expresses that India is a “Common Democratic Republic”.<sup>7</sup> This implies that there is no State religion. A common State should not victimize anybody on the ground of religion. A State is just worried with the connection between man and man. It is not worried with the connection of man with God. It doesn't mean permitting all religions to be polished. It implies that religion ought not meddle with the ordinary existence of a person.

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5 Virendra Kumar, “Towards A Uniform Civil Code: Judicial Vicissitudes [From Sarla Mudgal (1995) To Lily Thomas(2000)]” 42 JILI 315 (2000).

6 Lok Sabha Secretariat, CONSTITUENT ASSEMBLY DEBATES Vol. III, 551, 23 Nov. 1948.

7 Kirti Singh, “OBSTACLES TO WOMEN’S RIGHTS IN INDIA”, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, Deakin Library, Available at <http://link.library.deakin.edu.au/portal/Human-rights-of-women—national-and/Hfo4PeRL9Lg/>. (Last accessed on 16/12/2016).



The Constitution of India ensures equality to all citizens irrespective of the caste, sex, creed, religion and place of birth. Freedom of Religion, its practice and propagation, freedom of culture, freedom to manage religious affairs and educational rights are guaranteed as fundamental rights to all citizens especially to minorities of the Constitution.<sup>8</sup> Despite such effective constitutional safeguards, communal harmony and the peaceful co-existence of different communities and amity of citizens are affected on negative tenor.

Mr. Mohammad Ismail Sahib from the Madras Province opined for the amendment to the section that any group, community or section of people shall not be obligated to give up their personal laws. If we are including the provision of uniform civil code, that can be regimentation of the personal laws of the people.<sup>9</sup> Such regimentation may create disharmony among the people. The same opinion was expressed by Mr. Nazirrudin Ahmad. He stated for the procedure by the legislature to be implemented for the recognition of uniform civil code by the citizens. The community should give their approval for the same.<sup>10</sup> The uniform civil code is likely to violate the very essence of Art.19 of the Draft Constitution, “subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.” It seemed to be murdering the consciences of the members of different religions.<sup>11</sup>

But Mr. Hussain Imran from the Bihar Province opined that the legislature has to wait till whole India has got educated, when mass illiteracy has been removed, when people have advanced, when their economic conditions are better, when each man is able to stand on his own legs and fight his own fights.<sup>12</sup> Shri K.M.Munshi argued that the personal laws have to be unified in such a way that the way of life of the whole country may in course of time be unified and secular.

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8 Mohammad Shabbir, Ambedkar on Law, CONSTITUTION AND SOCIAL JUSTICE, Rawat Publications at p.200.

9 *Id* at 201.

10 *Id* at 202.

11 C.A.D, vol. VII, pp.538, 540-552.

12 *Supra* note 8 at 210.

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The aim is to divorce the religion from personal laws and to create disharmony. Religion must be restricted to spheres which legitimately appertain to religion and the rest should be regulated by a uniform code. National unity is of the prime concern for us.<sup>13</sup>

Shri Alladi Krishnaswami Ayyar from Madras constituency opined that we should derive knowledge from the British that when they conquered India, they implemented uniform criminal law i.e. Indian Penal Code for all the citizens. People did not protest against the same so why would they protest now? Every system law is derived is not self-contained. They are derived from different parts of the world. So if we want to unite India then we have to forget the differences existed among the personal laws.<sup>14</sup>

Muslim Personal Law from Mughal regime down to the British administration of justice, was duly protected and implemented. It is derived from Islam and the Islamic way of life. It manifests the religious faith and cultural ethos of the Muslim community.<sup>15</sup> It is part and parcel of Islamic religion and culture. Religion is a matter of faith and conscience. The culture and civilization incorporate the religious ethos. The Muslim personal law being the very core of Islamic religious faith amalgamates in itself 'belief', 'practice' and 'propagation'. Muslims, as a community, being the followers of different scholastic thoughts are divided into diverse sects and sub-sects which constitute religious denomination. Each sect of the Muslim has the fundamental rights to manage its own affairs in matter of religion under Art.23(b) of the Constitution of India<sup>16</sup>

Islamic family status, family relations, matrimonial issues and other related matters and their governance are the core and crux of the Muslim Personal Law. Of course, these institutions reflect the culture of the Muslim community.<sup>17</sup> Under

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<sup>13</sup> *Id* at 211.

<sup>14</sup> *Id* at 212.

<sup>15</sup> Archana Parashar, *WOMEN AND FAMILY LAW REFORM IN INDIA : UNIFORM CIVIL CODE AND GENDER EQUALITY*, Sage Publications, 1992 edition, p. 200.

<sup>16</sup> *Id* at 201.

<sup>17</sup> Ajai Kumar, *UNIFORM CIVIL CODE: CHALLENGES AND CONSTRAINTS*, Satyam Law International, 2012, p.100.

Article 29(1) of the Constitution of India, Muslims are empowered to preserve their distinct culture. Muslim Culture is intertwined and intermixed with the Islamic way of life. Muslim Personal law cannot be segregated from Islam and the Islamic culture. During the British regime, Muslims were allowed to follow their own personal laws. Permission to follow their personal laws assumed statutory recognition in the year 1753 by the Charter of George II, whereby, Muslims could get exemption from the application of the Mayor's court. By the permission under the relevant provision of the Charter, Muslims could adjudicate their cases on the basis of their personal laws.<sup>18</sup>

Non-interference with the personal laws was not the innovation of the British administration of justice. Rather, the British India inherited the same from its predecessor, the Mughal administration of Justice. Muslim rulers were convinced that neither it was just nor it was equitable to force other communities to give up their personal laws.<sup>19</sup> Consequently they allowed all religious communities to practice and profess their own personal laws. The feasibility and legitimacy of the policy of the Muslim rulers to the effect influenced the British administration in India to promulgate the Muf'assil Regulation, 1772 during the time of Warren Hastings, and later passed the Regulation of 1780.<sup>20</sup>

Again in 1937, the British Imperial Legislature assured the application of Muslim Personal Law to Muslims by enacting The Muslim Personal (Shariat) Application Act, 1937. Under the Article 372, the Constitution of India ensures the application of "all the law in force in the territory of India immediately before its commencement.

"...all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or a competent authority.

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18 Vasudha Dhagamwar, *Towards The Uniform Civil Code*, BOMBAY INDIAN LAW INSTITUTE 1989, P.300.

19 *Id* at 301.

20 *Id* at 302.

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Explanation: The expression “law in force” in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed...<sup>21</sup>

The very letter and spirit of Article 372 of the Constitution reveal that the Muslim Personal law is the ‘law in force’ as it is enacted by the competent legislature. Since its application, the Act has never been altered or repealed or amended by the competent legislature or other competent legislature till date, so it is ‘law in force’ or ‘living law’ according to Article 372 of the Constitution of India. Entry 5 of list III (Seventh Schedule) of the Constitution does recognize the existence of numerous personal laws. Muslim Personal law is one of the existing personal laws in India.<sup>22</sup>

Muslim Personal Law being the part and parcel of the religion and culture of the Muslim Community, is duly protected by part III of the Constitution. In such constitutional scenario, if the state enacts any law which takes away or abridges the personal law of the Muslim Community, it shall start Article 13(2) of the Constitution which reads:

The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall extent of the contravention, be void.<sup>23</sup>

The doctrine of ‘reasonable classification’ is recognized under Article 14 of the Constitution which deals with the ‘equality before the law’ and ‘equal protection of the laws’. Muslims in India have their own distinct language, religion and culture, thus, they constitute a ‘separate class’ as a distinct community. The philosophy of ‘reasonable classification’, they constitute a ‘separate class’. Being a separate class, they are constitutionally entitled to have their separate set of personal laws.<sup>24</sup>

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21 *Supra* note 8 at 213.

22 *Supra* note 17 at 103.

23 *Supra* note 18 at 303.

24 *Id* at 304.

It is paradoxical as on the one hand, all citizens are entitled to freedom of conscience and the right to profess, practice and propagate religion, and while on the other hand, the Constitution directs the state to endeavour to secure for the citizens a 'Uniform Civil Code' throughout the territory of India.<sup>25</sup> Any section if citizens having a distinct language, script or culture of its own shall have the right to conserve the same. Every religion's denomination or any section thereof shall have the right to manage its state of affairs in matters of religion.<sup>26</sup>

Not only religious belief, but acts done in pursuance of religious performance or practice: rites, ceremonies observances and modes of worship are protected under Article 25(1) and Article 26(b) of the Constitution. The constitutional provisions embody the principle of religious tolerance and serve to the secular nature of Indian Democracy which the architects of the Constitution considered the very basis of it.<sup>27</sup> Freedom of conscience connotes individual's doctrines and dogmas pertaining to all matters which are considered by him or her be essential and conducive to the spiritual well-being to carry out religious practices in pursuance of religious beliefs which are considered by that religious beliefs to be its essential and integral part.<sup>28</sup> Such religious practices are constitutionally guaranteed as Fundamental Rights. Its practice is religious, if it is considered as the essential and integral part of the religion, and depends on the conscience of the follower of the religion and its tenets.<sup>29</sup>

The practice of the Muslim Personal Law by the Muslim is the practice of Islam. The practice of Muslim Personal Law manifests the culture of the Muslim Community. Muslims are guaranteed by the Constitution to preserve and conserve their culture.<sup>30</sup>

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25 *Id* at 305.

26 *Id* at 306.

27 *Supra* note 18 at 306.

28 *Id* at 307.

29 *Supra* note 8 at 206.

30 *Supra* note 17 at 108.

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Religion is not only a matter of faith, but also prescribes ritual observance, ceremonies and modes of religious performance. The Muslim Personal Law is the integral part of Islam. Marriage, dower, divorce, maintenance, guardianship, administration of estate and inheritance, waqf, wills etc. constitute the core of Muslim Personal Law.<sup>31</sup> All these institutions are derived and developed by the primary and secondary sources of Shariat. It is an established postulate of the Islamic jurisprudence that in very concept of the Muslim Law, the essence of religion and values of ethics and morals are incorporated.<sup>32</sup>

Islamic religious faith become meaningless if it is not practiced according to the dictates of Shariat. For example, in Islam, to have faith in five times daily prayers and Haj (pilgrimage) are not sufficient till the moment these are not performed according to the Sunnah(action of the Prophet) by the Muslims.<sup>33</sup> According to the Constitutional Scheme, the state is under an obligation to protect the religious and cultural freedom of which Muslim personal Law is an inseparable part. Under the Islamic scheme, the ambit of Muslim Personal Law covers marriage, dower, guardianship etc.<sup>34</sup> These are the important components of religious faith and practice as revealed by Allah, the Almighty in His Holy Book, expounded by the Prophet (peace and blessing be upon him), collected, codified and interpreted by the great caliphs and learned Imams.

In view of the religious and cultural background of the Muslim Personal Law, any attempt by judiciary or any other wings of Government of India to change or codify or repeal it, would amount to rebellion against Allah, the Almighty, the Prophet(peace and blessing upon him), great caliphs, learned Imams and its followers. Also, any such attempt would violate the religious and cultural freedom of Muslims which are guaranteed by the Constitution of India.

The Indian judiciary on the issue of the Uniform Civil code and the Personal Law has not been consistent. It has adopted diverse approaches on different occasions.

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31 *Supra note* 18 at 309.

32 *Id* at 310.

33 *Supra note* 8 at 210.

34 *Supra note* 17 at 111.

The Division Bench of the Calcutta High Court in *Naresh Chandra Bose v. Schindra Nath Deb*<sup>35</sup> held that the expression “law in force” under Article 372(2) of the Constitution is not limited to statutory laws, but it is extended to cover the customary laws and personal laws like that of the Muslim community. Further, Article 44 of the Constitution itself recognized the existence of different sets of personal laws of different communities.

The Supreme Court in *Krishna Singh v. Mathura*<sup>36</sup> opined that in process of applying the personal laws of the parties, the judges of the High Court ‘could not introduce their concepts of modernity’. In view of the Supreme Court, the Constitution has maintained the position of personal laws status quo.

The Delhi High Court in *Harvindra Kaur v. Harmander Singh*<sup>37</sup> appreciated the sanctity of personal laws. The relevant observations of the Delhi High Court are extracted below:

1. The introduction of the Constitutional in the home of Personal Laws is most appropriate.
2. The Constitution is like introducing a bull in a China Shop.
3. It will prove to be a ruthless destroyer of the marriage institution and all it stands for.
4. In privacy of home and the married life, neither Article 21 nor Article 14 have any place.
5. In sensitive place which is most intimate and delicate, the introduction of cold principles of the constitutional law will have the effect of weakening the marriage bond.

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35 *Naresh Chandra Bose v. Schindra Nath Deb*, AIR 1956 Cal. 224.

36 *Krishna Singh v. Mathura*, (1981) 3 SCC 689.

37 *Harvindra Kaur v. Harmander Singh*, AIR 1984 Del. 66 of 75.

Academicians have the similar view:<sup>38</sup>

Inside the privacy of homes, to the cases paternal, marital, filial and fraternal relationships that requirement of our constitutional law, we must appreciate, have only a limited application.

Chief Justice Gajendragadar opined that the non-implementation of Article 44 amounted to a grave failure of Indian democracy. He expressed his conviction for its early implementation. In his view, a Common Civil Code was imperative for evolving a new secular social order.<sup>39</sup>

Justice Hedge, the Judge of the Supreme Court observed: Religious-oriented laws were a concept of medieval time, alien to modern societies which are secular as well as cosmopolitan. So long our laws are religious-oriented laws, we can build up hardly a homogeneous nation.<sup>40</sup>

The Constitution Bench in the case of *Mohd. Ahmad v. Shah Bano Begum*<sup>41</sup> opined on the Uniform Civil Code, while it was not the issue for the judicial interpretation before the Supreme Court. The relevant observation held unanimously by the five judges are noted below:<sup>42</sup>

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that the state shall endeavor to secure for the citizens of India a uniform civil code. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim Community to take a step in the reformation of laws towards the Uniform Civil Code.<sup>43</sup> A common civil code will help a cause of national

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38 See, Bhattacharya, A.M., *MUSLIM LAW AND THE CONSTITUTION*(ed.2nd.,1994), Mohammad Shabbir, *MUSLIM PERSONAL LAW AND JUDICIARY*(ed. 1st,1988) and Tahir Mahmood, *PERSONAL LAWS IN CRISIS*(ed.1st, 1986)pp.17,47-48, 133.

39 Gajendragakar, *SECULARISM AND CONSTITUTION*(ed.1st 1977) p.126.

40 See, S.Hdge, *ISLAMIC LAW IN MODERN INDIA*(ed.1st 1977) p.3.

41 *Mohd.Ahmad v. Shah Bano Begum*, AIR 1985 SC 945.

42 *Id.*

43 *Supra note 8* at 212.



integration by removing desperate loyalties to laws which have conflicting ideologies. No community is likely to bell a cat by making gratuitous concession on this issue of the state which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and, unquestionably, it has legislative competence to do so.<sup>44</sup> We understand the difficulties in bringing different persons of diverse faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution has any meaning. Inevitably, the role of the reformer has to be assumed by the court itself because, it is beyond the endurance of the sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between the personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

Again in a two judges bench of the Supreme Court in *Ms. Jorden Diegdeh v. S.S. Chopra*<sup>45</sup> reiterated:

...the time has come for the intervention. ..in these matters to provide for a Uniform Civil Code of marriage and divorce.

Justice O. Chinappa Reddy speaking for the court, referred to the observations of the court in the Shah Bano's case and observed:

It was just the other day that a Constitution Bench of the Court had to emphasize the urgency of infusing the life into Article 44 of the Constitution which provides for a Uniform Civil Code. The present case is yet another which focuses our immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of a Uniform Civil Code...<sup>46</sup>

Now, the latest but very controversial verdict of the Supreme Court in the *Smt. Sarla Mudgal case* wherein the Supreme Court, preferred to deal with the Uniform Civil Code was not raised for the judicial treatment. Factually speaking,

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44 *Supra* note 8 at 214.

45 *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 935.

46 *Supra* note 17 at 113.

Meena Mathur one of the petitioners was married to Jitender Mathur. Her husband embraced Islam and married Fatima, the name after her conversion to Islam. The marriage was solemnized when both embraced Islam and adopted Islam as a way of their life accordingly. Petitioner contended that the conversion of her husband to Islam was just to remarry by circumventing the provision of section 494 of the Indian Penal Code, 1860. He asserted that, being a Muslim, he could marry to the extent of four, provided he was able to do justice to all the wives according to the dictates of the Holy Quran and Sunnah of the Prophet (peace and blessing be upon him). Another petitioner, Geeta's husband, converted to Islam and married after conversion to a Muslim girl. His first wife contended that her husband's conversion to Islam was just to facilitate the second marriage as in the Islamic matrimonial system, a male could marry to the extent of four at a time. Geeta, a Hindu wife whose husband converted to Islam married to Deepa, a Hindu girl after conversion to Islam, contended that the conversions to Islam were to facilitate the marriage. Factual narrations in the preceding lines reveals that the issue of the Uniform Civil Code was not raised before the Supreme Court for its verdict. Nevertheless, Justice Kuldeep Singh preferred to opine on the need and the relevance of the Uniform Civil Code in India. For reason best known to Justice Kuldeep Singh and his companion judge Justice R.M. Sahai who suo-moto picked up the issue of the Uniform Civil Code and expressed his opinion on its length. Both expressed their favor for the implementation of it relying on the Shah Bano case of 'unity in diversity' as one of the peculiarities of India.<sup>47</sup> He did not pay heed to the doctrine of 'secularism' in the Indian context. He brushed aside the religious and cultural freedom of Indian Muslims guaranteed to them as Fundamental Rights by the Constitution of India and preferred to observe:

...those who preferred to remain in India after the partition fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in Indian Republic there was only one nation-Indian nation... and no community could claim to remain a separate entity on the basis of the religion.

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<sup>47</sup> *Supra* note 17 at 120.

To secure a Uniform Civil Code, Justice Kuldeep Singh manifested unwarranted zeal and finally made an earnest appeal to the government of India:

We, therefore, request the Government of India through the Prime Minister of the country to have fresh look at the Article 44 of the Constitution of India and endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India.<sup>48</sup>

Article 44 is based on the concept that there is necessary connection between religion and the personal law in civilized society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal laws. Marriage, succession and like matters of a secular nature cannot be brought within the guarantee enshrined under Article 25, 26 and 29. The legislation-not religion- being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded or supplemented by introducing a Uniform Civil Code. In this view of the matter no community of human civil code for all the citizens in the territory of India.

Besides other key concepts, secularism, religious and cultural freedom constitutes the 'basic structure' of the Indian Constitution. Religious freedom under Article 25 is not confined to freedom of conscience but its ambit covers right to practice, profess and propagate the religion by its own citizens. Indeed, the religion is a wide and pervasive concept. It is confined to 'faith' only because 'practice' and 'propagate' are the part and parcel of the religion. 'Faith' represents the inner aspect of religion, while 'practice' and 'propagate' manifest the 'external aspect'. Lastly, the general public has to understand the intricacies and implement the code.

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48 *Id* at 121.

# UNIFORM CIVIL CODE AND ITS CONSTITUTIONAL APPARATUS

*Nithya.C & Sera Rose George\**

## INTRODUCTION

It has become the need of the hour to enact a uniform civil code in our country. The simmering debate over the enactment of a uniform civil code started from the inception of the post-independence era. It is unfortunate that uniform civil code and the article 44 which envisages the same, is still in cold storage ever since the inception of the constitution. Homogenizing the personal laws and lack of a suitable legal and political atmosphere is one of the strong impediments to the enactment of the uniform civil code.

While the Uniform Civil Code still remains an anathema among various communities, what we should first understand is that the Uniform Civil Code does not necessarily entail the repeal of personal laws. For that matter, the Indian Succession Act or the Indian Special Marriage Act had not brought about any change or extinguished the personal laws relating to it. In fact, the Indian Special Marriage Act, a common marriage code for all Indians, was amended in 1976 with the addition of a proviso stating that Hindus marrying under the Act<sup>1</sup>, would continue to be governed by the Hindu Succession Act. Even with respect to Muslim personal laws, the Muslim scholars and Jurists including Tahir Mahmood, have opined that the Uniform Civil Code is not violative of the Islamic personal

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1 Special Marriage Act, 1954.

laws.<sup>2</sup> He states that: *A Muslim can remain Muslim even if he opts out of Shariat<sup>3</sup> and subscribes to a Uniform Code.*

### **HISTORICAL BACKGROUND**

The Uniform Civil Code is in no way a political agenda, but more of an idea to bring equality among people of different cultural backgrounds. Post-Independence, the need for a Uniform Civil Code was raised by Jawaharlal Nehru and his supporters, and the result being a compromised version added to the Directive Principles, due to heavy opposition. Apart from being an issue of secularism, it became one of the controversial topics of 1985 with the Shah Bano case.<sup>4</sup> The dispute was about the Muslim Personal Law which was partially based on the Sharia law and had remained unreformed since 1937, permitting unilateral divorce and polygamy. The Shah Bano case made it an issue focusing on identity politics, targeting specific religious minorities versus protecting its cultural identity. The debate for a Uniform Civil Code still remains one of the controversial issues of the 21<sup>st</sup> century with the secularism and democracy of the country questioned by various communities. Keeping in mind that the Code is not all about focusing on just the Muslim community, we can analyse the issues of the other communities that are going to be dealt with when the Code comes into effect. The issue put forth with regard to the Hindu personal law is a woman's right to property. Indeed, there are laws giving rights to women in ancestral properties as well as properties belonging to her husband or in-laws, but hardly practiced in reality. The recent Questionnaire on the UCC by the Law Commission, asks the question whether steps should be taken to ensure that Hindu women are better able to exercise their right to property. The most pertinent issue for Christians is perhaps the two-year waiting period for Christian couple seeking divorce by mutual consent, whereas the waiting period for Hindus and

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2 Anam Abrol; *Code for a Uniform Civil Code* (1988) ISLJ at 110.

3 Muslims in India are governed by "The Muslim Personal Law (Shariat) Application Act, 1937." It directs the application of Muslim Personal Law to Muslims in marriage, mahr (dower), divorce, maintenance, gifts, waqf, wills and inheritance.

4 Mohd. Ahmed Khan v. Shah Bano Begum & Ors., 1985 AIR 945, 1985 SCR (3) 844.

other religions covered by their law is only six months. As for the Muslims, the founder of Bharatiya Muslim Mahila Andolan, Zakia Soman, said, “Hindu, Parsi and Christian women have their own codified laws under which they are able to seek justice. But Muslim women are suffering from legal discrimination as we don’t have codified Muslim law in our country. Muslim Personal Law (Shariat) Application Act, 1937 is incomplete. So we need family law, like others.” She also opined that UCC should be optional, “so Muslim women can decide what they want.”

However, Joseph Dias, General Secretary of Catholic Secular Forum, strongly opposed the idea of UCC, because he feels it is a political move. He told Mumbai Mirror, “The State cannot encroach upon the religious freedom given by the Indian Constitution. If necessary, we can amend the present codified laws but there is no need of a new law. The codified laws come from different religious personal laws and these are based on religious texts or beliefs. State law cannot interfere and violate in religious customs. It will only invite social disharmony and disturb the social fabric in a diverse country like India.” In short this is the same argument raised by half of different communities, keeping aside their religions. This opposition has been mainly because of the idea of the interference of politics, to be precise the BJP Government has had a role in the implementation of UCC. But that is not the case, in fact, the judiciary has had a role in promoting this concept. In October, 2015, the Supreme Court of India asserted the need of a Uniform Civil Code and said that, “This cannot be accepted, otherwise every religion will say it has a right to decide various issues as a matter of its personal law. We don’t agree with this at all. It has to be done through a decree of a court.”<sup>5</sup>

The Law Ministry in its directive dated June 17, 2016 asked the law commission to examine the matter and submit a report. The Commission issued the questioned (mentioned previously) seeking views on family laws of all religions. The Union Government filed an affidavit in the apex court supporting SairaBano’s plea for

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5 Anand, Utkarsh (13 October 2015), *Uniform Civil Code: There’s Total Confusion, Why Can’t It Be Done, SC Asks Govt.*, New Delhi: THE INDIAN EXPRESS.

ban on talaq-e-bidat.<sup>6</sup> This led to various Muslim groups led by the All India Muslim Personal Law Board (AIMPLB) to accuse the Modi Government of waging war against Muslims. BS Chauhan, former Chief Justice said the timing of the questionnaire was purely coincidental and that the commission's exercise was independent of the triple talaq matter in the Supreme Court. "We have no political agenda. Also, the SC has not asked us to give any feedback, nor are we giving any. Whatever the SC decides will be binding on us."

A survey conducted by the Bharatiya Muslim Mahila Andolan, found that almost 90 per cent of Muslim women in India want a ban on "triple talaq" and polygamy in Muslim personal law. This demand has been made within the framework of codifying Muslim Personal Law, and not in the favour of a Uniform Civil Code, mainly because there is no clarity as yet to what the Uniform Civil Code would look like and also because those who advocate for a UCC comes from a particular right-winged group.

### **UCC AND THE CONSTITUTION OF INDIA**

Those in favour of the Uniform Civil Code have incessantly averred that the differentiated personal laws are not in consonance with several constitutional provisions. Besides Art 44, which will be discussed in detail in the latter part of this article, there are several other constitutional provisions that are repugnant with the existing regime of differentiated personal laws. For instance, most of the religious practices under the different personal laws and codes stand at odds with the fundamental rights – be it the right to equality<sup>7</sup> or the right to freedom<sup>8</sup> and several other rights incorporated under Part III of the Constitution of India. It is indeed true that these rights aren't absolute and that they are subject to reasonable restrictions for the protection of Public Interest.<sup>9</sup> But, the application

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6 Shayara Bano v. Union of India & Ors. Writ Petition (Civil) No. 118 OF 2016 (SC) (Available at <https://wallsofignorance.files.wordpress.com/2016/03/shayara-bano-writ-petition-maari-baari-62-18032016.pdf>). (Last accessed on 02/01/2017).

7 Art 14 of THE CONSTITUTION OF INDIA.

8 Art 19-22 of THE CONSTITUTION OF INDIA.

9 Basu, Durga Das (2003). SHORTER CONSTITUTION OF INDIA (13th ed.). Nagpur: Wadhwa & Co. p. 1972. ISBN 978-81-8038-206-2., p.35.

of personal laws cannot necessarily be equated to ‘the protection of public interest’. Religious activities cannot be confused with Secular acts like Succession, marriage and like matters of secular nature. The subtle difference between the two was spelt out by Justice Jeevan Reddy in *S.R. Bommai v. Union of India*.<sup>10</sup> It was held that religion is the matter of individual faith and cannot be mixed with secular activities. But secular activities can be regulated by the State by enacting a law.

Yet another part of the constitution that endorses the enactment of a Uniform Civil Code is the very Preamble of the constitution of India. The preamble, in itself, explicitly states that India is a ‘Sovereign, Socialist, Secular, Democratic, Republic’. The absence of a uniform civil code and the application of the differentiated personal laws would defeat the idea of a “Secular India”; an idea which is substantially incorporated in the Preamble for a reason. Thus even after 67 years since the constitution came into force, the lack of constitutional consonance stands as yet another reason to ascertain that the enactment of the uniform civil code still stands as a pressing issue.

### ***Article 44***

By tracing back the history of the uniform civil code in India, it is apparent that the inclusion of a uniform civil code in the constitution was propelled right from the very inception of our constitution. Since it became a hugely debated topic, the makers of the constitution decided to meet halfway and incorporate the uniform civil code as a directive principle under Art 44.

Art 44 states that “The state shall endeavour to secure for citizens a uniform civil code throughout the territory of India.” This provision is considered as a well-shielded compromise since the provisions pertaining to the directive principles are mere guidelines and need not be mandatorily followed. It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation.<sup>11</sup>

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<sup>10</sup> (1994) 3 SCC 1.

<sup>11</sup> *ABC v. The State (NCT of Delhi)* 2015 SCC Online SC 609.



The enforceability of the Directive Principles of State Policy (DPSP) has also been categorically barred as per Article 37 of the Constitution. Nonetheless, it is pertinent to note that this compromise, which involved constraining the code within a directive principle, was vehemently opposed by M R Masani, Hansa Mehta and Rajkumari Amrit Kaur. Among them, Rajkumari Amrit Kaur argued that: “One of the factors that have kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life. We are of the view that a Uniform Civil Code should be guaranteed to the Indian people within a period of five or 10 years.”<sup>12</sup> This also establishes the fact that the legislative intent of the constitution makers was to enforce and enact such a uniform code within a period of 5 to 10 years.

DPSP is part of the cluster of provisions that remains as constitutional goals alone. This could also imply that the purview of Art 44 and the enactment of a common code for all may extend to the fundamental duties as well. The fundamental duty specifically involved here would be the duty of every citizen “to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women”.<sup>13</sup> Article 44 encourages the elimination of differences between the various personal law to instil feelings of harmony and brotherhood as a result. However, this provision has remained a “dead letter” despite numerous reminders and observation from the Supreme Court to implement the provision.<sup>14</sup>

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12 Note of M R Masani, Hansa Mehta and Rajkumari Amrit Kaur (in the CONSTITUENT ASSEMBLY), cited in Shiva Rao, B., Menon, V. K. N., Kashyap, S. C., & Iyengar, N. K. N. (1966). *The Framing of India's Constitution*. New Delhi, INDIAN INSTITUTE OF PUBLIC ADMINISTRATION; [distributors: N. M. Tripathi, Bombay. Vol II, pg. 177.].

13 Article 51A(e) in THE CONSTITUTION OF INDIA.

14 Basu, Durga Das (2003). *SHORTER CONSTITUTION OF INDIA* (13th ed.). Nagpur: Wadhwa & Co. p. 1972. ISBN 978-81-8038-206-2., pp. 456–457.

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### ENACTMENT OF THE CODE – A PREROGATIVE OF THE LAW-MAKERS

The predicament here is that the enactment of such a code demands a suitable legal and political atmosphere as a necessary requisite, due to the absence of which the code still remains a dead letter. Besides the several stray observations made by the Supreme Court (throughout a plethora of cases<sup>15</sup>), there has been no binding legal precedents as such with respect to the common code's appeal. These observations cannot have much legal relevance and can only be a source of 'obiter dicta'. The absence of a binding precedent may be attributed to the fact that the enactment of such a uniform civil code is upon the legislature and is not within the realms of the judiciary. This was observed by the Court while dealing with a PIL filed by Ashwini Upadhyaya over the desirability of bringing in a uniform civil code in 2015. The PIL was dismissed on the grounds that it is upon the legislature to initiate such a common code. In the instant case, the observation of bench of Chief Justice TS Thakur, Justices AK Sikri and R Banumathi runs as follows; "It is for Parliament to take a call on it (uniform civil code). As far back in 1994 in *Maharishi Avadhesh v. Union of India*<sup>16</sup>, we declined to go into the issue. Constitutional goals are one thing but enforcing those goals is a different thing altogether. The question arises whether a mandamus can be issued to Parliament to enforce it."<sup>17</sup> Such observations and remarks substantiate the fact that the enactment of the Uniform Civil Code can only be a prerogative of the legislature/the Parliament. It also makes one wonder about the merely nominal role that the judiciary plays in bringing about this necessary shift in paradigm. The judiciary can only implement the enactments and it cannot direct

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15 Mohd. Ahmed Khan vs. Shah Bano Begum and Ors, 1985 AIR 945, 1985 SCR (3) 844, Danial Latifi & Anr. vs. Union of India, 2001 AIR 3958, 2001(3)Suppl.SCR 419, 2001(7)SCC 740, 2001(6)SCALE537, 2001(8)JT 218; Smt. Sarla Mudgal, President vs. Union Of India & Ors, 1995 AIR 1531, 1995 SCC (3) John Vallamattom v. Union of India, AIR 2003 SC 2902, Ms. Jordan Diengdeh vs. S.S. Chopra AIR 1985 SC 935.

16 1994 SCC, Supl. (1) 713.

17 Available at <http://epaperbeta.timesofindia.com/Article.aspx?eid=31812&articlexml=SC-leaves-civil-code-to-Parl-door-ajar-08122015001061>. (Last accessed on 18/12/2016).

the legislature to enact the code. Therefore as rightly mentioned in the *Lily Thomas case*<sup>18</sup>, if the communities wanted or desired such a code, they are to approach the government themselves and not the judiciary.

### **THE DISSENSION WITH SECULARISM**

The lack of constitutional consonance is often averred as an argument favouring the enactment, but it is seldom realised that the enactment of the same would also result in the same result, i.e., the uniform civil code, when enacted, would also stand to be repugnant to several other constitutional provisions, that stand as conflicting contradictions. Thus, in spite of the several decisions that establish the court's inclination towards a common code, no substantial endeavours are perceived to enact the same. This can be hugely attributed towards the unresolved debate on whether or not a common code would violate the constitutional provisions that ensures secularism, namely Art 25<sup>19</sup> and Art 26<sup>20</sup>, which assimilates the freedom of religion, and Art 29<sup>21</sup> and Art 30.<sup>22</sup> According to the constitution,

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18 2000 (6) SCC 224.

19 Art.25. Freedom of conscience and free profession, practice and propagation of religion. (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law - a) regulating or restricting any economic, financial, political or other secular activities which may be associated with religious practice; b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”

20 Art.26. Freedom to manage religious affairs Subject to public order, morality and health Subject to public order, morality and health, every religious denomination or any section thereof shall have a right- a) to establish and maintain institutions for religious and charitable purposes; b) to manage its own affairs in matters of religion c) to own and acquire movable and immovable property; and d) to administer such property in accordance with law.”

21 Art.29. Protection of interests of minorities

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them”.

minorities are guaranteed their right to follow their own religion, culture and customs under Article 29 and 30. The Enactment of the uniform civil code arguably hampers the intended purpose of these provisions. However, the Supreme Court has often taken the view that such a code would not impinge Art 25 or Art 26, throughout its several observations. An authority to substantiate the same is *John Vallamattom*<sup>23</sup> case, where it was observed that “It is not a matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution.” Further in *S.R. Bommai v. Union of India*.<sup>24</sup> It was held that religion and secularism should not be mixed together since the secular activities can be regulated by the State by enacting a law.

However, a conclusive remark to settle the conflict between the Uniform Civil Code and Secularism was quoted by Justice R.M. Sahai in the *Sarla Mudgal* case. The observation runs as follows;

*“Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative, both, for protection of the oppressed and for promotion of national unity and solidarity.”*<sup>25</sup>

22 Art.30. Right of minorities to establish and administer educational institutions (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language”.

23 Observation by V.N. Khare C.J.I Supra note at p. 9, *John Vallamattom v. Union of India*, AIR 2003 SC 2902.

24 (1994) 3 SCC 1.

25 *Sarla Mudgal v. Union of India* AIR 1995 SC 1531.

Hence, on the basis the aforementioned provisions and authorities cited, the argument, which is through the line of reasoning that the uniform civil code is inconsistent vis-à-vis the doctrine of secularism, does not hold water.

### ***Sacred Versus Secular: The Ubiquitous Conundrum***

By empowering the State to regulate or restrict any laws, as per Article 25, a clear distinction is made between sacred and secular. Thus practices such as witchcraft, sati, and prohibitions against widow remarriage, caste discrimination, Maitri Karar, Natha Pratha, talaq-e-bidat, and polygamy may be and have been banned or regulated. However, whether and where a boundary is to be drawn is debatable. The practice of Maitri Karar in Gujarat, allows married men to enter into ‘friendship deeds’, allowing them to live with women other than their spouse. Another practice is Natha Pratha, commonly practiced in states such as Rajasthan. This practice allows a man to sell his wife. There are laws in place giving rights to women in ancestral properties belonging to her husband or in-laws, but is not made practical in real life. This is either due to social pressure on women or lack of awareness about the rights available to them. But what we are facing here is, religious ideologies preventing a rational debate on Uniform Civil Code and the so-called secularists opposing the reformation in personal law and Uniform Civil Code. The concept of a Uniform Civil Code has become a *bête noir* for many, and is being wrongly perceived as a possible threat to religion and religious identities. An article published in 2003 by a leading newspaper had rightly said that, “A touch-me-not secularism has resulted in stalling the process of modernization and social reform by pushing large sections of emotionally besieged and ghettoized Muslims and even Christians into the arms of religious orthodoxy.”<sup>26</sup> This is exactly what is happening in the current scenario.

### **THE OVER-EMPHASIS ON MUSLIM PERSONAL LAW**

It is often observed that the Muslim Personal laws are always excessively scrutinized while dealing with the enactment of the uniform civil code. It almost

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<sup>26</sup> Verghese, B.G.(13 August 2003), *Who's afraid of a Uniform Civil Code*, Online edition: THE HINDU.

seems as if the common code would only shun the Muslim personal laws. Hence the question, is the Muslim Law as backward as the others claim it to be? This averment that the Muslim personal laws are primitive and unreformed cannot hold water because of the following reasons: (1) the law provides individual rights to property unlike Hindu law, where the family's natural condition is assumed to be "joint". (2) The Muslim marriage being a contract, protects women better during divorce, than in the case of Hindu or Christian marriages which are considered as sacraments, since all marriages have to be civil contracts. (3) Mehr paid by the husband's family as per Muslim Personal Law, to the wife, upon marriage becomes her exclusive property and is hers upon divorce, offering her a protection women of other communities do not enjoy. This can also act as a deterrent to a Muslim husband's absolute power to pronounce divorce on his wife. The presence of such women-centric provisions confirms that the excessive scrutiny and the over-emphasis on the Muslim personal laws cannot be justified.

Nonetheless, there are several shortcomings as well in the Muslim personal law, specifically the issue regarding "triple talaq". Many claim that the matter of triple talaq "was not an issue" among Muslims and that it had been brought up to implement a Uniform Civil Code. The AIMPLB<sup>27</sup> says that, "Muslim Personal Law is based on the Quran and not on a law enacted by Parliament."<sup>28</sup> The strong opposition to from this particular community to the uniform code can be attributed to the fear and insecurity that had stemmed out throughout the course of years. After the anti-Sikh riots, minorities in India, with Muslims being the largest in number, felt threatened with the need to safeguard their culture. The All India Muslim Board defended the application of their laws and supported the

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27 All India Muslim Personal Law Board constituted to adopt suitable strategies for the protection and continued applicability of Muslim Personal Law in India. The AIMPLB was launched as a direct result of the 1978 Shah Bano case. The orthodox Muslims in India felt threatened by what they perceived as an encroachment of the Muslim Personal Law, and protested loudly at the judgment.

28 Available at <http://www.firstpost.com/politics/lets-debate-uniform-civil-code-because-weve-long-ignored-real-minorities-2866988.html>, Shayara Bano v. Union of India & Ors. Writ Petition (Civil) No. 118 OF 2016 (SC) [<http://barandbench.com/wp-content/uploads/2016/09/Counter-affidavit-in-Shayaro-bano.pdf>]. (Last accessed on 02/01/2017).

Muslim conservatives who accused the Government of promoting Hindu dominance over every Indian citizen at the expense of minorities. They felt that the Criminal Code was a threat to their personal law which they considered as their cultural identity. According to them, the suggestion by the judiciary for a Uniform Civil Code meant that Hindu values would be imposed over every Indian. However, the increasing number of cases from this community proves that such an approach no longer exists.

### ***Tackling Prejudice***

The mal prejudicial attitude which the UCC seeks to tackle is chiefly the source of gender bias and gross discrimination against women in religious traditions. With the growing literacy, migration, economic and social mobility, many socially prohibited relationships such as inter-caste, inter-regional, inter-community marriages, divorce and acquisition or disposal of self-acquired property by women are becoming common. As a result, social breakdown and strife among couples of the same community takes place even without a uniform civil code. The traditional personal laws are not broad enough to accommodate emerging multicultural realities. However, so far, the Special Marriage Act has taken the role of a safety valve.

### ***The Goa Civil Code: An Exemplary Prototype***

The Goa Civil Code<sup>29</sup>, a legacy of the Portuguese colonial rule; is a single code which governs all Goans irrespective of their religion, ethnicity or linguistic affiliation. It underlines the point that the uniform civil does not mandate the obliteration of the personal law; that the Code can be complementary with the personal law in its combined form. This anachronistic combination of personal laws has been suggested by Jawaharlal Nehru and his supporters and women members during the post-colonial era.

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<sup>29</sup> The Goan Civil Code, collectively called 'Family Laws'.

### CONCLUSION: THE PANACEA TO THE LEGAL QUANDARY

Withdrawing the personal laws by force, would be more like trenching upon the most intimate emotion of an individual; because religion is a person's identity and affinity carried since birth and practiced by choice through the laws recognized as personal to them. We have different personal laws and so far it has not deprecated our national solidity. Yes, India is the only country to practice a hybrid legal system and that is why we have different personal laws unlike other countries. There is no personal law that is complete in itself. We have succeeded in bringing transitions through secular laws instead of forced legislations in certain instances. The idea of a bill for uniform adoption law was strongly opposed by the Muslim and Christian community when it was discussed in the Parliament, few years ago. But there was no protest from any community when adoption was made possible through the Juvenile Justice Act with a ruling that adoption under this Act will be applicable for Christians and Muslims. Similarly, under Hindu law, there was much hue and cry about the inclusion of the Hindus, Jains, Buddhists, Sikhs and other denominations of the Hindus under the same umbrella. Ultimately, this died down when the masses realized that it is beneficial to them in the long run.

*"When you want to consolidate a community, you have to take into consideration the benefits which may accrue to the whole community and not to the customs of a part of it. If you look at the countries in Europe, which have a Civil Code, everyone who goes there forms a part of the world and every minority has to submit to that Civil Code. It is not felt to be tyrannical to the minorities."*<sup>30</sup>

Perhaps, India shall be stronger by its multi-cultural, multi-religious differences and our national identity would be more secure with our unity in diversity instead of a forced homogeneity of all personal laws. But gradual changes made through legislations or judicial pronouncements that assure gender equality and adopting a broad outlook relating to marriage, maintenance, adoption and succession by

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30 CONSTITUTIONAL ASSEMBLY DEBATES Vol VII pg. 547.



acknowledging the benefit that one community secures from the other will be a good way forward. Reforms in personal law can be made through independent initiatives, and in the end we will have created laws that are uniform over a period of time. Social transformation cannot happen in a day, and the change from a diverse civil code to a uniform one should be gradual.

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## **MAINTENANCE UNDER MUSLIM PERSONAL LAW IN LIGHT OF DANIAL LATIFI VERSUS UNION OF INDIA – THE NEED FOR A UNIFORM CIVIL CODE**

*Varnika Chawla\**

### **INTRODUCTION**

The basic principle of a democracy is equality, which is based on the ideal of secularism. This very principle has been envisaged in Article 14 of the Constitution of India. It is this principle that may sometimes be undermined, keeping in mind the narrow interests of a particular community. However, it is the responsibility of the judiciary to interpret statutes in such a manner that the interpretation not only upholds the spirit of a democracy, but also promotes the very principle of equality and ensure the protection of fundamental rights of citizens. The word ‘gender’ is an extremely useful term which signifies a deeply entrenched institution of sexual differences, which permeate our society. However, most of these sexual differences have been produced by the society itself. Women face several injustices, by the virtue of the fact that they are women. This is mainly due to the gendered nature of the society, and affects women in a deep way.<sup>1</sup>

Personal laws have been viewed as anti-women, especially Islam. But, this is not the case. In Islam, women have been given more freedom than even English women in the pre-Independence period.<sup>2</sup> However in the divorce case of *Shah Bano*<sup>3</sup>, people felt that certain stray comments had been made in the judgment,

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1 Flavia Agnes, FAMILY LAWS AND CONSTITUTIONAL CLAIMS xxiv Vol I (2011).

2 *Id.*

3 Mohd. Ahmed Khan v. Shah Bano Begum AIR1985 SC 945 (Supreme Court of India).

against Islam and the Prophet. More importantly, the call for a Uniform Civil Code in the country, only contributed in giving a communal effect to the decision of the Supreme Court, ruling that a divorced Muslim woman, who was unable to maintain herself could file a claim for maintenance under Section 125 of the Code of Criminal Procedure.<sup>4</sup> The judgement in the *Shah Bano*<sup>5</sup> case created unrest in the Muslim community. It was believed by many Muslims, that the Supreme Court was denying Muslims their right to freedom of religion, a basic fundamental right, as guaranteed under Articles 25, 26, 27 and 28 of the Indian Constitution, as the Court was interfering in their personal laws. At the same time, the Babri Masjid issue as well as communal rights were taking place.<sup>6</sup> It has been argued by some, that the Congress party viewed this as an opportunity to secure votes for the upcoming elections.<sup>7</sup> Therefore, in order to pacify this unrest, the Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. However, this Act was seen as unconstitutional by several activists as it violated Articles 14, 15 and 21 of the Indian Constitution.<sup>8</sup> These people raised their voice against the same. The Supreme Court in the case of *Danial Latifi v. Union of India*<sup>9</sup> upheld the constitutionality of this Act and interpreted it in a way that ensured general welfare and provided social justice. This became a landmark judgement of the Court, as this democratic interpretation was used in all further Muslim divorce cases. It protected the rights of the divorced Muslim woman, and ensured her Right to Life with personal dignity.<sup>10</sup>

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4 Flavia Agnes, FAMILY LAWS AND CONSTITUTIONAL CLAIMS xxiv Vol I (2011).

5 AIR1985 SC 945 (Supreme Court of India).

6 Dispute centered on a plot of land in Ayodhya, Uttar Pradesh which is the birthplace of the Hindu Lord Rama. Muslims built a mosque after demolishing a temple dedicated to Lord Rama. The Hindus demanded demolition of the mosque and the land back, for re-building a temple for Lord Rama.

7 *Supra note 1* at 4.

8 Art.14, 15 are about equality and Art. 21 provides one with the Right to Life and Personal Liberty, THE CONSTITUTION OF INDIA, 1950.

9 Danial Latifi v. Union of India AIR 2001 SC 3958 (Supreme Court of India).

10 Art. 21, THE CONSTITUTION OF INDIA, 1950.

### DANIAL LATIFI- AN INTRODUCTION

The court, in the *Shah Bano*<sup>11</sup> judgement had declared that a Muslim woman, who was unable to maintain herself after divorce, would be governed under the principles of Section 125 of the Code of Criminal Procedure, and entitled to claim monthly alimony from her husband. Therefore, the decision examined the rights of the Muslim woman, from the point of view of equality, and with a humanitarian perspective.<sup>12</sup> After the Supreme Court's judgement in this case, there was furore in the Muslim community. People felt that the Supreme Court was over-stepping its boundary by interpreting Muslim personal laws. Moreover, they felt that the Court was interfering in personal laws, which would prevail over and above the Constitution of India. This created unrest in the Muslim community.

#### *Further Unrest in the Muslim Community*

The Hon'ble Supreme Court, in *Shah Bano*,<sup>13</sup> keeping the principle of equality as embodied in Article 14 in mind, interpreted Muslim personal laws to bring the divorced Muslim women under the ambit of Indian laws in order to protect their fundamental rights.

However, many felt that with this judgement, the Supreme Court overstepped its mandate in the name of judicial activism. This, coupled with the Babri Masjid issue led to an uprising by the Muslim community.

#### *The Muslim Women Act - Calming the Unrest*

In light of these circumstances, the Muslim Women (Protection of Rights on Divorce) Act, 1988 [HEREINAFTER "THE ACT"], was passed by the Rajiv Gandhi government to calm the Muslims. It overruled the decision of the Supreme Court in the case of *Shah Bano*<sup>14</sup>, which had held that a Muslim husband can be held

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11 AIR 1985 SC 945.

12 Flavia Agnes, FAMILY LAWS AND CONSTITUTIONAL CLAIMS Vol I 157 (2011).

13 AIR 1985 SC 945.

14 AIR 1985 SC 945.

liable for payment of maintenance to his divorced Muslim wife, who is unable to maintain herself post *iddat*<sup>15</sup> period, under Sec. 125 of the Code of Criminal Procedure [Hereinafter “CrPC”]. According to the Supreme Court’s ruling, the husband was not absolved of all liability if the divorced Muslim wife was not able to maintain herself and did not remarry, and had to provide sufficient maintenance to support her throughout her life, or till she remarried. The Act clearly absolved him of all liability after the three months of waiting, which constituted the *iddat* period and imposed liability on the relatives of the divorced woman to ensure her maintenance.

Women’s Rights activists, secular groups and several women’s organisations including the National Commission for Women felt that The Act was unconstitutional as it violated the principles laid down in Articles 14, 15 and 21 of the Indian Constitution,<sup>16</sup> and hence violated the basic fundamental rights guaranteed to all citizens irrespective of their gender, by the Constitution of India. Thus, these groups, organisations and individuals filed writ petitions in the Supreme Court for the same.

They felt that The Act was depriving Muslim women of their basic right to life, as guaranteed under Article 21 and at the same time was giving liberty to the husbands to escape liability with the payment of a small sum. These people felt that Muslim women should be governed under Section 125 of the Code of Criminal Procedure similar to women belonging to other religious communities, as the Code applied to everyone irrespective of religion. In doing so, they felt that the fundamental rights of these women would be protected and therefore the basic principles envisaged by our Constitution guaranteed. These were shown by the media as the modern thinking, independent and free people of the country.

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15 The waiting period after the divorce or death of a spouse, in which a Muslim woman cannot remarry, *c.f.* Asaf A. A. Fyzee, *OUTLINES OF MUHAMMADAN LAW*, 119 (5th Edn., 2008).

16 Articles 14-21, *THE CONSTITUTION OF INDIA*, 1950.

Danial Latifi, who had represented Shah Bano in the case of *Mohd. Ahmed Khan v. Shah Bano Begum*,<sup>17</sup> too had filed a writ petition in the Supreme Court of India contesting the constitutionality of The Act.

In the landmark case of *Danial Latifi v. Union of India*<sup>18</sup>, the constitutionality of The Act was questioned. It was argued to be *un-Islamic*, and suffocating Muslim women of their rights. Moreover, it was argued that Section 125 of the Code of Criminal Procedure should be applicable to divorced Muslim women as well and they should not be governed separately under this Act, as Section 125 had been enacted as a matter for general welfare and publicpolicy, and applied to everyone, irrespective of gender.<sup>19</sup> It was in furtherance of the principle of social justice, as laid down in the Preamble to the Constitution of India. The Act therefore, they argued, undermined the very spirit of the Indian Constitution and hence should be held invalid.<sup>20</sup>

The Act, however, was being interpreted in different ways in different courts. There were various innovative judicial interpretations of The Act. Some courts held that The Act was actually protecting women's rights and not depriving them of the same. Some others held that The Act gave greater financial freedoms to the husband, as he was liable to pay for maintenance only during the *iddat* period, after which his liability absolved. Till the time came for reviewing the writ petition filed by Danial Latifi, several judgements, interpreting The Act in different forms, had been passed.

The Supreme Court now had two options. The first would be to rule in favour of Danial Latifi, declare The Act unconstitutional and provide for Muslim women to be governed under Section 125 of the Code of Criminal Procedure, in case of a divorce. This would not only upset the legislators, but would also create a furore among the Muslim community, which felt that the Supreme Court was interfering

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17 *Mohd. Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945 (Supreme Court of India) [Hereinafter, "Shah Bano"].

18 *Danial Latifi v. Union of India* AIR 2001 SC 3958 [Hereinafter "Danial Latifi"].

19 Para 30, 31 AIR 2001 SC 3958.

20 AIR 1985 SC 945.

in their personal laws, and hence denying them freedom to practice their religion. Moreover, the Supreme Court, by doing so, would be crossing its mandate of only interpreting the Acts passed by the legislature in a manner to ensure general welfare.

The second option available to the Supreme Court, was to rule against Danial Latifi, uphold the constitutionality of The Act, and provide for Muslim women to be governed under this Act. This would mean creating disparities not only among genders, but within genders, as divorced Muslim women would not be liable to claim alimony from their husbands unlike their Hindu<sup>21</sup> and Christian counterparts<sup>22</sup>. More importantly, it would mean that the government would continue to create laws which would aid them in political advancement, but violate the secular and democratic principles of the country. Also, the Court, if faced with a choice, should ideally have selected that interpretation which was constitutionally valid.<sup>23</sup>

The researcher feels that, with a view to development of society, and the promotion of gender equality, a five judge bench of the Supreme Court of India, after many deliberations, arrived at a balanced decision, which symbolised not only the victory of secularism and democracy, but the victory of the oppressed Muslim woman. It upheld the validity of The Act, stating that it was not unconstitutional and did not violate Articles 14, 15 and 21 of the Indian Constitution.

Section 3 of The Act stated that the divorced woman was entitled to a *'fair and reasonable' provision and maintenance to be made and paid to her by her former husband during the iddat period*. The Court held that this maintenance should cover her financial needs not only during the *iddat* period but also ensure the same standard of living she enjoyed during marriage, beyond it. Moreover, if the husband was unable to pay the entire amount of maintenance in lump sum, he could approach the Magistrate, who would then direct him to make the payment in instalments. The duration of payment of these instalments could exceed beyond

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21 Hindu Marriage Act 1955, Special Marriage Act 1954.

22 Indian Divorce Act, 1869.

23 H.M. Seervai, CONSTITUTIONAL LAW OF INDIA Vol. 3 (1996).

the *iddat* period, but they would still be accounted as maintenance received by the wife.<sup>24</sup> The Supreme Court said that the wife was also entitled to receive mahr or dower as well as all gifts received by her relatives and friends as well as the relatives and friends of the husband, at the time of marriage<sup>25</sup>. Moreover, if the woman was still unable to maintain herself, she could approach the Magistrate. The Magistrate would then direct her relatives to ensure her maintenance. If the relatives did not have sufficient means to provide for her, the Magistrate would give her permission to approach the State Wakf Board for the same.<sup>26</sup>

Thus, The Act was interpreted in such a manner by the Supreme Court of India, that it protected the rights of the divorced Muslim woman, and brought her at a pedestal equal to that of her counterparts belonging to different religions.<sup>27</sup> This interpretation of The Act also ensured that there was no discrimination within genders and hence upheld the principle of equality. It was a display of judicial activism by the Supreme Court, in the interpretation of The Act. Moreover, contrary to popular opinion, the Court had not over-stepped its boundaries. It had only implemented and made use of the system of checks and balances. By doing so, the Court was able to ensure the effective and harmonious functioning of the legislature, executive and judiciary.

### **1986-2001: PRE-LATIFI INTERPRETATIONS AND EVENTS LEADING UPTO LATIFI**

The *Shah Bano*<sup>28</sup> judgement had created controversy as it was overriding the well-established principle of Muslim law: that the husband is not liable to pay for maintenance under any circumstances, beyond the *iddat* period. This decision had created an uprising in the Muslim community. The Supreme Court's analysis of the Quran and statements concerning the treatment of Muslim women under

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24 Para 34, AIR 2001 SC 3958.

25 Para 29, AIR 2001 SC 3958.

26 Para 34, AIR 2001 SC 3958.

27 Hindu Marriage Act, 1955 governed Hindu marriages and divorce, & Indian Divorce Act, 1869 governed Christian marriages and divorce.

28 AIR 1985 SC 945.



Islam were seen to be highly offensive by several Muslims. In light of the secular judgement passed by the Supreme Court, and to pacify the Muslim community, Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act in 1986.

The constitutionality of The Act was being questioned in different courts across the country. It was being interpreted in different ways and was seen to be violating the principles of equality and social justice laid down in the Indian Constitution, by several activists.

In the case of *Jaitanbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh*<sup>29</sup> it was held that, the husband was liable to pay a ‘reasonable and fair provision’ to his wife during the *iddat* period<sup>30</sup>, but which should run for much after the *iddat* period as well. However, the Court also said that the extent of the liability of payment of maintenance was restricted to the *iddat* period only. Moreover, if the woman was unable to maintain herself after divorce, she should approach her relatives for maintenance as the husband was not liable for his divorced wife after the *iddat* period had lapsed.

In the case of *Kaka v. Hassan Bano and Ors.*<sup>31</sup> the bench had said that, “*the claim for maintenance by a divorced Muslim wife is not only restricted to the iddat period. The husband will have to show that within the iddat period, he has provided, made and paid reasonable provision and maintenance to the wife which is an adequate provision for her life or till she remarries.*” Thus, the court interpreted The Act in a manner that granted a lumpsum alimony to the divorced Muslim wife, and hence protected her rights.

A similar interpretation was given in the case of *Arab Ahmadhia Abdulla v. Arab Bail Mohmuna Saiyadbhai*<sup>32</sup> where the Court held that “*a divorced*

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29 *Jaitanbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh* 1999 IndlawMUM 81, 1999 (105) CRLJ 3846 (Bombay High Court).

30 Sec. 3 Muslim Women (Protection of Rights on Divorce) Act, 1986.

31 *Kaka v. Hassan Bano* (1998) 118 PLR 1 (High Court of Punjab and Haryana).

32 *Arab Ahmadhia Abdulla v. Arab Bail Mohmuna Saiyadbhai*, 1988 Indlaw GUJ 87 (Gujarat High Court).

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*Muslim woman is entitled to maintenance after contemplating her future needs and the maintenance is not limited only upto the iddat period.”*

The Courts in the above mentioned cases arrived at this decision, after interpreting The Act in the manner of legal realist theory. The statute was closely analysed and followed, but more importantly, common sense was used and the method of legal realism was adopted. This interpretation also upheld the validity of The Act with respect to the Right to Equality<sup>33</sup> mentioned in the Indian Constitution.

Some courts, however, also took a contrary view. *Bibi Shahnaz alias Munniv. State of Bihar*<sup>34</sup> ruled that a divorced Muslim woman is entitled to claim maintenance from her husband only for and during the *iddat* period.

In *Usman Khan Bahamani v. Fathimunnisa Begum*<sup>35</sup>, the view of the majority bench was that the fair and reasonable provision and maintenance contemplated under Section 3 of The Act, payable by the husband was restricted only for the period of *iddat* and there was no liability on the husband, to provide for any provision or maintenance after the *iddat* period.

The Courts interpreted The Act in a limited manner in the above cases, keeping in mind the interests of the Muslim male, but forgoing the interests of divorced Muslim women in actuality. They followed a positivist view of interpreting the law only as per the provisions of the statute, and not thinking beyond it to arrive at a more just conclusion, which ensured the principle of equality, as was laid down in the Preamble to the Constitution of India.

Thus, The Act was being interpreted differently in different parts of the country. The decision of the Supreme Court in *Danial Latifi*<sup>36</sup> therefore, provided a uniform, liberal interpretation of The Act. It became a basis for all other subsequent

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33 Art. 14, THE CONSTITUTION OF INDIA, 1950.

34 *Bibi Shahnaz alias Munni v. State of Bihar* 1998 Indlaw PAT 15 (Patna High Court).

35 *Usman Khan Bahamani v. Fathimunnisa Begum*, 1989 Indlaw SC 205 (Andhra Pradesh High Court).

36 AIR 2001 SC 3958.

judgements as this interpretation not only protected the rights of divorced Muslim women, but at the same time, upheld the basic spirit of the Constitution. Hence, *Danial Latifi*<sup>37</sup> was a logical conclusion to all these developments. The unique aspect of this case, however was that the Supreme Court not only interpreted the Act, keeping in mind the provisions of the Constitution of India, but also ensured that the divorced Muslim woman was not oppressed and discriminated against due to Muslim personal laws. Personal laws were complied with, however the general perception of these laws changed significantly after the interpretation of The Act. Therefore, *Danial Latifi*<sup>38</sup> proved to be a landmark decision of the Hon'ble Supreme Court of India.

### **2001-PRESENT: HOW THE JUDGEMENT HAS AFFECTED SUBSEQUENT CASES**

The Hon'ble Supreme Court of India, in *Danial Latifi*<sup>39</sup> had ruled that a fair and reasonable provision and maintenance is to be made and paid by the husband to his divorced Muslim wife, within the *iddat* period. This maintenance, however, should provide for the wife's needs beyond the *iddat* period as well. Therefore, the Court was in a way, granting alimony in lump sum form to the divorced Muslim wife. This interpretation by the Supreme Court, of Section 3 of The Act, was widely used in subsequent cases.

In the case of *H. Sirajuddin v. Shaziya Alias Afsana and Another*<sup>40</sup> the Court held that the husband would be liable to make a reasonable provision for his divorced wife which would include her maintenance. The court further declared that if the Muslim woman did not remarry, she could seek maintenance from her husband beyond the *iddat* period as well. Moreover, she could also seek maintenance from her paternal relatives if the husband was not in a position to maintain her. Therefore, it is evident that the Supreme Court's interpretation of

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37 AIR 2001 SC 3958.

38 AIR 2001 SC 3958.

39 AIR 2001 SC 3958.

40 *H. Sirajuddin v. Shaziya Alias Afsana and Another* 2003 IndlawKAR 449 (Karnataka High Court).

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The Act in *Danial Latifi*<sup>41</sup> was used in deciding the maintenance to which the divorced Muslim wife was entitled.

Similarly, in the case of *Makiur Rahaman Khan and Another v. Mahila Bibi*<sup>42</sup> the Judge declared that where a Muslim husband was incapable of maintaining his divorced wife, who was incapable of maintaining herself after lapse of the *iddat* period and did not remarry, the wife could claim against her paternal relatives. Moreover, if the relatives were not in a position to provide for her, the woman could approach the Magistrate. The Magistrate would then direct the State Wakf Board of the area in which she resided, to allow her a reasonable maintenance.

A major judgement in the case of *Shabano Bano v. Imran Khan*<sup>43</sup> further made the mark created by *Danial Latifi*<sup>44</sup> more prominent. Here it was held that Section 125 of the Code of Criminal Procedure and The Act should be read harmoniously with each other. Also, a petition made under Section 125 should be reviewed under The Act. In this case, the divorced wife was claiming monthly maintenance of Rs. 3000 from her husband under Section 125. The Supreme Court held that, “even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Sec. 125 after the expiry of the *iddat* period, till she did not remarry”.

Therefore, the balanced judgement given by the Supreme Court in *Danial Latifi*<sup>45</sup> symbolised a victory for the divorced Muslim woman. The Act, was not watered down and remained a good, constitutionally valid law. It protected the rights of the divorced Muslim woman and ensured that there was no scope of discrimination against her. It ensured that no divorced Muslim woman was now oppressed by the system, oppressed by Muslim personal laws, oppressed by her husband. It

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41 AIR 2001 SC 3958.

42 Makiur Rehman Khan and Another v. Mahila Bibi 2001 IndlawCAL 9997 (Calcutta High Court).

43 Shabana Bano v. Imran Khan 2009 Indlaw SC 1702 (Supreme Court of India).

44 AIR 2001 SC 3958.

45 AIR 2001 SC 3958.

protected her right to life and it gave her equality. It protected the basic features of the Indian Constitution as envisaged in Articles 14, 15 and 21.

### CONCLUSION

The above analysis shows the significance of *Danial Latifi*<sup>46</sup> in interpreting the Muslim Women (Protection of Rights on Divorce) Act, 1986 and its impact in later cases. Not only did this judgement put to rest doubts in the minds of activists and women's rights' workers regarding the constitutionality of The Act, but also enhanced the status of the oppressed Muslim woman. It brought her at a level equal to, if not above, other women. More importantly, it proved that only a law which upholds the basic spirit of the Indian Constitution shall be passed and there shall be no discrimination on the basis of religion or gender. The judgement made it clear that the aim of the executive, legislatures and judiciary is to promote general welfare and ensure democracy and secularism hence ensuring that the basic features of the Indian Constitution are upheld and not violated.

Although it is said that personal laws lay the foundation to one's cultural identity, they are often seen as discriminatory, especially against women. It is here that the need of a liberal and democratic interpretation of these laws arises, especially in light of the increasing importance of gender equality in the society. It has been observed in cases ranging from the time of Shah Bano to ShabanaBano, that citizens need to be provided with support that they do not necessarily receive from their personal laws. It is this very support that the judiciary seems to have provided, in interpreting The Act in an egalitarian manner which not only favours the divorced Muslim woman, but also upholds the principles of equality and social justice laid down in the Preamble to the Constitution of India.

The rationale of the Supreme Court's interpretation of personal laws in the case of *Shah Bano*<sup>47</sup> had been to *weave women's rights into legal theory*. Keeping the same rationale in mind, the Supreme Court interpreted The Act in a realist

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<sup>46</sup> AIR 2001 SC 3958.

<sup>47</sup> AIR 1985 SC 945.

manner, reaffirming the position of women in the society. Law, justice and gender have always been three major concerns of the society. It is within this dynamic space that judges, lawyers and litigants face the challenge of interpreting personal laws, and this leads to varied negotiations and multiple interpretations.

Such landmark decisions are symbolic of the progress that our country is making as the world's largest democracy.<sup>48</sup>

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48 Ramachandra Guha, 'INDIA AFTER GANDHI' (2007).

# UNIFORM CIVIL CODE AND ADOPTION LAWS

## A CASE COMMENT ON

### SHABNAM HASHMI VERSUS UNION OF INDIA

*Sregurupriya Ayappan\**

This case comment aims to establish that while *Shabnam Hashmi v. Union of India*<sup>1</sup> is the right way forward to harmonise conflict between personal and statutory law, the Court was wrong in viewing the opt-in-opt-out approach as an interim measure towards the end of achieving a Uniform Civil Code. It also seeks to show that the court was incorrect and self-contradictory in citing personal law to deny the right to adoption the status of a fundamental right. In other words, while the court reached the right conclusion on both fronts, its reasoning was flawed. This comment begins with the legal background and factual matrix of the case, and goes onto analyse the judgment and then conclude. In the process, the various models of a uniform civil code are also explored.

#### BACKDROP

Islam does not recognise adoption<sup>2</sup> as there are verses in the Koran which disapprove of the practice.<sup>3</sup> However, some Muslims recognised adoption by custom and if no declaration is made under Section 3, Shariat Application Act, 1937 and the proof of custom is provided, the adoption would be given effect to.<sup>4</sup> The state of Jammu and Kashmir too recognises customary adoption.<sup>5</sup> In

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1 (2014) 4 SCC 1.

2 AA Fyzee, OUTLINE OF MOHAMMEDAN LAW, 184 (4thedn, 2005).Muhammad Allahdad v. Muhammad Ismail, (1888) 10 All 289, 341.

3 The Koran, XXXIII, 4-5.

4 Puthiya v. T.K Avooma, 1956 Mad 244; Moulvi Md. S Mehaboob Begum, 1948 Mad 7.

5 Muhammad Allahdad v. Muhammad Ismail, (1888) 10 All 289, 341.

*Philips Alfred Malvin v. Y J Gonsalvis*,<sup>6</sup> the court ruled that merely because there is no separate statute does not make the adoption invalid and the child shall be on par with a natural born child. Further, it has been argued that adoption in Islam would be permissible if the true identity of the child is disclosed to him where it is known and the inheritance of any natural heirs are undisturbed.<sup>7</sup> Hence, it may be argued that adoption was not expressly prohibited or unknown in Islam.

India has ratified the United Nations Convention on the Rights of the Child, 1989,<sup>8</sup> is a signatory to the *Declaration of the World Summit on Children* setting up the goals for child survival, development and protection. The National Policy for Children, 1974 has obliged the government to have laws which permit the adoption of all children, irrespective of religion, race, caste, sex or place of birth.<sup>9</sup> There were legislative attempts to enact uniform adoption laws.<sup>10</sup> However, until the Juvenile Justice (Care and Protection of Children) Act, 2000 [hereinafter “JJ Act”] (as amended in 2006) and the 2007 rules thereunder, prospective parents who did not fall under Section 2, Hindu Adoption and Maintenance Act, 1956 were subject to the Guardians and Wards Act, 1890. Currently, the JJ Act 2015 has an entire chapter on adoption in addition to the rules thereunder and the CARA guidelines 2011.

### ***Statement of Facts***

Shabnam Hashmi, a human rights activist and founder of an NGO ‘Act Now for Harmony and Democracy’, decided to adopt a girl in 2005. While completing the paperwork, she checked the “non-Hindu” column and was informed that the girl would become her ward and she and her husband would become guardians of the child.<sup>11</sup> This meant that the girl would not be treated on par with a biological

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6 AIR 1999 Ker 187.

7 Asha Bajpai, ADOPTION LAW AND JUSTICE TO THE CHILD, 35-37 (1stedn, 1996).

8 Provides for adoption in Articles 20(3) and 21. India signed and ratified it in 1992.

9 *Supra* note 7, 2.

10 THE ADOPTION OF CHILDREN BILL, 1972.

11 Available at <http://www.livemint.com/Politics/3mOuc3wMjpiDG2qx60B8PK/The-religious-contours-of-adoption-in-India.html>. (Last accessed on 02/01/2017).



child. Further, she could not inherit her property according to the Muslim personal inheritance law. Shabnam Hashmi filed a public interest litigation under Article 32 of the Constitution of India requesting the right to adopt. She had two main pleas. Firstly, the recognition of the right to adopt and be adopted as a fundamental right under Part III of the Constitution. Secondly, as an alternative prayer, optional guidelines enabling adoption of children by people irrespective of religion, caste, creed etc. She also requested the Court to direct the government to enact an optional law which was child-oriented.<sup>12</sup>

The Union of India submitted a counter-affidavit in 2006 informing the Court that prospective parents could access the provisions of amended JJ Act for adoption of children by following the prescribed procedure irrespective of their religious background. In the course of the proceedings, the Union of India furnished further submissions highlighting the development in the framework and infrastructure of the adoption and rehabilitation mechanism under the Act. In the light of the same, the petitioner conceded that the alternative prayer stood fructified. The amended JJ Act is an enabling legislation similar to the Special Marriage Act, 1954 and hence, facilitated adoption of children irrespective of caste, creed and religion.

The apex Court allowed the intervention of the All India Muslim Personal Law Board. It was their contention that adoption was only one of the methods for taking care of a child in need of care and protection envisaged under the JJ Act. Further, they submitted that Islamic law does not recognise an adopted child to be on par with a biological child. They instead proposed that the Court issue a direction to keep in mind the principles of Islamic law before declaring a Muslim child to be available for adoption. This was because of the “*kafala*” system. Under this the child is placed under a “*kafil*” who is allowed to legally take care of the child and allowed to provide financial support. The child remains the true descendant of his biological parents and has no right under personal inheritance law against the *kafil*.<sup>13</sup> However, the ‘adoptive’ parents can choose to bequeath

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<sup>12</sup> Shabnam Hashmi v. Union of India, (2014) 4 SCC 1.

<sup>13</sup> Shabnam Hashmi v. Union of India, (2014) 4 SCC 1.

one-third of their property or transfer property in the form of gifts to such a child. The *kafala* system has been recognised by the United Nations.<sup>14</sup>

### ***Holding and Reasoning***

After over eight years, the Supreme Court rendered a judgment in this case. It held that the JJ Act, as amended, is an enabling legislation that gives prospective parents that option of adopting a child by adhering to the procedure prescribed. It also held that the conferment of the status of a fundamental right on the right to adoption was a task for the legislature and not the judiciary. The court, albeit in its *obiter*, expressed the view that the JJ Act was “*a small step in reaching the goal enshrined by Article 44*” “*until such time that the vision of a Uniform Civil Code is achieved.*” Apart from delineating the developments brought forth since the 2006 amendment to the JJ Act, the court provides no further reasoning in dismissing the alternative prayer. With respect to the elevation of the right to adoption, the court itself confessed that it did not “*think it necessary to go into any of the issues raised.*” It does not reason as to why the elevation of this particular right cannot be done through the expansion of Article 21 like countless other rights. It merely states that it cannot do so due to the presence of “*conflicting though process in this sphere of practices and beliefs*” and that the “*legislature is better equipped to comprehend the mental preparedness of the entire citizenry,*” to conclude that the “*present is not an appropriate time and stage.*” Further, the court does not provide any reasoning or refute the grounds on which the decisions rendered by lower courts had recognised the right to adopt as a fundamental right except to categorise the ruling as specific to the facts of the respective cases.

### **ANALYSIS**

There are four main points against the Court’s reasoning. *Firstly*, the issue was not about a uniform civil code. *Secondly*, there are different models of uniform civil code. Even parallel legislation is a form of uniformity. Here, it would take the

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14 Article 20(3), UNCRC.

form of the enabling legislation. *Thirdly*, the Court itself notes that optional legislation cannot be “*stultified by principles of personal law*.” Hence, it seems contradictory to allow elevation to be stultified by the same principles. *Fourthly*, there are other reasons for dismissing the plea for elevation.

*Firstly*, it must be noted that neither party to the case nor the All India Muslim Personal Board which was allowed to intervene made any submission invoking Article 44 as per the judgment. The Court, of its own accord, brands the existence of an enabling legislation in the aspect of adoption to be a merely enabling legislation and hence, an interim measure – a small step towards a uniform civil code. By making such observations, it has gone against the “*well settled principles of judicial restraint*,” which prevented it from declaring the right to adoption to be under Article 21, and to a considerable degree stepped into the shoes of the legislature.

*Secondly*, the line of thinking depicted by the apex court reflects a straitjacket conception of uniformity which is ignorant or uncaring about the complexity and various different models that exist in other countries. One such model which might best suit India is the parallel application of religious and civil law. The securing of a uniform civil code should not negate the opportunity of citizens availing themselves of their religious law to govern them if they so please. Further, the state must assist in the enforcement of the religious law system as well, if intervention is required or circumstances allow for it. The mere existence of a civil law does not render the religious law system redundant.<sup>15</sup> The issue of uniformity also reflects a conflict of competing ideals of authority. It can be either hierarchal or coordinate. The latter emphasises horizontal, peer-to-peer, even bottom-up structures of authority with the pluralistic purpose of securing freedom and diversity. This would be more suitable to India and in fact, is in line with the legislative developments and scenario so far. It favours an interpretation of uniformity that establishes a parallel code and it simultaneously respects autonomous laws for defined religious communities. At the same time, it also

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<sup>15</sup> Shimon Shetreet and Hiram E Chodosh, UNIFORM CIVIL CODE FOR INDIA – A PROPOSED BLUEPRINT FOR SCHOLARLY DISCOURSE, xii (1stedn, 2015).

addresses extraordinary provisions considered inconsistent with a constitutional baseline of human rights and dignity. The presumption of a parallel system might itself reduce the initial distrust that must be overcome to mediate the conflict.<sup>16</sup>

The conception of a uniform civil code gives rise to a tension between the constitutional requirement of secularism, and the value of personal autonomy of individuals and groups. Included in this tension are the questions of how far the constitutional requirement of secularism is permitted to encroach into private spaces and, under what circumstances it is even acceptable to demand secularism. As secularism can be viewed as the process by which sectors of society and culture are removed from the domination of religious institutions and symbols, it comes into conflict with the personal autonomy of those who wish to lead a life guided by religion. One way to mediate this fine balance would be to adopt the pluralist model that promotes the interests of cultural and religious minority groups instead of the assimilationist model that seeks to achieve integration through coerced suppression.<sup>17</sup>

Enabling statutes enlarge common law and make it lawful to do something which would otherwise not be lawful. It confers power to do everything which is indispensable for carrying out the purposes in view.<sup>18</sup> Such statutes, especially in personal laws, can often be described in the language of societal change since the legal change reflects societal opinions and social structures. These changes in themselves bring about a degree of uniformity in the laws governing people.<sup>19</sup>

*Thirdly*, the court's refusal to elevate the right on the grounds of personal law is unsatisfactory. Ever since the same court held that the right to freedom of speech includes the right to remain silent, judicial interpretation has clarified that right to something implicitly includes the right to the converse.<sup>20</sup> This trend has meant that

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<sup>16</sup> *Id.*, at 4.

<sup>17</sup> *Id.*, at 68-71.

<sup>18</sup> Vepa Sarathi, INTERPRETATION OF STATUTES, 41 (6th edn., 1998).

<sup>19</sup> *Supra* note 15, at 79-80. The Special Marriage Act, 1954 is an example of this.

<sup>20</sup> *Bijoe Emmanuel v. State of Kerala*, AIR 1987 SC 748. The right to live however does not include the right to die according to *Gian Kaur v. State of Punjab*, AIR 1996 SC 946.

no one can be forced to violate his conscientiously held religious beliefs. Hence, right to adoption would include within itself the right to not adopt or be adopted. This does not infringe upon the existing personal law system. Moreover, the court does not deal with the reasoning of the courts in the case of *Philips Alfred Malvin v. Y J Gonsalvis*<sup>21</sup> or *In the Matter of Manuel Theodore v. Unknown*.<sup>22</sup> The latter interprets the right to live with dignity expansively and relies on the ability of the Courts to enforce treaties and conventions where the state has yet to frame laws and there is no conflict with municipal law if they can be construed to fall under Part III and states “*the right to adoption is now impregnated in Article 21.*”

*Fourthly*, there already exists a legal right to adopt in the form of the JJ Act. The grounds for elevating a right to Chapter III must be more exclusive. The expansive judicial interpretation of Article 21 has ramifications like devaluation of the currency of a right being fundamental and excessive litigation at the level of superior courts which adds to pendency and does not result in timely enforcement of the right. Fundamental rights were meant to provide for tangible safeguards which would be enforced by the Supreme Court to protect the rights of minorities given the majoritarian nature of the legislature.<sup>23</sup> In other words, the primary reason for elevation of a right should be in the face of possibility of infringement or reluctance on the part of the legislature. With respect to the right to adoption, there is no lack of legislative intent. Neither is there non-compliance or absence of legislation giving effect to the international instrument in concern. In such a situation, there is no need for elevation.

## CONCLUSION

Despite its shortcomings, *Shabnam* is an important case as it has clarified that people can adopt irrespective of their religion. It is also one of the cases in a long line which calls for a uniform civil code even when it is tangential to the issue in

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21 AIR 1999 Ker 187.

22 (2000) 3 Bom CRR 244.

23 Granville Austin, INDIAN CONSTITUTION – CORNER STONE OF A NATION, 58-61 (1st edn., 1999).

question. Since it has been just three years since this judgement, its precedent value cannot be estimated accurately. However, its application has been varied – it has been used to reiterate the role of the CARA in inter-country adoption and show legislative intent to allow Family Courts to exercise jurisdiction in matters of adoption,<sup>24</sup> to terminate the appointment of an adopted son on compassionate grounds,<sup>25</sup> and to conclude that a minor rape victim could deliver the child due to the presence of a robust system for adoption.<sup>26</sup>

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<sup>24</sup> Tibetan Children Village School v. Karma Lama, 2015 SCC Online Del 6046.

<sup>25</sup> Shaikh Jamir Sayed Saifoddin v. Municipal Council, 2015 SCC Online Bom 5067.

<sup>26</sup> A v. State of UP, 2015 SCC Online All 4735.

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**For National Law School of India University**

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