

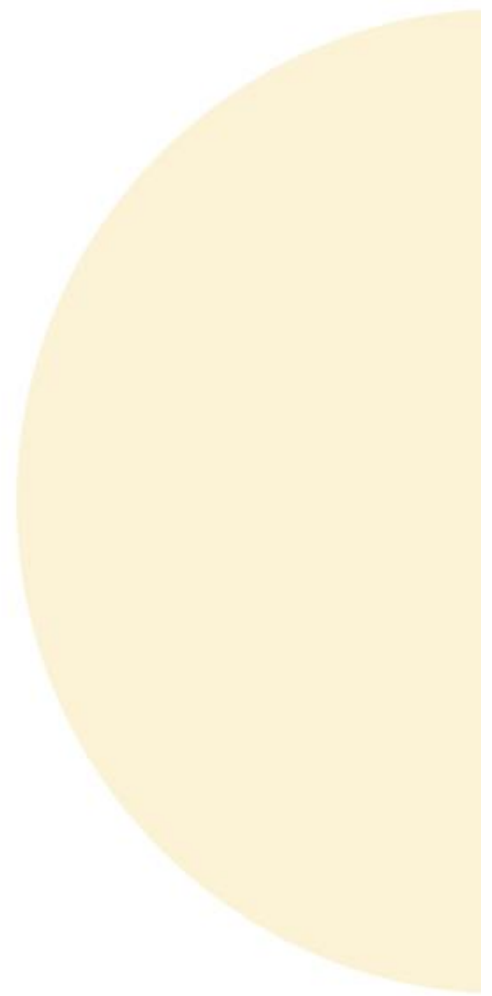


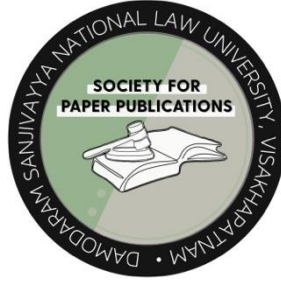
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Foreword

Indian Society is a multi religious and multi cultural society. Personal laws in India are based on their respective religions. Since religions are not uniform, their personal laws are also not uniform. Bringing uniformity in the personal laws poses certain challenges. These challenges are based upon the existing legal and factual ground realities. In this context, it is pertinent to note these challenges. Human rights, necessary for human survival are mentioned in the Indian Constitution in the form of fundamental rights and Directive Principles of State Policy. Article 44 of the Indian Constitution which provides for Uniform Civil Code falls in Directive Principles of State Policy. Moreover, Directive Principles of State Policy do not provide any time limit for their implementation; so far it is a non-starter. Uniform Civil Code is provided in Article 44 which says that “the state shall endeavor to secure to its citizens a Uniform Civil Code throughout the territory of India”.

So far no executive or legislative effort is made to secure this objective of Uniform Civil Code. Even the application of a provision in Criminal Procedure Code (Sec.125) in conflict with Muslim law led to serious protest from Muslim community compelling the parliament to change the law. [Mohd. Ahmed Khan vs. Shabhanu Begum (1985) and the consequent law known as the Muslim women (Protection of rights on divorce) Act 1986] was passed by the Parliament.

Religious freedom is guaranteed by the Indian Constitution as a fundamental right and cultural and educational rights are guaranteed to the religious and linguistic minorities also as fundamental rights. This Constitutional position has its own impact on the proposal for framing Uniform Civil Code in India.

I congratulate Prof. K. Madhusudhana Rao, Registrar In-charge and his team of students for bringing this volume with thought provoking articles. I also congratulate the authors for their excellent academic contributions in making this endeavor a grand success. Undoubtedly, the present volume will enrich the existing literature on Uniform Civil Code and will be useful to the scholars, students and the policy makers in future.

S. SURYA PRAKASH

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TABLE OF CONTENTS

1. MULTIPLICITY OF FAMILY LAWS IN INDIA AND A QUEST FOR UNIFORM CIVIL CODE

- *DR. ASHOK P. WADJE*

2. UNIFORM CIVIL CODE: - A SOCIO-LEGAL PRESPECTIVE

- *VINAY KELLA*

3. HIJAB CONTROVERSY: A BASE FOR UNIFORM CIVIL CODE

- *PALLAV VATS & SHRUTI*

4. UNIFORM CIVIL CODE – INCLUSION OF FAITH & RELIGIOUS PRACTICES: A STEP FORWARD

- *ANIKET KUMAR & SUDHANSHU SACHAN*

5. UNIFORM CIVIL CODE: A TRUMP CARD TO ATTAIN GENDER JUSTICE

- *RAJ GOKUL & KARREDDULLA PRASHANTHI*

6. UNIFORM CIVIL CODE FOR GENDER JUSTICE

- *ADV. FARNAZ .H. SHA*

7. IS THE UNIFORM CIVIL CODE THE ONLY REMEDY FOR ELIMINATING DISCRIMINATION?

- *NAJLA PAZHAYAKATH*

8. THE UNIFORM CIVIL CODE - A MYTH OR REALITY

- *YASH KUMAR SHARMA & SIMRAN SINGH VERMA*

9. IS INDIA YET READY TO EMBRACE THE GRAND CONSTITUTIONAL DIRECTIVE OF UNIFORM CIVIL CODE?

- *KAUSHIK CHOWDHURY*

10. MULTICULTURALISM AND SECULARISM: A CONUNDRUM FOR UNIFORM CIVIL CODE?

- *MANAS AJAI SONKAR*

11. PERSONAL LAWS AND WOMEN'S RIGHTS: IS UCC ACTUALLY A STEP TOWARDS GENDER JUSTICE?

- *NIRANJAN EV*

12. CAN UCC COMPLETELY OVERLAP PERSONAL LAWS IN INDIA?

- *PRIYA WADHWA*

13. UNIFORM CIVIL CODE AND CONFLICT WITH PERSONAL LAW

- *SHIANJANY PRADHAN*

14. UCC AND GENDER JUSTICE: A BITTERSWEET HOPE

- *KRITI KABRA*

15. BEYOND SECULARISM, FOR HUMAN RIGHTS AND GENDER JUSTICE

- *DIYA BANERJEE*

16. UNIFORM CIVIL CODE: A CHALLENGE TO THE RIGHT TO RELIGION OR A STEP TOWARDS CIVIL EQUALITY?

- *GURLEEN KAUR*

17. DIVORCE MECHANISM 2.0: A CRITICAL ANALYSIS OF POSSIBLE UPGRADATION TO A UNIFORM DIVORCE SYSTEM IN INDIA

- *SACHIN BHARDWAJ & SHERRY PANT*

18. UNIFORM CIVIL CODE: ITS TRANSPARENCY IN A MULTI-RELIGIOUS COUNTRY LIKE INDIA

- *YAMINI REDDY. K & MUPPANA NIKHILA*

19. SYNERGIES IN GENDER JUSTICE AND PERSONAL LAWS: NEED TO REGULATE AND REFORM VIA UNIFORM CIVIL CODE

- *RAJAT KUMAR & SHIKHA SRIVASTAVA*

20. MARRIAGE AND DIVORCE LAWS IN GOA AND IN INDIA: A COMPARATIVE STUDY OF UNIFORMITY AND DIVERSITY

- *NAHEED MUSTAFA*

21. CONCEPTUAL ANALYSIS AND HISTORICAL PERSPECTIVE OF THE PHILOSOPHY OF UNIFORM CIVIL CODE

- *SHRADDHA OBEROI & DR. RUCHI SAPAHIA*

22. THE NEED FOR IMPLEMENTATION OF A UNIFORM CIVIL CODE IN INDIA

- *PARNASHREE CHAKRABORTY*

MULTIPLICITY OF FAMILY LAWS IN INDIA AND A QUEST FOR UNIFORM CIVIL CODE

*Dr. Ashok P. Wadje*¹

INTRODUCTION

Family Law is a set of laws that governs the interpersonal relationship of persons related to each other by Consanguinity, Marriage, and Affinity. It governs and regulates subjects or areas of the personal sphere such as: Marriage, Divorce, Maintenance, Succession, Minority & Guardianship etc. In India, there are multiple family laws and these laws are governing personal relationships / domestic relationships. The set of Family laws is diverse, and it originates mainly from religious scriptures, despite the fact that most of the family laws in India have now been codified in the form of Statutes. With the passage of time, these norms were given statutory recognition with several enactments in the area of Marriage, Divorce, Maintenance, Inheritance & Succession, Guardianship, and Custody matters. Various Religions in India have their own family laws. There are five prominent religions in India, to be noted in this connection:

1. Hinduism²
2. Islam
3. Christian
4. Parsi and
5. Jews

Although, most of the communities in India have their separate family laws depending on their religion that does not necessarily mean that they are purely religious in nature or based completely on religion. It is also not necessary that the person must be an ardent follower of a particular religion. A person may be an atheist, but he/she is having no choice but to be

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² It includes original/born/converted Hindus, Buddhist, Sikh, and Jains.

governed by religion-based family laws. So, in India one cannot claim or declare that he/she is not governed by the family law of his/her religion. Even by conversion to another faith/religion, they will still be governed by the family law of that Religion wherein the person has converted. Having said that, there is an option where such persons may subject themselves to the general law of marriage not based on religion. That is the Special Marriage Act, 1955³. It is not just in relation to the marriage subject but also in case of succession. Succession to the property of persons who marry under the said Act and their off-springs, would be governed by the provisions of the Indian Succession Act, 1925.⁴ The difficulty arises when a person claims to be an atheist and does not practically follow any particular religion. So, the question in this context is, what is the personal law, that is applicable to such a person. Unless a person formally declares, it becomes difficult for the court to decide the religion of that person. This issue has been discussed in detail hereinafter, as *determination of religion* of a person, is the very foundation of family laws in India.⁵ Family laws are applicable to persons in India depending on what religion they belong to and what territory they are resident of.⁶ Since the Family Law is a part of the personal sphere of the persons and the foundation of the said branch is to be seen in the religious practices, it is to be considered to be a branch of 'Personal Law' in India governing matters such as marriage, divorce, matrimonial affairs, inheritance and succession, and adoption⁷.

The importance of personal laws can be seen by their very nature, composition, and personas, and relations to which it is being applied. Personal laws occupy a unique position in today's age, and it plays a vital role in keeping society in the civil bounds. There are few areas in some communities, which are yet to be given a legislative shape. It is actually the political environment hampering the reform in a few personal laws of the country.⁸

³ Also, Foreign Marriage Act, 1969

⁴ Except where two Hindus are marrying under Special Marriage Act, 1955, where there is statutory exemption is given to them under Section 21A of the said Act. As a result of this, such Hindu couple is still subject to the provisions of Hindu Succession Act, 1956.

⁵ Juristic opinion of Prof. Poonam Pradhan Saxena, Family Law expert in India and Vice Chancellor, National Law University, Jodhpur

⁶ Id.

⁷ S.P. Sathe, *Judicial Activism in India*, 191 (Oxford University Press 2002).

⁸ Id at 193.

ROOTS OF PERSONAL LAW AND FAMILY LAWS IN INDIA:

To trace the sources of personal law or the family laws based on the religion, one might resort to the traditional means of identifying the sources of law such as ‘Legislation’, ‘Judicial Precedents’, ‘Customs and Usages’ and ‘Juristic Writings’. However, the thing is a slight variation when it comes to the ‘Personal Laws’, of course, these are also the main sources of personal laws. But ‘religious scriptures’ or ‘religious norms’ being the foundation of the existing personal laws, it adds to the conventional list of sources of laws. Religious Norms reflected in the Personal Laws or in the Family Laws are the identities of a person of a particular religion. These norms form an essential part of the ‘practice’ of the religion and the ‘Freedom of Religion’ and ‘right to practice religion’ forms a fundamental right of a citizen⁹. It is to be noted here that the Hon’ble Supreme Court of India, in *Commissioner Hindu Religious Endowments (HRE), Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*¹⁰ discussed the point i.e. *doctrine of essentiality* and clarified that a particular practice under Article 25 to be protected as a fundamental right must form an essential part of the religion and while answering the questions such as ‘What is an essential part of the religion’, ‘what is protected under Article 25’, and ‘What rituals & ceremonies can be protected as an essential practice under Article 25’, observed the following:

“A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it will not be correct to say that religion is nothing else but a doctrine or belief.....it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion and these forms and observances might extend even to matters of food and dress.....The guarantee under the Constitution of India not only protects the freedom of religious opinion but it also protects also acts done in pursuance of religion and this is made clear by the use of the expression "practice of religion" in Art. 25”

So, it is clear that the family laws based on the religion or the religious scriptures or its norms could well be said to have derived from the Article 25 of the Constitution of India, being an essential part of the religion and the same is coming to be discussed by the Apex Court of the country in various cases which will be discussed in the upcoming part of the paper.

⁹ INDIA CONST. art. 25.

¹⁰ [1954] AIR SC 282.

Further, in addition to the ‘right to practice’ under Article 25 of the Constitution of India, Seventh Schedule, List-III, Entry 5¹¹, the Central Legislature and the State Legislature can legislate on the subject such as Marriage 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 the Constitution of India subject to their personal laws. So, it becomes evident that the State (both Central and State legislature) is competent to legislate on the subject of ‘family law’. It does also mean, that they can take steps in furtherance of the Uniform Civil Code out of combined reading of Article 44 and Seventh Schedule, List-III, Entry 5. However, the legislative path ever since the commencement of the Constitution of India has been inclined in favor of the codification of religion based on family laws in India. The Hindu Code Bill is the major evidence of the approach and continuation of personal laws *as it is* after the commencement of the Constitution of India in other religions such as Muslims, Parsis, and Christians. The Hindu Code Bill brought out revolutionary changes in the way Hindu Personal Law was seen and it brought reformation in the form of bringing laws at par with the gender justice concern and concerns of equality and fairness in the law under the Indian Constitution. Such reformation in the form of the Hindu Code Bill was seen in the backdrop of and as a step-in furtherance of constitutional commitments. A committee which was constituted and led by B.N. Rau appealed for the opinions and insights on the reformation of the Hindu Personal Law and presented a draft and a Select Committee, chaired by B.R. Ambedkar examined the draft¹². Later it came to be called the “Hindu Code Bill” inclusive of the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoption and Maintenance Act, 1956. Below mentioned are the drastic changes that the Hindu Code Bill brought in the legislation of Hindu Personal Law keeping in view the Constitutional commitments¹³:

- Hindu marriages became a dissoluble marriage¹⁴
- Free consent became an important ingredient of marriage.
- Women and Men were granted the right of divorce and remarriage.

¹¹ Concurrent List (List of subjects wherein both Central and State Legislature can enact).

¹² FLAVIA AGNES, FAMILY LAWS AND CONSTITUTIONAL CLAIMS 18, (Oxford University Press, 2011).

¹³ Id.

¹⁴ Provision for divorce was introduced.

- Hindu marriages became monogamous.
- Equal inheritance rights were granted to daughters in the separate / self-acquired property of their father.
- A large number of female relatives became Class I heirs - mothers, widows, daughters, wives of a pre-deceased son, grandson, and great-grandson.
- A widow could not be divested of the inherited property upon remarriage. The property inherited by her became her absolute property.
- Mother was deemed natural guardian of the child, after father.
- Women acquired a right to appoint a guardian.
- Girls could be taken into adoption (earlier only boys could be taken into adoption).
- Consent of the wife became mandatory for adoption.
- Right of Separate Residence and Maintenance to wives/widows introduced.

However, similar reformation or overhauling of the personal laws could not be done for the Muslim communities and the Legislature chose to reform the personal law of the majority community instead. Muslim law continues to be governed by the Muslim Personal Law which is based on the “Shariaya”, and it was clarified in the Muslim Personal Law (Shariyat Application) Act, 1938 a pre-Constitution of India, 1950 enactment which is continuing not just post-Constitution of India, 1950 but till today. The Muslim Personal Law is based completely on the ‘religious scriptures’ principally the same being the ‘Quran’ which is a holy text in case of Muslims and a major of the Muslim Personal Law¹⁵. Of course, post-constitution, there have been a couple of attempts to intervene in the uncodified Muslim Personal law, but those steps were in fact, in furtherance of ‘continuation’ of Muslim Personal Law only and it did not see the reformation which is required to be there like Hindu Code Bill. Even in the case of Christians and Parsis their pre-Constitution of India, 1950 Statutes continued to be made applicable to them with no changes or modifications.

However, in the midst of the *continuation* of existing, religion-based personal laws and reformations in the Hindu Personal Law in the form of the Hindu Code Bill, an option was

¹⁵ TAHIR MAHMOOD AND SAIF MAHMOOD (Eds), MUSLIM LAW IN INDIA AND ABROAD (Universal Law Publishing Co. Pvt. Ltd. 2012).

provided to the persons who would not like to be governed by their religion-based personal laws in the form of 'Special Marriage Act, 1954'. The Special Marriage Act, of 1954 is a progressive piece of legislation that was meant to be a secular and optional code.

The scheme of the Special Marriage Act, 1954 is such that if any person in India would not want to be governed by their religion-based personal law, they can marry the person of his / her choice in accordance with the provisions of the Special Marriage Act, 1954 and thereby they can alter the application of other personal laws such as inheritance and succession which are incidental to the subject matter of marriage and divorce. This was the unique system made to provide a choice to such persons in place of the Uniform Civil Code. There are scholarly opinions that it is an optional Uniform Civil Code or a step-in furtherance of the Uniform Civil Code or an alternative to the Uniform Civil Code till the State takes steps in furtherance of Article 44 of the Indian Constitution. This Act helps them in overcoming the constraints posed by their own personal laws and is called the civilian of marriage and the marriage under the Act of 1954 is "civil marriage". The marriage of two persons belonging to two different religions or between persons of a similar religion could alter the application of family law of their religion¹⁶. The applicable law in case of marriage under the Special Marriage Act, 1954 for divorce and matrimonial remedies would be the Special Marriage Act, 1954 and for inheritance and succession, it is the Indian Succession Act, 1925. Further, in case one of the parties to the marriage is a Hindu and the other party to the marriage is non-Hindu, it results in severance of status of that Hindu spouse from the Hindu Joint Family or Hindu Undivided Family (HUF) and that spouse will no longer be called as the member of the HUF¹⁷. Similarly, the Act of 1954 also permits two persons who are already married in accordance with their personal law to *register* their marriage under the Special Marriage Act, 1954 before a Marriage Officer under the Act of 1954,¹⁸ and thereby they may alter their personal laws to be governed by another set of family law as mentioned above. Even in such cases, Section 19, 20, 21, and 21A will have a similar effect.

However, when both the parties to the marriage are Hindus, then severance, as given in Section 19, will no longer happen and even the succession to the property or inheritance of the property of the Hindu couple would be in accordance with the Hindu Succession Act, 1956 and not in accordance with the Indian Succession Act, 1925.¹⁹ Although the Act of 1954 is hailed

¹⁶ Special Marriage Act, 1954, Sec 21.

¹⁷ Marriage Act, 1954, Sec 19.

¹⁸ Special Marriage Act, 1954, Sec 15.

¹⁹ Special Marriage Act, 1954, Sec 21 A.

as being a secular law or an optional civil code, it also has the tendency to favor the religion or to have its application by putting a savings clause under Section 21A for a particular religion.

In the backdrop of this, it becomes pertinent to take an overview of the existing framework of the (religion-based) family laws in India applicable to the parties.

THE FRAMEWORK OF REGIME OF FAMILY LAWS IN INDIA:

In the backdrop of the *continuation* Pre-Constitution of India, 1950 family laws based on the religion or religious scriptures, the authority of the State to legislate on the subjects of marriage, maintenance, succession, or inheritance, and the non-existence of the Uniform Civil Code in the country, it becomes matter immense importance to know and see the structure of the *existing* family law, which is the outcome of a) religious scriptures²⁰ and b) codifications under Seventh Schedule, List-III, Entry-5 of the Constitution of India²¹

HINDU PERSONAL LAW (FAMILY LAW):

1. Hindu Marriage Act, 1955 (for marriage and divorce in the case of Hindus)
2. Hindu Succession Act, 1956 (for succession or inheritance to the or of a Hindu in case of death of either male or female Hindu)
3. Hindu Adoption and Maintenance Act, 1956 (for provision of adoption of a child and maintenance to the Women, Parents, and children)
4. Hindu Minority and Guardianship Act, 1956 (for custody issues and for the legal and natural guardianship of a child below 18 years of age)
5. Un-codified Hindu Undivided Family Law / Joint Hindu Family Law

As far as HUF Law is concerned in the case of Hindus, there are some schools of thought, prescribing rules pertaining to Hindu Undivided Family Institution, which is very unique in the world. The Dayabhaga school of Hindu law prevails in Bengal, Assam, Tripura, and Manipur. In the rest of India, it is the Mitakshara school that prevails. The Mitakshara school is further sub-divided into four sub-schools, viz., the Mithila, the Benares, the Maharastra or Bombay, and the Dravida or the South India school, which, broadly speaking prevails in their respective jurisdictions. The peculiarity of schools of Hindu law is that if a Hindu governed by a particular school migrates to another region, he would continue to be

²⁰ Pre-Constitution of India, 1950 (family laws).

²¹ Post-Constitution of India, 1950 (family laws).

governed by his own school unless he gives it up and adopts the law of the place where he has settled. These schools have still relevance in respect of un-codified Hindu Law, particularly joint family and partition.

MUSLIM PERSONAL LAW:

Quran is a paramount source of Islamic law and Muslim jurists have to extract law from it. But in doing so, they need to take into account other sources as well. Quran, in itself, is not a book of law like an enacted Code legislated by Parliament i.e., Indian Penal Code, the Indian Contract Act, etc. Its verses are not Sections of a Code. As a divine policy, Quran does not contain 'law' in the strict sense of the term. 'Law' has, in fact, been deliberately concealed by God himself within the legally imprecise and sometimes ambiguous sacred texts. 'Law' in Islam is to be extracted from the sources of Islamic Law. Quran is not law, but the source of law. This extraction is human activity and is called 'ijtihad', which means 'endeavor' or 'self-exertion'. In fact, Sharia is based on Divine instructions called 'Wahi'. Law, on the other hand, does rely on human reason or human speculations called 'Aql'. Other than Quran and Sunna, all other sources of Islamic law are based on human reasoning such as Ijma (consensus amongst learned), Qiyas (analogical deductions), and Istislah (juristic preference), Istislah (public interest), and ijtihad (juristic reasoning). Thus, jurists discover 'law' in Islam.²²

Also as described by Prof. Paras Diwan and Prof. Jaswal²³, as opposed to Hindu personal law, in respect of Muslims, the schools have no territorial or regional connotation in the sense in they have in relation to Hindus. The Hanafi school (one of the four schools of the Sunni sect) covers a vast majority of Muslims all over India. Most of the Shias are governed by the Ithna Ashari school. Ismailis who constitute the smallest minority group of Muslims and who are mostly found in western India are governed by the Ismaili school. Muslims belonging to Shaafi school are mostly found in southern India. Mention may also be made of the three commercial communities of Muslims, the Khojas, the Bohras, and the Cutchi Memons who before the Shariat Act, 1937 were governed by their own customs and in some matters by Hindu law. After the year 1937, it is not so. The former two belong to the Shite Ismaili sect and the last belongs to Sunnite Hanafi School. The Khojas still retain the option of being governed by customary law, but others have lost the option by accepting the application of

²² LIVE LAW NEWS NETWORK, available at <http://www.livelaw.in/favour-uniform-civil-code-piecemeal-manner-interview-nalsar-vc-prof-faizan-mustafa/>

²³ Paras Diwan and Prof. Jaswal, *Family Law*, available at <http://14.139.60.114:8080/jspui/bitstream/123456789/738/23/Family%20Law.pdf>

Muslim law. The Mopilla Muslims of Kerala was another Muslim community, which was at one time governed by customary law. They still retain the customary law of tarvad.

Following is the list of existing codifications in the case of Muslim personal law/family law:

1. The Muslim Personal Law (Shariyat) Application Act, 1937 (A statute that clarifies the source of Muslim Personal Law)
2. The Dissolution of Muslim Marriage Act, 1939 (a provision for divorce is made for Muslim female spouse)
3. The Muslim Women (Protection of Rights on Divorce) Act, 1986 (enacted after the aftermath of *Md. Ahmed Khan vs. Shaha Bano Begum*²⁴ 1986 landmark judgment by the Supreme Court of India allowing Muslim divorced wife to claim maintenance under Section 125 of the Code of Criminal Procedure).
4. The Muslim Women (Protection of Rights on Marriage) Act, 2019 (enacted after the landmark judgment of the Supreme Court of India in *Shayara Bano vs. Union of India and others*²⁵ which is considered a revolutionary judgment for Muslim women who had imposed with irreversible triple talaq by the Muslim men which got penalized in the present Statute by the Parliament).

CHRISTIAN PERSONAL LAW:

According to the Indian Christian Marriage Act, 1872, 'Christians' means persons professing the Christian religion, and 'Indian Christians' include 'the Christian descendants of natives of India converted to Christianity'. In respect of marriage, matrimonial causes, and succession, Christians are governed by statutory law. They are:

1. The Indian Christian Marriage Act, 1872
2. The Indian Divorce Act, 1869
3. The Indian Succession Act, 1956

PARSI PERSONAL LAW:

Indian Parsis belong to Zoroastrian faith and in that sense in India, Parsi and Zoroastrian are synonyms. In modern India, Parsi law applies to the following three sets of persons²⁶: (a)

²⁴ (AIR 1985 SC 945)

²⁵ (2017) 9 SCC 1

²⁶ Paras Diwan and Prof. Jaswal, *Family Law*, available at <http://14.139.60.114:8080/jspui/bitstream/123456789/738/23/Family%20Law.pdf>

persons who are descendants of the original Persian emigrants and are born of Zoroastrian parents, (b) those persons whose father is (or was) a Parsi and mother an alien but admitted to Zoroastrian faith and (c) Zoroastrians from Iran

In respect of marriage, matrimonial causes, and succession, Parsis are governed by statutory laws. They are:

1. Parsi Marriage and Divorce Act, 1936 and
2. Indian Succession Act, 1929.

PERSONAL LAW OF JEWS:

For the family laws of Jews, there is no codified law in India. They are governed by their religious laws. The Jewish Law was written down in the first five books of the Old Testament often together called Torah (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy). The modern Jewish law is an adaptation of the Mosaic and Talmudic law. That is a collaboration of divine and evolved law²⁷.

PERSONAL LAW AND UNIFORM CIVIL CODE VIS-A-VIS THE CONSTITUTION OF INDIA, 1950:

Now, post the commencement of the Constitution of India, 1950 the discussion started if the personal laws based on the religion is to be continued and when the Constitution of India was made, many members of the Constituent Assembly were concerned about the national integration, however, the scars of the partition of India brought some barriers in the line of having a uniform family law for the citizens. It was thought that a uniform law and abolition of different personal laws based on religion would bring people closer²⁸. So, the vision of national integration by the framers of the Indian Constitution through the instrumentality of uniform family law could not be brought into reality and as a result, we see the addition of 'Uniform Civil Code' as one of the goals to be achieved in governance by the State under Article 44 of the Indian Constitution. Article 44 of the Indian Constitution runs as follows:

'The State shall endeavor to secure a Uniform Civil Code for the citizens throughout the territory of India.'

²⁷ *Jewish Law of Marriage & Divorce In India*, IPLEADERS, available at <https://blog.ipleaders.in/Jewish-Law-Marriage-Divorce/>.

²⁸ S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA*, 191 (Oxford University Press 2002).

The Uniform Civil Code was seen through the lenses of ‘secularism’, the idea of ‘national integration, and the ‘gender justice’, as the majority of the religions were unjust towards women before the commencement of the Indian Constitution. Especially, after the commencement of the Indian Constitution, there is a complete overhaul of the Hindu personal law so far as family affairs are concerned. There are Constitutional mechanisms ensured under Article 25 and legislative steps which were taken in the form of the ‘Hindu Code Bill²⁹’ after the commencement of the Indian Constitution. The Christian³⁰ and Parsi laws³¹ were already codified during the British regime and the codification brought somewhat rationality and reasonability to the laws governing Christians and Parsis in India. However, the Muslim Personal Law was, and even to date is far from the codification and is being considered to be unjust towards the women. The Uniform Civil Code was seen as a solution for this not just the multiplicity of family laws as a problem but the concern such as gender issues, reasonability, and rationality in the laws governing family affairs.

The Uniform Civil Code was also spoken of as being a test of secularism by rationalists who emphasized that religion should be irrelevant in social and public life. However, a campaign for the Uniform Civil Code with emphasis on uniformity was interpreted as an effort by the majority community to impose their law on Muslims and this resulted in the weakening of the secular forces among the Muslims who wanted the reform of Muslim Personal Law from the perspective of gender justice.

Further, the concern of the Uniform Civil Code was addressed in Article 44 which is one of “Directives” to the State and an “Objectives” to be achieved whenever appropriate time comes³². It has become a dead letter and the State has not taken any initiative in furtherance of the Uniform Civil Code and its implementation throughout the country³³. The then ruling party in governance also made it clear that the right time has not come to bring into force the Uniform Civil Code as the time is not ripe yet to push through³⁴. In addition to the political spectrum, at

²⁹ Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoption and Maintenance Act, 1956, Hindu Minority And Guardianship Act, 1956.

³⁰ Indian Christian Marriage Act, 1872 Indian Succession Act, 1925, (Indian) Divorce Act, 1869, the Guardians and Wards Act, 1890.

³¹ Parsi Marriage and Divorce Act, 1936, Indian Succession Act, 1925, the Guardians and Wards Act, 1890.

³² Ahmedabad Women’s Action Group vs. Union of India AIR 1997 SC 3614.

³³ Shabbeer Ahmed and Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, IJPS 67, No. 3 (JULY - SEPT., 2006), p. 547, <https://www.jstor.org/stable/41856241?seq=3>.

³⁴ Id.

the judicial level too similar observation was made out in the case of *State of Bombay vs. Narsu Appa Mali*³⁵, the Bombay High Court in this case ruled that:

- Personal laws are not ‘laws in force under Article 13 of the Constitution as they are based on religious precepts and customary practices; and
- The principles enshrined in Part III of the Constitution cannot be applied to the personal laws.

The observation made by the Bombay High Court in the present case had impacted the way the Uniform Civil Code was seen. Moreover, the branch of “Personal Law” received the silent license to operate validly despite several contentions being there in the family law. These issues have time and again come into the limelight of court and the courts in the country have dealt with them considering the Constitutional obligation of the Courts in the country to protect the basic rights or the fundamental rights of the citizens, especially, the concern of gender justice. Despite the Bombay High Court approach in the above-mentioned case, the Courts have time and again tested the “Personal Law” on the touchstones of the Fundamental Rights in the Constitution of India. On all such occasions, the Judiciary reminded the State of its obligation under Article 44 of the Constitution of India i.e., the Uniform Civil Code throughout the country.

The first such dynamism on the part of the Judiciary came to the light in the case of *Md. Ahmed Khan vs. Shaha Bano Begum*³⁶ wherein the Supreme Court of India restored the right of maintenance of a divorced Muslim Wife under Section 125 of the Code of Criminal Procedure, 1973. A Muslim divorced wife by virtue of Muslim Personal Law which restricted her right to claim maintenance after divorce³⁷. Whereas in other personal laws, a divorced woman could legitimately claim her right under Section 125 of the Code of Criminal Procedure. The apex court felt the need for enforcement of Article 44 owing to the several gender issues that existed in the personal laws. The judgment led to the enactment of a separate law for Muslim Woman on post-divorce maintenance, namely, the Muslim Women (Protection of Rights on Divorce) Act, 1986. However, the Act of 1986 failed to come to comply with the terms of equality and is considered to be flawed legislation. Although the Act of 1986 is flawed

³⁵ ILR 1951 Bom 775.

³⁶ AIR 1985 SC 945.

³⁷ INDIRA JAISING (ED.) GENDER JUSTICE, MEN’S LAWS WOMEN’S LIVES A CONSTITUTIONAL PERSPECTIVE ON RELIGION, COMMON LAW AND CULTURE IN SOUTH ASIA, 7 (Women Unlimited 2005).

legislation on some counts, it did utilize existing practices and structures present in Islam to grant maintenance to women³⁸.

Further, the Supreme Court of India in *Sarla Mudgal vs. Union of India*³⁹ and *Lily Thomas vs. Union of India*⁴⁰ came heavily on the fraudulent conversions by non-Muslims to the Muslim faith with the intent to remarry with Muslim women in accordance with the tenets of Muslim marriage and declared such marriages as invalid and would amount to Bigamy despite the conversion being a matter of fundamental right. In these cases, too, the apex court of India expressed the need for Uniform Civil Code and directed the States to take steps in furtherance of Article 44 of the Indian Constitution.

Surprisingly, in *Ahmedabad Women's Action Group vs. Union of India*⁴¹, although the Supreme Court of India directed the State to take steps in furtherance of Article 44 of the Indian Constitution, it did not consider the request made by the Petitioners in the case to declare certain parts of Family Law in some religions as unconstitutional. Supreme Court of India felt and observed that 'personal laws are a matter of State policies with which Court do not have any concern⁴²'.

It is evident from the judicial pronouncements that the Judiciary has been concerned with the Uniform Civil Code time and again and has been directing the States with respect to their Constitutional obligation under Article 44. However, these observations have never been taken seriously by the State and there has been no attempt to the furtherance of Article 44. Having said that the Supreme Court of India did not turn a blind eye toward arbitrariness and unreasonableness that exists in some of the personal laws and has been testing them on the touchstones of the fundamental right in Part-III of the Indian Constitution through the judicial lenses. The courts in the country have used the doctrine of judicial review which enables the Apex Court and High Courts to make sure fundamental rights are not violated by any law of the country, as they are bound to become active in such cases of legislative transgression⁴³.

Be it *Shaha Bano Begum*⁴⁴ judgment, or *Githa Hariharan v. Reserve Bank of India*⁴⁵ to review discriminatory guardianship law in case of Hindus or *Mary Roy v. State of*

³⁸ Id.

³⁹ AIR 1995 SC 1531.

⁴⁰ AIR 87 2000 SC 1650.

⁴¹ AIR 1997 SC 3614.

⁴² Id.

⁴³ S.P. SATHE, JUDICIAL ACTIVISM IN INDIA, 30 (Oxford University Press 2002).

⁴⁴ (AIR 1985 SC 945).

⁴⁵ SCC 1999 2 228.

*Kerala*⁴⁶ to review discriminatory inheritance laws in case of Christians, or the recent Supreme Court pronouncement in *Shayara Bano vs. Union of India and others*⁴⁷, declaring the irrevocable instant triple talaq as invalid in Muslim Law, the Judiciary have time and again proved that the Courts cannot ignore the blatant violations of fundamental rights ensured in Part III of the Indian Constitution and such personal laws would not sustain. This approach of the judiciary is taking care of the Constitutional goals hidden under Article 44 of the Indian Constitution till the Uniform Civil Code becomes the reality.

Moreover, recently, the Law Commission of India conducted a survey by publishing a Circular (Appeal) and a Questionnaire⁴⁸ with respect to the Uniform Civil Code, and on the basis of empirical study, it has come to the conclusion that the people or the system is not yet ready to go for Uniform Civil Code under Article 44 of the India Constitution⁴⁹. However, we also see some movements⁵⁰ in the existing Central Government in furtherance of the Uniform Civil Code (Article 44) which is the main agenda of the governance of the existing government in the center.

CONCLUSION:

The constitutional goal of secularism, gender justice, integrity, and brotherhood hidden in the philosophy of the concept of Uniform Civil Code Article 44 of the Indian Constitution could not see the light of the day. Of course, the multicultural system is a unique feature of the Indian Society, but it should not have entered the domain of the *family law system* which is often considered to be a civil affair. The continuation of religion-based norms in family affairs or personal affairs is eroding or compromising the foundations of secularism, gender justice, unity and interiority of India, and a sense of brotherhood amongst the citizens. However, the courts in the country although could do nothing substantial in terms of Article 44, it definitely came to the rescue of the fundamental rights whenever they are threatened by the existing personal laws. It seems the present approach of reviewing the multiple family laws codified on the basis of religion would continue in near future.

⁴⁶ AIR 1986 SC 1011.

⁴⁷ (2017) 9 SCC 1.

⁴⁸ Appeal dated 7th October, 2016 by the Chairman of the Law Commission of India.

⁴⁹ *Uniform Civil Code Neither Necessary Nor Desirable At This Stage*, Law Commission Of India, THE BAR AND BENCH, <https://www.barandbench.com/news/uniform-civil-code-law-commission-india> (Last visited May 5th, 2022).

⁵⁰ *Govt Likely To Refer Uniform Civil Code Issue To LAW PANEL*, THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/govt-likely-to-refer-uniform-civil-code-issue-to-law-panel/articleshow/89332232.cms> (Last visited May 1st, 2022).

UNIFORM CIVIL CODE: - A SOCIO-LEGAL PRESPECTIVE

-Vinay Kella¹

ABSTRACT-

*The Uniform Civil Code (UCC) aims to replace personal laws based on each major faith, community's scriptures and practices with a single body of rules that governs all citizens as it establishes a single law that applies to all faith communities in personal concerns such as marriage, divorce, inheritance, and adoption.*²

Numerous problems are associated with UCC implementation which is societal and legal in nature as it goes contrary to Article 25 of the constitution which guarantees religious freedom to all people in India and safeguards the diversity of each faith's culture and rituals. Is UCC in Goa treat all religions equally? Are we becoming a more intolerant society to the other religious practices as recently seen in Hijab row? The main question is whether is UCC being blindly supported for justice for Muslim women or because other communities are being denied four marriages?

Ill-Informed discussions on UCC have created a huge confusion among the masses as there is a huge gap between the expectation and reality of implementing UCC which are- The fear of minority and tribal communities' ritual practices being overshadowed by the majority community practices are real. Uniform civil code is being blindly supported on the wrong prepositions that Muslim law is unfair to women which must be analyzed clearly. UCC is not a standardized code as seen in Goa where the Hindu men in Goa have the right to polygamy and the same practice is being used for propagating gender justice for Muslim women! The most neglected question is- Will the Majority community accept the sacrifice of its own religious practices (Hinduism being a diverse religion)?³

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² Faizan Mustafa, *Explained: Uniform Civil code — the debate, the status*, INDIAN EXPRESS,(September 18, 2019 11:24:50 am).

³ Albertina Almeida, *CJI Bobde Needs to Know That Goa Family Laws Are Not All Uniform or Equal*, THE WIRE, (April 5th ,2021).

The author's first part of the article deals with the impact on multiculturalist and non-multiculturalist societies by UCC. The second part of the article deals with the exploration of problems associated with the UCC and discusses the various realities associated with the implementation of UCC. The third part deals with the alternative solutions to UCC. The fourth part deals with a conclusion.

INTRODUCTION

Uniform Civil Code (UCC) object is to replace personal laws based on religious scriptures with a single body of rules that governs all citizens⁴. Personal laws through religious scriptures governs three subject areas – family law (marriage, divorce, custody, alimony and maintenance), property law (succession, inheritance and wills) and the law governing religious establishments (such as endowments and offices)⁵ but UCC aims to replace such governance through a singular law equally applicable on all citizens, neglecting their own unique religious and cultural practices. Due to which UCC is a threat to both religious and cultural practices, as religion and culture do not exist in isolation, but affect and influence each other. As various cultural practices become ‘religionized’ and various religious ideas become a part of the cultural practices.⁶

UCC is problematic on two fronts- Firstly, due to the codification of all personal laws and as a result the essence of the culture and identity of an individual is lost due to which the importance of culture in an individual's life is lost. As culture is the ‘lens’ through which an individual identifies itself and identify various experiences in the world through such lenses as described by Will Kymlicka⁷. This concept of culture is so sacrosanct that the constitution also identifies as evident from several articles mentioned in the constitution such as Article 25 (Freedom to practise, propagate religion), profess Article 26 (Freedom to manage own religious affairs).

⁴ Faizan Mustafa, *Explained: Uniform Civil code — the debate, the status*, INDIAN EXPRESS, September 18, 2019 11:24:50 am.

⁵ Jayanth K. Krishnan, *Legitimacy of Courts and the Dilemma of Their Proliferation: The Significance of Judicial Power in India*, in *Asian Courts in Context*, 290 (Cambridge University Press, 2015).

⁶ Mariam Rawan Abdulla (2018) Culture, Religion, and Freedom of Religion or Belief, *The Review of Faith & International Affairs*, 16:4, 102-115, DOI: 10.1080/15570274.2018.1535033.

⁷ WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS*, 83 (Oxford, Clarendon, 1995)

Secondly, the idea of UCC is from the idea of ⁸nationalism which advocates for defined borders for a country populated by people of one race, one religion, one language which is also pointed by Rudolphs that the UCC is a direct attack on ‘religious minority, personal laws and cultural identity’ and, ultimately, a unified civil code is for the nationalists to remove cultural distinctions⁹. And such an idea is against the concept of pluralism and multiculturalist society which accommodates many communities which are different in terms of their ethnicity, religion, etc but yet protecting the individual member of the community instead of positing a binary opposition between national and community-based identities¹⁰. This multiculturalism becomes much more important for a country like India which has a huge diverse population with numerous Religions and Cultures. India should take into consideration of various personal laws associated with specific religion and must contemplate the true gap between the harsh realities and utopian expectations regarding the implementation of UCC, otherwise several social and legal problems can arise in the society, as discussed further in the essay.

The next part analyses and explores the various gaps between the realities and expectation regarding implementation of UCC.

1. One of the important arguments in favour of implementing UCC is that it is mentioned in Article 44 dealing with the Directive Principles of State Policy (DPSP). But in reality, the DPSP’s are just the guiding light for the state to make laws and achieve the standard set by the constitution. Whereas, Article 25 guarantees Right to religious freedom (A Fundamental Right) which can’t be overridden by a DPSP as held in the case of *Minerva mills vs Union of India*¹¹, so essentially the UCC has to effectively balance the DPSP (equality) and Fundamental right (religious freedom) as pointed out by Flavia Agnes¹², which is seemingly difficult when considering the debates around UCC in the present scenario.
2. As pointed out earlier that such ideas of uniformity are essentially brought on Nationalistic grounds but the main aim of including UCC in DPSP (Article 44) was for granting Equal status to women, which is evident from the constituent assembly

⁸ M.P. Singh, *Uniform Civil Code, Legal Pluralism and the Constitution of India* 5 JILS 7, 8.

⁹ RUDOLPH AND RUDOLPH, *LIVING WITH DIFFERENCE IN INDIA*, 55.

¹⁰ Rajiv Bhargava & Ashok Acharya, *POLITICAL THEORY AN INTRODUCTION*, 131 (Pearson 2008).

¹¹ *Minerva Mills v Union of India*, (1980) 3 SCC 625.

¹² Flavia Agnes, ‘The Supreme Court, the Media, and the Uniform Civil Code Debate in India’, in Anuradha Dingwaney Needham and Rajeshwari Sunder Rajan (eds), *The Crisis of Secularism in India* (Ranikhet: Permanent Black, 2007), p. 294.

debates¹³. But in reality, this original intent is absent when we are discussing UCC in today's time. The main question that we need to ask ourselves is that are we really securing UCC for justice for women or are we becoming so intolerant, as recently seen during the Hijab row and we want to shroud and invade other community's practices by the majority community practices, just because some community is being denied the rights which are available to a minority community. This gap increases due to the negligence of cultural diversity by the political community¹⁴ and inaction of politicians due to their vote-bank politics where either force them to act or omit certain duty in the name of vote-bank politics, so that their voter base is kept intact.

3. The most neglected question in the debate around UCC is that will Hindus really accept UCC? The answer in reality is very difficult to answer as Hinduism is a diverse religion. And if going by the constitution's definition of 'Hindus' then around 85% of the population falls into that domain and non- acceptance of UCC by such a large population is not healthy for a democracy like India. Example: - The Hindu Marriage Act of 1955 prohibits marriages between close relatives, yet it is considered auspicious in the south¹⁵. The concept of 'Goutra' in marriages is very popular in North India, but it is not a very essential practice of the Hindu culture in South.

This gap between the reality and expectation has led to the negligence of various social and legal problems associated with UCC.

SOCIAL PROBLEMS DUE TO UCC

1. Minorities in India oppose the idea of UCC as they fear that their cultures might be assimilated with the majority culture in the name of uniformity. This fear becomes evident when minorities are coerced to forge their individual religious or cultural identity and identify themselves as Indians¹⁶ or integrate into the Hindu mainstream.

¹³ M.P. Singh, *Uniform Civil Code, Legal Pluralism and the Constitution of India* 5 JILS 7, 8.

¹⁴ Ethnic Diversity and the Nation State Author(s): NIRAJA GOPAL JAYAL Source: *Journal of Applied Philosophy*, 1993, Vol. 10, No. 2 (1993), pp. 147-153 Published by: Wiley Stable URL: <https://www.jstor.org/stable/24354252>.

¹⁵ Faizan Mustafa, *Legal pluralism in personal law*, THE HINDU (OCTOBER 30,2019), <https://www.thehindu.com/opinion/op-ed/legal-pluralism-in-personal-law/article29825335>

¹⁶ Neera Chandoke, *Rethinking Minority Rights*, Vol. 23, No. 1 (SPRING), pp. 123, 129 (1996).

Example: - Basques in Spain, Quebecois in Canada, were all forced to shed their cultural identities and identify themselves as Spanish, Canadian.

2. Otherwise, these minorities will be coerced to prove their allegiance to the nation or they will be treated as a perpetual stranger in the society, which is harmful for the harmony of the society. The consequences can be learned from the Civil war which took place in Sri Lanka where one group (Sinhalas) wanted to suppress the other group's (Tamils) cultural and religious rights.
3. Members of minority groups are forced to give up their views due to the imposition of views of the majority community, which leads to a loss of self-esteem and isolation. This aggressiveness and isolation of a community does not contribute to the development of a healthy democratic polity¹⁷. Repercussions of cultural marginalisation are deadly as made aware by theorists like Frantz Fanon¹⁸. Example; - In Pakistan, Ahmadis are classified as a non-Muslim under Article 260 of the Pakistan Constitution and have been punished under the law for referring to themselves as Muslims or referring to their place of worship as a mosque.
4. Tribes and UCC- Tribes are being significantly exploited as their natural resources are being exploited for gaining profits in this capitalist society which has subjugated them to bonded labour¹⁹. The tribals are being drawn into the mainstream of national life — economic, political, and cultural — not only to be pushed to the bottom of the social/class structure, but also to be governed by laws that ignores their own personal laws. Example: - Polygamy is practised by the Naga tribes, the Gonds, the Baiga, and the Lushai and various other tribes, which has been barred by the Hindu Marriage act, 1955.
5. This problem was highlighted by a Tribal group²⁰ when it went to Supreme court against the implementation of UCC. They claimed that – “the Adivasis (tribals) had their own personal laws and do not come in the category of Hindus as they worshiped nature instead of idols and performed burial of the dead. The marriage ceremonies of tribals are also different from the Hindu rituals”.

¹⁸ Neera Chandoke, *Rethinking Minority Rights*, Vol. 23, No. 1 (SPRING), pp. 123, 133 (1996).

¹⁹ NIRAJA GOPAL JAYAL, *Ethnic Diversity and the Nation State*, Vol. 10, No. 2, *Journal of Applied Philosophy*, pp. 147-153, 151, (1993).

²⁰ Utkarsh Anand, *Tribal Rights Group Moves SC Against Uniform Civil Code*, INDIAN EXPRESS (Oct. 24, 2016, 5:47 pm), <https://indianexpress.com/article/india/india-news-india/supreme-court-tribal-rights-protection-customs-uniform-civil-code-3094151/>

LEGAL PROBLEMS DUE TO UCC

Several Legal problems are associated with implementing UCC, which are being neglected in the debates centred around UCC. Various Articles in constitution appear to be in contradiction UCC.

1. Article 29 (1) of the fundamental rights states that- *“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”*. This article acknowledges that different groups have different cultures and these different linguistic and religious practices are important to their individuals. Further, this article cannot be restricted on any grounds by the state as it acknowledges that members of minority cultures may face disadvantages in a majoritarian society; and that, as a result, these members have special rights to their own culture. And suppression of such practices or cultures goes against the Fundamental Right, which happens when we promote the idea of UCC.
2. The Importance of special rights to minorities is also important as it was also recognised by the constituent assembly. The constituent assembly viewed this special right of minority to their culture as sacrosanct and as an unqualified right. As Dr. Ambedkar said when the Interim Report on Fundamental Rights was being debated in the Constituent Assembly - *“(r)ights of minorities should be absolute rights. They should not be subject to any consideration as to what another party may like to do to minorities within its jurisdiction... I think that the rights which are indicated in clause 18 are rights which every minority irrespective of any other consideration is entitled to claim²¹”*.
3. India’s responsibility towards protecting and promoting different cultures becomes more important as it is a secular state. The Indian concept of secularism (state treating all religions equally) is divided into three components- religious freedom, neutrality and reformatory justice as defined by Rajeev Dhavan²². A secular state like India cannot promote religious freedom by implementing UCC as it homogenises different cultures, rituals, practices and moreover, India should not abolish the personal laws of a religion or religions due to a single regressive practise. Religious freedom here is not just religious beliefs but also includes rituals and practices. Protecting such religious

²¹ Constituent Assembly Debates, Official Report, vol 3, Lok Sabha Secretariat, Delhi 1989, pp. 507- 508.

²² RAJEEV DHAVAN, THE ROAD TO XANADU: INDIA’S QUEST FOR SECULARISM, (Bloomington: Indiana University Press, 2001).

freedom becomes much more important as other freedom related to speech and expression²³, etc essentially derives when such religious freedom is available to the community and individual. Moreover, the concept of secularism can't be forsaken for implementing UCC as secularism is considered to be a part of the basic structure doctrine as held in the case of ²⁴*Kesavanand Bharati vs State of Kerala*.

4. One more utopian expectation is that Goa is cited as a shining example of UCC, but the reality could not be farther from the truth, as there are various discriminatory provisions in the code, which favours Christians or Hindus and further there is no uniform applicability of personal laws in the code. Example: - The Code allows Hindus²⁵ to practise limited polygamy under specific conditions, but prohibits polygamy in Muslims. Catholics are also granted several privileges under the Code and are not required to register their weddings and signatures of church is adequate for civil registration. Many women are unaware that the UCC demands a second confirmation through signatures, and as a result, their marriages are declared null and void when a disagreement occurs. Many incidences of fraud have been documented as a result of such deceptions²⁶.

Pluralism in Indian society is a major reason why UCC appears to be a faraway dream. We must consider each minority's particular judgments and laws equally in order to protect the nation's diversity and to avoid such problems we must consider Special marriage act and concept of Legal Pluralism as an alternative to UCC.

ALTERNATIVE TO UCC

Special Marriage Act is a civil alternative to personal laws that can be chosen freely by a person. In contrast to personal laws, the Act provides a common or uniform marriage for all Indian people, regardless of religion or caste.²⁷ In the case of marriage and related concerns,

²³ RAJEEV DHAVAN, *THE ROAD TO XANADU: INDIA'S QUEST FOR SECULARISM*, (Bloomington: Indiana University Press, 2001) Page 279.

²⁴ *Kesavanand Bharati vs State of Kerala*, (1973) 4 SCC 225.

²⁵ Alberta Almeida, *CJI Bobde Needs to Know That Goa Family Laws Are Not All Uniform or Equal*, *THE WIRE* (Apr. 5, 2021), <https://thewire.in/law/cji-bobde-needs-to-know-that-go-family-laws-are-not-at-all-uniform-or-equal>

²⁶ Faizan Mustafa, *EXPLAINED: WHY GOA'S CIVIL CODE IS NOT AS UNIFORM AS IT IS MADE OUT TO BE*, *INDIAN EXPRESS* (Apr. 20, 2021), <https://indianexpress.com/article/explained/why-goas-civil-code-is-not-as-uniform-as-it-is-made-out-to-be-7279365/>

²⁷ Krishna Kumari, Areti, *In the Absence of a Uniform Civil Code, is the Special Marriage Act the Best Alternative for Women?* (January 10, 2007). Available at SSRN: <https://ssrn.com/abstract=956233>

this Act takes a different approach, as it extends to specific persons regardless of their religious affiliation. The Act establishes a common or uniform marriage for all Indian citizens, regardless of religion or caste. The Special Marriage Act of 1954 is regarded as a watershed moment in India's secularisation of personal laws.²⁸

Country like India with enormous diversity and social heterogeneity must continue practising Legal pluralism²⁹ as it promotes heterogeneity, which perfectly fits with the socio-economic conditions prevalent in India, which is also endorsed by Rudolphs, when he says that the “Proponents of legal uniformity support a uniform civil code, and proponents of legal pluralism argue for minority rights in the form of diverse personal laws³⁰”. Example: - Tribal Laws in coexistence with IPC³¹ is a shining example of Legal pluralism where both the systems work harmoniously, and minorities are given their constitutional right to practise their rituals and cultures.

CONCLUSION

Article 51A of the constitution imposes a duty on every citizen- "To promote harmony and the spirit of common brotherhood among all the people of India transcending religious, linguistic, regional or sectional diversities,". This duty is on citizens, which also includes our Elected Representatives as they are also the citizens of the country. Their duty is much more when compared with that of normal citizen as they are the elected by the people for establishing a welfare state which promotes harmony between different communities and not divide them in the name of religion. To improve the Special Marriage Act and Legal Pluralism, the state must create an atmosphere conducive to discourse among many communities, avoiding the necessity to implement UCC.

The repercussions of implementing UCC are many as described earlier but still if the ‘State’ wants to implement UCC then the Piecemeal improvements would be a preferable

²⁸ Shambhavi Singh, *Special Marriage Act in Absence of Uniform Civil Code*, 4 (3) IJLMH, 295 - 301 (2021), <https://doi.org/10.1000/IJLMH.11451>

²⁹ M.P. Singh, *Uniform Civil Code, Legal Pluralism and the Constitution of India* 5 JILS 7,10.

³⁰ Rudolph and Rudolph, ‘Living with Difference in India’, p. 36.

³¹ M.P. Singh, *Uniform Civil Code, Legal Pluralism and the Constitution of India* 5 JILS 7, 9.

course of action³², which was also the idea discussed in the constituent assembly. ³³Hussain Imam in the constituent assembly said that- “I feel that it is all right and a very desirable thing to have a uniform law, but at a very distant day. For that, we should first await the coming of that event when the whole of 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 battles³⁴.”

The adoption of UCC may jeopardise harmony in the society. While implementing the UCC across the country, we should keep in mind the concerns of minority and tribal groups and the possible loss of their culture and identity within the Indian culture.

³²Faizan Mustafa, *The importance of piecemeal reforms*, THE HINDU (May 28, 2016, 05:54), <https://www.thehindu.com/opinion/op-ed/the-importance-of-piecemeal-reforms/article6167344.ece>

³⁴ Constituent Assembly Debates, Vol. VII, p. 546.

HIJAB CONTROVERSY: A BASE FOR UNIFORM CIVIL CODE

-Pallav Vats & Shruti¹

ABSTRACT

The UCC is a proposal pending for many years even after getting praise from Dr B.R. Ambedkar, due to religious and political reasons. Despite having a mammoth sized population and dissenting religious beliefs, we all are living peacefully due to the secular soul of our nation. The UCC is something that's always found itself as the topic of debate club societies but the recent 'Hijab' controversy in Karnataka become a base for UCC. The Karnataka Hijab controversy unveils the real problems of not following UCC.

UCC includes uniformity between all the religions. Not only will it strengthen the brotherhood between people with dissenting religious beliefs but also protect the rights of women in different religions where they find themselves discriminated against. However, Article 44 and Supreme Court from time to time always keep lobbying about UCC but to implement it in the whole country's 'political will' remained submissive.

According to the people who oppose UCC, it has certain issues and conflicts with religion. The Hijab controversy has given hope to sit and discuss all the good and evil effects of UCC and clears the path of implementation of UCC within the whole country.

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INTRODUCTION

Hijab is a head-covering mainly used by Muslim women. However, it is not an essential practice of Islam, but they wear it to maintain modesty. The whole Hijab controversy started when six girls of a government-run college in the *Udupi* district of *Karnataka*, started protesting after they were stopped from attending their classes for wearing hijab. When we get admitted to an educational institution we automatically agree to abide by the rules and regulations and Dress Code of the said institution. The rule stands for everyone, irrespective of community. Unfortunately, this issue suits the political agenda of many parties, radical institutions and some specific countries too. Protests, placard gangs and the future of India were protesting against the college administration, maybe on their own or somehow influenced by others. This all was as quick as a wildfire and protests were shifted to the whole country very systematically with the help of some radical organizations.

The UCC is something for which the Supreme Court and even Article 44 of our Constitution keep lobbying. Even *Dr B.R. Ambedkar* supported UCC during the debates of the constituent assembly². However even now the absence of political will and for various other reasons, UCC can't get implemented.

HIJAB BAN, NOT A NEW THING-

The purpose of the Hijab is to cover the head mainly, however with the passing of time it become a vote and sympathy gainer tool for various radical and political groups. Nowhere in the Quran³, is it mentioned that Hijab is *mandatory for all females* but in the upper class, Arab females the practice of veiling was popular. Soon it was propagated in all classes as the dominance of males were increased in society.

However, many countries have already imposed a ban on hijab,⁴ such as Russia, France, Bulgaria, Belgium, Netherlands and even Syria and many other countries, wearing of Hijab in college has been banned since 2010. Wearing a hijab in these countries can lead anyone to

²*Ambedkar And The Uniform Civil Code*, OUTLOOK INDIA, (last visited Feb 25, 2022), <https://www.outlookindia.com/website/story/ambedkar-and-the-uniform-civil-code/221068>

³*History of hijab in Islam: Why Muslim women wear hijab?*, JAGRAN JOSH, (last visited Feb 25, 2022), <https://www.jagranjosh.com/general-knowledge/history-of-hijab-in-islam-1644244440-1>

⁴Hindustan Newshub,

Trending news: Hijab is already banned in these countries, there is also a provision of fine in many countries (last visited Feb 26, 2022) <https://hindustannewshub.com/world-news/hijab-is-already-banned-in-these-countries-there-is-also-a-provision-of-fine-in-many-countries/>

punishment and pay a fine. Hijab or Burqa are banned in these countries due to security reasons, as there are many such terrorist incidents in the world including Sri Lanka⁵, France⁶ and European countries. Hijab is banned in these above-mentioned countries due to security alert and to eradicate radicalism.

In India, Hijab is not banned in any sense, but every citizen should respect the norms of any institutions, as when we take admission in any educational institution. UCC is the need of the hour otherwise the Hijab controversy will forever feed the people from the lobby of radicals and opportunists political parties.

HIJAB CONTROVERSY: A LAUNCH PAD FOR UCC-

The UCC became a matter of discussion in 1985 in India. It was the time when the *Shah Bano* case came into the limelight. In this case, Supreme Court held that *Shah Bano* should get alimony from her ex-spouse. In this case, the Supreme Court had quoted the uniform Personal laws. Personal laws were first framed during British rule, mainly for Hindu and Muslim citizens. However, the British doesn't implement UCC, as they feared that locals would rebel.

When we take admission to an educational institution we automatically agree to abide by the rules and regulations and Dress Code of the said institution, but the unnecessary protests are unchastening the environment of all educational institutions in India.

FREEDOM OF EXPRESSION; MOST MISUSED TERM IN INDIA-

Freedom of speech and expression has lost its charm due to many current incidents of unnecessary defamatory statements in the public sphere. Freedom of speech and expression is the most important rights enshrined in the Indian constitution. However, on daily basis, it is getting misused. In the name of freedom of speech and expression, any Tom, Dick and Harry are accusing anyone, maybe army man, Prime Minister or even Chief Justice of India⁷. There are some restrictions on the freedom of speech and expression, and we should all respect the

⁵ *Sri Lanka bans face veils after terrorist attacks*, THE WORLD FROM PRX (last visited Feb 26, 2022), <https://theworld.org/stories/2019-04-29/sri-lanka-bans-face-veils-after-terrorist-attacks>.

⁶ *Indivisibilité, Sécurité, Laïcité: the French ban on the burqa and the niqab - French Politics*, SPRINGERLINK, (last visited Feb 26, 2022), <https://link.springer.com/Article/10.1057/s41253-021-00164-8>.

⁷ *Tablighi case: Freedom of speech & expression most abused right in recent times*, (last visited on April 22, 2022) https://economictimes.indiatimes.com/news/politics-and-nation/tablighi-case-freedom-of-speech-expression-most-abused-right-in-recent-times-says-sc/articleshow/78550618.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

same. In any case, freedom of speech and expression should not be engaged with the cause of radical and religious violence.

RADICAL BACKING OF HIJAB-

Not only is it about the students, but it is also about the freedom of school and business owners to create a dress code and ensure the dress code is followed by every employee and student irrespective of their religion.

Some banned organizations like PFI, SIMI, Jamaat-e-Islami Hind and Campus Front of India are also backing the wearing of Hijab. A Kerala based journalist *MP Basheer's*⁸ sensational audio clip went viral in which the journalist alleged Jamaat-e-Islami was involved in receiving funds from Saudi Arabia's universities. Even open threats to murder⁹ CJ *Ritu Raj Awasthi* of Karnataka HC were made. The whole scenario is pointing towards a big conspiracy.

JUDGEMENT OF KARNATAKA HIGH COURT-

March 15, 2022 was a historic day. A three-judge full bench of Chief Justice *Ritu Raj Awasthi*, Justice *Krishna S Dixit* and Justice *JM Khazi* of Karnataka High Court rejected the plea that the ban on Hijab violates rights guaranteed by the Constitution i.e., under Article 14 (equality before law), Article 15 (no discrimination over faith), Article 19 (freedom of speech & expression), Article 21 (protection of life & personal liberty) and Article 25 (freedom of religion). Karnataka High court dismissed the petitions filed by students from *Udupi*, *Kundapur* and *Bengaluru* and also a couple of PILs that had set off a nationwide debate.

The bench primarily framed 4 questions,

- Whether Hijab is an essential religious practice protected under Article 25,
- Whether school uniform is not legally permissible,
- Whether the govt. order of Feb 5 was issued without application of mind and was arbitrary, and
- Is any case made out to initiate disciplinary inquiry against the college?

⁸ REPORT WIRE (last visited Feb 26, 2022),

<https://www.reportwire.in/clubhouse-leaks-how-jamaat-e-islami-illegally-receives-funds-from-saudi-arabia-to-islamise-india>

⁹ *Death threats to Karnataka judges over Hijab verdict*, ECONOMIC TIMES (last visited Feb 27, 2022) <https://economictimes.indiatimes.com/news/india/death-threats-to-ktaka-judges-over-hijab-verdict-2-arrested/Articleshow/90331514.cms>

However, in my opinion, the question which should be primarily raised should be

- Whether schools can prescribe uniforms or not?

Karnataka HC, dismissing a batch of petitions in this matter ruled¹⁰ that-

- Hijab is not an essential religious practice of Islam.
- Upheld a state government order on a uniform in educational institutions.
- Uniforms of school/college will be considered as a reasonable restriction that students can't object to.

It was a tough time for the nation as this Hijab controversy has become a turning point of religious tension in Karnataka as well as other parts of the nation and the world. This judgment will surely endorse the spirit of “uniformity” that school and college dress codes/uniforms promote. The crux of the judgement was-

The uniform is to ensure all students feel equal. It was indeed a tight slap to PFI, CFI & all those who want to communalize educational institutes. Radicalism should be kept away from the educational institutions.

NEED OF UCC-

Today, UCC is the need of the hour. After seeing this unnecessary ruckus and painful visuals of students protesting outside the classroom, anyone can realize this fact. UCC is also necessary due to following reasons-

- **Sense of real Secularism:**

There is a lot of difference between selective secularism and real secularism. In India, we are not availing secularism in its true form although we are living in a country that promotes selective secularism. In selective secularism, there is a lot of minority appeasement, it's more like pseudo-secularism. A UCC is the mirror image of real secularism which results will reflect a law-abiding society in which all citizens of India have to follow the same laws irrespective of their religion.

¹⁰ *Bangalore News Highlights: Karnataka HC upholds hijab ban in educational institutions*, (last visited Feb 28, 2022), <https://indianexpress.com/Article/cities/bangalore/karnataka-bangalore-news-live-traffic-weather-covid-7818659/>

- **Everyone is equal:**

In India there are personal laws for a particular religion, there are different rules for different religions. A Muslim man can legally have multiple marriages but the other religion if doing so can be punished as per law. This doesn't seem equal in any sense, that's why UCC is necessary.

- **It will empower Women:**

In some particular religions, the status of a male is very dominating. A man can easily initiate a divorce against a women or they have to cover themselves unnecessarily. A UCC will also help in improving the status of women in India by neutralising the laws which are inclined toward men. The patriarchal society can be eliminated only through a UCC, which will also help in eradicating these old traditions which are discriminatory against women.

- **Every modern nation is adopting UCC:**

Every nation which aims to eradicate radicalization has a UCC. It signifies progressiveness. Now, this is the right time when we fully adopt UCC and fulfil the dreams of *Dr. B.R. Ambedkar*¹¹.

THE GOA MODEL-

Goa is the state where UCC is implemented successfully. However, in Goa also there are some dissimilarities in the procedure of marriage registration between Catholics and non-Catholics. It is indeed an uphill task to implement UCC nationwide but from taking inspiration from the Goa model and with the help of enough political will it can happen one day. Also, the Supreme Court from time to time keeps lobbying for a UCC as in the *Shah Bano*¹² and the *Sarla Mudgal case*¹³.

After this decision, Rajiv Gandhi, the then Prime Minister was the one who due to his political ambition, instead of lauding the Supreme Court for its bold decision, overturned the verdict in Parliament by enacting the Muslim Women (Right to Protection on Divorce) Act, 1986, just for the sake of minority appeasement (Muslim appeasement). A golden opportunity for improvement in personal law and the great struggle of *Shah Bano* goes in vain for the sake

¹¹*Ambedkar And The Uniform Civil Code*, OUTLOOK INDIA, (last visited Feb 25, 2022), <https://www.outlookindia.com/website/story/ambedkar-and-the-uniform-civil-code/221068>

¹² *Mohd Ahmad Khan v/s Shah Bano Begum* 1985 (1) SCALE 767; 1985 (3) SCR 844; 1985 (2) SCC 556; AIR 1985 SC 945

¹³ *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531

of minority appeasement politics. A UCC will not be a dream anymore if society became more progressive and political parties care less about appeasement for the sake of votes.

OBSTACLES IN THE PATH OF UCC-

The path for UCC is not so easy. Even the UCC is already mentioned under directive principles for state policies in the constitution of India, but the structure of our Indian society always used to threaten the lawmakers to make any law that goes against our so-called secularism because radical religious groups get themselves ready with a wide range from flashing placards to the deadliest violent practice that one can imagine.

There are some reasons mentioned below which are considered as the major obstacles in the path of UCC-

- **Vast Personal Laws:**

India is a country in which many religions exist with their own sets of traditions, practices and personal law. For example, Hindus are governed by the Hindu Marriage Act of 1955, the Hindu Succession Act, 1956, The Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act (1956) and the Muslims are governed by Personal Law (*Shariat*) Application Act, 1937, the Parsis and Christians also have their own set of personal laws. It's evident from the above that it is not easy for the lawmakers to make one uniform law that will implement on all people following different religions.

- **The Constitutional Barrier:**

India is a country having two sides, a progressive one that is ready to welcome a UCC while a regressive and radical one that is afraid of losing its political power. The constitution of India provides us with the fundamental right of every citizen of India, who has the right to practice and profess any religion. According to some constitutional experts if a UCC gets implemented then it will be a violation of fundamental rights. However, Art-44 of the DPSP states that the Government must ensure the application of a UCC, which still gives some hope.

- **The Absence of Education:**

Education is the most important element in building a nation. A good educated society will sustain its credibility in worst of the situation. The persons associated with these Radical groups and self-motivated religious groups are not so well educated that they

can really differentiate between right and wrong. They only used to follow the command of their leaders. Getting brainwashed and following the commands of their leaders is the only motto of their life.

Lack of education cause delusion, person cannot able to differentiate between right and wrong. An educated society will never entertain such leaders who brainwashed people for their own egoistic ambition. An uneducated person is the soft targets for such radical leaders, they are easy to manipulate and easily get brainwashed by radicals. They don't want to see any logic behind any command, they only want to prove their loyalty towards their so called leaders. Many terrorist attacks like *Kasab, Mumbai serial blasts etc.* and bombing prove the above. Their confessions describe their mental state and slavery towards their leaders.

- **Some radical groups:**

Radicalisation in educational institutions is like termites eating the future. In India, before 80s there was no such thing like Hijab in schools/colleges, it all happened after the emergence of a Radical Islamist Organisation called as *dukhtaran e millat*¹⁴ a banned terrorist organization in Jammu and Kashmir valley. They radicalise and brainwashed the valley in such a way that *Burkha* and *Hijab* became a common thing in Jammu and Kashmir and later the normalisation of Hijab happens. This organization makes a so called imaginary Islamic dress code and forcefully implement that with the help of violence.

Radical Islamist groups in which some are banned also such as, PFI, SIMI, Jamaat-e-Islami Hind and Campus Front of India are also backing the wearing of Hijab, the backing of Hijab by these organizations indicates something very fishy. Even Kerala based journalist *MP Basheer*¹⁵ makes serious allegations on this whole Hijab controversy, as per him, the whole Hijab controversy is being funded by the Saudi Arabia.

¹⁴Southasiaterrorism, *Dukhtaran-e-Millat*, (march10,2022),

https://www.satp.org/satporctp/countries/india/states/jandk/terrorist_outfits/dukhtaran.html

¹⁵ *Clubhouse leaks: How Jamaat-e-Islami illegally receives funds from Saudi Arabia to Islamise India*, REPORT WIRE (last visited Feb 26, 2022), <https://www.reportwire.in/clubhouse-leaks-how-jamaat-e-islami-illegally-receives-funds-from-saudi-arabia-to-islamise-india>

WHETHER POLITICAL WILL FOR IMPLEMENTATION OF UCC IS REQUIRED?

"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"- Dr B.R. Ambedkar (Constitution Assembly Debates)

Any country in the world revolves around politics. Politics revolves around ideology. Ideology may be Right, may be left or may be centrist. Implementation of UCC need political will, one wrong move in politics costs you to become opposition from party in power. Implementing UCC is not an easy task. A lobby consisting of some radical groups, political parties, depending on minorities and radical votes don't want UCC to get implemented. That's the reason many political parties ignore this issue, but this recent Hijab controversy and Karnataka HC judgement has given a new hope to get UCC implemented, may be the political will can implement the UCC on one day.

CONCLUSION-

It is evident that the whole Hijab controversy is just to create a ruckus in society, even Islamic country like *Syria* has also imposed a ban on wearing Hijab in colleges. In the name of freedom of speech, no one should get the license to radicalize the education system as some restrictions also come with freedom. It got the backing of radical Islamist groups, which indicates something very fishy. Karnataka HC's judgement gives some hope to the nation, moving toward a progressive India as it states that the Hijab is not a mandatory element of Islam and upheld the state govt. order. This judgement is a huge disappointment for radicals and new hope for the UCC as every modern nation has accepted a UCC.

UCC is the need of the hour, after visualizing unnecessary ruckus and painful visuals of students protesting outside the classroom anyone can realize this fact. There are some barriers in the path of the UCC such as some self-motivated religious groups, lack of education, the technicality of the constitution etc. However, the political will is also required to implement UCC, and the day political parties will care more for the country rather than votes, a UCC will get implemented nationwide.

UNIFORM CIVIL CODE – INCLUSION OF FAITH & RELIGIOUS PRACTICES: A STEP FORWARD

- Aniket Kumar & Sudhanshu Sachan¹

ABSTRACT

India is a country where people follow different religions, culture and traditions owing to which there are different practices and norms particular to each religion. The diversity of religion does not hinder the social structure of the country. It is the practices that are an impediment to the law of the land irrespective of the religion to which they belong; be it the exclusion of certain age group of women from Sabrimala Temple or banning entry of women in mosques to the issues of Triple Talak and Hijab. These prevailing incidents have reignited the debate around Uniform Civil Code (hereinafter referred as “UCC”) in the country.

The Constitution of India provides for India being a secular country not having any religion as a state religion & also provides for freedom of religion under Articles 25 & 26. The extensive indifference between various religious norms and the fundamental right to profess one’s religion have made the implementation of UCC a tough task. The non-application of UCC leads to the problems of gender inequality caused due to the difference in religious practices.

There is no doubt that laws having a wider scope and applicability on everyone irrespective of their religion i.e., divorce, marriage, adoption can be regulated by the UCC but when it comes to the inherent practices of each religion i.e., entry of women into temples and mosques etc. the question still pertains as to whether the UCC would be able to transcend these religious norms or not. The authors in this paper tend to analyse this question and argue for the inclusion of the same under the UCC with special reference to the issue of entry of women in mosques. The authors also analyse the effect of the same on the religious rights guaranteed under the Constitution. The authors advocate that the inclusion of these religious practices under the UCC would help in achieving the cherished goal of social justice enshrined under the Constitution.

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INTRODUCTION

India is a country where people follow different religions, culture and traditions owing to which there are different practices and norms particular to each religion. The diversity of religion does not hinder the social structure of the country. This diversity is the beauty of our country which entails in it the common identity of nationalism despite the differences. The constitution which is law of the land has provided an instrumentality under Article 44 which provides for the enactment of uniform civil code by the State. The constitution was enacted for the whole country, and every section and community must accept its provision and its directives.² The concept of Uniform Civil Code (hereinafter referred as UCC) has now gained a significant attention in the light of the contemporary issues which are directly in violation of the natural laws but are still going on in the name of religious practices. The intervention of courts on triple talak, hijab row etc. shows that the practices which have been carried out in the name of religious autonomy are not only violative of the law of the land rather do not even find concrete evidence to be backed by their parent religion. The absence of any backing by the religion itself shows that these practices are a way of imposition of certain ideology rather than a facet of the religion.

The issue of entry of certain class of women in the Sabrimala temple which was resolved by the Hon'ble Supreme court garnered more attention as to the question that to what extent the rituals or practices of a religion can be regulated by the judiciary and by what means are these to be regulated. The judgement also voiced the interference of courts in the issue of non-entry of women in the mosques.

Apart from these major issues, a pertinent question that needs to be answered is whether the courts have to step in every time a religious practice or dogma is in dispute with the fundamental rights; not to forget the plethora of pending cases in the court. Another approach can be suggested as the enactment of a Uniform Civil Code, but it is difficult to imagine a comprehensive code that regulates each and every aspect of all the practices of various religions.

² M.C. Chagla, *Plea for Uniform Civil Code*, WEEKLY ROUND TABLE, 7, 1973.

Through this paper the authors have tried to analyse the possibility of inclusion of the respective religious norms in UCC. The authors have also tried to explore the judicial view of conflict between UCC and freedom of religion and the way forward to enactment of a Uniform Civil Code.

GENDER JUSTICE & UNIFORM CIVIL CODE

There is a need to bring UCC primarily for three purposes; *national consolidation, equality of laws & gender justice*.³ The case for national consolidation is difficult to implement on ground. While on the other hand, the argument for achieving gender justice makes a stronger case for enactment of the UCC. The case for equality of laws is a kind of mix of the former & the latter. Achieving national integrity & gender justice would subsequently lead to equality of laws.

In the words of Rosemarie Tong, *'Gender Justice..., requires us, first to make the rule of the game fair and, second, to make certain that none of the runners in the race for society's goods and services is systematically disadvantaged*.⁴ Gender justice is not only about bringing men & women at the same pedestal but is about making an environment where they both can be treated as wholly human.⁵ The goal of gender justice, set in the larger context of social justice is yet to see the light of the day. Even after 75 years of independence, the other half of the population still lives with the shackles of regressive practices in the name of religion. It has been argued that labelling customs & social practices as "law" provide them impunity against being questioned for their patent discrimination & are "*retrogressive & impose primitive androcentric practices*".⁶

Various religious norms of different religions are *prima facie* discriminatory against women; ***Exempli Gratia***, "*Under Muslim law, husband's apostasy from Islam results in automatic dissolution of a Muslim marriage though wife's apostasy does not. Under Hindu law, a spouse converting to another religion confers on the other spouse a right to sue for*

³ Akhilendra Pratap Singh, *Utility of Uniform Civil Code*, 59 JOURNAL OF THE INDIAN LAW INSTITUTE, 178, 179 (2017).

⁴ Mrs. Prabhavati K.S. Baskey, *Uniform Civil Code vis a vis Gender Justice in India*, 3 INTERNATIONAL JOURNAL FOR INNOVATIVE RESEARCH IN MULTIDISCIPLINARY FIELD, 23, 25 (2017).

⁵ Medha Sarin, *Uniform Civil Code for Gender Justice*, 3 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES, 665, 667 (2020).

⁶ Rohini Dahiya, *Gender Justice in India: Outlook on Uniform Civil Code*, SOCIAL AND POLITICAL RESEARCH FOUNDATION, (2021).

divorce. The same is the position under Parsee law. Under Christian law, apostasy does not affect the marriage but where the apostate husband has married again, the wife gets a right to sue”⁷ Other discriminatory practices include the issue of entry of women in mosques which is presently sub-judice⁸ before the Hon’ble Supreme Court.

The authors tend to argue that these inherent religious practices that are discriminatory & arbitrary in nature should be regulated by bringing them under the ambit of the UCC. The state has the power to make laws on the regulation of the same under Article 25 (2) (a) of the Constitution of India read with the restrictions given under Article 25 (1) of the Constitution.

FREEDOM OF RELIGION AND UNIFORM CIVIL CODE

The Constitution of India guarantees Freedom of Religion to every individual which emphasize the secular nature of Indian polity which the founding fathers considered to be the very basis of our constitution.⁹ The right to freedom of religion provides all persons entitlement to freedom of conscience and right to freely profess, practice and propagate religion.¹⁰ The rights under Article 25-28 of the constitution embody the principles of religious tolerance that is a basic feature of Indian Civilization.¹¹ Clause 2 of the Article permits the state to make any law to regulate or restrict any secular activity that maybe associated with any religious practice.

The term ‘Religion’ has not been defined in the Constitution, but Hon’ble Supreme court has defined it comprehensively as ‘*Religion is certainly a matter of faith with individuals or communities, and it is not necessarily theistic*’¹². The latter part was for the religions that do not believe in existence of any god i.e., Buddhism, Jainism. For the purposes of this part, religion is not limited to beliefs but includes any practice which are regarded as part of its religion by a community¹³ and can extend to the matters of food and dress.¹⁴

Article 26 deals with the religious rights of group of individuals known as religious denominations subject to public order, morality and health. For a group to be categorized as religious denominations, they must have common faith, common organisation and a distinctive

⁷ D. C. Manooja, *Uniform Civil Code: A Suggestion*, 42 JOURNAL OF THE INDIAN LAW INSTITUTE, 448, 456 (2000).

⁸ Yasmeen Zubair Ahmed & Anr. v. Union of India & Ors, WRIT PETITION (CIVIL) NO. 472 OF 2019.

⁹ Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

¹⁰ INDIAN CONST., art. 25, cl. (1).

¹¹ MP SINGH, VN SHUKLA’S CONSTITUTION OF INDIA, (13 ed., Eastern Book Company, 2015)

¹² Commissioner, HRE v. Sri Lakshmindra Thirtha Swamiar of Shirur Matt, AIR 1954 SC 282

¹³ Jagdishwara Nand v. Police commissioner, Calcutta, AIR 1984 SC 51.

¹⁴ Ram Chandra Deb v. State of Orissa, AIR 1959 Orrisa 5

name.¹⁵ Article 25 protects the religious freedom of an individual whereas Article 26 deals with collective rights of religious denomination.¹⁶

Article 44 of the constitution states that *'The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.'* The word "Uniform" in Art 44 means that all communities must be governed by the uniform principles of gender justice and human justice¹⁷. A uniform law would not necessarily mean a common law, but different personal law based on uniform principles.¹⁸ This particular provision came under intense debate during the constituent assembly proceedings and the representatives of minority sections were vocal against this provision. The major objections that were put in the Constituent assembly were *firstly* it would step on the religious freedom of the individuals and groups, & *secondly* it would be an imposition of majority will against the minority.

The objection of the first part have been removed by the clause 2 of Article 25 which excludes the secular activities associated with religious practices from purview of freedom of religion. However, the second objection is the one which still entails in the minds of the minority group. In the words of Maulana Hasrat Mohani, *"I would like to say that any party, political or communal, has no right to interfere in the personal law of any group..... If anyone who thinks that he can interfere in the personal laws of the Muslims, then I would say to him that the results will be harmful"*¹⁹

However, a part of the constitutional forefathers also argued the inclusion of this provision was necessary by giving the examples of Turkey and Egypt where even in advanced Muslim Countries, the personal laws do not have such sanctity as to impede the enactment of a civil code.²⁰

Dr. B. R. Ambedkar in his final statement stated that the State has only given the power to legislate on the personal laws only and not to do away with them. Even if the state has got

¹⁵ SP Mittal v. Union of India, (1983) 1 SCC 51.

¹⁶ Supra note 12, para 26.

¹⁷ Dr. Jayshree Das, *Uniform Civil Code for Gender Justice*, 1 MSSV JOURNAL OF HUMANITIES AND SOCIAL.

¹⁸ Sathya Narayan, *Selected works of S.P.Sathe, Social Justice and Legal Transformation*, 3 OXFORD UNIVERSITY PRESS, 91 (2015).

¹⁹ Constituent Assembly debates, Vol VII, 4 Nov 1948 – 8 Jan 1949, 759.

²⁰ KM Munshi, Constituent assembly debates, Vol VII, 4 Nov 1948 – 8 Jan 1949, 547-548

power any government would not exercise its power in such a way that it gives rise to a rebellion.²¹

In a nutshell it can be said that the religious freedom has been provided by the same state which has the power to enact a Uniform Civil Code. In the current scenario, any attempt to effect or change personal laws can give rise to rebellion as in the Shah Bano case or the Sabrimala case. So, the enactment of Uniform Civil Code has to be done in a way that it does not only give regards to religious freedom but also respect public opinion.

UCC: JUDICIAL VIEW

The power to enact the UCC has been cast upon the state and Judiciary being an organ of the State has time to time enunciated the need of a Uniform Civil Code. The Hon'ble Court has time to time emphasized the need for the enactment of a Uniform Civil Law.

In the recent case of **Jose Paulo Coutinho v. Maria Luiza**²², the Supreme Court held that, *“While the authors of the Constitution in Article 44 in Part IV managing with the Directive Principles of State Policy had trusted and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard”*. In the case of **ABC v NCT of Delhi**²³ the court managed with the issue of guardianship of a Christian unwed mother without the consent of the child's father. While ruling the case in the woman's favour, the court commented- *“It would be inverse for us to underscore that our Directive Principles imagine the presence of a Uniform Civil Code, but this remains an unaddressed constitutional expectation”*

Similarly, in other cases too, the Honourable Supreme Court has marked the necessity of implementation of a Uniform Civil Code. In the case of **John Vallatom v. Union of India**²⁴, *“Parliament is still to step in for framing a UCC in the Country. A UCC will help the cause of the national integration by removing the contradiction based on ideologies.”* Justice MC Chagla while making a vehement plea for UCC wrote, Article 44 is a mandatory provision binding the government and it is incumbent upon it to give effect to its provision.²⁵

²¹ Dr. B. R. Ambedkar, Constituent Assembly debates, Vol VII, 4 Nov 1948 – 8 Jan 1949, 779.

²² Jose Paulo Coutinho v. Maria Luiza, Civil Appeal No. 7378 of 2010.

²³ ABC v NCT of Delhi, 2015 SCConline SC 609

²⁴ John Vallamattom v. Union of India 2003 (5) SCC 384.

²⁵ Supra at 1.

It is clear by the decisions of the Honourable Court that the desirability of Uniform Civil Code can hardly be doubted. The UCC can come into effect or accepted by the people only when social climate is properly built up, the politicians leaders rise above their personal motivations and awaken the people to accept the change for the betterment of the nation at large.²⁶ India being a diverse land with large religious and social diversities, it is highly essential to have a Uniform Civil Code at the earliest to bridge the gap created by various personal laws which have crept in through the years.²⁷

THE ISSUE OF NON – ENTRY OF MUSLIM WOMEN IN MOSQUES

A PIL has been filed before the Hon'ble Supreme Court challenging the non-entry of Muslim women in mosques as violative of Article 14, 15, 21, 25 & 29 of the Constitution of India. The petitioner Yasmeen Zuber Ahmed Peerzade had written a letter to Mohmdiya Jama Masjid, Bopodi, Pune seeking permission to offer namaj in the mosque. The permission was denied by the authorities with the caveat that the issue has been sent for consideration to higher authorities. There was no response from the higher authorities after which the petitioner wrote to the Imam who categorically denied permission. Aggrieved from the same, the writ was filed before the Hon'ble Supreme Court.

It is *prima facie* clear that not allowing women in mosques is violative of Article 14, 15, 21, 25 & 29 of the Constitution of India. The authors place their reliance on the celebrated judgment of **Dr. Noorjehan Safia Niaz and anr. v. State of Maharashtra & ors.**²⁸, wherein the Bombay High Court and later the Supreme Court quashed the ban imposed on the entry of women in the sanctum sanctorum of the Haji Ali Shrine. The ban was quashed on the grounds that it contravened Articles 14, 15 and 25 of the Constitution. Even the All -India Muslim Personal Law Board has submitted in their counter affidavit that Muslim women are free to enter mosques and Islamic texts do not restrict their entry.

Given the same, the larger question that the authors seek to address is that there are similar practices existing in other religions as well & are not being questioned in the name of religious practices. *Exempli gratia*, the issue related to parsi women married to a non-parsi into the holy

²⁶ Lily Thomas etc. v. Union of India and others AIR 2000 SC 1650

²⁷ Atish Chakraborty, *Uniform Civil Code & the Indian Judiciary*, SSRN (2017).

²⁸ Dr. Noorjehan Safia Niaz and Anr v. State of Maharashtra and Ors. Manu/Mh/1532/2016

fire place of an agyari²⁹ or the issue regarding the powers of constitutional courts to go into the question of whether a particular religious practice of a religion satisfies the *essential religious test*, w.r.t. the female genital mutilation (*hereinafter referred to as FGM*) in the Dawoodi Bohra Community.³⁰ The practice of FGM, in India, is common in the Bohra community, where it is referred to as “Khatna” or “Khafz/Khafd”. “*Khatna essentially involves cutting the tip of a girl’s clitoris when she is 6-7 years old.*”³¹ The reason behind this practice is deep rooted discrimination against women and girls. The other reasons include “*religious dicta, an aid to female hygiene and a tool to control or reduce female sexuality*”³². According to a study conducted mostly amongst the women of the Dawoodi Bohra community,³³ it was found that fulfilment of religious requirements, traditions and customs clubbed with the wish to curb the girl’s sexuality were the significant reasons for the flourishing practice. The existence of these inhumane practices is itself a question on the modern notions of human rights & social justice.

THE STEP AHEAD

The implementation of Uniform Civil Code is necessary to remove the gender discrimination and secure equality. The implementation until now has been halted due to the reasons of inactivity of the lawmakers probably because they do not want to compromise their electoral share of votes. One should also not forget the mass agitation of people whenever the courts have tried to interfere with any of the religious norms. Uniform Civil Code is thus required not only to ensure uniformity of laws between communities, but also uniformity of laws within communities ensuring equalities between the rights of men and women³⁴. The authors hereby suggest some possible approaches in furtherance of enactment of a Uniform Civil Code.

1. **Parallel Implementation:** An amendment was proposed to Article 35 of the draft constitution to add a proviso – *‘Provided that any group, section or community shall*

²⁹ Kapil Sankhila, *Sabarimala May Lead to Uniform Civil Code — But Will We Accept It?*, THE QUINT (March 10, 2022, 10:05 P.M.), <https://www.thequint.com/amp/story/voices/opinion/sabarimala-temple-verdict-uniform-civil-code-supreme-court-fundamental-rights-indian-constitution#read-more>

³⁰ *Id.*

³¹ Female Genital Mutilation, Guide To Eliminating The FGM Practice In India

³² *Id.*

³³ R. Ghadially, ‘*All for ‘Izzat’: The Practice of Female Circumcision among Bohra Muslims*’, 66, (1991)

³⁴ F. Agnes, *Hindu Men Monogamy and Uniform Civil Code*, XXX (50) Economic and Political Weekly 32 (1995)

not be obliged to give up its own personal law in case it has such a law'.³⁵ To implement a civil law for all people, there should be a liberty given to people so as to choose between the law from which they wish to be governed. Securing a Uniform Civil Code should not negate the possibility of citizens to avail themselves of their religious laws of their wish.³⁶ This type of law is followed in Serbia, Croatia etc. and have proved a better way to impose a civil law by minimising any discontent or dissatisfaction. However, a major disagreement to this approach can be cited as this type of alternative remedy can be used by the persons to their own advantage.

2. **Laws based on Principles:** Article 44 provides for taking steps to secure a Uniform Civil Code meaning thereby that the steps not exclusively mean enacting concrete law. A better approach can be securing some established principles rather than enacting a concrete law. These principles should be consistent with gender justice, equality, rule of law and right to life of the people. A concrete law can create an impression that the lawmakers are directly infringing their religious rights but the just principles will be accepted by a society as a reform rather than a destructive step to their personal laws. However, one plausible argument that can be advanced against the same is that the principles, not being a concrete law are subject to interpretation by the courts every time any religious issue comes into dispute. This would further add to the burden of courts and even securing UCC would be of no avail.
3. **Gradual Implementation:** This third step is necessary to maintain communal harmony and remove the state of discontent among the people. The implementation should involve steps as to topic wise and chapter wise till the society is ready to step up for a change for the betterment of the country.

³⁵ Mohd. Ismail Sahab, Vol VII, 4 Nov 1948 – 8 Jan 1949, 540-541

³⁶ SHIMON SHETREET & HIRAM E. CHODOSH, UNIFORM CIVIL CODE FOR INDIA, (1st ed., Oxford University Press, 2015.)

CONCLUSION

The ideals of gender justice & equality within the communities can be achieved in a sustainable manner only when the communities/sects that are constantly carrying these ill-practices recognize the same as inhumane & put a stop to them at once. The authors are of the opinion that these discriminatory practices exist among all the religions in one way or the other. Bringing them under the ambit of the UCC for their regulation is the first & the foremost step towards recognizing them as an issue of significant concern. Unless & until, we recognize them as a problematic issue we won't move an inch forward towards their solution. This paper is an attempt towards the recognition of the same.

We also need to look towards the bigger picture, in the sense, the idea of an India that we wish to create. If these practices continue to exist, they will surely act as a blackspot tarnishing the reputation of *Bharat and* will raise unanswerable questions about our stand on such issues. It is high time to build a narrative & create a discourse that can lead to the withering away of these practices.

UNIFORM CIVIL CODE: A TRUMP CARD TO ATTAIN GENDER JUSTICE

-Raj Gokul & Karreddulla Prashanthi¹

ABSTRACT:

A change in personal laws to different individuals will undoubtedly be met with resistance in multicultural society such as India, which has a plethora of religions and practises. However, in order to create a level playing field, we must first rewrite the laws that place certain groups of people on a pedestal. The objective of the study is to identify the lacunas present in the current personal laws that disadvantage certain genders and the non-existence of laws to represent other disadvantaged gender-minority groups. This paper aims to study how personal laws of various religions obstruct gender justice and whether the UCC's implementation will result in gender equality. It also analyses the UCC's debates as well as the complexities involved in its implementation. This paper weighs the pros and cons of having a uniform civil code and examines how having one could be a step in the right direction for gender justice. Further, the discussion about UCC is usually centred on the plight of women and also overshadows the needs of other gender minorities by highlighting some of the most arbitrary provisions in personal laws to demonstrate the necessity of UCC. Thus, this paper's goal will be to identify the need for implementation of UCC and India's position to implementing such a code and to show how it can be helpful as a tool for obtaining gender justice by enacting provisions for marriage, divorce, succession, inheritance, and adoption, among other things, that apply to everyone, regardless of religion or gender.

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INTRODUCTION:

UCC is a means of unifying all “personal laws” into a set of secular laws that is applicable to all Indian citizens irrespective of the community affiliations. It is yet establish the contours of such unifying code, it is expected to include contemporary and progressive aspects of all subsisting personal laws while rejecting which are regressive

The Constitution’s “directive principles” mandates that the state creates a Uniform Civil Code to protect all Indian citizens. Under Art 44 of the Indian constitution, 1949, *"The State shall endeavour to secure for the citizens a UCC throughout the territory of India²"*. The directive principles, as stated in the Constitution, are not enforceable in the court of law. Nonetheless, they are “fundamental in the country’s governance”.³ This demonstrates that, while our constitution states that UCC should be implemented in some way, it is not an obligation. As a result, the debate over whether India should have its own UCC continues.

In legal terms, the implementation of U.C.C. and the issue of gender justice are inextricably linked. The fundamental issue is to provide proper justice, and equal treatment for all genders which is confined in various modern issues such as freedom, secularism, and religion, among others. Gender justice is a serious issue that requires immediate addressing. For instance, if we take women then Women's empowerment is required in various fields, including health, security, & employment, as well as in the fight against gender bias. This will not be entirely possible because of the biased personal laws.⁴

There are personal laws specific to each religion, as well as personal laws that are universal if someone wishes to use them. Hindus, for example, have a marriage law called the Hindu Marriage Act, 1955, whereas Muslims follow Sharia law. The Parsis, Jews, and Christians all have their own set of marriage laws. There is also the Special Marriage Act of 1954, which allows two people to marry even if they are from different religions or castes or if they want to follow the universal law. Apart from this there are other laws such as guardianship, adoption, maintenance, Inheritance which are different for different religions, and which constitutes gender inequality⁵. There is now a pressing need to amend these acts in

² India. (1949). *The constitution of India*. New Delhi.

³ Bhim Singhji v. Union of India AIR 1981 SC 234.

⁴ “*Is Uniform Civil Code the Path to Gender Justice? - Sayfty.*” Sayfty, sayfty.com, 14 June 202.

⁵ GHOSAL, JOYDIP, UNDERSTANDING UNIFORM CIVIL CODE AND ITS PROBLEM IN IMPLEMENTATION (2019).

order to accommodate the rights of transgender people. So, the Supreme Court has recommended that the U.C.C. be sanctioned by the Central Government. It is claimed that it will only help if governments prioritise gender equality as a top priority.⁶

THE ROLE OF PERSONAL LAWS IN PROMOTING GENDER INEQUALITY IN THE CASE OF WOMEN

Our nation discriminates on the basis of personal laws such as marriage, succession, divorce, maintenance, minority, and guardianship, as evidenced by historical development. They also create norms, rules, and regulations that govern human relationships in the family. Personal norms governing Hindus, Muslims, Christians, and others are patriarchal in nature, rendering them unjustified and discriminatory to women.⁷

When we review Muslim Laws, it is unmistakable that the current personal laws are prejudiced towards women and are oppressive in character. Despite modifications, practically all religious laws have been the subject of lengthy legal fights. This dispute, however, arose in the aftermath of the Triple-Talaq ruling. Women's rights advocates were quick to bring into question the prevalent discriminatory practices in personal legislation. The discussion began with a question on Muslim law. Polygamy, unilateral divorce, and depriving women of maintenance were all investigated as harsh practices under Islamic law⁸. However, it is far from the last example of discriminatory personal law in the country.

In another case, Muslim law recognises a guardian's authority to enter into a marriage contract with his minor ward and there is a remedy in the shape of the "option of puberty" (the right to repudiate the marriage upon reaching puberty), but it is limited to women.

In case of inheritance, if the wife that dies and there exists a lineal descendant, the husband receives quarter of the property; if no lineage exists, the husband receives half of the property, while the widow receives just 1/8th. If an intestate property is left behind, the

⁶ de Silva, Rangita and Jaising, Indira, The Role of Personal Laws in Creating a 'Second Sex' (September 2016). New York University Journal of International Law and Politics (JILP), Vol. 48, Pg. 1085, 2016, U of Penn Law School, Public Law Research Paper No. 16-40, Available at SSRN: <https://ssrn.com/abstract=2854330>

⁷ "Uniform Civil Code Towards Gender Justice." Law Corner, lawcorner.in, 3 Apr. 2021, https://lawcorner.in/uniform-civil-code-towards-gender-justice/#GENDER_INJUSTICE_AND_UNIFORM_CIVIL_CODE_CONFLICT.

⁸ Religion, state, and the problem of gender: new modes of citizenship and governance in diverse societies. (n.d.)>*TheFreeLibrary*.(2014).Retrieved Apr222022 from <https://www.thefreelibrary.com/Religion%2c+state%2c+and+the+problem+of+gender%3a+new+modes+of+citizenship...-a0132872721>

daughter is entitled to half of it; but, if there is a son, the daughter becomes residuary, and the son is entitled to twice as much as the daughter. Prior to the enactment of the Muslim Personal Law Act in 1937, women had no right to inherit⁹. A significant breakthrough in Muslim personal law is the *Shah Bano* case¹⁰, in which the Supreme Court ruled that the wife divorced by triple Talaq is eligible for maintenance under section 125 of the Code of Criminal Procedure, 1973. Polygamy was outlawed in India prior to this breakthrough judgement, with the exception of Islamic males who may have more than one wife. Women do not have this right.

The father is the primary natural guardian, as per Hindu law, Section 6 of the Hindu Minority and Guardianship Act, 1956. Women are robbed of their natural protective role as a result of this decision. It not only reflects patriarchal values, but it also goes against constitutional principles.

Previously, women were not considered as family heirs. Only a male may be a coparcener and have birth right to the property. Men were given priority over all rights in the ancient times, while women were considered second-class citizens. Women were made to be men's property and liabilities. The man was the family's Karta, and all family decisions, particularly those concerning women, were made with his consent exclusively. In Hindu law, Mitakshara and Dayabhaga are the two inheritance systems followed. Mitakshara determined the property rights of the deceased Karta's family members, and it bases its beliefs on the doctrine of representation, which stipulates that following the death of the father or grandfather, or both, the portion of the property passes to the son, son's son, and son's grandson.¹¹ It expresses clearly the traits of a male-dominated society. The principle of religious efficacy is followed at Dayabhaga School, which asserts that the person who is able to offer duties to the family's deceased head member will be allocated the property shares. According to Hindu law, only the male heir of the family is allowed to perform religious offerings, not the female heir. Then, in 1956, the Succession Act was passed, which expanded the concept of order of succession to include women's rights. However, following the Hindu Succession Amendment Act of 2005, the deceased's daughter was given the right to be a

⁹ "A Critical Study on different modes of transfer of Properties under Customary and Islamic Law - Best Free Essays Examples. (2019, June 7). N&S Digital Essay Service. <https://northandsouthdigital.com/a-critical-study-on-different-modes-of-transfer-of-properties-under-customary-and-islamic-law/>

¹⁰ Ahmad Khan v. Shah Bano Begum, 1985 (2) SCC 556

¹¹ Rai, Lavanya. "Schools of Hindu Law: Mitakshara and Dayabhaga – Legal Study Material." Legal Study Material, [legalstudymaterial.com](https://legalstudymaterial.com/schools-of-hindu-law-mitakshara-and-dayabhaga/#Mitakshra_School), 20 Apr. 2021, https://legalstudymaterial.com/schools-of-hindu-law-mitakshara-and-dayabhaga/#Mitakshra_School

coparcener by birth, with the same share and liability as a son or other male coparceners. The court interpreted the goal of the 2005 Amendment Act, which is to remove gender bias and disparities between men and women. But it took nearly 50 decades to remove the gender bias in this aspect.¹²

Next, in the landmark case of *Sarala Mudgal v. Union of India*¹³, the Supreme Court of India raised the application of the Uniform Civil Code. It ruled that marriages entered into by a Hindu male after converting to Islam with the goal of engaging in polygamy are null and void. If a Hindu male converts to Islam while his first marriage is still active, there has been an injustice to his first wife, and his second marriage is regarded null and void. This demonstrates how individuals are attempting to take advantage of personal law loopholes.

Gender bias is also prevalent in Christian divorce laws. In case of men, adultery can be used to obtain a divorce whereas, for women, it is not permitted to divorce only on the grounds of adultery. It should be based upon either bestiality, sodomy, or abandonment¹⁴.

Many elements of specific personal Parsi laws also contain gender bias; for example, if a Parsi female marries a non-Parsi male, she loses both her property rights and her religious freedom. A Parsi man marrying a non-Parsi woman is a different story. In terms of possibilities, this is only the tip of the iceberg. These demands do not cover the entire extent of discrimination that personal laws imply and have to remember that personal laws reflect the beliefs and faith of one's community. They come in a range of shapes and sizes.

THE ROLE OF PERSONAL LAWS IN PROMOTING GENDER INEQUALITY IN THE CASE OF TRANSGENDER

Gender-based rules have been in place in India for a long time. This is not limited to property, adoption, or succession rules. It pervades both criminal and labour laws (e.g., the Indian Penal Code, Code of Criminal Procedure, Workmen's compensation Act 1923 and the Factories Act, 1948.). The Hindu Succession Act and the Hindu Marriage Act 1955, which govern personal rights, are perhaps the most visible examples of this. Under Section 13 of

¹²“Uniform Civil Code Towards Gender Justice.” Law Corner, lawcorner.in, 3 Apr. 2021, https://lawcorner.in/uniform-civil-code-towards-gender-justice/#GENDER_INJUSTICE_AND_UNIFORM_CIVIL_CODE_CONFLICT.

¹³ *Sarla Mudgal v. Union of India.*, AIR 1995 SC 1531

¹⁴ Susruthan, N., & Sundaram, A. (2018). UNIFORM CIVIL CODE TOWARDS GENDER JUSTICE Introduction. *International Journal of Pure and Applied Mathematics*, 120(5), 4793–4807. <https://acadpubl.eu/hub/2018-120-5/4/391.pdf>

the General Clauses Act, for example, any expressions importing the male gender must be understood to include females, according to the law. The use of terminologies like male and female, on the other hand, reveals inherent prejudices in law formulation. Section 13 clearly excludes transgender people and applies only to males and females.

Aside from utilising gendered language, legislations also differ in how they handle people of different genders. As this section demonstrates, both male and women have different inheritance rules. This not only an exclusion of the third gender but also leaves a vacuum of uncertainty which questions how they are to inherit property if at all they are included. The 174th Report of the Law Commission of India, the 207th Report of the Law Commission of India, and the Consultation Paper on Family Law Reform have all noted that this is not a new problem¹⁵.

This is especially important considering that the Constitution forbids discrimination on the basis of religion, race, caste, gender, or place of birth. This says that the state cannot enact legislation that treats people differently based on the distinctions stated above which may have exceptions in some particular circumstances. Because gender is defined in Article 15 of the Indian constitution 1948 in the context of sex, legislation shall not discriminate against transgender individuals purely on the basis of their identities.

The Hindu Succession Act, 1956 which governs the rights of Hindus, Sikhs, Buddhists, and Jains, spells out all of the succession regulations in great detail. Transgender persons, on the other hand, are not covered in the Act's framework. The defining phrase, which states that the successor must be male or female, exemplifies this. It also creates agnates and cognates' rights based on a binary gender paradigm. Furthermore, the Act treats men and women extremely differently. However, the Act is unclear on whether a transgender person who identifies as a male is eligible to inherit under Section 8. This answer is also not accessible in the General Clauses Act, which provides definitions for particular statutes that are absent.

Recently, the Madras High Court interpreted the term "bride" under Section 5 of the Hindu Marriage Act 1956 to include transgender people in a landmark judgement given in 2019. However, with this ruling, a new ground has been established. The Madras High

¹⁵ Sharma, S. (n.d.). A CRITICAL ANALYSIS OF THE 174TH REPORT OF THE LAW COMMISSION OF INDIA Subject: Family Law. *Www.academia.edu*. Retrieved April 22, 2022, from https://www.academia.edu/7575974/A_CRITICAL_ANALYSIS_OF_THE_174TH_REPORT_OF_THE_LAW_COMMISSION_OF_INDIA_Subject_Family_Law

Court based its judgement on three historic decisions in favour of LGBTQ+ rights: the NALSA decision, the K.S. Puttuswamy Case (privacy under Art. 21), and the Navtej Singh Johar decision. Although these judgements have been given, the government has not included transgender marriage provisions in the 2019 Transgender Persons (Protection of Rights) Bill, which was proposed to protect the trans community and pave the path for a much more progressive legal system.¹⁶

As a result, Indian law prohibits transgender people from marrying, either in letter or spirit. If they are not allowed to marry, which would be a considerable legal problem in and of itself, their inheritance rights would be jeopardised. This is due to the fact that personal laws (such as marriage and inheritance) are frequently intertwined. Property is bestowed on designated relatives, including marriage partners, under inheritance laws. As a person they cannot claim any part of their deceased partner's property without a lawful marriage.

The treatment of male and female adoptees is different under the law. Like, a single male can only adopt a female if he is at least twenty-one years older than the person to be adopted, according to the Hindu Adoptions and Maintenance Act, 1956. Similarly, there must be a twenty-one-year gap between a single adoptive mother and a male child. Furthermore, the Juvenile Justice Act's 2015¹⁷ Adoption Regulations restrict a single male from adopting a female kid. This restriction does not apply to a female adopting a male child. Gendered sections are frequently used in both Acts (and regulations). Similarly, a person who is not legally recognised as the child's adoptive parent may be unable to inherit the latter's property if the latter dies¹⁸

¹⁶ Sharma, Devika, and Editor. "Madras HC | Transgender Female Is a 'Bride' under Hindu Marriage Act; No Impediment in Registration of Transgenders Marriage | SCC Blog." SCC Blog, www.sconline.com, 25 Apr. 2019, <https://www.sconline.com/blog/post/2019/04/25/transgender-female-is-a-bride-under-hindu-marriage-act/>.

¹⁷ Juvenile Justice (Care and Protection of Children) Act, 2015

¹⁸ Karan Gulati, and Tushar Anand. "Inheritance Rights of Transgender Persons in India." NIPFP Working Paper Series, 26 Aug. 2021, https://nipfp.org.in/media/medialibrary/2021/08/WP_350_2021.pdf.

NEED FOR UCC TO PROMOTE GENDER EQUALITY

The need for the implementation of UCC was felt since the creation of the constitution, the objective of which was to bring parity to the women who was severely underprivileged in all aspects. We shall now discuss how UCC will positively impact India. As there is flip side to everything the disadvantages of UCC also shall be looked into and how the advantages will eventually outweigh the negative aspects.

1. To bring equality irrespective of any gender divide

Implementation of a Uniform Civil Code will ensure in the equality treatment irrespective of the religion, place of birth, gender etc. The implementation of UCC will bring forth the true intent of the secular state.¹⁹

2. It will help in bypassing the personal law and promote gender equality

Because women are subjugated in all religions, and because the foundation of all personal laws is anchored in religion, these personal laws are profoundly discriminatory and undermine their rights. With its implementation, UCC can correct the unfair pedestal that males have been granted in terms of succession and inheritance as compared to their females.

3. It will portray and facilitate the aspirations of the youth

As one of the world's oldest civilizations, the Indian Civilization has more than half of its population under the age of 25. They're on the lookout for a new identity. Young people's societal perspectives and ambitions must be moulded by global principles of equality, humanism, and modernism in order to keep the country together. UCC will undoubtedly give young people the opportunity to employ their full potential in the service of country building if it is implemented.

4. To further the unity of the nation

UCC will allow for the non-politicization of a variety of issues, such as specific advantages enjoyed by certain communities as a result of their personal laws. The notion of equality will triumph over all anti-national and anti-social features in all of its expressions with the implementation of UCC.²⁰

¹⁹ Alim, A. (2021). Towards the Uniform Civil Code and Personal Laws in India: Gender Equality Perspective. *Annals of Bioethics & Clinical Applications*, 4(4). <https://doi.org/10.23880/abca-16000206>

²⁰ Team, ClearIAS. "Uniform Civil Code (UCC): Pros and Cons in a Nutshell - Clear IAS." ClearIAS, www.clearias.com, 23 Mar. 2017, <https://www.clearias.com/uniform-civil-code-ucc/>.

SOME OF THE DISADVANTAGES OF UCC SHOULD ALSO BE LOOKED INTO WHICH ARE –

1. Problem in accommodating the vast diversity of India

Considering the vast diversity of India, the cultural, habitual and customary practices will make it cumbersome to implement. To transition from ingrained traditional practices to a uniform civil code will be received with much friction. An example of which can be marriage.

2. Perception of curtailing religious freedom

Many communities, religious minorities and other people have a fear of the idea that implementation of the UCC will suppress their religious freedom. This fear though genuine is to some point valid because, the influence of the majority will always have its influence on the government, and this might cause a bending of the law to accommodate more of the majority practices in the UCC. It will take some time to have a tolerant attitude to the establishment and implementation of UCC via minority groups in particular.²¹

UCC AS A WEAPON TO KILL GENDER INEQUALITY

The Uniform Civil Code has been debated in different forums for many years regarding the minority rights against uniformity, secularism against religion, modernization versus traditional views. The need of Uniform Civil Code was mainly to level the gaps created by religion at different strata. From 1960 onwards the All-India Women's Conference started pressing for the implementation of the UCC as a means to ensure gender just laws for women from all backgrounds. The AIDWA recommended that a two-pronged strategy is needed for achieving unifying gender laws as well as making internal reforms also they specifically suggest that Muslim personal law be reformed within the scope of the religion. This method is effective in bringing parity to minority identity in context of the dominant fundamentalist and it will create a space for distancing the feminist position from the conservative Hindus

²¹ Team, ClearIAS. "Uniform Civil Code (UCC): Pros and Cons in a Nutshell - Clear IAS." ClearIAS, www.clearias.com, 23 Mar. 2017, <https://www.clearias.com/uniform-civil-code-ucc/>.

demand for UCC. Flaves Agnes who is a women rights lawyer also is of the strong belief that implementation of UCC must be for achieving gender justice and not only for uniformity's sake²². She suggests that reform from within each community, by piecemeal legislations, personal civil code could help with the needs and contribute towards the bigger picture. An appropriate notice time and marriage registration will be one of the benefits of a standard civil code. Ceremonies will be made optional. However, as a ceremony, parties can have rituals of their choosing, such as Hindu—Saptapadi; Muslim—Nikah; Christian—Church blessing, and so forth. However, the registration and compliance with what is needed of notice, etc., as set forth in the unified civil code, shall stand as proof of the marriage. Monogamy will indeed be required, and divorce rules will be the same for men and women, resulting in social coherence and non-fragmentation. Both men and women must have equal property rights which can be legally enforceable, and it will be a huge step forward for women.²³

However, as we have shown, implementing a consistent civil code would be difficult. In 1972, the government enacted comprehensive adoption legislation. It said that the Hindu adoption law will be abolished. There would be only one law that applied to everyone in India. Despite the fact that it was just an enabling measure, the Bill was sent to the Select Committee and was defeated. A purely secular bill failed to pass because one group objected on religious grounds, claiming that while Islam prohibits adoption, a terrible Muslim may adopt anyhow. A Muslim community member even went so far as to state that no such rule should exist that allows any community “the liberty of forsaking their particular beliefs.”²⁴

The time has come to fulfil the promise of equality given to Indian women and enshrined in the Constitution. Personal laws, in my opinion, should be consistent with fundamental right to equality, and if there is a conflict, equality should prevail. I ask the present administration to take the lead and create a uniform civil code.

The government must take severe measures to ensure the well-being of its citizens, which will benefit not only present but future generations. Personal interests may take precedence over collective interests until a legislation to address these situations is

²² Sunder Rajan, R. (2000). Women between Community and State: Some Implications of the Uniform Civil Code Debates in India. *Social Text* 18(4), 55-82. <https://www.muse.jhu.edu/article/31888>.

²³ “Is Uniform Civil Code the Path to Gender Justice? - Sayfty.” Sayfty, sayfty.com, 14 June 2021, <https://sayfty.com/is-uniform-civil-code-the-path-to-gender-justice/>.

²⁴ Südasien-Chronik. “Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women’s Movement and the Indian Supreme Court.” *Edoc.Hu-Berlin.De*, <https://edoc.hu-berlin.de/bitstream/handle/18452/9168/61.pdf?sequence=1&isAllowed=y>. Accessed 19 Mar. 2022.

implemented. Hence, adoption of the Uniform Civil Code is an urgent requirement. The ultimate goal is to create ideals of equality that will balance genders as well as religious organisations, which UCC hopes to achieve. Until and unless these institutions are modernized, democratized, and elevated, there will be no change in UCC's outlook. UCC must improve women's standing and dignity, establish social harmony, and promote secularism.²⁵ Traditional communities are resistant to change. Furthermore, if UCC is made necessary, it will be extremely difficult to achieve the stated goal. As a result, it must be marked optional first. With the passage of time, it will be adopted by the entire society. UCC may become a reality in a country like India. It requires a will, which our government, sadly, lacks.

CONCLUSION

Now is the time to put into effect what the Indian constitution has envisioned from its inception: a commitment to gender equality. Most developed countries have already adopted UCC; so, India, as a true secular society, must soon follow, and can look to Goa as an example, as it is the only state in India to do so, which is commendable.

In our opinion, the country's age-old religious norms and personal laws, which have generally favoured men, particularly Muslim men, require significant reform. We strongly believe that the UCC will be the vehicle through which women's conditions in the country can be improved. Also, customs and traditions that are no longer relevant in today's modern society must be abandoned, and women must be granted equal rights. Furthermore, a uniform civil code will not only benefit women in India by improving their situation, but it will also strengthen national unity and uphold true secularism. By integrating UCC, we may also be able to remove prejudices towards many cultures and faiths. Everyone would be able to enjoy the same rights as those provided under a single piece of legislation. The constitutional goals of unity, integrity, and fraternity will be more fully achieved as a result.

²⁵ India International Centre Quarterly, Vol. 31, No. 4 (SPRING 2005), pp. 40-54

UNIFORM CIVIL CODE FOR GENDER JUSTICE

-Adv. Farnaz .H. Sha¹

ABSTRACT

*This article aims to define and explain the terminology of “Uniform Civil Code towards Gender Justice”. A Civil Code can be defined as a set of laws which govern the rights pertaining to property as well as laws pertaining to personal matters like divorce, adoption, marriage etc. One has to observe that the Constitution of India basis its principles on the ideology that people of all walks of life are equal and deserve an equal opportunity. The constitution speaks about the philosophies of equality, justice and sovereignty. But the major question to be asked is whether the women of India enjoy equality in the true sense of term. Most of the women in India suffer from patriarchy and are treated as subordinates in the society. They are not only discriminated based on their sex, but also based on their religion, which in most cases becomes the biggest hindrance in a woman’s life. In India it can be seen that women are constantly struggling to achieve the basic virtues of **equality, liberty and justice**. One can also note that women in India have suffered from gender biases from time immemorial and even today when India is moving towards modernization they still experience the same atrocities. Hence it becomes very necessary to establish a **Uniform Civil Code** by getting rid of multiple laws for various religious communities. It is mentioned in **Article 44** of the Indian Constitution where it is applicable to everyone irrespective of caste, creed or religion. Even though **Uniform Civil Code** is considered a solution towards the path of obtaining Gender Justice in India , there are a share of legal and social experts that believe that enacting a **Uniform Civil Code** could be problematic for two main reasons one being that that there is no well written conception of what the **Uniform Civil Code** should actually contain and two that there is no concrete assurance that if a Uniform Civil Code is enacted in India it will not be discriminatory towards women as ultimately most of the members of the parliament consist of men who ultimately will frame the laws. However **Uniform Civil Code** is a dream that India has been dreaming for from quite a few years as except the state of Goa, all the other states follow Personal Laws. But it is to be seen in the future when the preview of the draft is*

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presented in the Parliament of India if it will bring gender justice/equality/liberty or not? Lastly, but the most important point one has to remember is that in a country like India where there is so much diversity it would be myopic to expect everyone to accept a Uniform Civil Code and this mindset of the people has to be resolved first, if the implementation of Uniform Civil Code has to be a success.

INTRODUCTION

One of the basic and main objectives of the **Indian Constitution** is **Gender Equality** which speaks about equal rights to both the men and women of this country. It has to be duly noted that the implementation of the **Uniform Civil Code** and the issue of gender justice/equality are very closely interconnected in the pursuance of law. The issue of gender equality has to be treated with grave seriousness. **Article 44** of the constitution of India very clearly states that the states should safeguard all the citizens of India by a Uniform Civil Code. But this is far from reality. Except the state of Goa which follows a Uniform Civil Code, all the other states follow the personal laws set up by their respective religions. These include laws that deal with topics on marriage, maintenance etc. The personal laws pertaining to different religions of Hinduism, Islam and Christianity vary tremendously among each state. Even though the Apex Court of India has asked the Central Government to draft a Uniform Civil Code, this dream can only become a reality for the citizens and especially the women of India if all the state governments in collaboration with the Central government consider it to be a serious issue.²

WHAT IS THE MEANING OF A UNIFORM CIVIL CODE?

The major aim of Art 44 of the Indian Constitution was to secure a single codified law for its citizens throughout the territory of India, but it fails to assess any single law that would be applicable to different religious communities amongst its Indian Citizens. There is however no proper explanation of “**Uniform**” in the Indian Constitution and hence it becomes a hassle for states while trying to implement a codified uniform law. The art further states that there should be uniformity in law in the principles of gender and human justice.

² Sathya Narayan, selected works of S.P.Sathe, Social Justice and Legal Transformation, Vol.3,Oxford University Press,2015,p.251.

OBJECTIONS TO THE IMPLEMENTATION OF A UNIFORM CODE

When the idea of enacting a Uniform Civil Code in India was proposed while drafting the Constitution, a huge number of Muslim Parliamentarians raised objections. These objections were mainly raised on two grounds. The **first objection** is based on the foundation that there was already a great deal of uniformity of law and though the law was maybe a little diverse in its nature among personal laws, there was nothing wrong about it. It was also strongly recommended that personal laws and secularism should be separated from religion. **Clause (2) of Article 25** specifically saves secular activities associated with religious practices from the guarantee of religious freedom contained in **Article 25(1)**.

The **second objection was K.M.Munshi** who pointed out that that the founding fathers of the constitution are going to enact the laws in such a manner that the personal laws in due course of time will unify with those who argued that the framing fathers of the Constitution are going to Consolidate and unify the personal law in such a way that it will unify with the whole country in due course of time. He tried to support his argument with the example of Europe which has implemented a civil code throughout their country and everyone who goes there irrespective from whichever part of the world they may belong or from whichever minority community they represented, irrespectively they had to submit to the civil code.³

Dr.B.R. Ambedkar in support of enacting the Uniform Civil Code put forth a very strong argument in which he rightly argued that he did not understand why there was a need to mix religion with the judiciary or legislature. He also believed that the legislature was for the freedom of the common people, Hence it had to be liberal of any religious interference which was based on a social stigma of inequalities and discriminations and directly conflicted with the supremacy of our fundamental rights.⁴

The founding fathers of the Indian Constitution merged Uniform civil code with Constitution with a goal of separating law from religion and in order to promote the feeling of equal rights among its people/citizens which will lead to a unified and strong India in the long run. But however, another major issue of gender justice was not considered an important topic in the debate of the members of the constituent assembly while framing the constitution. In absence of Uniform Civil Code, however, The Supreme Court of India has to completely rely

³ M.P.Jain, Indian Constitutional Law, Lexis Nexis, 7th Edition 2015,p.1430.

⁴ Constituent Assembly Debate, Vol.VII,547-48

upon **Article 44** of the Constitution of India to interpret many provisions of the personal laws of Hindu as well as Muslim to protect the rights of women in cases of matrimonial affairs.

HOW DO PERSONAL LAWS DISCRIMINATE AGAINST THE WOMEN IN INDIA?

Most of the personal laws in India are based on a patriarchal mindset keeping the atrocities suffered by the women to the very far end of fair justice. Society has always looked to treat women as the weaker sex, to treat them as subordinates to men and personal laws are no different. There is no element of fairness, equality and justice in such laws and hence it becomes a necessity for the country as a whole to implement a Uniform Civil Code towards Gender Justice in India.

As we can note that between the years of 1955 to 1956 women were barred from enjoying any rights that were equal to men as per the **Hindu Personal Law**. Also, one can rightly note that the concept of polygamy was a very normal phenomenon before the year of 1950 same cannot be said when it came to the Hindu women. Another interesting point one can note is that Hindu law prohibited Hindu women from having any kind of independent land holdings in any form of ancestral property owned by the family except when it came within the sphere of Stridhan. Previously a Hindu woman could not adopt a child as a single mother she needed to have a spouse as per Hindu Law, but this has been amended today. From this we can gather that even though a few of the laws have been amended, we still have a long way to go as a country to bring about gender equality in terms of laws.

When we talk about the position of women with regards to **Muslim Law** it has to be noted that the Holy Book of the Muslims i.e. The Holy Quran holds women in a very high position with respect to men, it speaks about equality between the rights of men and women, yet the Muslim women feels discriminated upon many times, she feels there is lack of equality, justice and liberty that she enjoys. The Muslim Law state that a man is entitled to have 4 wives at the same time, the only requirement being that he can take care of them monetarily and perform all the duties expected from him as a husband. This is not the case when it comes to women, a Muslim woman is not entitled to polyandry.⁵

The practice of Triple Talaq was a concept which was so prevalent and unfair and unjust to the Muslim women until it was struck down and criminalized by the Government recently.

⁵ M.P.JAIN, INDIAN CONSTITUTIONAL LAW, 1431 (Lexis Nexis, 7th Edition 2015).

It not only caused the women mental torture, but it also caused the women economical torture as many Muslim women are dependent on their husbands for their livelihood.

Another horizon in which Muslim personal law discriminated against women unjustly was in the form of maintenance after divorce, which made the husband not liable to pay beyond the time period of Iddat. This was struck down by the Court in the epic case of *Mohd. Ahamed Khan v. Shah Banu Begum*.⁶

WHY DO WE NEED UNIFORM CIVIL CODE FOR GENDER JUSTICE IN INDIA?

A Uniform Civil Code for Gender Justice in India is required for the following purposes.

1. It will guarantee that all the laws that are enacted are in favor of both the men and women of India, thus promoting a sense of liberty and equality between both the genders.
2. Enacting a Uniform Code throughout the country will bring about consistency in laws, thus removing any form of arbitrariness or any discrepancy.
3. It will help promote the idea of justice that the Constitution of India seeks to establish in its very true sense.
4. Personal Laws always cause a great confusion as to the rights and duties that are assigned to the two genders, thus causing a power differential to rise, if a Uniform Code is to be implemented throughout the country it will eliminate all forms of uncertainty regarding the rights and duties for the two sexes.

WHAT WILL BE THE MERITS IF A UNIFORM CIVIL CODE IS ADOPTED IN INDIA?

If a Uniform Civil Code is adopted by the central government in India and is truly implemented without any unbiased motives that it can.

1. Help in bringing about national integration throughout the country
2. There are many provisions of personal law that have been seen by judicial experts getting overlapped , if a Uniform Civil Code is adopted this overlapping can be avoided.

⁶ Mohd. Ahamed Khan v. Shah Banu Begum , AIR 1985 SC 985.

3. The number of cases of litigation that arise due to the inconsistencies and inequality in personal laws would show a sharp decrease.
4. The country being unified as one through a Uniform Civil Code will come out stronger as a sovereign and as one power.

THE LEGAL/JUDICIAL OPINION PERTAINING TO THE UNIFORM CIVIL CODE

The judiciary has time and again pointed out that the injustice caused due to the unfair provisions mentioned against women in personal laws is tremendous. The Apex Court of India had urged that there should be consistency in laws while dealing with the personal matters of its citizens. In one of the most groundbreaking decisions given by the court in the matter of *Mohd. Ahamed Khan v. Shah Banu Begum*, it was held by the Honorable Court that the Muslim man is liable to maintain his divorced wife beyond the period of Iddat. The court further stated that the decision will be executable on all the religions under Section 125 of the Code of Criminal Procedure⁷

Yet in another case *Sarla Mudgal v. Union of India* the Supreme Court held that if any Male who is Hindu by birth converts his religion to Islam for the sole purpose of bigamous obstacles, then such a matter will be treated within the purview of **Section 494** of the Indian Penal Code. Such marriages will be considered void ab initio by the court.⁸

CONCLUSION

In a country like India which bases all its laws on the foundation of the principles laid down in Democracy women's rights and upliftment have always been the talk, but that's all it has been, just talk rarely any action is taken to achieve this goal. The main aim of the Central Government as well as the Law makers of India should be the women's position and rights by doing away separate personal laws. Today one can see that the Hindu Personal Law has made some changes to accommodate the rights of women, but it still has a long way to go, but on the other hand Muslim Laws have been and are still, even in these modern times, rigorous and outdated. This gender bias in the respective personal laws keeps the woman caged and at the mercy of the

⁷ Mohd. Ahamed Khan v. Shah Banu Begum , AIR 1985 SC 985.

⁸ Sarla Mudgal v. Union of India, AIR 1995 SC 1531.

opposite gender. Hence a Uniform Civil Code becomes the need of the era as it will do away with most of these socio-legal evils and will treat the needs of both genders equally without any bias, thus achieving the goal of Gender Justice.

IS THE UNIFORM CIVIL CODE THE ONLY REMEDY FOR ELIMINATING DISCRIMINATION?

- Najla Pazhayakath¹

ABSTRACT

This paper discusses whether the Uniform Civil Code is the only remedy for eliminating discrimination under the personal laws in India. Replacement of religious, cultural-oriented laws by a secular uniform code was the topic of debate before independence. Later, the constitutional makers added the Uniform Civil Code in Part IV of the Indian Constitution. The Constitution recognized legal pluralism and secularism, and also it protected the religious rights of the people under part III of the Constitution. This paper explains the judicial approaches when conflicts arise between Fundamental Rights, Directive Principles, and two Fundamental Rights. The judgments in this matter consider the harmonization of two conflicting rights. For solving the conflicts among rights, most people suggest enacting a Uniform Civil Code. These arguments are limiting the scope of the concept of secularism and evading the concept of multiculturalism. This paper concludes with a suggestion to make uniformity in laws through progressive interpretation within the religion rather than forcing a uniform code on the people practicing different cultures.

INTRODUCTION

Indian Jurisprudence regards law as not a static or eternal concept but as changing and evolving with the evolution of society.² Law is in some way rooted in religion.³ Every school of thought, every religion, and prophet constitutes the fundamental and practical social change factor within that school. Different religions, in general agreements, have some foundational

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² S.S. Dawan, *Secularism in Indian Jurisprudence*, in *SECULARISM: IMPLICATION FOR LAW AND LIFE IN INDIA*, 102–138 (1966).

³ DENNIS LLOYD, *THE IDEA OF LAW* 47 (1964).

views.⁴ Aldous Huxley's perennial philosophy says that every religion or thought has eternal values such as truth, justice, etc.⁵

We know that India is a religiously pluralistic society. But India has no state religion. There are no express provisions like the first amendment of the USA, prohibiting the establishment of religion by law.⁶ For emphasizing no state religion, the Indian Constitution added the word 'secularism' to the preamble.⁷ At the same time, the Constitution of India gives all persons equally entitled to freedom of conscience and the right to profess, practice, and propagate their religion.⁸ And this freedom to practice religion and the freedom to manage religious affairs⁹ are not absolute rights; they are subject to public order, morality, and health.

LEGAL RECOGNITION OF PERSONAL LAWS

In India, before colonization, Hindus and Muslims with very few exceptions were governed by their respective laws in religious and secular matters.¹⁰ The British continued with the same policy concerning the personal issues of Hindus and Muslims. At the beginning of the 17th century, the British legal principles and notions of justice influenced the Indian judicial system. The British allowed the Muslims to continue to be governed by their laws. This permission assumed a statutory status under Charter Act 1753, which George II granted. After this, the Muslims could obtain an exemption from the Mayor's Court to get their cases adjudicated based on their law.¹¹ Section XV of the Regulation IV of 1793 enacted by Lord Cornwallis provided that, "*in suits regarding succession, inheritance, marriage and caste, and all religious usages or institutions, the Mohammedan Laws with respect to Muhammadans and Hindu Laws with respect to Hindus, are to be considered as the general rules by which the judges are to form their decisions*".¹²

Personal Laws are one of the unique components of the Indian Legal system.¹³ Different personal laws in India govern different religious communities like the Muslims, the Hindus,

⁴ CAFER S. YAREN, ISLAMIC THOUGHT ON THE EXISTENCE OF GOD- WITH CONTRIBUTIONS FROM CONTEMPORARY WESTERN PHILOSOPHY OF RELIGION (2003).

⁵ ALDOUS HUXLEY, THE PERENNIAL PHILOSOPHY (1947).

⁶ VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1058 (1999).

⁷ THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976.

⁸ INDIA CONST. art. 21.

⁹ Article 26 *Id.*

¹⁰ Cutchi Memons, Mappilahs, Nairs etc.

¹¹ DR. PARAS DIWAN, MUSLIM LAW IN MODERN INDIA (6 ed. 1993).

¹² DR. MOHAMMED SHABBIR, MUSLIM PERSONAL LAW AND JUDICIARY (1988).

¹³ Denkila Bhutia, *A Study of the Status of Personal Laws in India with Reference to Article 13 and Judicial Review under Constitution of India*, December, 2018.

and others. They are governed by the laws which govern matters of marriage, inheritance, etc., of people belonging to a particular religion. In *Inayatullah v. Gobind Dayal*¹⁴, Mahmood J said, “It is to be remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot readily be dissevered from it”.

Muslims and Hindus are different not only in religion but also in their historical background, social habits, cultural outlook, educational development, etc. So, the Muslims and Hindus are classified separately and subjected to the different status of laws. Such classification is not based on religion alone. In the cases of *State of Bombay v. Narasu Appa Mali*¹⁵ and *Srinivasa Aiyar v. Saraswati Ammal*,¹⁶ the courts held that different laws for the Hindus and the Muslims were not on religion only but social and other developments of and various other considerations peculiar to each of the communities.

Many provisions in the personal laws in India dis-privilege women. The primary reason behind this discrimination is the unequal status of women in existing personal laws. The gap between the old laws and the new needs of society is inevitable. This can be narrowed down effectively by legislation. But the legislative reforms lead to opposition from the conservative sentiments. The Hindu Succession Act, 1956 and the Indian Succession Act, 1925 improved the situations and changed their provisions to ensure equal justice. Such a gap can also be filled up by progressively interpreting the existing laws and making a decision according to the needs of society. The judiciary has taken a hands-off attitude towards personal law till 1975.¹⁷ Later, the judiciary started to interpret personal laws in a progressive way.¹⁸

STEP FOR ELIMINATING GENDER DISPARITIES

The Constitution guarantees all persons the equal protection of the laws and prohibits the State from denying any person equality before the law.¹⁹ Nothing in this section prevents the State from making special laws for what the Constitution regards as the weaker section of the society. The beneficiaries of preferential treatment are indicated clearly in the Constitution.²⁰ Preferential treatment of women and children is well explained. Most women

¹⁴ *Inayatullah v. Gobind Dayal*, (1885) ILR 7 All 775.

¹⁵ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

¹⁶ *Srinivasa Aiyar v. Saraswati Ammal*, AIR 1952 Mad 193.

¹⁷ *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*, 1985 AIR 945.

¹⁸ see *Mrs. Mary Roy v. State of Kerala*, 1986 AIR 1011; *Shayara Bano v. Union of India and Ors*, AIR 2017 9 SCC 1 (SC); *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1.

¹⁹ Article 14

²⁰ Articles 15(3), 15(4) and 16(4) THE CONSTITUTION OF INDIA, 1950, *supra* note 7.

in India face different kinds of inequalities in socially, economically, and politically or other challenges both physically and mentally. The personal and customary laws of the Hindus and Muslims imposed particular disabilities and restraints on them.

The majority of the people opined that enactment of the Uniform Civil Code is the only solution for eliminating these disparities under personal laws. Dr. Ambedkar observed that, during the debates in the Constituent Assembly regarding Article 44 (on the draft Article 35), “*India is the only country that was not covered by any uniform civil code was marriage and succession. It was the intention of those who enacted this Article as part of the Constitution to bring about that change.*”²¹ Is it the only remedy for ensuring equal justice to women under personal laws? In *Gurdial Kaur v. Mangal Singh*²², the Court observed that it would be impossible to codify different personal laws in this country into one uniform Code of laws relating to all matters covering all castes, creeds, and communities.

*Sri Krishna Singh v. Mathura Ahir and Ors*²³, the Court held that Personal Laws are immune from being subject to Part III of the Constitution. In the judgment of *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*²⁴, the Supreme Court began to test personal laws on the touchstone of fundamental rights. This approach enabled the courts to either strike down any particular statutory provision in any law or reinterpret them harmoniously with Part III of the Indian Constitution.²⁵

LEGAL IMPEDIMENTS IN THE ENACTMENT OF UNIFORM CIVIL CODE

We know that Women's interests have not been prioritized in personal laws and practices. The Constitution of India enshrines the principles of justice, liberty, and equality for all citizens of the country. It guarantees the dignity of individuals irrespective of their sex, religion, or place of birth. Therefore, certain general and specific provisions were incorporated into the Constitution for promoting equal justice. Freedom of individuals, if needed, should be annexed for the accomplishment of social justice. The goal of the welfare state can be achieved

²¹ CAD, Vol. VII, 550–551.

²² *Gurdial Kaur v. Mangal Singh*, AIR 1968 Punj 396 (398).

²³ *Sri Krishna Singh v. Mathura Ahir and Ors*, 1980 AIR 707.

²⁴ *MOHD. AHMED KHAN V. SHAH BANO BEGUM AND ORS*, *supra* note 16.

²⁵ *Bhutia*, *supra* note 12 at 228.

only through the instrumentality of social justice, and the claims of social justice must be treated as paramount and primary. The first and the vital principle enjoins that the State shall secure a social order in which social, economic, and political justice shall inform all the institutions of national life. The directives are in the nature of duties which the Constitution calls upon the State to perform to achieve the welfare state.²⁶

There are two types of conflicts that arise in the Constitution provisions. One is the conflict between two Fundamental Rights, such as Freedom of Religion²⁷ versus the Right to Equality.²⁸ The other is conflicts between Fundamental Rights and Directive Principles such as Freedom of Religion versus the Uniform Civil Code.²⁹ How to resolve these conflicts is still a crucial question before the legislature and judiciary.

a) Conflicts between two fundamental rights:

Fundamental rights are primarily of individual character and are mainly meant to protect individuals against arbitrary state action. Conflict of fundamental rights means the existence of one right is causing the other right to lose its character. When there is a conflict between two articles of part III of the Indian Constitution, the Supreme Court has resorted to applying the 'balancing test'. If the balancing was not possible or a constitutional dilemma happened, the Court applied the test of 'greater community interest' or interest of the collective or social order.³⁰

There can be conflicts between two fundamental rights or two rights in the same Article. In certain circumstances, conflicts may arise between the same person's fundamental rights, which means one fundamental right enjoyed by him may come in conflict with the other fundamental right guaranteed to him. In all these situations, the Court has to examine where lies the more significant public interest while balancing the two conflicting rights. It is the paramount collective interest that would ultimately prevail.³¹ The Supreme Court has introduced a three-step formula; 1) the facts and the circumstances of both violations are

²⁶ SHAILJA CHANDER, JUSTICE V.R. KRISHNA IYER ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES 58 (1992).

²⁷ Article 25(1)(b) THE CONSTITUTION OF INDIA, 1950, *supra* note 7.

²⁸ Articles 14 and 15 *Id.*

²⁹ Article 44 *Id.*

³⁰ Asha Ranjan v. State of Bihar, (2017) 4 SCC 397.

³¹ P. Gopalakrishnan v. State of Kerala, (2020) 9 SCC 161; Mazdoor Kishan Shakti Sanghatan v. Union of India, AIR 2018 SC 3476.

considered 2) the competing interests are measured, and 3) a balance is sought to creatively interpret the violations by ensuring that none is wholly made extinct.³²

b) Conflicts between fundamental rights and directive principles

Whether the directive principles are inferior to the Fundamental Rights? Whether it is an essential part of the Constitution? There are several questions raised before the judiciary. Jawaharlal Nehru observed that the directive principle represents a dynamic move towards a particular objective. The Fundamental Rights represent something static to preserve certain rights which exist. Both are rights. But sometimes, the dynamic movement and the static stand still do not quite fit into each other.³³

However, there is no express conflict between Fundamental Rights and Directive Principles. They are complementary and supplementary. H.M. Seervai said that Directive Principles do not enlarge the legislative powers. A law implementing Directive Principles may confer rights on persons, which will be statutory rights. The Fundamental Rights cannot be taken away by any law in view of Article 13(2). Thus, the former will prevail in a conflict between fundamental rights and statutory rights.³⁴

One of the important cases in the sphere of conflict is the *State of Madras v. Champakam Dorairajan*³⁵. The Supreme court held that the chapter of fundamental rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the Article provided in Part III. The directive principles cannot override the provisions found in part III but must conform to and run as a subsidiary to the chapter on fundamental rights.³⁶ P.K. Tripathi criticised the most unfavourable opinion expressed by the Supreme Court on the value and effectiveness of the directive principle.³⁷

Later, the Constitution First (Amendment) Act, 1951 was enacted and added Article 15(4) to advance socially and educationally backward classes and the scheduled castes and tribes. Through this amendment, the legislature gives importance to directive principles rather than fundamental rights. But the judiciary did not give much importance to directive

³² ASHA RANJAN V. STATE OF BIHAR, *supra* note 29.

³³ LSD(1951) II. COLS 8822-23

³⁴ H.M. Seervai, constitutional law of india 1618

³⁵ State of Madras v. Smt. Champakam Dorairajan, 1951 AIR 226.

³⁶ Article 29(2) and Article 46 were discussed

³⁷ P.K. TRIPATHI, SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION (1972).

principles.³⁸ If any Act which prima facie infringe the fundamental right of the citizen, as such would be void under Article 13 of the Constitution of India.³⁹

To bring harmony between the directive principles and the fundamental rights, it is essential that the courts give due consideration to the directive principles in interpreting the provisions relating to the fundamental rights. The appropriate directive principle should be used to determine the implications of phrases like 'public interest, 'public purpose,' and 'reasonable restriction' used with reference to fundamental rights.⁴⁰

The Directive Principles were not the mere policy of any political party because the principles fixed by the Constitution for directing the State to act accordingly.⁴¹ Any legislation which implements one of the directive principles would prima facie be reasonable unless it could be considered that there was an arbitrary or excessive invasion of the fundamental right.

In *Mohammed Hanif Qureshi v. State of Bihar*,⁴² the State argued that the laws made by the State for discharging the fundamental obligation imposed on them, so that the Fundamental Rights conferred by part III must be regarded as subordinate to the State laws and the directive principles, were equally, if not more, fundamental and must prevail. The Court rejected the contentions and held that the State should not make any laws which take away or abridge the fundamental rights.⁴³ The directive principles cannot override this categorical restriction imposed on the State's legislative power. However, the Court introduced the doctrine of harmonious construction as a new technique for interpreting these issues. In determining the scope and ambit of fundamental rights, the Court may not entirely ignore these directive principles but should adopt the principles of harmonious construction.⁴⁴

Justice Mudholkar said that for solving the conflict between fundamental rights and directive principles, the former should be interpreted in the light of the latter.⁴⁵ *Golaknath v. State of Punjab*⁴⁶ held that the fundamental right and directive principles of state policy formed an 'integrated scheme' and were elastic enough to respond to the changing needs of the society.

³⁸ Nusserwanji Balsara v. State of Bombay, AIR 1951 Bom.210, Jagawant Kaur v. Kesar singh

³⁹ S Fazal Ali, The State of Bombay and Another v. F.N. Balsara, 1951 AIR 318.

⁴⁰ CHANDER, *supra* note 25 at 63.

⁴¹ State of Bihar v. Kameshwar Singh, 1952 SC 252.

⁴² Mohammed Hanif Qureshi v. State of Bihar, AIR1958 SC731.

⁴³ *Id.*

⁴⁴ In Re Kerala Education Bill, (1959)SCR955 688.

⁴⁵ Sajjan Singh v. State of Rajasthan, AIR 1965 SC845.

⁴⁶ Justice Subba Rao, AIR1967 SC1643

But the legislation to implement the directive principle came into conflict with fundamental rights. The State may enact legislation contravening the fundamental rights while implementing the directive principles.⁴⁷ So, enacting a uniform civil code for gender justice infringes the fundamental rights of freedom and expression of their religion and the right to profess and practice religion. Moreover, it hurts religious sentiments and may raise some sensitive protestants. The people who oppose the Uniform Civil Code, neglect the question of elevation of the status of women and focus only on the cultural plurality and religious rights.⁴⁸

ALTERNATIVE REMEDY FOR SOLVING GENDER DISPARITIES IN THE PERSONAL LAWS

The conflicts between directive principles and fundamental rights and inter fundamental rights in personal laws will cause unending trouble to both legislature and judiciary. In this context, paramount collective interest is elevating the status of women under personal laws. To promote paramount collective interest, balancing the conflicting rights is necessary. Whether the balancing between the conflicting rights is possible? The balancing can be possible only through interpreting the existing laws in a progressive way and making a decision according to the needs of society.

In resolving the inevitable tension between the negative and positive aspects of religious freedom and seeking to promote the tolerance that the basic law mandates, the State must strive to bring about an acceptable compromise.⁴⁹ Religious problems can only be solved if there are grounds within a religious tradition calling for toleration or respect for the rights of others to have divergent beliefs.

Fortunately, there are resources within most religious traditions that support according to others such respect. For example, we know that traditional and classical Islamic law has not had an effective framework comparable to the modern legal system. The *Sharia* must regain its previous rational and pluralist tradition to overcome the contemporary challenges the Muslims face today.⁵⁰ Some additional tools of Islamic jurisprudence, such as *masaleh*

⁴⁷ CHANDER, *supra* note 25 at 51.

⁴⁸ Bhutia, *supra* note 12 at 233.

⁴⁹ JACKSON AND TUSHNET, *supra* note 5 at 1179.

⁵⁰ HOSSEIN ESMAELI, IRMGARD MARBOE & JAVOID REHMAN, *THE RULE OF LAW, FREEDOM OF EXPRESSION, AND ISLAMIC LAW* (2017).

mursalah (consideration of public interest), *urf* (custom), and *ijtihad* (juristic reasoning), are available and can be applied while interpreting the cases relating to Muslim personal laws.

In his 'Religion of Religions', Dr. Radhakrishnan reflects the Indian concept: “*our historical religions will have to transform themselves into the universal faith, or they will fade away. This prospect may appear stranger and unwelcome to some, but it has a truth and beauty of its own. It is working in the minds of men and will soon be a realised fact.*”⁵¹

CONCLUSION

A secular state should not deprive any individual's religious and cultural rights. In recent years, secularism has come under criticism for giving much space to the public use of reason and sometimes for fostering a thin understanding of public deliberation that can obstruct the creation of a genuinely pluralistic society. Religions are rooted in culture. The cultural identity of the various minority communities was lost by the act of legislature and judiciary in India.

However, the structured and codified personal laws make a uniformity among the persons who believe in the same religion. Today the concept of multiculturalism overrides the concept of uniform civil Code and even the concept of secularism because secularism focuses on religion rather than culture. But multiculturalism accommodates all kinds of cultural and religious practices. For example, In Canada, the province of Ontario passed an Arbitration Act, which is helpful for religious minorities accustomed to their law in family and other disputes.⁵² I am concluding with a suggestion that India has to relook its attitude towards personal law and do a progressive reading within the ambit of personal laws itself. It can be possible on the basis of the jurisprudential study. Also, India needs to recognize the concept of multiculturalism rather than the out fashioned concept of 'one nation and unified law.

⁵¹ CHANDER, *supra* note 25.

⁵² ARBITRATION ACT, 1991 Province of Ontario, Canada.

THE UNIFORM CIVIL CODE : A MYTH OR REALITY

- Yash Kumar Sharma & Simran Singh Verma¹

ABSTRACT

This paper deals with various dimensions of UCC. The motive of this research is to impart the readers about the concept of uniform civil code, whether it is the appropriate time to implement it and the ways to implement the UCC. This research starts with the meaning of UCC. Then it explains the origin and historical evolution of UCC in India and why our country needs uniformity in personal laws. Further, it will cover the challenges which the UCC is witnessing such as diversity, rigid ideologies of some religions in personal laws, deeply instinct patriarchy, social taboos, wrong interpretation of secularism, beliefs of minorities that UCC will destroy their customs, politics based on vote bank and lack of political will, and it will also deal with hijab controversy. As we have a uniform divorce mechanism, how can we have a uniform code of conduct in personal laws as well. Then the research will move further as how UCC can be a way to eradicate discrimination against women, bring gender equality and promote religious harmony. After understanding the challenges this research aims to show the readers how India can work on these challenges with the motive of implementing the UCC. This research will also set forth the judicial pronouncements towards implementation of UCC. It will also take into consideration the places where its implementation is promoting peace and security such as Goa and other countries. Then research will provide the best version of UCC. Further it will also provide to the readers the advantages and disadvantages of UCC and then it will deal with suggested measures to implement UCC then it will conclude whether its implementation is a myth or reality as per Indian perspective.

"As long as there is a feeling of duality, unity is not possible"

-Swami Madhvacharya

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INTRODUCTION

The Uniform Civil Code (Samāna Nāgrika Samhitā) which is interpreted in many different senses but has one common aim i.e., the welfare of all communities and removing the social taboos such as gender disparities, looking at the positive side of secularism, taking the best version of personal laws and making one common code for all religions i.e., Hinduism, Christians and Muslims etc. Though India has a one common Criminal Code² it lacks in "one common personal law" as it is a home to Diversified religions practicing them differently which makes it difficult to implement the UCC. The UCC is generally understood with family related matters such as succession, inheritance, property rights, marriage and adoption etc., but its roots are not limited to these only as it also entails "festival conflicts" (Eid and Diwali), religious worship such as "Namaj" in mosques and "Puja" in temples where one regard it as "God is one and there is no other God" on the other the Hindus regard it as "vasudhaiva kutumbakam" i.e., the "whole world is one family" respectively. The UCC has constitutional sanction (Article 44)³ which the framers have mentioned it in chapter 4 i.e., Directive Principles of State Policy which can't be enforced in court of law as it only directs the Government to make policies for the implementation of UCC, but the structure of constitution promotes democracy which means what people think becomes the "law of the land". Strongest point of democracy is its people and their will, which nowadays has become the weakness of it as the government comes with the support of people and the constitution also supports the concept of federalism which means power is not centered but decentralized because of this various expectations arises, and such expectations cannot be meted out at the same time. This leads to too much Diversity as it gives them reasonable liberty to practice freedom of religion, and these religious practices support some customary practices which have become a challenge to socio-economic equality, gender equality, positive secularism, democracy, women empowerment, vote bank politics etc. This research paper will deal with each of these issues separately and will provide the suggestions for the implementation of UCC. The research question is whether it is possible to implement UCC in India.

² Indian Penal Code, 1860, No. 45, Act of Parliament, 1860 (India).

³ INDIA CONST. art. 44

ORIGIN & HISTORICAL BACKGROUND OF UCC

Before understating a concept, it's important to first understand its history. UCC is not a new concept in India. Its origin had started a long time ago. The idea of UCC came from the similar European codified laws.⁴ In colonial India for the very first time in 1935 the British Government presented a report for the codification of laws related to contract, penal laws, property laws etc., but the personal laws of Hindus, Muslims and other religions were excluded from it because of the reason that it may hurt the religious sentiments of people.

B.N RAO COMMITTEE

Again in 1941 B.N. Rao committee was formed. It recommended “*codification of Hindu laws*”⁵ which should not be male centralized and contain rights and recognition to women.

POST-INDEPENDENCE

Further after independence when the Constitution was framed, provision regarding UCC was provided. Article 44 of our Constitution lays down that the "State shall endeavor to secure a UCC for the citizens throughout the territory of India". As UCC was included in the DPSP's that's why the State was not obliged to introduce it immediately and there was room for the consent and negotiation of all religious communities in India.

THE HINDU CODE BILL

Again in 1951 the report was presented before the Select Committee headed by B.R. Ambedkar for discussion. During the debate, the Hindu Code Bill was lapsed, and it was reintroduced in the year 1952. Finally in the year 1954 Hindu Succession Act was passed which gave property rights for the first time to women applying to Sikh, Jains and Buddhists also. Nevertheless, personal laws of Muslim Parsis and Christians remain separated from the Bill.

⁴ Abhinav Mehrotra, *Uniform Civil Code (UCC) in India: An overview, or online. org*, ORF OBSERVER RESEARCH FOUNDATION, (Mar. 18, 2022, 3:10 PM), <https://www.orfonline.org/expert-speak/uniform-civil-code-ucc-in-india-an-overview/>

⁵ Rau Committee Report (1947). 13, 32–34, 156, 182.

UCC IN GOA

In India, Goa is the first state, a shining example of an Indian State which has a UCC applicable to all, regardless of one's religion except the protection of certain limited rights. In Goa Portuguese introduced the Portuguese Civil Code⁶ in the late 19th and 20th century under which some parts have been repealed in 2016 and get replaced by Goa Succession Act, Special Notaries Act and Inventory Proceedings Act, 2012 which are more or less conforming to the Portuguese Civil Code.⁷

SHAH BANO & SARLA MUDGAL CASE

The Hon'ble Supreme Court has also asserted the need of UCC through various judgements. In the historical judgment of Shah Bano case Supreme Court dealt with the matter of maintenance under Sec 125 of CRPC⁸ under which the husband of Shah Bano gave talaq to her. The Supreme Court in this case observed that there must be a common civil code for equality and harmony. Another judgement was given in Sarla Mudgal Case where Supreme Court dealt with issue of polygamy after conversion into Islam. The Supreme Court has at various times put the stress on the government to introduce UCC. Many times, attempts were made but due to various challenges and "communal politics" nothing happened in this way.

NEED & ADVANTAGES

India is a home to many diversities and the diversified people practices some personal choices and customs which sometimes favorable to one class of people but unfavorable for another one such as "Triple Talaq" is more in favor of Muslim man but not for Muslim women, mandate of "dowry in Hindu Religion" (despite Dowry Prohibition Act) is favorable to the groom side but unfavorable to the bride side as well as for the large public interest. Further, the nation is burning in many other social problems such as rising "caste or religion-based vote bank," Therefore the need arises to provide a mechanism which will act as a medicine and will cure these social taboos from their roots. Then there will be an India "without caste-based politics", with treating their daughters, sisters and mothers with proper "respect and dignity",

⁶ Faizan Mustafa, *Explained: Why Goa's Civil Code is not as uniform as it is made out to be*, THE INDIAN EXPRESS (Last Visited April 20, 2021 7:41:46 am) <https://www.google.com/amp/s/indianexpress.com/article/explained/why-goas-civil-code-is-not-as-uniform-as-it-is-made-out-to-be-7279365/lite/>.

⁷ Ashok Kini, *no attempt made to frame UCC despite judicial extortion*, LIVE LAW (Last Visited March 18,2022, 3:42 PM) <https://www.livelaw.in/top-stories/no-attempt-made-to-frame-uniform-civil-code--14804>.

⁸ The Code of Criminal Procedure, 1973, Sec 125.

with a positive side of secularism. If a nation wants to see its future like this, then it has to concede to the idea of UCC.

Above all “dvaita” (द्वैत) means seeing all separately and “advaita” (अद्वैत) means seeing one. As long as we are living in duality, the conflicts of mine-yours, honor-respect, happiness-sadness, profit-loss etc. keep bothering us. It is this duality that gives bondage, for liberation it is necessary to come in a non-dual spirit. Advaita itself is called “Ekatma Bhava”. “Ekatma” means that one soul is present in all living beings. So, the "concept of non-duality"⁹ is important for the peace and prosperity which prevails only in uniformity.

ADVANTAGES OF UCC

1. One of the biggest advantages of UCC is the welfare of women. It will eradicate the discrimination against women and would promote their equal status in their marital life.
2. UCC would reduce the distinction between religions in the matter of marriages, maintenance etc. and all will be dealt with by the same civil laws which would be helpful in the making of a uniform and homogenous society.
3. It will trigger the dirty communal politics of divide and rule in the name of religion, caste etc. And then the nation will focus on other important issues like health, education, spiritual development etc.
4. UCC will promote real Secularism which had not prevailed till now. In some aspects we are secular but in others there is no secularism. Implementation of UCC will promote the atmosphere of real secularism in which all citizens have to follow same set of laws whether they are Hindu, Muslim, Sikh, Christian or of any other religion.¹⁰
5. The implementation of UCC will remove the differences between various religions leading to a more unified and peaceful nation.
6. The development of a country is very much dependent on the empowerment of its women. As a UCC would promote women equality. It will lead to a more developed and prosperous nation where all women enjoy equal status as men.

⁹ B Shivkumar, *Dwait and Adwait*, THE TIMES OF INDIA (Mar. 19, 2022, 10:54 AM) <https://m.timesofindia.com/advaita-and-dvaita/articleshow/7352731.cms>.

¹⁰ Mayank Chandra, *UCC: India's Requirement*, LEGAL SERVICE INDIA (Mar. 18,2022, 5:18 PM) <https://www.legalserviceindia.com/legal/article-3916-uniform-civil-code-india-s-requirement.html>.

7. It will clear the confusion created by the plurality of personal laws and the customs which are contradictory to other religions.
8. UCC will also promote the welfare of marginalized sections and minorities, though there has been an ideology that UCC would favor only mainstream religion but it's only the one side UCC would bring all the sections at one platform especially the women of marginalized communities which are the most suffered being.
9. UCC would promote the “integrity and unity” of our nation and would foster the dream of "One Nation One People"
10. Lastly, UCC is to secure the diversity but with certain equality among the distinct religions so that no person would have to face discrimination or injustice due to his/her religion.

DIVERSIFIED PERSONAL LAWS

The contradictions do not end here because personal laws of Hindu, Sikh, Jainism, Buddhism are different and other tribes such as tribes of Bhil, Kholcha, Bhel, Nayaka, Koknas, Vedch, Gamits, Warlis, and Chaudaris have different sets of beliefs and practices to follow. When it is difficult to first make uniform laws for these, how can Muslims be included in such uniformity?

As in one religion bigamy is a punishable offence but in another (Muslims) there is no such case. Therefore, in such a different religious ideologies', it is very difficult to make a "uniform set of laws" for the diversified communities.

UCC AND HUMAN RIGHTS

Inequality of women, their suppression and discrimination against them has always been the topic of debates in India. There are various examples where women are not treated equally with men despite the fact that our Constitution gives everyone the right to equality. But in reality, all these rights are on one side and the discriminatory personal laws on the another. Personal laws of every religion have been more or less male centric and ignored the status of women, their property rights etc. In Muslim personal laws polygamy is practiced only by males.

In Hindus mother is given the secondary status same as the case with Christians, Muslims and Parsis. Indian Women have frequently raised the voice against gender inequality and the need of UCC specially in Muslim personal laws. The UDHR gives certain human rights

to each and every person despite his religion, gender etc.¹¹ To properly enforce these rights, implementation of UCC could be a boon for the women. It would promote the human rights of women of every religion and give them an equal and dignified status in marriage related issues.

UCC AND SECULARISM

Secularism in the true sense is a belief system that separates religion from state and its civic affairs. The introduction of the word “Secular” by the 42nd Amendment simply made the secular nation of the Indian Constitution more apparent. It means that no religion is given special status in India as a state. There is no such thing as an Indian state religion particularly. This distinguishes it from theocratic regimes such as the Islamic Republic of Pakistan and other Islamic countries. But it is only one side of the coin. On the other side secularism is also the most misinterpreted term. Nowadays, religious controversies are at its verge. One of the main reasons is the contradictory customs and tradition. It is intolerable to see a person murdering his own mother by another who considered it sacred. Like murdering a cow (sacred among Hindus) but killing it is sacred among Muslims. So, we can also say that the concept of secularism which advocates the "equal respect for all religion" means to have eyes but let yourself blind when another is violating your religious principles then only respect for the "concept of secularism" is possible which is a harsh reality, can't be tolerated by a common man. That's why many riots take place. In a way it is also a vital challenge before UCC as the people of various religions don't want to leave their rigidness in the name of God and religion and don't want to settle for less, everyone wants that his/her religious practices must prevail in UCC which is not practically possible. We have to understand the true meaning of secularism and the people of our nation have to become aware and rational only then the dream of equality and uniformity could become possible. And for a true secular nation it becomes very important to have some homogenous customs which are not contradictory to each other.

MISINTERPRETATION OF UCC BY MINORITIES

Generally, the concept of UCC is misinterpreted by the minorities in a way that its implementation will only compile the religious practices and customs of the majority and their customs will get destroyed. With this they will be forced to practice the customary laws of other religions and it will infringe their freedom of religion given under Article 25. In India

¹¹ United Nations, 10 Dec 1948, Universal Declaration of Human Rights (217 A) available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

majority of Muslims, Christians think that UCC will only give rise to the spread of Hindutva and their hegemony.

LACK OF POLITICAL WILL

From time to time the Constitution has been an expedient device for the politicians to veto anything they disapprove of. But they fail to see it in totality. *“Governments were formed and changed but the discussion towards the implementation of UCC has been only in theoretical aspects.”*¹² There was the absence of specifics of what changes to be done, what matters to be included, should gender equity be included and to what extent they must be done to satisfy each community of society.

But this couldn't go a long way due to lack of political will and the dirty politics of religious vote banks. The result is that the exercise of drafting a UCC is still a hope.

JUDICIAL STAND ON UCC

The Indian judiciary has always emphasized on the implementation of UCC. There are numerous cases where the Supreme Court has referred to Article 44 regarding the concept of UCC mainly to highlight the lackluster attitude of the Executive and Legislature in the implementation of the directive.

In **Shah Bano** case¹³ a 73-year-old woman Shah Bano was divorced by her husband using triple talaq. She approached the district court and the court gave a verdict in her favor. His husband appealed against the verdict in Supreme Court and contended that he has fulfilled all his duties according to Islamic laws. The Supreme Court, under Section 125 of CRPC which is about maintenance of wives' children and parents, favored her. Court further observed that “It is also a matter of regret that Article 44 of our Constitution has remained a dead letter.” This was the first historical judgement which led to huge debates and agitation and finally the government passed The Muslim Women's (Right to protection on divorce) Act (MWA) in 1986, which made Section 125 of the Criminal Procedure Code inapplicable to Muslim women.

The judgement of Shah Bano case was nullified by Section 3 of the **Muslim Women (Protection of Rights on Divorce) Act, 1986** which provides the maintenance to the Muslim

¹² Hitarth Dixit, *Is Article 44 a Myth? Origin of Uniform Civil Code or UCC Explained*, LIBERTATEM (June 5, 2021) <https://libertatem.in/articles/what-is-article-44-indian-constitution-uniform-civil-code/?amp>.

¹³ Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SCR (3) 844.

women at the time of divorce. Sec 3 of the Act obligates the husband for “a reasonable and fair provision and maintenance to be made and paid within the iddat period.” which can vary from case-to-case basis and is open to judicial interpretation. This Act restricted the right of maintenance to Muslim women ‘by her husband’ until the iddat period only.

Further in case of **Daniel Latifi**¹⁴ in which constitutionality of Muslim Women (Right to Protection on Divorce Act) was challenged on the ground that it unreasonably discriminated against Muslim divorced woman and violated their rights granted under Articles 14, 15, and 21 of the Constitution and it also nullifies the judgement of Shah Bano case. But the Apex Court upheld the constitutional validity of the Act and it was held that the act doesn't nullify the judgment of shah Bano, it only codifies it.¹⁵

In **Sarla Mudgal case**¹⁶, the husband of a women Sarla Mudgal after converting into Islam practiced polygamy. The court held that the Hindu marriage solemnized under Hindu law can only be dissolved on the grounds specified under the Hindu Marriage Act 1955. Conversion into other religion and then marrying again will not dissolve the marriage under Hindu marriage Act and thus second marriage solemnized after converting to Islam will be an offence under Section 494 of the Indian Penal Code, 1860.

In **AWAG case**¹⁷ a Public Interest Litigation was filed challenging the gender discriminatory provisions in Muslim, Hindu and Christian personal laws. In this Court held that the matter of removal of gender discrimination in personal laws involves the issues of State policies also in which the court cannot interfere. This judgment was criticized as the court didn't play its role in protecting the principles of equality regarding gender related issues of personal laws of various communities in India.

In **Lily Thomas case**¹⁸ The court held that the desirability of UCC can hardly be doubted. But it can only become possible when the social atmosphere is properly built up by the society, leaders and politicians who instead of gaining personal gains rise above and awaken the masses to accept the change for the betterment of the nation at large.

¹⁴ Danial Latifi&Anr v. Union of India, (2001) 7 SCC 740.

¹⁵ Rachit Garg, *Daniel Latifi v. Union of India: A critical analysis*, IPLEADERS (Mar. 19,2022,12:22PM) <https://blog-ipleaders-in.cdn.ampproject.org/v/s/blog.ipleaders.in/danial-latifi-v-union-of-india>.

¹⁶ Sarla Mudgal v. Union of India,1995, AIR 1531 1995 SCC (3).

¹⁷ Ahmedabad Women’s Action Group (AWAG) v. Union of India, AIR 1997 SC 3614.

¹⁸ Lily Thomas etc. v. Union of India and others, AIR 2000 SC 1650.

In **Ammini E.J. case**¹⁹ Kerala High Court struck down the Section 10 of Indian Divorce Act, 1869 as being violative of gender equality. Similar action was taken in case of **Pragati Verghese**²⁰ in which Bombay High Court struck down the Section 10 of Indian Divorce Act, 1869 on the ground that it is violative of gender equality.

In **John Vallamattom case**²¹ The then Chief Justice of India VN Khare had observed that "It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country." He also asserted that a common civil code will help the cause of national integration by removing the contradictions based on ideologies.²² In this case Section 118 of the Indian Succession Act was declared unconstitutional on the ground that it is violative of Article 14 of the Constitution of India. Despite the exhortations by the judiciary, legislatures have not taken any step in the direction of UCC. Courts of the country have been reiterating the need of UCC, now it's time to make it the reality for the nation.

SUGGESTIONS

Although the Law Commission of India had concluded in 2018 that a "UCC is neither desirable nor feasible"²³ No expert committee on the lines of the Hindu Law Reforms Committee of 1941 has ever been constitute²⁴, nor has any blueprint for a UCC been prepared. UCC is desirable, but the approach must be piecemeal. In the light of DPSP²⁵, there are following suggestions this research has concluded in order to make UCC a reality, namely: -

1. Progressive and Broadminded Outlook

There is a need of progressive and broadminded outlook which must be encouraged among the people to understand the spirit of the UCC. For this, education, awareness and

¹⁹ Ammini E.J. v. Union of India, AIR 1995 Ker.252.

²⁰ Pragati Verghese v. Cyrill George Verghese, AIR 1997 Bom. 349.

²¹ John Vallamattom v. Union of India, 2003.

²² Sandhya Ram, *UCC: The unique Goa experience*, LIVE LAW In (Mar. 18, 2002,2:27PM) <https://www.livelaw.in/uniform-civil-code-unique-go-a-experience/>.

²³ Law Commission of India, Consultant paper: Reforms on family law, Report no, 31 August 2018 at <https://lawcommissionofindia.nic.in/>.

²⁴ Faizaan Mustafa, *explained: Why Goa's Civil Code is not as uniform as it is made out to be*, THE INDIAN EXPRESS.(Apr.20, 2021) <https://www.google.com/amp/s/indianexpress.com/article/explained/why-goas-civil-code-is-not-as-uniform-as-it-is-made-out-to-be-7279365/lite/>.

²⁵ The Directive Principles of State Policy enshrined in the Constitution of India.

sensitization programmes must be taken up.

2. Work on Religious Divide

First of all, there is a division which already prevails in Hinduism which has to be sorted out then only the question of Muslims and Hindu unity comes into play. So Hindus have to make joint efforts to wipe out all of their conflicts so they could be able to discuss with the other sides. The matter of Uniformity being sensitive in nature, it is always better if the initiative comes from the religious groups concerned.

3. Discussions and negotiation

History is evidence that there were many wars which Hindu and Muslims had fought against each other, so it is the mandate of today's need that if we fight like that then there will be poverty, hunger, lack of women empowerment, no proper policies would prevail, and we would end up having nothing. Therefore, it is desirable to put forward the best version of each religion which can lead to peace and happiness. These discussions must be inclusive where all religions including tribal people should be given a chance to put forward their views and practices. A "committee of eminent jurists" may be constituted to maintain uniformity and proper care must be taken not to hurt the sentiments of any particular community.

4. Understanding religion with science

If diversified people have come on a single platform to understand the religion of other sides, then it would be most desirable to understand the religion with "science and progress". As the religion is a tool for mankind to attain either "salvation" or "Jannat", if it becomes hindrance for their upliftment and obstructing them to achieve the highest goal of their religion then practitioners have to choose which version of their religion and others religion can be helpful for them just like Gautam Buddha has understood various religions before attaining "buddhatva".

5. Understanding "Aham Brahmasmi"²⁶ (Universe in within Me)

It is the duty of an individual to protect its mother earth, their living entities including their mother, daughters and brothers. So, this can only happen if he connects himself with all the living beings rather than first identifying himself with a religion and understanding the

²⁶ Brihadaranyaka Upanishad 1.4.10 of the Yajur Veda.

world. So he has to understand that he is neither first a Hindu nor a Muslim or Christian but only an individual who is connected to the cosmos. Otherwise, he would end up calling himself "I am a Muslim or Christian or American or Pakistani or Indian. Once the individual see himself within the limited identity, violence is the natural consequence and limited individuals would end up in conflict and wars. Because for them the other side is just an opposite version of them who doesn't belong to themselves but to another one. So, it is recommended from the author's side to first be a human having cosmic identity then let religion be your identity. To clear the doubts of readers, being a follower of "Sanatan" is not a religion but a way of living a life.²⁷

6. Preparing a draft

The UCC should be drafted keeping in mind the best interest of all the religions. After letting oneself connected with the whole cosmos, all communities have to decide where they have to go. What are those uniform sets of practices which are best for all human beings, especially Indians which are environmentally friendly. As humans can't ignore the importance of the environment. Then they can collectively make a joint effort to prepare a uniform code of conduct. It is highly recommended from the opinion of the author to make a code which lets each individual think clearly and makes them feel connected with all the living creatures, where not only women and children but animals are also priorities. Where the environment is also being paid due attention.

7. Joint efforts

Clapping with one hand is not possible unless the other hand also plays its role so the individuals, societies, governments, NGO's, judiciary has to play its collective role to educate the people about UCC benefits for their country and themselves. Instead of using it as an emotive issue to gain political advantage, political and intellectual leaders should try to evolve a consensus. The question is not about the "protection of minority, or even of national unity, it is simply one of treating each human person with dignity, something which personal laws have so far failed to do.

²⁷ ArushiLohia, *Meaning of AhamBrahmasmi: The philosophical words*, INDIATIMES (Mar. 19,2022, 1:24 AM) <https://www.google.com/amp/s/www.indiatimes.com/amp/lifestyle/the-meaning-significance-of-aham-brahmasmi-two-words-that-form-the-basis-of-hindu-philosophy-354883.html>.

CONCLUSION

UCC is possible but only with strong political will. Unfortunately, strong political will flows from the people, who are deeply tortured by the poverty and hunger, chooses their leaders in such a compulsion can't choose them with active participation and can't freely choose them without any such compulsion. When these people elect their people then political will has to work under the will of people. So ultimately the people of India have to awake themselves then only the "pious concept of UCC" can be possible. India has its unique blend of codified personal laws of Hindus, Muslims, Christians, Parsis. There exists no uniform family-related law in a single statute book for all Indians which is acceptable to all religious communities who co-exist in India. The argument of minorities that UCC is more in favor of Hinduism is correct because UCC and Hinduism both are progressive and believe in the concept of inclusiveness. The biggest hurdle in the implementation of UCC is the personal laws and personal practices which can't make UCC enforceable at least for now but the judiciary can be helpful like it did by interpreting Section 125 of CrPC. However, a majority of the Indian population believe that UCC is definitely desirable and would go a long way in strengthening and consolidating the Indian nationhood.

IS INDIA YET READY TO EMBRACE THE GRAND CONSTITUTIONAL DIRECTIVE OF UNIFORM CIVIL CODE?

- KAUSHIK CHOWDHURY¹

ABSTRACT

The studied idea of uniformity and standardization by institutional instrumentalities respecting antiquated traditions, habits, conduct and conventions, which has earned a commendable degree of legitimacy, seems manifestly foreign to and alienated from the social fabric and cultural moorings which tend to epitomize a community, people or nation as such. The command of tradition becomes so vociferous and obstinate owing to the continuous process of its legitimization through intergenerational perpetuation that any attempt to break the status quo becomes an immediate context of disputation even if it is bona fide, having statutory affiliation, scientific and subsumes an utilitarian or a felicific component for the progression of the common masses. The above narrative essentially vindicates the growing furor and ire of the members of the Muslim community, some of whom happen to be self-proclaimed zealous custodians of Islam, whenever any attempt is made even to tinker with their personal laws, inspired by Article 44 of the Constitution of India – adoption of an Uniform Civil Code applicable to all in India. This essay is a modest attempt to appreciate the social, economic, political, intellectual and legal maturity of India after seven decades since Independence to accommodate a shift towards singularity of approach amidst roaring undercurrents of diversity. This paper attempts to deal with the idea of Uniform Civil Code in the light of the Constitution of India, the Law Commission's stance and finally the author's submission as to the preparedness of India to adopt Uniform Civil Code as a viable option in tune with the Constitutional mandate.

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INTRODUCTION

The debate with regard to the Uniform Civil Code in India has traversed through notably three stages - consolidation and convergence at the national level, legal equality and the concept of gender justice.² The socio-cultural matrix of India is manifestly pluralistic in nature owing to intermingling of diverse races, cultures, religions, languages and economic realities. This vast diversity provides much needed rationality to accord India the status of a sub-continent. Any attempt to analyze the contribution made by the Indians to free India from the yoke of foreign servitude will be imperfect or rather lopsided if it is made with intent to disproportionately betray credit to any one religious, cultural, linguistic or racial community. The contributions, sacrifices and ceaseless efforts for political independence came from all and sundry as each and every one witnessed a shared destiny, and it is this sentiment or impulse that more than justifies the microcosmic character of the Indian polity. It is almost an acceptable fact that the normative objectives of governance and political possibility are in a constant tussle. It is highly significant to revisit the popular discourse on Uniform Civil Code to fortify the whole idea of constitutional democracy.³ It is an established reality that there is a multi-layered interaction between society and religion in India and most of the social conventions owe their unflinching allegiance to the religious prescriptions. In other words, religion shapes society to a large extent. Law may apparently draw its inspiration from the social dynamics and with changing times it is the duty of a progressive nation to accommodate the shifting pulse of the society into legislative enactments to accord it a contemporary status adequately reflective of the changing social expectations at varying levels in its evolutionary trajectory. But if we are patient enough to observe the functioning of the interactive process of law and society, perhaps the most compelling justification that lies at the core of all contradictions and complexities is the lacuna in adequately representing the voices of all the pockets of several communities. Such a true and precise representation of the sentiments of all the communities whether religious, linguistic or racial become highly problematic thereby making it really difficult to enact laws that are accommodative of the demands, desires and expectations of all. Thus, the basic problem which is perhaps the source of unending conflict between law and society is the lack of comprehensive machinery and democratic tools to subsume multi-chromatic prisms which constitute our nation called India in the form of a richly variegated society. The idea of a

² Peter Ronald DeSouza, *Politics of the Uniform Civil Code in India*, L ECON. POLIT. WKLY. 50- (2015).

³ *Id.*

Uniform Civil Code⁴ is fraught with numerous challenges primarily resulting from the profound interconnectedness of law and religion of the Muslim community. The fight with regard to full-fledged implementation of the Uniform Civil Code is not between men and women but between forces of progress and forces of reaction.⁵ So far as the penal laws of the country is concerned, it has been possible to confer nationwide legitimacy to the Indian Penal Code and other penal enactments which are applicable to all humans irrespective of caste, color, sex, religion, language and other categories of assortment. But when it comes to personal laws of the land regulating marriage, divorce, succession, probate, testamentary disposition of property and the like, the Muslim community has shown a vehement reluctance to allow statutory enactments to tinker with their age-old personal law which is nothing but the injunctions of the Koran. The Muslim society holds more or less a unified opinion about the fact that their personal laws are sacrosanct, and courts and legislators cannot be allowed to distort their religious instructions.⁶

HUMAN RIGHTS VIS-À-VIS RELIGION

It is quite shocking for a person who is conscious of the insuperable values of human rights discourse to locate several inconsistencies in the practices of the Muslim community so far as their conduct in the realm of personal law is concerned. Firstly, the Muslim society almost in all the regions of world with some notable exceptions are not ready to consider women as an integral and functional component of the society so much so that any voice of dissent with regard to any practices or any alternative version of thoughts adopted by the Muslim women are looked upon with condemnation and the Muslim patriarchy in such incidents are quick to dilute such strands of thoughts as feminist ideologies which are nothing more than incitement or provocation to destabilize an ideal society. This brings us to a position where we can well understand the status of Muslim females.⁷ They are nothing more than carriers of generation which the bountiful nature has showered upon them as a biological truism. Years of torture, cruelty, regimentation and dogged disciplining of the female community among the Muslims have robbed them of the strength to question and fight for the injustice meted out to them.⁸ All these days the Muslim women have remained silent witnesses to the specter of horror,

⁴ Article 44 in The Constitution Of India 1949, , <https://indiankanoon.org/doc/1406604/> (last visited Feb 24, 2022).

⁵ Leila Seth, *A Uniform Civil Code : towards gender justice*, 31 40–54 (2005).

⁶ SYED KHALID RASHID, *MUSLIM LAW* (5th ed. 2009).

⁷ *Id.*

⁸ TAHERA. AFTAB, *INSCRIBING SOUTH ASIAN MUSLIM WOMEN : AN ANNOTATED BIBLIOGRAPHY & RESEARCH GUIDE* (Online-Au ed. 2008).

unfairness and blatant violation of human rights in every walk of life.⁹ But with the growing human rights consciousness on a global scale and due to the large scale integration of nations and cultures, the inhuman treatment towards the Muslim women has become glaringly obvious. Gandhi once remarked curtly that law alone cannot assure total equality in a nation. What is also required along with bold legislations is the transformation of social attitudes. Law at best can be a pointer and a veritable guidepost.¹⁰ The Muslim intelligentsias who are most of the time open to influences of the liberal education have increasingly realized the unjust environment in which the Muslim women are destined to live. The “madrassa” form of education, the “burqah” system, triple “talaq”, doctrine of “halala”, the doctrine of “iddat” are the truest insignia of the retrograde practices at whose receiving end lie the hapless Muslim women.¹¹

THE COMMON CIVIL CODE – A CONSTITUTIONAL DIRECTIVE

The Indian Constitution envisages a pattern of uniform civil code as an ideal directive for an ideal government to realize and practice.¹² It is noteworthy to mention that uniform civil code was initially thought to be put into the Fundamental Rights chapter but later was finally incorporated in the Directive Principles of State Policy by the makers which is sufficiently indicative of the politics of compromise¹³ and lengthy Constituent Assembly debates - all of which underscore that the then socio-economic and political realities were not in favor of such an attempt and therefore the makers of the Indian Constitution thought it prudent to keep it as an ideal or a directive for the State to be realized at a subsequent point of time when the legal, political and socio-economic temperament of the nation would be mature enough to accept and accommodate such an ideal. So, it is a question of preparedness¹⁴ of the people of this country to transform the dream of a uniform civil code into a reality. Moreover, the idea of Uniform Civil Code also finds a robust encouragement and support from the international legal regime as India is a signatory of ICCPR and CEDAW. It means India is legally bound to put its provisions into effect. Historically, Indian women affiliating to various religions such as Hinduism, Islam and Christianity have suffered and still continue to suffer tragically a notable

⁹ Vrinda Narain, *Gender and community : Muslim women's rights in India* 202 (2001).

¹⁰ Seth, *supra* note 4.

¹¹ AQIL AHMED, *MOHAMMEDAN LAW* (24th ed. 2011).

¹² Article 44 in *The Constitution Of India 1949*, *supra* note 3.

¹³ DeSouza, *supra* note 1.

¹⁴ IS INDIA READY FOR A UNIFORM CIVIL CODE? – Lexlife India, , <https://lexlife.in/2021/05/06/is-india-ready-for-a-uniform-civil-code/> (last visited Feb 24, 2022).

degree of discrimination when it comes to the personal laws relating to matters of marriage, succession, divorce and inheritance. Therefore, it is highly imperative to keenly look into the various personal laws of our country with a view to critically decipher the areas of discrimination and conflict not only with the ideals and ethos of the Indian Constitution but also with the essential tenets and spirit of the international laws and treaties reflecting global 'equality' jurisprudence. Such an exercise will no doubt help us take a constructive step towards fulfilling the greater ideal of gender justice.¹⁵ Further there is no denying the fact that the Constitution apart from being a social document also owes allegiance to its role as the supreme law of the land and because of the complex multifarious role of the Constitution; several conflicting claims are engendered in the process of its functioning. The dominant theme of the Indian Constitution is equality and social justice. The Preamble to the Indian Constitution urges in unwavering terms social and economic justice for all its citizens. India is a secular country and establishing a uniform civil code is perhaps the most patent ideal of any secular nation. Religion cannot be allowed to transcend its legitimate confines and if it does, it tends to jeopardize the meaning of secularism through distorted interpretation. The most notable objections to adopting a uniform civil code in India seem to be two.¹⁶ Firstly, it would, if adopted, result in infringement of the right to freedom of religion envisaged in Article 25 of the Constitution of India and secondly it would be utterly despotic to the minority community. However, the first objection is misconceived. Article 44 of the Constitution of India in no way impedes the functioning of Article 25 of the Constitution of India. Freedom of religion or observance of any particular religious faith is one thing and perpetuation of several personal laws directed by respective religious motivations by adherents of different faiths is quite another. The latter serves to encourage splintered religious ideologies and perspectives thereby undermining the grand constitutional goal of a uniform civil code. As regards the second objection it may be said that the enactment of a uniform civil code would not be tyrannical to minorities. The personal laws of the Indian sub-continent which are deeply enmeshed with the dominant sentiments and edicts of various religions seem quite despotic and discriminatory at times when it comes to property and other rights of women in relation to men. It seems that somehow the deeply embedded patriarchy manifestly reflects in the personal laws of India. These laws therefore have hardly favored Indian women or secured their rights as equal citizens of this country. On the contrary, the retention of these personal laws across various religious

¹⁵ Jyoti Rattan, *UNIFORM CIVIL CODE IN INDIA : A BINDING OBLIGATION UNDER INTERNATIONAL AND DOMESTIC LAW*, 46 577–587 (2018), <https://www.jstor.org/stable/43951938>.

¹⁶ V.N. SHUKLA, *CONSTITUTION OF INDIA* (Mahendra Pal Singh ed., 11th ed. 2008).

faiths has served well to deepen the schisms between the Hindu majority and minority religions like Islam and Christianity among others. In addition to this, the personal laws have over the years amplified inter-faith tensions and conflicts by introducing identity politics. Hence it will not at all be an overstatement to say that instead of realizing the dream of ‘one’ India, these laws have sown the seeds of fissiparous forces that have in effect gone a long way in segregating this country on religious and political lines. Perhaps this is the most crucial moment to fructify the lofty aspirations of the architects of the Indian Constitution to adopt a Uniform Civil Code.¹⁷ There are several advanced Muslim countries where the personal laws of the Muslims were never considered to be so sacrosanct and immutable so as to justify non-adoption of a standard civil code meant for persons belonging to all religious denominations. If we consider countries like Turkey and Egypt, no minority in these countries were allowed to enjoy rights unique to their communities. When the Shariat Act 1937 was passed, the Khojas and the Kutchi Memons wanted to follow their own religious practices as a part of their personal laws but the Central legislation did not allow that and brought every community within the sweep of the blanket legislation.¹⁸ Therefore there is no legal logic in not enacting a uniform civil code in India when there are several countries in the world that have enacted a standard civil code and have thus set precedents. On the contrary, there are difficulties, problems and confusion if a particular religious group (Muslims) is allowed to maintain its unique practices. It is problematic because a religious community does not necessarily affiliate to a singular practice universal to that community as a global identity or standard. The observances of several personal laws become highly intriguing in a country like India with diverse cultures, religions and traditions. Therefore, it is desirable that there is a single Uniform Civil Code that applies to all and sundry in India. There is no gainsaying the fact that adopting the Uniform Civil Code is a grand constitutional directive and hence the State shall gradually try to realize the lofty constitutional ideals of unity and integrity. It is almost a known fact that India will find it difficult to witness a unified and integrated self of several religious groups having conflicting ideologies. When a set of laws in a country are used to uniformly regulate personal matters of citizens irrespective of their religious affiliations, it becomes the truest test of

¹⁷ Shalina A. Chibber, *Charting a new path toward gender equality in India: From religious personal laws to a uniform civil code*, 83 INDIANA LAW J. 695–717 (2008).

¹⁸ SHUKLA, *supra* note 15.

secularism. Such a legal framework will no doubt put an end to gender discrimination on religious lines.¹⁹

LAW COMMISSION REPORT(S)

The Law Commission needs to appreciate the true character, scope and implications of Article 44 of the Constitution of India while responding to the governmental nudge for adoption of a Uniform Civil Code. There is no law commission report till date wholly and specially dedicated to adoption of a Uniform Civil Code. However, the 15th Law Commission's Report dealing with marriage and divorce amongst Christians in India have incidentally and tangentially touched upon some aspects of Uniform Civil Code. In the recent past, the Ministry of Law and Justice has asked the Law Commission to examine and report on issues pertaining to Uniform Civil Code. Since then the matter has become a highly debatable issue both in the print and the electronic media. Now, the law commission is trying to ascertain the pulse of the country to evaluate the feasibility of the model called Uniform Civil Code. In its efforts to do so, the Law Commission has also decided to take stock of the feelings and sentiments of the tribal people with regard to Uniform Civil Code as the true hallmark of a progressive democracy is societal inclusion and leaving aside tribal men and women in this analysis will be inapt and a lopsided approach since the final analysis will surely be defective for want of representation of all the social pockets.²⁰ There has been a widespread opposition from the tribal people respecting adoption of a Uniform Civil Code on the ground that such imposition of Uniform Civil Code will be repugnant to their ethos, culture and religious practices. The Law Commission Chairman Justice B.S. Chauhan in an exclusive interview to "India Today" said that at this initial stage the Law Commission is eliciting public opinion on Uniform Civil Code to ascertain the level of preparedness of the country as a whole to accept such standardization. But the Chairman was quite discreet about the fact that under no circumstances the Uniform Civil Code, if adopted, would bulldoze all personal laws based on unique religious affiliations as every person has a right to his own personal law. What the Law Commission would do at the most is integration of all the personal laws on such aspects which are found to

¹⁹ Union Minister Venkaiah Naidu on Uniform Civil Code: Why not a Common Civil Code for all? - The Hindu, <https://www.thehindu.com/opinion/lead/Union-Minister-Venkaiah-Naidu-on-Uniform-Civil-Code-Why-not-a-Common-Civil-Code-for-all/article62116269.ece> (last visited Feb 24, 2022).

²⁰ Uniform Civil Code: Law Commission open to suggestions from tribals | India News - Times of India, , <https://timesofindia.indiatimes.com/india/Uniform-Civil-Code-Law-Commission-open-to-suggestions-from-tribals/articleshow/55396452.cms> (last visited Feb 25, 2022).

be overlapping or having a certain degree of commonality across personal laws of different religious groups.²¹

CONCLUDING OBSERVATIONS:

The popular human rights discourse is fundamentally an equality narrative. The normative framework of the entire human rights thesis is equality or non-discrimination on unreasonable grounds. The Uniform Civil Code finds explicit expression in the Directive Principles of State Policy of the Constitution of India vides Article 44.²² It will be an interesting reflection in this juncture to interpret the minds of the makers of the Constitution. The inclusion of the idea of Uniform Civil Code in the Directive Principles of State Policy is not inadvertent but deliberate. The prime reason being the lack of preparedness or democratic maturity of the nation to go for Uniform Civil Code at the time India gained independence. India with such humongous diversity and a multi-chromatic society is an assimilation and confluence of several cultures and religions. The age-old traditions and customs have their deep roots embedded in the social fabric which cannot be brushed aside once and for all with a single stroke of legislative intent, no matter how pure and noble that intent is. In order to realize that a patient and harmonized attempt is called for and for this, the nation has to wait for the gradual process of psychological preparedness to set in on the collective psyche of the citizens of India. The disputations, the movements and the protests by various segments of the society for or against Uniform Civil Code are adequately reflective of the persistent tensions, conflicts and confusions that still plague us. If one section of the intellectuals are continuously calibrating the socio-psyche preparedness and maturity of the Indian democracy to embrace the grand constitutional directive of Uniform Civil Code to secularize personal laws relating to marriage, inheritance, succession, adoption etc., on the contrary, another section of the intelligentsia is stridently mooting for the inauguration of the Uniform Civil Code which according to them is long overdue. The Uniform Civil Code, if enacted, will no doubt deal with the personal laws of diverse religions pertaining to marriage, divorce, adoption, inheritance, succession and custody of children. Popular discourses seem to have created a lot of anxieties and apprehensions about polygamy in Islam. Several Islamic countries like Syria, Tunisia, and Pakistan etc. have codified personal laws. The provisions of those laws have either absolutely

²¹ Law Commission Chairman on Uniform Civil Code: Each religion would continue to have personal laws - India News, <https://www.indiatoday.in/india/story/uniform-civil-code-law-commission-chariman-religion-personal-laws-gender-justice-351904-2016-11-14> (last visited Feb 25, 2022).

²² Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9 GER. LAW J. 211–250 (2008).

abrogated or substantially curtailed the obnoxious practice of polygamy. The American judiciary opines that the practice of polygamy is toxic to public morality despite the fact that some religions make it necessary for their respective followers.²³ It is quite unfortunate that India after several decades of gaining independence still cannot take a firm stand for adoption of a uniform civil code system.²⁴ The turbulence will eventually die down for sure and that will be the most appropriate time to allow the establishment of the Uniform Civil Code and thus transform one of the dreams of the makers of the Constitution into a palpable reality. Another dimension that requires to be emphasized upon is the lack of political will²⁵ to legislate enactments motivated by the lofty ideal of a Uniform Civil Code. The politics of vote banks has always undermined the progress and development of this nation. The shrewd politicians always want to reap personal benefits at social cost and public harm. They try their level best to keep the communal tensions and regional conflicts alive in order to perpetuate their rule euphemistically termed as governance. Moreover, the pathetic level of education, glaring deficit of awareness and scientific temper in India has always proved to be the aggravating factors that provoke clashes and disharmony among persons bearing diverse religious affiliations.²⁶ It seems it will take some more time before the citizens of this country realize that religion is not the sole identity of an individual. It is not the single most potent denominator to which every human kind needs to be subjected.²⁷ Uniform Civil Code is neither a Utopia which is unrealizable nor it is a panacea that, if established, will rule out all sources of conflicts. Although the uniform civil code is often projected as a master solution to all of India's problems by some, the realization of it is at times found to be so unworkable that it has repeatedly failed to garner enough motivation to fructify it.²⁸ India must witness sufficient political will, democratic maturity and a majority consensus of the citizens of this country before Uniform Civil Code becomes a proven reality and the order of the day.

²³ SHIMON SHETREET & HIRAM E. CHODOSH, UNIFORM CIVIL CODE FOR INDIA: PROPOSED BLUEPRINT FOR SCHOLARLY DISCOURSE (2015).

²⁴ Shabbeer Ahmed, *UNIFORM CIVIL CODE (ARTICLE 44 OF THE CONSTITUTION) A DEAD LETTER*, 67 545–552 (2018).

²⁵ DeSouza, *supra* note 1.

²⁶ AMARTYA SEN, *IDENTITY & VIOLENCE: THE ILLUSION OF DESTINY* (2006).

²⁷ *Id.*

²⁸ The Nagaland turmoil shows why a uniform civil code is neither possible nor desirable in India, , <https://scroll.in/article/829884/the-nagaland-turmoil-shows-why-a-uniform-civil-code-is-neither-possible-nor-desirable-in-india> (last visited Mar 1, 2022).

MULTICULTURALISM AND SECULARISM: A CONUNDRUM FOR UNIFORM CIVIL CODE?

- MANAS AJAI SONKAR¹

ABSTRACT

Religion and Culture are one of the core essences of any civilization. Resultant, topics such as Secularism and Multiculturalism never leaves mainstream debate especially in a diverse country like India where Secularism and Multiculturalism appears to coexist. The concept of Secularism is not uniform rather it fluctuates from one place to other when it comes to the West, it is thought of as a separation between the state and religion, but not in India. In former, Nation is permitted to abridge the rights of citizens if religion is provoking an impediment in the working of the Nation whereas in the latter Secularism is not separate from religion. Instead, the state sees all religions as equal. In India, the idea isn't just about how religious groups are run. Rather it is about emulating a positive relationship between the country and religion in the social and cultural realm. This unique political approach is what keeps Multiculturalism alive. With the increasing globalization and interaction of cultures Indian Secularism seems to be attracted towards the western one. However, Indian Judiciary have made sure that kernel of such concepts remains untouched from external forces keeping national interests in mind. Authors aspires to look into such judicial pronouncements while analyzing different variants of Secularism and trying to figure out that which secularist approach upholds Multiculturalism. Also, this research strives to understand whether the concept of the Uniform Civil Code poses potential conflict towards the concept of Multiculturalism in a secular political system or not.

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INTRODUCTION

The ignition of the concepts related to Culture and Religion never gets cold. Discussion and debates on these topics are enough to deviate the minds of the common public and are chiefly used by politicians. Multiculturalism and Secularism are the central tenets of these concepts. For a layman, both these tenets are the fierce enemy of each other, but the myth fades away once a proper conceptual understanding occurs. The appropriate understanding of these concepts becomes more critical when the seeds of communal hatred are sowed daily in the public's minds by the political-minded people with the aim of their personal benefit. Historically, if we look back, the Partition that took lakhs of innocent lives was only motivated by communal hatred. The makers of Modern India were the spectator of these events, which inspired them to make the constitution that is a firm defender of all religions and their sentiments and supports cultural diversity. The first Prime Minister of Independent India was deeply devoted to making BHARAT a religious and culture-tolerant land.

The roots of Multiculturalism and Secularism have been initially witnessed in western societies. It does not mean that Indian communities were uninformed regarding these concepts; they were only reluctant to officially proclaim their policies on these lines. Even in the medieval era, certain emperors follow Secularism in their policies and governance². On the other hand, western developed nations were quick enough to adjust to shifting societal requirements by officially proclaiming them as their policy. Eastern Countries, though a bit late in initiation, have initiated to adapt to the changes. Globalization is a decisive factor in this impacting economy, politics, and governance. India and Sri Lanka have officially proclaimed Secularism as their way of governance, but Multiculturalism still awaits. However, these countries do practice Multiculturalism in their policies and governance. Similar goes with other Asian and African Countries except for a few exceptions³. It is critical to remember that the concept of Multiculturalism and Secularism being practiced in Indian and other eastern countries set up is entirely different from the one which is practiced in the West.

As stated in the initial part of the introduction, both these concepts are seen as enemies by the layman's understanding, but the integrated approach of both these tenets can provide salvation in terms of policy and governance.

²TRT WORLD, <https://www.trtworld.com/magazine/akbar-the-great-the-ruler-who-envisioned-a-united-india-33293> (last visited Nov. 4, 2021).

³DW, <https://www.dw.com/en/an-islamic-or-secular-pakistan/a-17325395> (last visited Nov. 4, 2021).

SECULARISM

It is often known that Secularism is characterized by the detachment of religion from public affairs and the nation-state. Still, it may also be expanded to include an identical stance about the necessity to eliminate or minimize the influence of religion in any public realm. The literal meaning of the word “Secular” refers to “being away from religion.” So, a secular person is supposed to refrain from having any biases for any religion. According to Merriam Webster dictionary, Secularism refers to the exclusion of religion and its considerations.⁴ In simple words, Secularism involves treating religion as a personal matter and extracting it from other dimensions of life, i.e., Political, Economic, Social, and Cultural. The state is to be separated from the religion and should adopt the policy of religious tolerance. It further prohibits discrimination on the grounds of religion.

The philosophical Indian Secularism

India is and has always been a land of cultural and religious diversity. Religiously unbiased traditions are deeply rooted in History. Since the ancient era, India’s philosophy, as propounded in scriptures called Upanishad, is *Sarva Dharma Sambhava* meaning all faiths and religions are treated with same respect.⁵ Modern leaders, i.e., Swami Vivekanand and Mahatma Gandhi, emphasized this concept. The Vedas further emphasize the idea of *Dharma Nirapekshata*, meaning “indifference of state to the religion.” Emperors like Ashoka⁶ and Akbar⁷ are great examples of implementing religious tolerant state policies. Various Religious movements, i.e., Bhakti and Sufi movements, also advocated harmonizing relations between all religions. Except in a few instances, rulers of India have always followed religious and cultural tolerant policies. India, i.e., BHARAT, has not had any religion of its own. The Indian Secularism is not exhaustive in nature; instead, it is fit to fulfill the religious plurality to achieve harmonious conformity of different religions.

Secularism and the Supreme document

The arrangements in the Indian Supreme document i.e., Indian Constitution clearly emphasize the concept of Secularism. The notion of secularism was not explicitly addressed in the Constitution at the inception of its adoption. Some articles i.e., Articles 14, 15, 16, 25, 26,

⁴MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/secularism> (last visited Nov. 4, 2021).

⁵BERKLEY CENTER, <https://berkeleycenter.georgetown.edu/quotes/atal-bihari-vajpayee-on-the-indian-concept-of-secularism> (last visited Nov. 4, 2021).

⁶THE GUARDIAN, <https://www.theguardian.com/world/2019/apr/24/a-lesson-in-religious-tolerance-from-ancient-india> (last visited Nov. 4, 2021).

⁷HUFFPOST https://www.huffpost.com/entry/finding-tolerance-in-akba_b_3031746 (last visited Nov. 4, 2021).

27, 28, 29, 30 and 44, however, demonstrate the presence of the same. Following the passage of the 42nd Constitutional Amendment Act in 1976, the term "Secular" was included in the preamble. The term "secular" refers to the notion of Secularism as embodied in the provision of freedom of religion as a fundamental right as guaranteed by the constitution.⁸ Apex Court in *S.R. Bommai v. Union of India*⁹ regarded Secularism as a facet of the basic structure of this supreme document. The Hon'ble Court observed that according to the definition, the word "Secular" has been left undefined, probably because it is a highly elastic phrase that is not capable of a clear definition and is thus better left undefined. What was previously implied was made clear as a result of this amendment. Freedom of conscience and the right to freely proclaim, practise, and spread one's religion are guaranteed to all people on an equal basis.¹⁰ The state is also prohibited from enacting legislation that limits any commercial, financial, political, or other secular activity that is affiliated with a religious practice of any kind.¹¹ Article 26 of the supreme document provides citizens with the freedom to manage their religious affairs, including establishing and maintaining religious institutions.

Furthermore, the state has no authority to force anyone to pay taxes to promote or maintain a specific religion or belief system.¹² Even religious institutions are empowered to maintain their own religious institutions to transmit religious values.¹³ These provisions clearly demonstrate the fundamental essence of Secularism in the constitution.

Indian versus Western Secularism

Indian Secularism is different from the one being practiced in western societies. It is because India has developed its own unique concept to serve the need of the society as they are fundamentally different from one another. The notion of Secularism as it is understood in the West refers to the total separation of the state from religion, i.e., both have their own arena, and neither of them is allowed to enter into the other's part. But when it comes to the Indian concept of Secularism, it does not refer to the complete exclusion of religion from state affairs, i.e., there is no such thing as a dividing line between religion and state; instead, they engage and interfere with one another within the constraints and restrictions that have been established. When it comes to religious, educational institutions run by religious minorities, the western model prohibits the state from providing financial assistance. In contrast, the Indian model does

⁸V.N. SHUKLA, CONSTITUTION OF INDIA 4 (Eastern Book Company, Lucknow, 2017).

⁹*S.R. Bommai v. Union of India*, (1994) 3 SCC 1, 149.

¹⁰INDIA CONST. art. 25.

¹¹*Ibid.*

¹²*Supra* note 8, art. 27.

¹³*Supra* note 8, art. 28.

provide financial help to religious, educational institutions run by religious minorities if they require it. Western Secularism restrains the state from drafting any policy solely based on religion, but when it comes to India, the state is involved in setting up various Departments of religious endowments, etc.

So, it can be summarized as the Indian concept of Secularism is disparate from that of the western concept. It is regarded as a complete separation of state and religion in the West. Whereas, in India, it is not separate from religion; instead, the state believes all religions as equal. This unique positive approach of hammering out a positive relationship between State and the Religion is what promotes and preserves multiculturalism, which has been discussed in the latter part of the article.

MULTICULTURALISM

Culture refers to language, religion, food, social customs, music, and the arts are all examples of the qualities and knowledge of a specific group of people.¹⁴ Differences among these cultures are natural and well-established in today's world. Due to the rise of diverse cultures, there has been a rise in cultural pluralism. The other reason for the increase of cultural pluralism and tolerant behavior against Culture is the changing political setup that focuses on the will of the people, i.e., Democracy.

Multiculturalism refers to how a society or a government will cope with the underlying cultural variety that exists.¹⁵ It also implies that cultural variety and amicable ties between both of these cultures would be beneficial to both society and the state in the long run. Multiculturalism begins with the observation that most modern societies are 'multicultural,' that is, they include a diverse range of cultural traditions and practices.¹⁶ The notion of cultural minorities is derived from the concept of cultural diversity. As a result, it would not be incorrect to assert that the idea of Multiculturalism instills a statement in which smaller cultures may maintain their own different identities and traditions. The political bodies must take the lead in fostering Multiculturalism since this is the most critical aspect of the effort. When it comes to embracing a shared feeling of belonging and resulting in a stable multicultural society, the shared political commitment is crucial to success. A shared sense of belonging among its

¹⁴LIVE SCIENCE <https://www.livescience.com/21478-what-is-culture-definition-of-culture.html> (last visited Nov. 4, 2021).

¹⁵THOUGHTCO. <https://www.thoughtco.com/what-is-multiculturalism-4689285> (last visited Nov. 4, 2021).

¹⁶George Crowder, *Theories of Multiculturalism: an Introduction* 7 (Polity Press, 2013).

members, according to Bhikhu Parekh¹⁷, who said this in one of his seminars, "*is essential for a multicultural society to be stable and long-lasting.*"¹⁸ For a multicultural society to function well, the feeling of belonging cannot be based on shared cultural, ethnic, and other qualities since such a society is too heterogeneous. Instead, the sense of belonging must be political in nature, based on a common devotion to the political communities.¹⁹

Indian Multiculturalism

One of the distinguishing characteristics of the Indian subcontinent is its cultural diversity. As a result, India is the ideal case study for studying a diverse society. It is because of this that Indian Multiculturalism is superior to Western Multiculturalism. Unlike in Western countries, Indian Multiculturalism extends beyond religion, race, and ethnic groups (as in the case of the West), and includes physical characteristics such as physique, dressing sense, language, food habits, and rituals. By developing Multiculturalism, the Indian state and its policies have been able to effectively conserve and promote pluralistic heritage, despite the wide range of distinctions that exist.

Throughout History, India has adopted the expression "Vasudhaiva Kutumbakam," which translates as "the globe is one community."²⁰ Knowing about the cultural richness of the Land of Seven Rivers, the constitution's drafters incorporated provisions that give enough protection and the necessary privileges to the many ethnic traditions and identities in the country. Numerous specific legislations²¹ have been implemented to shield their interests. Even though India has a plethora of personal laws and lacks a unified civil code, the Indian government has effectively ensured that each individual's cultural identity and interest are safeguarded within the community.

¹⁷He is a part of the Labour Party in the House of Lords. Between 1982 to 2001, he was a Professor of Political Theory at the University of Hull, and during 2001 to 2009, he was a Professor of Political Philosophy at the University of Westminster. From 2003 until 2008, he was president of the Academy of Social Sciences.

¹⁸INDIA SEMINAR, <https://www.india-seminar.com/1999/484/484%20parekh.htm> (last visited Nov. 4, 2021).

¹⁹*Id.*

²⁰LIVEMINT, <https://www.livemint.com/Opinion/p8mFadX0wkkPJNRWH4hEWK/Vasudhaiva-kutumbakam-for-the-21st-century.html> (last visited Nov. 4, 2021).

²¹The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989 (India).

Is it a modern concept?

Secularism originated in the Western and European states as an official concept to engage the indigenous population. The situation is slightly different for Multiculturalism. It was initially formulated in North America, which later diffused to parts of western Europe and Australia in the 1970s. This period is regarded as the first phase of Multiculturalism. It was also the time when Secularism too existed in these states. They generally adopted “Secularism” for themselves whereas “multiculturalism” for others. One of the reasons for the introduction of Multiculturalism was the emergence of explicit government policy in response to various issues, i.e., demands for independence and religious autonomy, an assertion of indigenous rights, pressure for the recognition of migrants' cultural traditions, and many more.

Multiculturalism became more popular and relatable from 1989 onwards, resulting in the communist states established in the European parts began to collapse one after another. Resulting European Union started to formulate its policies so that the issues related to new inducts do not go unattended. These policies were nothing but the policies of Multiculturalism. Apart from this, the main reason for introducing this concept was to negotiate with the issues related to race and ethnicity. In short, to solve the problems of incoming and settled immigrants from different races and ethnic groups. The bare reading of the timeline might lead to an instant conclusion that the concept of Multiculturalism is recently developed, but the conclusion remains partially true. It is true that the Countries of the West started to officially proclaim multiculturalist policies in the latter part of the 20th Century but does this means that earlier societies were singular in the case of Culture? Obviously NOT. Earlier, too cultural diversity was present, and those diverse cultures too lived together harmoniously. However, they were reluctant to officially proclaim it due to the lack of a modern political mechanism. The best example of it is the cultural diversity of India.

Secular Multiculturalism

It has been clearly understood that both the concepts, i.e., Secularism and Multiculturalism are essential for the proper mechanism of society. The concepts become more important when most nations have a democratic set, and globalization backed by Human Rights has further ensured that countries respect both these concepts while drafting any policies. Secularism, in simple words, refers to the separation of state/government and religion (Indian Secularism is slightly different from this). Whereas Multiculturalism relates to States with various cultural identities that acknowledge, encourage, and promote cultural diversity. Instead

of regarding both these concepts as enemies of each other, an integrated approach is sure to make a harmonious condition in society.

Western Secularism: a false hope for Multiculturalism

A growing number of scholars, such as Charles Taylor²², are of the opinion that Secularism and Multiculturalism have begun to coincide, with questions about the appropriate rule of Secularism in the Western political framework becoming increasingly intertwined with questions about how best to deal with the increasingly diverse society.²³ The immigrants living in western democracies are governed by the respective country's constitution. Undoubtedly, most of these western constitutions promote secular Multiculturalism, at least on paper but end up being extremely secular while denying various aspects of Multiculturalism. One of the most important case studies is of France; the constitution of France makes it a secular and multicultural state. It further guarantees that people are free to follow and practice any religion. Interestingly, the same state promoting secular Multiculturalism ends up legally prohibiting the wearing of the headscarf by women²⁴. Immigrants are free to wear a headscarf in their native countries, but the same gets banned while entering secular and multicultural states, i.e., France. In reality, these nations of the West are giving more and more emphasis on the literal meaning of Secularism resulting in a misinterpretation of Multiculturalism. The goal of Multiculturalism is to allow for cultural variations within a single state. Diverse cultural characteristics of ethnic minorities are encouraged and allowed to exist, rather than forced assimilation into famous society and subjugation and refusal of diverse cultures. Multiculturalism seeks to enable and incentivize different cultural features of ethnic minorities while also widening to them the entire rights of a citizen in the Nation.²⁵ A critical analysis of the western liberal democracies clearly shows how they keep on shouting the concept of Multiculturalism, but only a few have implemented policies to promote it.

²²He is a retired professor of political philosophy, philosophy of social science, philosophy history, and intellectual history at McGill University. His work has garnered him the Kyoto, Templeton, Berggruen, and John W. Kluge Prizes.

²³OPENMIND BBVA, <https://www.bbvaopenmind.com/en/articles/secularism-and-multiculturalism/> (last visited Nov. 5, 2021).

²⁴ALJAZEERA, <https://www.aljazeera.com/news/2021/4/9/a-law-against-islam> (last visited Nov. 5, 2021).

²⁵Ralph Grillo, *Pluralism and Politics of Difference: State, Culture and Ethnicity in Comparative Perspective*, 178(Oxford: Oxford University Press, 1998),

Indian Secularism (Eastern Secularism): An ideal for Multiculturalism?

As explained earlier, the Indian concept of Secularism is very much different from the one that is being practiced in western countries. Instead of being completely alienated from the religion, the state interacts with each other within the prescribed limit. Many countries in the east have been practicing secular Multiculturalism in one form or the other, although the policy of the implementation is (in some cases) and was (in most cases) unofficial. Numerous cultural and ethnic minorities did live harmoniously and were even living before independence. The Indian concept of Secularism does not force one to come out of their religious beliefs, culture, and traditions (as in the case of some western countries, especially France); instead, it aims to eliminate and counter religious disputes by promoting tolerance accepting difference. It does not let the literal meaning of secular hurt the feelings of the multicultural society. Multiculturalism's main aim is to preserve different and diverse cultures within the geographical terrain.²⁶ This aim is fulfilled within the Indian concept of Secularism as it absorbs diversity, equality, equality of opportunity respects other cultures and traditions, and most importantly, it does wrap any concept or prohibit doing anything to promote Secularism. Though the State does not have any official culture or religion, the state does take measures to promote cultural and religious diversity within the subcontinent. The same secular constitution provides the legal framework for the protection and promotion of Multiculturalism (refer to Part III of the Supreme Document).

Conclusively, the Indian concept of Secularism is ideal for Multiculturalism than the Secularism being practiced in western countries having some standard code to govern each Culture.

UNIFORM CIVIL CODE AND NATIONAL INTEGRATION

Uniform Civil Code (hereafter referred to as UCC) is one of the most hotly debated topics in today's world. The constitution-makers were aware of its future importance resulting in they drafted it in the Directive Principle of State Policy (hereafter referred to as DPSP).²⁷ However, article 37 cannot be enforced by the court. The article states that the state must make every attempt to assure that the people of India have access to a uniform civil code across the country's territory. Various Hindu personal rules were legislated in 1956; however, there was

²⁶Dr. Sanjay Pandey, *Constitutional perspective of multiculturalism in India*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=963563 (last visited Nov. 6, 2021).

²⁷*Supra* note 8, art. 44.

very little debate over the Uniform Civil Code (UCC). The flames of UCC got wings after the landmark case of Shah Bano,²⁸ where the Hon'ble Supreme Court reiterated the need for UCC. The need was further observed in various other cases, i.e., Daniel Latifi case²⁹, Sarla Mudgal Case³⁰, John Vallamattom case³¹, and many others. In recent times, there have been several demands to move forward towards achieving the aspiration of Article 44. The issue further got wings when the then sitting Chief Justice of India lauded Goa's Uniform Civil Code.³²

Hijab Row: 'Uniformity'

The hijab controversy erupted on January 1, 2022, at Government Pre University College in Udupi, when 6 (six) students (female) alleged they were not permitted to participate in classes while wearing Hijab. They began protesting against college officials, which quickly escalated into a statewide (later nationwide) controversy. As a result, on January 31, 2022, the Karnataka High Court received a slew of applications from Muslim pupils asking for the right to cover their faces and heads (Hijab) in class under Indian Constitutional Articles 14, 19, and 25. An interim restriction on religious clothing and symbols was enforced by the Karnataka High Court till it issued a ruling. Recently, the Hon'ble High Court of Karnataka upheld the Hijab ban on the grounds that wearing a Hijab does not form a part of essential practice in Islam.³³

This controversy had poured oil on the incessant flames of Uniform Civil Code debates. Various for and against have again come into the limelight. Some have argued that wearing Hijab is not an essential practice in Islam, whereas some are on the contrary. It has also been stated that wearing a differential uniform undermines the concept of Uniformity, one of educational institutions' core. However, it is also important to note that implementing things to maintain uniformity seems to neglect Multiculturalism and looks more tilted towards the Western notion of Secularism.

²⁸Mohd. Ahmed Khan v. Shah Bano Begum, 1985 AIR 945.

²⁹Daniel Latifi v. Union of India, (2001) 7 SCC 740.

³⁰Sarla Mudgal v. Union of India AIR 1995 SC 1531.

³¹John Vallamattom & Anr v. Union of India, (2003) 6 SCC 611.

³²INDIAN EXPRESS, <https://indianexpress.com/elections/chief-justice-of-india-s-a-bobde-lauds-uniform-civil-code-in-go-7248631/> (last visited Nov. 6, 2021).

³³Resham v. State of Karnataka and Others, MANU/KA/0912/2022.

FOR AND AGAINST

As stated earlier, UCC is one of the highly debated topics of Modern India, especially when globalization is at its peak and the concept from the western democracies are fascinating day to day Indians, including the western idea of Secularism. Religion and Culture are the most delicate and sensitive topics and should be tackled with great care and precaution. So, it becomes more important to analyze for and against arguments of the concept.

The most random argument given in favor of UCC is that it will further integrate India (the land of diversity). The diverse religion, culture, and tradition will be covered under a singular code of conduct, resulting in a National Integration by giving a sense of oneness. Vote bank politics is not an alien concept in the Indian Political system. Introducing a standard code will ultimately provide a severe blow to vote bank politics. India is a land of numerous religions, and the absence of a common code has led to the working of various personal laws. These personal laws have certain loopholes, and those can be easily tackled with a common code governing all. Another persuasive argument in favor of UCC is that it has become a symbol of being a developed state as most developed nations do have a common code of conduct. Our pace of social growth is much slower in comparison to economic growth. It is further argued that the common code will promote the actual value of Secularism without affecting the freedom of religion³⁴ being guaranteed under the constitution. The common code is more likely to provide a more effective and coherent legal system by reducing confusion and more efficient administration of justice.

As stated in the preceding paragraph, religion is a very delicate issue; its delicacy can be understood by politicians taking enormous care while speaking on these concepts. The most arguments given in against is that there might be a possibility that the majority community may impose their views on the minority community. They also contend that UCC will also be violative of various minority rights³⁵ enshrined in the constitution. One most important reason for this argument is that the terms and the contents of UCC are yet to be announced. They also argue that personal laws have a divine origin, and alteration in them will hurt their religious sentiments.

³⁴*Supra* note 8.

³⁵*Supra* note 8, arts. 29 30.

NATIONAL INTEGRATION AND THE WAY FORWARD

National integration is one of the most important and reliable arguments favoring common code. This importance of National integration was well known by the founders of modern India, where Britishers left us with more than 500 independent states. However, with the tireless efforts of our great leaders, we succeeded in geographically unifying the nation. However, the founding fathers were not in a mood to initiate any alteration in the religious part as the Nation was still recovering from the wounds of partition on religious grounds. Even then, many leaders in the Constituent Assembly favor implementing a common code. KM Munshi said that as soon as feasible, we must achieve the status of a powerful and united country.³⁶ Religion must only be practiced in those aspects of life that are legitimately associated with religion, and the rest of society must be organized, united, and modified to attain that position in the shortest amount of time feasible. Our first and most crucial challenge is to bring about a sense of national togetherness in our country. We believe that we have achieved national unity. However, there are numerous – and significant – factors that continue to pose severe threats to our Nation's oneness, and it is absolutely essential that the entirety of our life, insofar as it is restricted to secular spheres, be unified in such a way that we may be able to say as soon as possible.³⁷ AK Ayyer believed that UCC aims at amity rather than destroying it.³⁸ Justice YV Chandrachud, in the case of Shah Bano,³⁹ observed that through the adoption of a uniform civil code, the goal of national unity will be furthered by eliminating divergent allegiance to laws that contain competing philosophies. Making unjustifiable compromises on this subject is unlikely to cause a ruckus in any given community. It is the state that is tasked with the responsibility of ensuring that all inhabitants of this Nation have access to a Uniform Civil Code, and it has indisputably the legislative authority to accomplish this goal. UCC is indeed bound to strengthen our Nation's integration. The existence of various laws whose applicability depends on religion was regarded as inferior and shows political disintegration.⁴⁰ Common code is bound to lead to the genuine meaning of democracy through a well-integrated nation. India is a mixture of diversity, and the same goes for the various personal laws of different religions. A significant portion of the population does favor the common code as it seems beneficial in the long run. However, the minorities' stance is still critical. Instead of directly

³⁶Refer Constituent Assemble Debates, VOLUME IX.

³⁷VII, *Constituent Assembly Debates*, 548.

³⁸*Ibid* at 549.

³⁹*Supra* note 24.

⁴⁰Indra Deva(eds.), *Personal Laws, or a Uniform Civil Code? Sociology of Law*, (Oxford University Press, New Delhi, 2005).

hitting the target, there should be a gradual consensus development. The state should consider that while promoting a common code, it doesn't lead to the death of Multiculturalism as is the case in some countries (a detail has been covered under the head, i.e., Secular Multiculturalism).

CONCLUSION

Secularism and Multiculturalism are two important and interrelated concepts. The Indian variant of Secularism seems more fit with Multiculturalism as it is inclusive of it. Further, the Constitution of India makes it easier to promote Secularism on the one hand while Multiculturalism on the other. Whereas when looking to the western model of secular Multiculturalism, though these countries officially declare themselves multicultural, they also penetrate the minority culture and tradition.

With the increasing globalization and influence from the West, UCC seems like a need of the hour. Although the government is aware of the sensitivity of religion, so it generally tries to escape from this debate. However, due precaution must be taken when implemented by ensuring that UCC doesn't negatively impact the MULTICULTURALISM.

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PERSONAL LAWS AND WOMEN'S RIGHTS: IS UCC ACTUALLY A STEP TOWARDS GENDER JUSTICE?

- NIRANJAN EV¹

ABSTRACT

Uniform Civil Code (UCC) has always been a controversial area of discussion in India. It is seen that UCC will benefit one section of the society at the cost of another. India being a diverse nation, it is extremely challenging to take into consideration of all religious beliefs and practices. UCC being a highly debatable topic is always better understood in the context of human rights. This journey of UCC started way back in 1840 through the Lex Loci Report and continues till date, also seeing many Constituent Assembly debates pertaining to the need for UCC. Various religious beliefs and scriptures also justify patriarchal dominance but however, a country like India, which is a conglomeration of religions, has inclined against them through the Constitutional provisions provided under Part III. As Gender justice remains to be one of the central issues revolving around UCC, the claim for codifying personal laws has to be analyzed with specific reference to women's rights as regards to the need for secular civil laws that govern the nation as a whole. While critically analyzing the present condition of women's rights in India under personal laws, the article seeks to examine the civil code of the U.S and its position in India.

INTRODUCTION

Feminism seeks to address women's subordination in social and personal life. Dalton defined feminism as a range of highly dedicated questioning and interaction firstly to characterizing status for women, examining its nature and scope, secondly to inquiring not only how, but also the through and what methodologies, and also why, for much of what

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complicated and interconnected reasons, women try to reclaim that position and lastly, to attempting to change subordinate status.² Feminist jurisprudence examines the effect of laws in supporting patriarchy and proposes reforms to end male power. As a result, the Uniform Civil Code (UCC) is also seen a feminist narrative.³ However, the issue of whether India is ready for a UCC after seventy-five years of the Constitution coming into force remains unresolved. The UCC has long been touted as a powerful tool for recognizing and enacting Indian women's rights and elevating their standing in societal structures like family, marriage and maintenance.

On the basis of an individual's religious connections, various religious personal laws govern subjects such as marriage, maintenance, guardianship, divorce, etc. Certain religious writings contain gender discrimination, which runs counter to Article 14 of the Indian Constitution's underlying idea 'equality before law'.⁴ Women must battle inequality in order to lead a life with dignity and identity, which is also a concept enshrined in Article 21 of the Constitution of India.⁵ The World Economic Forum's (WEF) Global Gender Divide Report of 2016 provides a broad conceptual overview on the gender gap that exists.⁶

A UCC involves the concept of a single set of secular civil rules that govern all individuals regardless of religious background and affiliation. The code is considered to supplement a country's several personal laws. The objective of UCC is twofold. Firstly, UCC aims at implementing uniform laws across all people regardless of their religious affiliation; secondly, UCC also aims at eliminating gender bias by means of 'similar laws' for 'similar circumstances'. Many countries like the US and the UK have a common civil code that governs their people.⁷ This paper examines the existing civil codes in the US and the personal laws in India with specific reference to the rights of women. The paper also discusses the discriminatory nature of existing personal laws in light of gender equality.

² Schneider and Hanna, Cheryl, *The Development of Domestic Violence as a Legal Field: Honoring Clare Dalton*, JOURNAL OF LAW AND POLICY 343, Brooklyn Law School Legal Studies Paper No. 305 (2012)

³ Nivedita Menon, *A Uniform Civil Code in India: The State of the Debate in 2014*, 40 FEMINIST STUDIES, INC., (2002).

⁴ INDIAN CONST. art. 14.

⁵ Maneka Gandhi v. Union of India, (AIR 1978 SC 597).

⁶ Global Gender Gap Report 2020, WORLD ECONOMIC FORUM (February 10, 2022), http://www3.weforum.org/docs/WEF_GGGR_2020.pdf

⁷ Harshita Vatsayan, *Quest For Secular Identity And Feasibility Of A Uniform Civil Code*, 1 ILI LAW REVIEW (2017)

PERSONAL LAWS AND GENDER INJUSTICE IN INDIA: AN OVERVIEW

The dispute over personal laws and the necessity for a UCC is indeed a major point of contention in almost any debate of India's secular and religious standpoint. Though the existing secular laws grounded on 'justice, equity, and good conscience' today control just a few aspects of social life, personal laws remain largely unchanged.⁸ The colonial overlords anticipated animosity and local backlash, which made them, decide not to engage in the locals' religious affairs. The fundamental criticism of personal laws in the aftermath of the triple *talaq* issue seems to be that personal laws, particularly Muslim laws, are backward and weaken women.⁹ On these bases, a proposition for the adoption of a UCC was made. However, it is erroneous to claim that just Muslim Laws are oppressive. It must be highlighted that there are several idiosyncrasies that make certain statutes act discriminatory against married Hindu women. In India, the Hindu Succession Act of 1956 governs the succession matters of Hindus. This statute is peculiar because it distinguishes the case of both men and women in cases of intestate succession.¹⁰ Female intestate successions are determined by the source of the deceased female's possessions.

The fundamental rules in Hindu law are found in the *Manusmriti*.¹¹ The underlying societal inequity and injustice against women are claimed to have their origins in the *Manusmriti*, which was composed at such an era when women's role in society was utter obedience and subjection. Manusmriti, also known as *Manav Dharma Shastra*, is an ancient Indian scripture that is seen as the world's first law since it provides laws governing society, its operations, relationships, etc. For instance, Chapter 8 law 3 of the script promotes the idea that women must 'fit into the norms'¹²; chapter 9 law 78 makes woman a victim to separation from her husband if she disrespects him, and will also be deprived of her jewels and money.¹³ Women were only perceived to be naturally and physically inferior to men, and they were

⁸ Id.

⁹ Tanja Herklotz, *Religion Based Personal Laws in India from a Women's Rights Perspective*, SOUTH ASIA CHRONICLE (2015), <https://www.rewi.hu-berlin.de/de/lf/ls/dnn/staff/th/religion-based-personal-laws-in-india-from-a-womens-rights-perspective-context-and-some-recent-publications>.

¹⁰ *Supra*, note 6.

¹¹ Prachi Dutta, *Gender Inequality and Hindu Personal Laws*, 8 INDIA LAW JOURNAL, (Feb 12, 2022) <http://www.indialawjournal.org/archives/volume8/issue-1/article10.html>.

¹² Meenakshi Sharma, *Feminism: Debunking the Myths of Manu in a Quest for Gender Equality*, 11(1) CONTEMPORARY VOICE OF DALIT 17 (2019).

¹³ Id.

viewed as a 'distraction' to male superiority.¹⁴ They were deemed incapable of self-defense and were placed under the supervision of a male family member since their birth. They were required to stay inside the confines of their homes and were prohibited from venturing outside of them.

Under Property law, the injustice is very apparent. There exists no difference between ancestral property or self-acquired property under Muslim laws. If a couple has children, the Muslim wife, is entitled only to one-eighth share in the husband's property, else she is entitled to only one-fourth of the same. Moreover, even though daughters are entitled to the estates of the deceased parents, they only get half as much as their brothers/male heirs.¹⁵ On the other hand, under Hindu Succession Act, Section 14 mentions the categories of property, which a female legal heir can inherit.¹⁶ A Hindu woman would have the same rights on her deceased parent's property as a Hindu male. There really is no discrepancy between rights of men and women as far as inheriting property from a deceased parent is concerned. ¹⁷ The distinction in the property rights of Hindu women and Muslim women is a strong instance to showcase those personal laws create a huge divide in the already existing diversity, thereby not only creating a gap within the religion but also amongst religions inter-se.

Even though the country maintained secular values, religion was perceived as having sway over domestic and familial matters. The rights of minorities, ethnic groups, and other groups frequently justify diversity in family law. Women are frequently oppressed as a result of these collective rights. Although gender stereotypes infect all parts of human life, women's rights are most jeopardized in the home, which serves as a breeding ground for conventional attitudes. The prevalence of Personal Laws demonstrates that they've been regarded as selective mechanisms of governance of religious sentiments, which have already frequently proved detrimental to women. This religious disparity in family law is one of the contentious issues of gender equality and the question is whether a UCC can resolve this.

The Indian Constitution that came into effect in 1950 has seen several dilemmas and deliberations with regard to Article 44, which is the source of contention and debate. Article 44 focuses on the State's duty to enact a UCC for its citizens applicable uniformly all through

¹⁴ Saroj Bohra, *Uniform Civil Code, Women Empowerment And Gender Justice*, 3 SOUTH ASIA JOURNAL OF MULTIDISCIPLINARY STUDIES (2016).

¹⁵ Shivani Dutta, *Critical Study of Civil Code in UK, USA and India with Special Reference to Rights of Women*, 4 NLSIU JOURNAL OF LAW AND PUBLIC POLICY 95- 107 (2017).

¹⁶ Hindu Succession Act 1956 § 13, 14

¹⁷ *Supra*, note 10.

the country.¹⁸ If put into effect, the civil code will address the existing law of all religious communities that deal with marriage, inheritance, adoption, divorce and other similar issues. However, it has never been materialized till date as it is formulated as part of DPPSS-Part IV of the Constitution, which is by fact non-justifiable.

RIGHTS OF WOMEN UNDER PERSONAL LAWS IN INDIA AND THE U.S

In India, women primarily did not have equal rights to males until the Hindu laws were codified in the years 1955 and 1956. Polygamy was common prior to 1955, and women could not own property unless in the instance of *Stridhan*.¹⁹ Although the laws are established, some discriminatory clauses persist.

HINDU PERSONAL LAWS AND LAWS IN THE U.S

In India, the Hindu Adoption and Maintenance Act, 1956 keeps adoption rights of men and women on the same footing, after the amendment of the Act in 2012.²⁰ On the other hand, women have the absolute right to adoption under the personal laws in the U.S. As far as the minimum age for marriage is a concern, for women in India, the age of marriage is set at 18. The Prohibition of Child Marriage (Amendment) Bill 2021 that suggests increasing the minimum age of marriage of women from 18 to 21 years was assigned to the Parliamentary Standing Committee. The Taskforce appointed by the Standing Committee in 2020 then prepared a report and the same is yet to be tabled for discussion as of April 2022. The task force was also asked to address issues on women's access to higher and safety of women, which act as supporting measures that delay underage marriage.

The United States has an 18-year-old age of marriage, with limited exceptions- Nebraska that has fixed the minimum age as 19 and Mississippi has set it to 21.²¹ Most states in the US, nevertheless, include exceptions that permit marriage at a relatively younger age with parental approval, court approval, pregnancy, or a permutation of all these circumstances.

¹⁸ INDIAN CONST. art. 44

¹⁹ ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY, 158 (SAGE publishers, 1992).

²⁰ *Supra*, note 12.

²¹ *Marriage Laws around the World*, PEW RESEARCH CENTER (22 Feb, 2022) https://assets.pewresearch.org/wpcontent/uploads/sites/12/2016/09/FT_Marriage_Age_Appendix_2016_09_08.pdf.

With regard to Inheritance of property by women, in India, daughters are given the same share as sons, as reiterated in *Vineeta Sharma*'s²² case in 2020. The main issue in this case is pertaining to how Section 6 of the Hindu Succession (Amendment) Act, 2005 be interpreted.²³ The Hon'ble Supreme Court held that the Amendment grants co-parcenary status to a daughter (of a co-parcener daughter) regardless of whether she was born before or after the amendment, also regardless of the marital status.²⁴ The liabilities and rights would be the same as the son. This observation by the apex court not only clarifies the position of law, but also advocates gender equality.

According to Hindu law, the widow is a Class 1 heir and therefore inherits the deceased's estate equally as the other Class 1 heirs. On the other hand, the Married Women's Property Acts in the U.S are a series of laws enforced by specific states beginning in 1839, generally under that name but occasionally, particularly the ones spreading the clauses of a Married Women's Property Act, under names explaining an express legislation, like the Married Women's Earnings Act.²⁵

In India, Section 13B of the Hindu Marriage Act (HMA) of 1955 allows for mutual agreement based divorce.²⁶ It is the case in the U.S and respective state laws govern it.²⁷ As per Section 125 of Cr.P.C in India, the husband is required to pay maintenance to his wife until she decides to re-marry or becomes unchaste. The constitutionality of the Muslim Women's (Protection of Rights on Divorce) Act, was contested before the Supreme Court of India in the case of *Danial Latifi*, upon the grounds that it denied Muslim women their maintenance benefits similar to that given by Section 125 of the Cr.P.C., 1973, which is in contravention of Articles 14, 15, and 21 of the Constitution.²⁸ The Act's constitutionality was upheld and it is worth noting that, prior to interpreting its provisions, the Supreme Court of India felt it important to examine the woman's role in Indian marriages. The courts have the authority to decide whether one should grant alimony and, for how long. Regarding spousal support, the majority of states in the U.S follow the Uniform Marriage and Divorce Act.

²² *Vineeta Sharma v. Rakesh Sharma*, (2020) AIR 3717 (SC)

²³ *Id.*

²⁴ *Id.*

²⁵ *Supra*, note 12.

²⁶ Hindu Marriage Act 1955 § 13B.

²⁷ *Supra*, note 12.

²⁸ *Daniel Latifi v. Union of India*, (2001) SC SCC 740.

Polygamy is illegal in India under Section 17 of HMA, 1955. Similarly, bigamy is a criminal offence, which is punishable under Section 494 of the IPC, 1860.²⁹ Polygamy is prohibited in every state of the U.S.³⁰ Furthermore, the U.S federal government has enacted various legislations that make being married to more than one individual illegal.

MUSLIM PERSONAL LAWS IN INDIA

Inheritance is different under Shia and Sunni laws. With reference to inheritance under Shia law, in comparison to a son, a daughter's portion is half. According to Sunni law, when a son dies, a daughter succeeds as a residuary and receives a part, which is half of the son's share.³¹ Furthermore, if the deceased has a living child or a descendent of a son, the widow's portion is only one-eighth of the inheritance under Shia law. If not, then she is entitled to one-fourth. In case of divorce, only the husband has the capacity by law to pronounce *triple talaq* in case of divorce.³² The Halala system is also widely used in India. In India, the practice of polygamy is legal. On the other hand, to combat the abuse and exploitation of this repulsive practice, Islamic nations such as Syria, Morocco, Iran, Pakistan, etc., have codified their personal laws in which polygamy is either completely forbidden or highly restricted.³³ The irony is that India as a secular country falls behind in welcoming this type of approach.

PERSONAL LAWS AND ITS DISCRIMINATORY APPROACH

In India, the discriminatory nature of both personal laws of Hindus and Muslims are apparent in nature. The adoption of the idea of unilateral divorce is by far the most absurd and discriminatory element of Islamic law. As a result, a 'husband has the right to unilaterally divorce his wife' even if there is no reasonable cause or justification.³⁴ Moreover, Islamic divorce law even supports the happening of the event of a divorce in the absence of the wife,

²⁹ Indian Penal Code 1860 § 494.

³⁰ *Countries Where Polygamy Is Legal* 2022, WORLD POPULATION REVIEW (Feb 23, 2022) <https://worldpopulationreview.com/country-rankings/countries-where-polygamy-is-legal>.

³¹ Sangeetha Sriraam, *Uniform Civil Code: An Instrument for Gender Justice* SSRN (Feb 24, 2022) <https://ssrn.com/abstract=3590351> or <http://dx.doi.org/10.2139/ssrn.3590351>

³² *Supra*, note 12.

³³ *Uniform Civil Code: On fast forward movement*, DAILY EXCELSIOR (Feb 25, 2022), <https://www.dailyexcelsior.com/uniform-civil-code-on-fast-forward-movement/>.

³⁴ *Supra*, note 26.

just merely pronouncing the phrase. With respect to the age of marriage all men and women across the world have the right to get married at any age by free consent, and with complete freedom of choosing the spouse. Personal laws in India, on the other hand, are deemed unsatisfactory in this regard. The right of guardians to marry underage ward is recognized under Muslim law. There is indeed a cure in the shape of 'option of puberty' but is only available to women. The procurement of permission by fraud or coercion, or consent by proven unsoundness of mind, makes the marriage void under Hindu law.

In order to understand how personal laws are discriminatory, it is pertinent to look into the flipside of codification of all Hindu laws. Much after the enactment of Hindu personal law, the role of Hindu women is still clouded by inferiority complexes. Although the western ideas of monogamy, divorce, and maintenance remedied a few of the afflictions in Hindu law, certain Hindu groups that were far advanced in western ideology were forced towards a more backward personal law system. The Islamic system was seen as somewhat progressive. For example, even before the Shariat Act was enacted in 1937, the *Marumakattayam* system was followed in the state of Kerala, which was only applicable to Muslims living in Kerala, which had liberal divorce and maintenance provisions.³⁵ The female line law-based framework had advanced laws for women relating to succession as well. It is argued that the sanskritization of these practices paved way for washing away a possible social reformation.³⁶

The objective of the maintenance is to provide monetary stability and social security to women of various religious backgrounds, depending on their religious views. A Hindu is legally obligated to support his wife. However, the rights conferred upon the wife are very limited in scope as under Section 18(3) of the Hindu Adoption and Maintenance Act.³⁷ Accordingly, if a Hindu wife is unchaste and changes to another faith, she will not be eligible for separate home and the existing maintenance thereafter. Similarly, the concept of adoption is also discriminatory.³⁸ Mothers have always been given a statutorily passive role under Hindu law when it comes to the custody of their children. A minor child's guardian is naturally and legally the father and the mother will take custody of the second.³⁹ On the other hand, the father would be the sole custodian of his minor child and his property under Muslim

³⁵ Shambhavi, *Uniform Civil Code: The Necessity And The Absurdity*, 1 ILI LAW REVIEW (2017)

³⁶ Proceedings of Constituent Assembly Debates Proceedings, Vol. VII, (Nov. 23, 1948)

³⁷ Hindu Adoption and Maintenance Act 1956 § 18(3).

³⁸ Shruti and Siya, *Adoption Laws in India: Reviews and Recommendation Needed*, SSRN (Feb 26, 2022). <https://ssrn.com/abstract=2021003>.

³⁹ Id.

law.⁴⁰ Hence, looking at the confusion that prevails, adoption is also an area in which the mother is discriminated against solely because of her marital status.

The Hindu code that aimed to provide a common system of laws for all Hindus, is inconsistent with the basic parts of family law. The legality of a marriage is determined by the community's customs. It is interesting to see that inheritance rights differ in Kerala and Tamil Nadu.⁴¹ Also, who is eligible for adoption is determined by custom and traditionally agreed rules and finally, it is shocking to note that automatic application of the Hindu Succession Act, 1956 Scheduled Tribes community is prohibited, as observed under *Butaki Bai's* case.⁴² The issue in this case was whether the legislative bar under Hindu Succession Act, 1956 is exempted for the *Halba* Scheduled Tribe community. The court observed that the community that the parties belong to, still follow their customary succession practices and has failed to establish that they have been "sufficiently Hinduised".⁴³ It was held that the Section 2(2) of the Act of 1956 will apply and thus the provisions of the Act will not be applicable to the parties.⁴⁴ The Hindu code undoubtedly unifies numerous components of Hindu personal law; it also leaves custom and other local practices unaffected in several areas.

Through various decisions, the Hon'ble Supreme Court of India has demonstrated its support for a UCC. The case of *Shah Bano* is one of the decisions made by the apex court in favour of UCC, wherein in addition to covering the claim for maintenance even after the '*Iddat period*' for Muslim women, the Indian Government's reluctance to formulate a UCC was criticized in light of the Muslim community's sensitivity.⁴⁵ Subsequently, the Parliament was highly under pressure to pass the Muslim Women's (Protection of Rights on Divorce) Act of 1986.⁴⁶ The case of *Shayara Banu*, explains how Muslim women become victims of the injustice caused by *triple talaq*.⁴⁷ This has resurfaced only thirty years post the *Shah Bano's* case. However, the current issue is not about obtaining maintenance from the husband, but rather about contesting the legality of her husband's conduct of arbitrarily evicting her out of his life by repeating the word '*Talaq*' three times. This portrays how women's rights are not

⁴⁰ Shujath Ahmed, *Applicability of Muslim personal law (Shariat) to custody matters*, LEXOLOGY, (Feb 26, 2022), <https://www.lexology.com/library/detail.aspx?g=0b7ad5fc-61bc-49f7-a382ee6e2588f6d5>.

⁴¹ *Supra*, note 30.

⁴² *Smt. Butaki Bai v. Sukhbati*, AIR 2014 Chh 110.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Mohammed. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

⁴⁶ *Id.*

⁴⁷ *Shayara Bano v. Union Of India Case Analysis*, AIR 2017 9 SCC 1 (SC).

prioritized in a country like India, which is Secular, by Constitution. Consequently, the Apex court reaffirmed the necessity for Parliament to bring in a UCC that will aid unity by resolving ideological conflicts.

UCC AS A CATALYST TO GENDER JUSTICE

In the spirit of defending religious institutions' rights, Parliament has already avoided its responsibility to protect the interests of women, who are the most vulnerable in the group. Women's rights must not be sacrificed in the name of state impartiality in religious matters. Religious reformation must not be halted in the name of protection of the rights of minorities. Although the Constitution of India advocates equality, women continue to face injustice, and violence as a result of differing personal law systems. Their status well within the family itself is pitiful. In a modernized and democratic society, wherein an individual's choices are valued and prioritized, personal laws are obsolete. Such laws not only regard women as chattel but are also intended to keep them at a place inferior to that of men. UCC supporters think that by ensuring equality, UCC will ensure religious transformation.⁴⁸ Women have always faced discrimination under personal laws because of which they have faced numerous challenges in their marriages, divorces, and inheritances. Patriarchal dominance arises when a religion determines the laws that will be applicable to an individual with regard to marriage, divorce, adoption, etc. It is argued that a UCC will demolish gender inequality and will act as a touchstone of gender justice.⁴⁹

The twist behind the notion of UCC lies in the process of achieving gender justice and national integrity. On the downside, this acts as an attempt to repress minorities' identities and poses a serious threat to cultural diversity. This issue is again divided into two parts: the challenge to people's distinctive identities as well as communities' collective identities as a whole, and the flawed and partially failed uniformity criteria required to defend women's rights. The former is a much more generally debated and highlighted justification against the UCC,

⁴⁸ Jyotika Kalra, *Uniform Civil Code: A journey not a destination*, INDIA TODAY (Feb 28, 2022), <https://www.indiatoday.in/news-analysis/story/uniform-civil-code-journey-destination-features-1839110-2021-08-10>.

⁴⁹ *Personal Laws versus Gender Justice: Will a Uniform Civil Code Solve the Problem?*, ENGAGE, (March 1, 2022) <https://www.epw.in/engage/article/personal-laws-versus-gender-justice-uniform-civil-code-solution>.

but the latter is a mainly overlooked issue that is believed to be forgotten amidst the political outcry.

In the 2015 Bharatiya Muslim Mahila Andolan (BMMA) survey that consisted of approximately five thousand women from ten states, more than ninety percent of them wanted polygamy as well as *triple talaq* to be abolished.⁵⁰ About seventy-eight percent of five hundred and twenty-five divorced women who were surveyed had been victims to *triple talaq*. Remarriage was forced on them. In some cases, they were even asked to return to their husbands.⁵¹ As mentioned, the case of *Shayara Banu* best explains the need for a reformation. Moreover, the Government of India a few years ago asked the Law Commission to assess and examine the problem in implementing the UCC.⁵² The Law Commission also sought public input on the same from various stakeholders, but their conclusion is still unclear by simply suggesting that the code shall be in lines with Equality, Freedom and Secularism. The Law Commission also emphasized that any reform must be consistent with constitutional principles such as secularism, religious freedom, and inclusivity.⁵³

It can be very well inferred from the Preamble, Fundamental rights, DPSPs as well as the provisions relating to political reservations under Arts. 243D (3)(4) and 243T(3), gender justice has always been considered a cornerstone of the Constitution.⁵⁴ Every religion has its traditions, customs, rituals and local practices, but it is significant to note that any such custom that puts one religion above or below another should be abolished. Gender concerns take precedence over all other discrepancies, imbalances, and injustices that have resulted so far. Gender inequalities cannot be ignored since they are intertwined with several other concerns. There is no reason, and it is futile to claim that gender equity cannot be realized because it is hampered by religious limitations.

Codification of diverse laws and legal principles, customs, and cultural laws provides the legal framework a collective identity and makes laws easier to implement. The rights and obligations that come from such laws and norms are likewise recognized and traceable. Furthermore, a uniform rule governing all citizens equally is the real goal and the society is

⁵⁰ *Supra*, note 12.

⁵¹ *Supra*, note 12.

⁵² Anusha Soni, *Law Commission Chairman on Uniform Civil Code: Each religion would continue to have personal laws*, INDIA TODAY, (March 5, 2022) <http://indiatoday.intoday.in/story/uniform-civil-code-law-commission-chariman-religionpersonal-laws-gender-justice/1/810271.html>.

⁵³ *Id.*

⁵⁴ INDIAN CONST. art. 243D(3)(4), art. 243T(3).

progressing towards its full realization. J. Kuldip Singh in *Sarla Mudgal V. Union of India* has pointed out that in India, about eighty percent of the citizens have been restricted within the purview of their personal laws and there lies no justification to be not adopting a UCC that would apply through the length and breadth of the territory of India.⁵⁵

Inequality might be defined differently in each culture. It is vital to identify the levels of gender injustices that exist in one culture but not in others. Without even a doubt, many elements of personal law are antithetical to the feeling of women's rights that exists in a community. As a result, the primary step is to eliminate the unfair traditions that are prevalent in that culture. Rather than rushing to create a common definition for inequality, which would be the pervasive viewpoint, all of these cultures must first acknowledge the notions of inequality as well as injustice in their spheres of existence. Alternatively, these civilizations might turn defensive.

CONCLUSION

The UCC is a legal endeavor, which is unique to India since it is a multicultural country. The debate over enacting the UCC has rattled the social, legal and political realms. However, UCC has always been a part of the Constitution of India that 'we the people' had given to ourselves back in 1950. Considering that the goal is closer, the question of whether the UCC is acceptable is no longer viable in India's cultural landscape. The critical question before judges and legislators is what should be included in the newly passed Code. A UCC with impartial family law provisions should be free of religious personal laws and comprise just the reasonable and just elements of each system. The specifications for public dialogue and opinion on the UCC should be provided in the form of a draft Code. The focus should be on gender justice, fairness and equity. This action should never be misconstrued as a violation of the status of minorities and their rights provided for under the Constitution of India. If it is felt that the UCC risks at violating Art. 25 of the Constitution, the best option is to formulate the Code in a way that promotes religious liberty and the State's responsibilities under Art. 44, rather than putting the entire requirement on hold permanently.

⁵⁵ *Sarla Mudgal, & Others. v. Union of India*, AIR 1995 SC 153.

CAN UCC COMPLETELY OVERLAP PERSONAL LAWS IN INDIA?

- Priya Wadhwa¹

ABSTRACT –

The idea of Uniform Civil Code (hereinafter “UCC”) is undoubtedly an integral part of our constitutional values, a future envisioned by our constitution framers. Its capability of forming a common ground for the diverse population of the country instilled hope of greater fraternity and communal bond. After years of judicial stress on its formulation and adoption, the tenacious political will seems to be tilted towards it, necessitating the legal community to delve deep into the concept of the UCC and analyse its viability in India. While the UCC has immense benefits and element of greater social integration, many roadblocks lie in its way before it can be applicable to the citizens of India.

Treading on the idea that adoption of UCC in India is not only the need of the hour, but also quintessential for enhancing judicial efficacy, this paper will discuss how the current system of application of personal laws is heaping challenges and disconnecting the citizens.

However, the biggest challenge posed against UCC is not just garnering public sentiment, but its effectiveness in courts, and its effect on prevailing customary practices. Customs are practices being continued for generations and cannot be expected to be derecognized even after application of UCC. However, with their continued application, the doubts and vividness in applicable principles will remain.

The prospective application of UCC, being substantive in nature, would, before relieving the judiciary would, on the contrary leave the currently overburdened judiciary in a greater flux. Repeated determination of the question of its applicability or non-applicability will not only add to the time taken for judicial determination, but also lead to rise in challenges to such orders, escalating instability of legal relations.

Thus, is the applicability of UCC in India an absolute necessity requiring a buffer period after which its true effect will emerge, or will it smoothly take over the procedure of

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enforcing remedies that are currently governed by personal laws is the question that remains, which depends on the drafting and formulation of UCC. Upon deliberating on the various aspects stated above, the paper concludes with the suggestions of what should the UCC look like in India for it to be smoothly functional.

INTRODUCTION TO UCC -

We have often come across, and even participated in debates regarding whether the time is ripe for India to adopt Uniform Civil Code (hereinafter 'UCC'). The conclusiveness or inconclusiveness of such debates are immaterial, as such intellectual discussions introduce facts, deliberate over possible impacts and does not let the issue be perceived as a distant dream, but an impending state of affairs. They contribute to create a conducive environment for its introduction by broadening the horizons of minds oblivious to the idea.

The Uniform Civil Code is a peculiar and a pressing issue in the current times, often finding itself to be the focal point of debates, whenever personal laws are challenged or the judiciary advocates for its implementation. Its significance has grown with every passing year, and the legislature is finding itself in a flux with regard to its introduction in India. The legal system in India is complex and judicial functions tough to carry out, and the issue of whether UCC should be adopted in India cannot be stated without going into the depths of its aspects and effects. Irrespective of that, UCC is widely considered to be a panacea, not only for strengthening the secular fabric of the nation, but also to give a new lease of life to the ailing and overburdened judicial system of the nation.

This paper will be going over the contours of UCC in context of the legal system in India, and while comparing it with the currently applicable Personal laws, will try to bring forth the framework of UCC that would be ideal for India.

DISSECTING THE WORD UCC

The name of UCC itself suggests its characteristic of applicability in a uniform manner. Uniformity stands on the bedrock of equality and secularism. It furthers itself by covering within its ambit every individual irrespective of their unique peculiarities like gender, religion, ethnicity, caste, creed etc. The classifications and classes formed on the basis of such individual traits are, as a consequence, done away with, and one body containing a set of legal provisions remains applicable on every person. Hence, every person stands at an equal footing, truly making the embodiment of law, with her vision restricted by tying a cloth over her eyes, come to life.

Civilised societies stand tall declaring their citizens to have equal status before legal forums by application of laws recognising them as equals. Physical, mental, intellectual differences between citizens have no consideration in such matters, and the value of life of one person is similar to the other. This principle is seen to be manifest when every citizen over a particular age is given the right to vote and choose its political representative, when no criminal is treated differently, and when the state aims at giving every child the same quality of education to improve their quality of life and prospects.

Uniformity of application also correlates to the secular nature of law, roots of which are deeply entrenched in constitutionalism. Hence it would not be conjectural to find Uniform civil code to be extension of the constitutional principles and values.

CIVIL

Civil law is the sphere encompassing within itself the interpersonal relations between citizens, whether formed through socio- religious acts, or contracts. Often, civil law is categorised negatively, i.e., encompassing within itself every law other than those specifically dealing with criminal law, both substantive and procedural. Civil law dictates basic norms to be followed and enforced in case of violation. The rights and liabilities imposed by such law are personal in nature, since the impact is limited to such individuals while the society at large remains unaffected. However, the dichotomy that lies here is though civil rights are perceived to have a limited impact upon individuals, such individuals, being an indispensable part of the society, do in a manner affect the societal relationship, because no person lives in isolation, but is surrounded by the society in all aspects.

Stability of legal relationships plays an important role in society. The sum total of individual efforts, social and legal relationships, proprietary rights, economic activities shape the society and economy. Thus, the role of civil law and its enforcement cannot be neglected.

Under modern law, rights and liabilities relating to marriage, divorce, guardianship, adoption, commercial relationships based on contracts, property and goods related transactions etc. form the basic cluster of civil laws, coupled with adjective or procedural laws like Code of Civil Procedure, 1908 (hereinafter ‘C.P.C.’) and Indian Evidence Act 1872 (hereinafter ‘I.E.A.’). The majority of substantive civil law relating to contracts, property (except gift), remedies like declaration, injunction etc are already secular, thus the only aspect of civil law having application based on religion, caste, sect etc is one relating to marriage, divorce and other incidental remedies. These matters are currently governed by personal law, i.e., codified or uncodified principles applicable on a person on the basis of their religious affiliation. Hence, the only aspect of civil law that remains to be distant from the idealistic ‘secular’ nature are these, and the only ones referred to when the issue of UCC is deliberated upon.

CODE

A legislation is often referred to as an Act or statute, rarely a code. There might seem a slight or even negligible difference between an Act and a Code, both having been drafted and passed by the legislature, both containing legal provisions and regulations applicable on individuals covered within its ambit.

Despite the same, there is a notable distinction between a legislation called an Act, and one called a Code, which lies in the nature of the legislation. Particularly, a legislation is termed ‘Code’ when the matters covered by it are exhaustively dealt with, such as the procedure for enforcement of civil and criminal rights and liabilities under the C.P.C., and Code of Criminal Procedure, 1973 (hereinafter ‘Cr.P.C.’) respectively.

The question as to whether the legislation exhaustively deals with a subject matter is extracted from the preamble to the legislation, which, if it does, contains the word ‘consolidate’.

Hence, when UCC is considered as a whole, it will be a compilation of exhaustively formulated principles dealing with specific civil matters like marriage, divorce, guardianship, adoption, inheritance and maintenance and having uniform application over all individuals

irrespective of religion, caste, creed etc. A Uniform civil code would retain the customary diversity of all communities by providing a uniform base of constitutional values.²

ORIGIN OF THE CONCEPT OF UCC

Under the pre-colonial Indian legal regime, legal principles were varied, implementation of which was highly decentralised. Local customs and traditions were the determining factors. Communities were held together by way of such local customs and usages, violation of which was taken up before royal courts, and determined thereof.

The British had a hard time dealing with such varied, decentralised and non- uniform structure of legal principles, making the tasks on their hands multiply manifold. Hence, attempts were made to compile the existing principles to bring uniformity, and while such attempts were successful, making way for various laws having uniform implementation, the private sphere having close proximity with religious ideals and philosophies were kept untouched to keep opposition and retaliation at bay.

Cautiously treading on the path of beneficial legislations, the British introduced important legislations like Hindu Widow Remarriage Act, 1856, Hindu Inheritance (Removal of Disabilities) Act, 1928 and Married Woman's Property Act, 1923, granting proprietary rights to Hindu women. Though, similar legislations were not passed as for Muslim women due to harsh opposition and conservatism.

This was succeeded by the demand of UCC by The All-India Women's Conference, to further gender equality in the nation.³ Consequently *B.N. Rau Committee* was formed in 1941, which recommended the introduction of a Uniform Civil Code which gives equal rights to women, though it is pertinent to note that the focus of the committee was on Hindu laws. It was reconstituted in 1944, and the recommendations finally materialised into the four main laws governing Hindu personal laws, though after considerable delay.

The Special Marriage Act, 1954 read along with the Indian Succession Act, 1925 also gave a voluntary option for individuals belonging to any religion, to adopt secular, egalitarian principles and abandoning personal laws.

² Razia Patel, *Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice*, 44 ECONOMIC AND POLITICAL WEEKLY, 44, 2009.

³ Nandini Chavan Et Al., *PERSONAL LAW REFORMS AND GENDER EMPOWERMENT: A DEBATE ON UNIFORM CIVIL CODE 84* (Hope India Publications 2006).

It can be stated that the UCC is, in part, given effect as the Special Marriage Act, 1954 read with the Indian Succession Act, 1925. The extent of its application is, though, very limited.

UCC AND THE LEGAL REGIME IN INDIA

Independence of India brought the assurance of self-governance and with it, the unfulfilled aspirations, hopes and dreams of Indians seemed to be at the brink of realisation. The institutional suppression of Indians was sought to be done away with, by adoption of a constitution that, as of a modern state, would guarantee basic rights to its citizens.

The Constituent Assembly was formed on 9th December 1946, which sought to draft the Indian Constitution. With 22 Committees working under it, the draft was completed and adopted in part on 26th November 1949, and came into force as a whole on 26th January 1950, taking a total of 2 years 11 months and 18 days.

The Constitution of India is, what reputed jurist Kelsen stated, the *Grundnorm*. Having such stature, no law in force in India, whether a pre-independence or post-independence law, can be violative of the constitutional provisions, as is stated under Article 13 read with Article 372 of the Constitution. With the passage of time, the interpretation of the Constitutional provisions shifted from the literal interpretation of the words of the provision, to the essence of the same, which was ultimately sufficed in the *Kesavananda Bharati Case*⁴. The Basic Structure of the Constitution, coined in this judgment was not a compilation of provisions, rather, principles that were considered to be omnipresent in the Constitution, cutting across every provision. Principles like equity, justice, reasonableness, non-arbitrariness are recognised as a part of the Basic Structure.

Article 44 of the Constitution of India is a Directive Principle for State Policy (hereinafter 'DPSP'). The DPSP were formulated in a separate part, i.e., Part IV of the Indian constitution and provides for certain principles that act as a societal goal for our nation, which at the apt time could be adopted and implemented. These societal goals or the summation of the goals and aspirations of Indians at the time of independence and undoubtedly fundamental in governance, though forming an important part under the constitution, are not justiciable, i.e., are non-enforceable, as has been clarified under Article 37 of the Constitution.

⁴ Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr. (1973) 4 SCC 225.

Article 44 of the Constitution has been in the midst of debates quite often, and a focal point of discussion and deliberation in the constitutional courts in the country.

Reproduction of Article 44 is as follows: “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”. Here, the state will refer to the Central government only, since it is only the Parliament which is empowered to make law that applies throughout the territory of India. The words ‘the state shall endeavour’ imposes a positive duty on the state to implement UCC when the societal conditions are thought conducive to it.

While Article 44 uses the words “State shall endeavour”, other Articles in the ‘Directive Principles’ chapter use words such as “in particular strive”; “shall in particular direct its policy”; “shall be obligation of the state” etc. Article 43 mentions “State shall endeavour by suitable legislation” while the phrase “by suitable legislation” is absent in Article 44. All this implies that the duty of the state is greater in other directive principles than in Article 44.⁵

If the framers of the Constitution had intended to have a Uniform Civil Code, they would have given exclusive jurisdiction to Parliament in respect of personal laws, by including this subject in the Union List. But “personal laws” are mentioned in the Concurrent List. Last year, the Law Commission concluded that a Uniform Civil Code is neither feasible nor desirable.⁶

The Hon’ble Supreme Court also shed light on the relationship between UCC and Fundamental right under Articles 25-27 of the constitution of India as below:

“Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. 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. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other

⁵ Faizan Mustafa, Explained: Uniform Civil code—the debate, the status, THE INDIAN EXPRESS (Sept. 18, 2019), <https://indianexpress.com/article/explained/explained-uniform-civil-code-the-debate-the-status-6004396/>.

⁶ Id.

*communities would not, though the Constitution enjoins the establishment of a "common civil Code" for the whole of India."*⁷

The constitutional courts in India have repeatedly iterated the urgent need for implementation of UCC. The judiciary maintains a close connection with the society, and is a witness to its current state, and also to its needs and requirements. As is well known, the more the laws, the more are the loopholes left to be exploited, same is the state with personal laws, which are often misused by individuals to their own advantage, and in utter negligence towards the society. To close the gaps left open under various personal law related statutes and principles, the courts have urged the legislature to analyse the situation and bring forth the UCC.

In the landmark judgment of *Mohd. Ahmed Khan v. Shah Bano Begum*⁸, before concluding the judgment, the Constitution bench of the Hon'ble Apex court observed:

"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter... A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between 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."

UCC AND PERSONAL LAWS

Personal laws play an important role in Indian society. While they obviously do their job in being the governing rules for both substantive and procedural rights and liabilities of disputed parties, they also act as a reassurance to people belonging to the distinct religions. This reassurance emanates from Article 25 of the Constitution, since being governed by personal laws is also viewed as a way of practicing one's religion. Personal laws govern and

⁷ Sarla Mudgal v Union of India, AIR 1995 SC 1531.

⁸ 1985 SCR (3) 844.

regulate relations arising out of certain factors connecting two persons or more than two persons. Those factors are Marriage, Blood, and Affinity. Moreover, personal law governs and regulates subjects or areas of personal sphere such as: Marriage, Divorce, Maintenance, Succession, Minority & Guardianship etc. Barring few, most of the personal laws in India are based on scriptural laws which are divided and based on religions.⁹

Though the personal laws were hailed during colonial times, as keeping the personal disputes under a veil and away from the colonial authorities, their application or implementation has grown to become more complex with the passing time.

The theological basis of the personal laws is carefully looked into by the legislature before enacting a statute. It is also quite often discussed in great detail by the constitutional courts while hearing myriad cases present before it.

Considering the fact that UCC aims to substitute the personal laws presently applicable in India, it is pertinent to examine in detail the various laws, the issues that have cropped up over the period of time and how UCC, if it would, correct or further deepen the cracks.

Some of the significant personal laws in India are as follows:

- Hindus (including Jains, Sikhs, Buddhists and all those who are not Muslims, Jews or Christians) are governed by Hindu Marriage Act, Hindu Succession Act, Hindu Minority and Guardianship Act, Hindu adoption and Maintenance Act
- Muslims are governed by Muslim Personal Law (Shariat) Application Act, 1937, The Muslim Women (Protection of Rights on Divorce) Act, 1986, Dissolution of Muslim Marriage Act, 1939 and The Muslim Women (Protection of Rights on Marriage) Act, 2019.
- Parsis are governed by Parsi Marriage and Divorce Act, 1936
- Christians are governed by Indian Christian Marriage Act, 1872, Indian Divorce Act and Indian Succession Act.

It is considered that the provisions in these legislations are founded on a respective scriptural basis. Indians have, since time immemorial, considered their religion, not just as one

⁹ Hrishikesh Jaiswal, *Development of Personal laws in Colonial India*, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-5412-development-of-personal-laws-in-colonial-india.html>

under which they are supposed to act in a definitive manner on certain specific occasions, rather, Indians consider and treat their religions as a way of life.

This broadens the horizons of religious affinity, making individuals feel althemore closer and in tune with their religions.

It is appropriate to note that 4 important legislations governing the Hindu law were enacted after independence, considering the need to bring homogeneity amongst Hindus as to applicable rules, irrespective of caste, sects, subsect etc. the common code for Hindus did not, in its entirety base itself on religious scripts, but brought the changes that were necessary to maintain a modern Indian society having constitutional values and guarantees. By ditching the old concepts and introducing completely opposite ones, like monogamy, the right of women to hold property and be recipients of inheritance, right to divorce, etc were introduced. It is repeatedly asserted that the Hindus, ultimately gave in to these new principles, and though reluctant, made way for a common code for governance. And the success of these laws should be one of the rationales for the UCC. Hindus, after some pacification as was needed at the time, embraced laws for their collective good.

Before these laws, Hindu women were considered much less empowered and independent, because unlike their Muslim counterparts, neither could they be property owners, nor could they walk away from their marriages. In fact, Hindu society was plagued by several social vices, ways out of which seemed impossible.

Gradually, the rights given to Hindu women, in particular under the Hindu Code have expanded by legislative actions or judicial interpretations, and true sense of equality has been achieved on paper. Though on the other hand Muslim, Christian women still seem to be restricted by practices or provisions that do not necessarily establish gender justice.

In the context of Hindu law, several landmark judgments have been passed by the Hon'ble Apex Court upholding the spirit of gender justice in India. The recent judgment of *Vineeta Sharma v. Rakesh Sharma*¹⁰ partly overruled the judgments of *Prakash v. Phulavati*¹¹ and *Danamma v. Amar*¹², which stated that for a Hindu Daughter to be a coparcener in a Hindu Undivided family, it is necessary that her father was alive on 9th September 2005, when the respective amendment came into effect. The court has in the recent judgment held that no such

¹⁰ (2020) 9 SCC 1.

¹¹ (2016) 2 SCC 36.

¹² (2018)3SCC 343.

criteria, which was not placed by the legislature, can be brought by the judiciary and restrict the rights of daughters in coparcenary.

Another judgment that valiantly introduced gender equality was *Githa Hariharan v. RBI*¹³ wherein Section 6(a)(2) of the Hindu Minority and Guardianship was challenged, since it mentioned only the father of the child to be its natural guardian, and mother was considered the guardian only in the father's absence. The Hon'ble Apex Court held that the words in absence of father' were to be applied even where the husband was unavailable, and hence mothers are also natural guardians of the child.

The case of *Sarla Mudgal v. Union of India*¹⁴ the Apex Court noted how Hindus often converted to Islam to avail the benefit of polygamy, and how Religion too is treated as a commodity and abused without extent. The Apex Court declared that such conversion and subsequent marriages while marriage prior to conversion subsists, would have the effect of making the marriage after conversion to be void, and such act would also be punishable under Section 494 of the Indian Penal Code. The judgment tried to strike a balance between the right to convert, and the rights of married women on conversion of husband. It declared that the marriage before conversion does not automatically dissolve on conversion.

Another peculiar judgment is that of *Isha Tyagi v. State of Uttar Pradesh*¹⁵ wherein the female descendants were not given benefit of the reservation for family of freedom fighters in the state of Uttar Pradesh. The Allahabad High Court, speaking through Hon'ble Chief Justice D.Y. Chandrachud (as he then was) held that there cannot be any distinction between the family of a married son or daughter, and members of both would be treated as family of freedom fighters.

The application of the distinct personal laws over individual citizens has caused many issues to crop up. These issues have majorly been regarding the alignment of the personal laws with the Constitution of India. Validity of certain provisions or practices on the touchstone of constitutional values like equality, non-discrimination, right to life and personal liberty, right to privacy have often come up before the judiciary. And the courts as well as the government have, for a long time tried to maintain a non- interference approach with regard to personal

¹³ 1999, 2. SCC 228.

¹⁴ AIR 1995 SC 1531.

¹⁵ 2014 (107) ALR 61.

laws. Decisions in cases like *Krishna Singh v. Mathura Ahir*¹⁶ and *Maharshi Avadhesh v. Union of India*¹⁷, the Apex Court refused to interfere in matters of religion and simply stated that the legislature is the appropriate forum to decide whether such changes ought to be brought in the legal realm of personal laws. And this would ultimately fructify when there is a public consensus amongst the religious community to bring forth such changes.

Gradually the court started scrutinising the religious principles, usages, customs or provisions of personal laws against the backdrop of omnipresent constitutional values. Covering a long distance now, we have reached a stage where religious practices are kept at an inferior setting than **Constitutional Morality**. The best example is the *Sabrimala case*¹⁸ a decision given by a constitution bench wherein the Hon'ble bench of the Supreme Court held that restricting the entry of women in temples, due to them being in their 'menstruating age' is unconstitutional and violative of articles 14,15, 21 and 25 of the Constitution.

Additionally, the *Shayara Bano judgment*¹⁹ held that triple talaq, or 'talaq-e-biddat' is arbitrary and hence violative of Article 14 read with Article 13(1) of the Constitution of India. It not being an essential practice under Islam and even condemned under it, is not afforded the protection of Article 25 of the Constitution.

This monumental shift in the approach of the highest court of our country is also indicative of the fact that the nation is at the brink of being conducive to the idea of UCC, since the judiciary, too, is a representation of the society. The spatio-temporal nature of law is witnessing a gradual and constant shift towards being a society more in line with constitutional morality, rather than social morality.

The vividness and wide distinctions between the different personal laws has not only proved difficult for the administration of justice but has also created a divide in the society. Gender justice is not equal amongst different religions, as is also the case with property rights.

The repeated call for UCC from the judiciary is in the context of it being helpless when it comes to the discriminatory laws, resulting in numerous individuals losing in court, or even unable to reach the court despite them being in an unjust and unequitable circumstances.

¹⁶ AIR 1980 SC 707.

¹⁷ 1994 (Supp) 1 SCC 713.

¹⁸Indian Young Lawyers Association & Ors. v. State of Kerala, 2018 SCC Online SC 1690.

¹⁹ Shayara Bano v Union of India, AIR 2017 9 SCC 1.

Though, now the judiciary is taking bold decisions despite the public sentiment in disagreement with it, the measures will truly be successful only with legislation in place.

MODEL FRAMEWORK OF UCC IN INDIA

The UCC is, time and again, hailed as the **messiah of secularism**, i.e., secularism is considered the genus while UCC is its species. UCC falls within the broad umbrella of secularism due to the fact that those civil laws that are currently governed by personal laws would, upon the introduction of UCC, be of homogenous application upon the citizens.

Secularism is undoubtedly a part of the basic structure of our constitution. The interpretation of secularism is limited when it comes to western countries: separation of church and state, i.e., the state, or government having independent and uninfluenced working from the church. However, Indian society is far more complex, and so is the concept of secularism in India. Secularism here does not end at the state not having its religion, and keeping the state and religion separate. Rather, the ultimate goal of secularism in India is to advance the feeling of fraternity amongst citizens.

Indians, with their distinct religions, castes, dialects, scripts and languages, do, owing to human nature, find it harder to simply attach themselves to the sole identity of ‘being Indian’. The conspicuous and glaring differences between them is a dividing factor, but the uniting factor of being Indian and **building the sense of fraternity** is what is sought to be achieved through efforts of the state. And this is the true need of secularism in India.

It is also ironic to note that UCC is also often considered an attack on the secular fabric of Indian society, with its effect on restricting application of principles emanating from respective religions. It is considered draconian, and a sharp attack on the fundamental right to freedom to profess one’s religion.

In context of UCC, the father of Indian constitution and India’s first Law Minister Dr. B.R. Ambedkar was of the view that UCC must have **voluntary application**, and not be coercive. This seems to be the perfect system to create a conducive atmosphere for UCC.

Researchers have also considered voluntary adoption of UCC as the way forward for India: *“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."²⁰

It is considered that though the non-implementation of the provisions contained in Article 44 amounts to grave failure of Indian democracy represents one side of the picture, then the other side claims that, logical probability appears to be that the code would cause dissatisfaction and disintegration than serve as a common umbrella to promote homogeneity and national solidarity'.²¹ Hence, to prevent the peril of creation of dissatisfaction and opposition or protests in the society having multi-fold impact on the society and the economy, having an option for adoption, left for individual choice would be appropriate. This would also test the willingness of the public to adopt the UCC.

Another ideal structure of family laws in India would be the **Goa Portuguese Civil code,1867** (hereinafter 'the code'), which the former Chief Justice of India, Hon'ble Justice S.A. Bobde (as he then was) called it a shining example of application of UCC in the country. The code has the same application for all religions; however it also allows for some deviations or particular applications for certain religions. The Code, though extensive, also includes some peculiar concepts, about which the majority of Indian population is unaware, like pre-nuptial agreements, joint ownership of assets by spouses, restriction on disposing more than 50 percent of property by will or 50 percent assets compulsorily to devolve to heirs in succession, bar on polygamy on Muslims married in Goa etc.

Public sentiment seems to be against the tide of UCC, because for the common man, it seems that adoption of UCC is equivalent to them losing their specific, religion-based practices, and being governed by the mechanical laws having no fundamental and reasonable foundation, and that it would create a further divide between their customary practices. The very bedrock of aversion in this context needs to be demystified by the state for **creating a public consensus** in its favour. The framework and its impact on the lives of citizens must be openly communicated and explained by audio-visual modes to ensure its acceptance by the citizens.

A roadblock in the way of UCC in India, though, is the **recognition of customs** in the Indian legal system. Customary practices are given due importance and weightage after they

²⁰ C.K. Mathew, Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach, THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY (Oct. 26,2019, 15:09 P.M.), <https://www.thehinducentre.com/publications/issue-brief/article29796731.ece>.

²¹ Sarla Mudgal v Union of India, AIR 1995 SC 153.

are duly proved to have been continuing in a family or community, which is quite difficult in itself. The only problem that remains is, on the implementation of UCC, what will be the status of such customs. If their status remains the same, it will continue to create hindrance in the functioning of the judiciary, which is one of the major causes for the implementation of UCC.

CONCLUSION

Concluding on the same note as at the inception of this paper, it is crucial that we continue to debate, to put our mind and energy on the idea which would help our nation progress in a sustainable direction. Our deliberations contribute to the creation of a common consciousness and awareness about an issue. Law, as we know cannot remain stagnant, it has to be dynamic to the needs of the society. And if it very validly seems that UCC will put an end to numerous lacunas in the legal regime in India, we as considerate members ought to put our minds onto the solution for its efficacious implementation. We must also step up and educate the citizens in any way possible, about such significant matters.

It is also necessary to keep in mind the wise words of Hon'ble Justice Abdul Nazeer, that efforts should be made to **Indianise the legal system**, since the European system of administration of justice has failed and choked the judicial structure. Lessons must be drawn from the ancient Indian jurists like Chanakya and Manu to implement principles that have withstood the test of time. An innovative solution must be drawn for the issue at hand, so the coming generation in the country witnesses a new India, with greater fraternity, unity, true equality in every sphere, and an overall enriched life. The UCC would indeed act as another spoke in the wheel of justice, providing greater support to it, contributing to the creation of stability of relations in Indian society.`

UNIFORM CIVIL CODE AND CONFLICT WITH PERSONAL LAWS

- SHIANJANY PRADHAN¹

“Our ability to reach unity in diversity will be the beauty and the test of our civilization”

- Mahatma Gandhi

ABSTRACT

India has always been a torchbearer of “unity in diversity”, in the world. Keeping in mind, our age-old traditions, the legal system of India has always upheld the concept of legal pluralism, which means every religion will have a place for its personal laws. Uniform civil code, envisaged in article 44 of the constitution of India, in the directive principles of the state policy, can be considered as foundation stone placed for the achievement of the uniform laws in the country. Since the inception of the constitution, it has been a topic that has been highly debated. It comes into a sharp contradiction with the concept of legal pluralism. Given the intricacies of the issue, the constituent assembly vested the responsibility in the upcoming generations, to deal with the issue of UCC, so for the time being it was placed in part 4 of the constitution, for being one of the guiding principles for the state to maintain the law and order. The implementation of UCC is not an easy task given the nature of secularism that has been followed in India. The debates that arose during the constituent assembly have been never settled and continue even today, the main concern being in which situation the unity and the harmony of the nation can be maintained. This article focuses on the conflict of the uniform civil code and the personal laws of the various religious communities, the debate between the fundamental rights and the directive principles as well as the implementation of the UCC.

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CONSTITUENT ASSEMBLY ON THE UCC

India takes pride in being multi-religious country. The constituent assembly took up the responsibility for drafting the constitution of the newly independent India. Like every other article or provision, the concept of UCC was also discussed, deliberated, and debated in the parliament. The constituent assembly was a democratic platform that stood high in the principle of listening to all the members and their views, to have the best possible results. During the committee stage, every sub-committee of the constituent assembly was vested with the respective task. Similarly, the sub-committee on the fundamental rights was given the task of coming up with a list of fundamental rights, that the committee members thought to be included in the category of fundamental rights. The members were asked to come up with drafts. This was also the time when in the assembly deliberations were going on regarding splitting the fundamental rights into two sections, one would be justiciable and the other would be non-justiciable. During these debates, certain members had given the view that relying on the history of our nation, they said, that something which has always threatened our nation was our own disunity and therefore, if there will be space given to the personal laws then the seeds of disunity will be sown again. According to them, the religious laws would have held back India from achieving true nationhood. Article 44 of our constitution replicates the draft Article 35 which proposes *that the state shall endeavor to secure a civil code for citizens of the country*. A proviso was proposed to be added which reads as “*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.*”² Dr. B.R Ambedkar who was also a staunch supporter of UCC stated:

“I quite realize their feelings in the matter, but I think they have read rather too much into article 35, which merely proposes that the State shall endeavor to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens.”

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An objection was raised mainly by the Muslim community in the assembly, that such a provision would be tyrannical for the communities and will be obstructing the fundamental

² Constituent Assembly Debates (Proceedings), Vol. VII, Tuesday Nov. 23, 1948

³ Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948.

rights of the people. Mr. K.M. Munshi responded, that it was not understood by him, how UCC can be tyrannical when all the communities will be governed by a uniform and secular set of laws. He said that even many Hindu laws are discriminatory, especially towards women, which is totally against the equality principle. He also specified, that religion can be limited to certain spheres of life. Few assembly members from the Muslim community proposed an amendment that the UCC should leave the personal laws aside. They said, that UCC will create a form of disharmony among the Muslim community. To this K.M. Munshi said, that not just the Muslim community but every community will be affected by it, but it is important, as there should be no need for personal laws when we have a common law. As per Hindu law, some parts of India follow the “Mitakshara” school of law, some follow the “Dayabhaga” and there are different schools of thoughts with different interpretations which further creates ambiguity. There should be a uniform mode of inheritance and succession. After this debate, it was reminded Dr. B.R. Ambedkar, that article 35, is optional, thus they will be putting it in the directive principles of state policy which will act as a guiding principle for the upcoming government to make sure that they have to achieve the uniformity of the laws, some-day, depending on how evolved as a society we become, to accept such changes.⁴

FUNDAMENTAL RIGHTS VIS-À-VIS FUNDAMENTAL DUTIES

Article 25 talks about the freedom of the religions to practice, profess, and propagate them. So, going with the constitutionalism, we as citizens of India have given ourselves the constitution which will in turn, like all our rights, will protect our right to religion, but the question always arises that whether enforcing the fundamental duty would abridge the fundamental right or vice-versa. It has been debated whether the fundamental rights will be preferred over the directive principles of state policy or the other way round. In the case of the *State of Madras v. Champakam Dorairajan*⁵ where the fixed quota was placed for Harijans, and the same was said to be done as per article 46, which is the part of DPSP, the court said that in no case, the DPSP can supersede the fundamental rights, the DPSP has a duty to conform to the fundamental rights and only then they can be enforceable, otherwise, they will be declared unconstitutional. Here, the courts raised the status of fundamental rights in comparison to the directive principles, but now, the status of directive principles will be

⁴ DR. B.R. AMBEDKAR, THE ANNIHILATION OF CAST: THE ANNOTATED EDITION, 11 (Navayana Publication, New Delhi, 2014)

⁵ State of Madras v. Champakam Dorairajan, 1951 SCR 525

questioned. Therefore, even after this judgment, it has always been a go to approach of the courts, that the fundamental rights and the directive principles have to be balanced with each other and become supplementary to each other, as the directive principles act as the guiding principles for the government, that makes it equally important, albeit they can't be enforced directly in the court of law as said in the case of *Chandra Bhavan boarding and lodging v state of Mysore*⁶. Lastly, in the case of *Minerva Mills v Union of India*⁷, the court said that a harmony should be there in between the fundamental rights and the directive principles of state policy. Similarly, the debate between the personal laws, which are granted a fundamental right as per article 25 and article 44 of the DPSP, can be solved by creating a balance between the two. Putting them on scales and weighing them in such as to neither of them gets curbed, always has been the motive of the courts. But, at times, where any discriminatory practice of religion is said to violate article 14, 19, and 21, then the courts have taken, step up to ensure that that the basic rights of human beings are not overshadowed and there the secular laws come into place which can be said to be extracts of the UCC.

INCIDENTS OF CONFLICT WITH PERSONAL LAWS

India has been a home to many faiths, religions, and communities. Apart from the criminal law, a major part of the civil law, concerned with the issues of marriage, divorce, inheritance, succession, guardianship, and adoption is governed by the personal laws of the communities. The sources of these personal laws are mostly the holy texts or the customs that have been practiced in a certain community, and we know if a custom has been practiced for a long period, without a question being raised and is not violating the law of the land in any case, then the same can be incorporated in the law. Despite, these criteria, there are certain laws of the communities which are felt to be discriminatory, towards a certain caste or a gender or a community. For example, practices like sati and abandonment of widows continued for a very long time, despite being discriminatory. Thus, to avoid these discrepancies, it is felt by a certain section of people that this is where UCC needs to be applied because it will be inherently discriminatory, where each community gets to rule by their code of conduct, rather than the common law. An approach that the courts have tried to take up, is trying to do away with the

⁶ Chandra Bhavan Boarding & Lodging, Bangalore v. the State of Mysore (1969) 3 SCC 84

⁷ Minerva Mills Ltd. v. Union of India, (1986) 4 SCC 222

discriminatory practices of the personal laws, which violate the basic rights as mentioned in articles 15, 14, 19, and 21.

When it comes to personal laws, the courts rather than asking the legislature to implement the UCC, have tried to carve out a balance, many times through section 125 of the CrPC, *which talks about a wife who is without any income, has no source of income and is neglected by her husband is entitled to maintenance, which includes a divorced wife who is not married.*⁸ Here, the religious laws of maintenance may come at loggerheads with secular law like section 125 CrPC. Since it's secular law, it will apply to people of all religions, this has quite often sparked controversy. In the case of *Mohd Ahmed v. Shah Bano*,⁹ where a 60-year-old woman was divorced by her husband, and he gave her maintenance only till the duration of the "Iddat period". The issue was raised by Shah Bano, that she has no one to maintain her and the maintenance duration should be increased by the courts so that she has the basic necessity to survive herself. The court issued that if after the iddat period the wife will be able to maintain herself then there is not a problem but if she can't then the same has to be provided by the husband and the principle of iddat as given by the Muslim law will be superseded by section 125 of the CrPC. Here the court said that the authority of the "Holy Quran" will be greater than that of Muslim personal law and further solidified that whenever there is a collision between CrPC and Personal Laws the former will prevail as both statutes cover different subject areas. Also, the court said that it has to be the duty of the legislature to make way for the uniform civil code which has remained a dead letter since the adoption of the constitution. In another case of *Pannalal Bansilal v. State of Andhra Pradesh*,¹⁰ where it was raised that since the constitution has guaranteed articles 25 and 26, article 15 should be declared unconstitutional. The case was concerned with the authority of the religious charitable institutions to manage their funds and administration, where an attempt was made by the government to unify the administration of all the charitable organizations. On this, the court had said that a uniform civil code at this state will be acting as a threat to the unification of the nation, as all the communities are existing at peace because their laws have been given a place in the country. *John Vallamattom v. Union of India*,¹¹ was a case where two Christian priests had challenged section 114 of the Indian Succession act, which they felt was discriminatory towards the Christians as it somehow imposed restrictions on the Christians in the matters of donation of

⁸ Code of Criminal Procedure, 1973, Section 125

⁹ Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556

¹⁰ Pannalal Bansilal Pitti v. State of A.P., (1996) 2 SCC 498

¹¹ John Vallamattom v. Union of India (2003) 6 SCC 611

the property, which was to be done for the religious and charitable purposes. The court agreed to the same and struck down section 114 of the Indian Succession Act, and said that it is sad that hitherto, UCC has not been put into place. In, *Commissioner of Police v Acharya Jadvisharanand Advutha*¹², a matter was raised that whether the “tandava” dance which was performed in public by the people of Anand Margi community, forms an essential part of their faith or not, to which the court had said that it is not so and to determine what forms an essential part of the religion, the difference between the integral laws of the religion and the secular laws has to be seen and owing to such confusions, the court again emphasized the need for UCC.

It is important to understand that at times, the conflict between two personal laws also takes place, which was found in the case of *Sarla Mudgal v. Union of India*,¹³ where the Validity of the second marriage of a Hindu was in question and the same was allowed under the Muslim law. The court said that in such cases where such a situation arises then the personal law which will be suiting the best of the interest of the parties will be chosen and, in such cases, again the courts say that UCC is the need of the hour. Finally, very recently in the case of *Shayara Bano v. Union of India*,¹⁴ it was held that the practice of triple talaq is discriminatory towards the women of a certain community and therefore it was criminalized, but there was a wide debate on the topic and the need for the criminalization of the same. The courts have tried to suggest amendments to the Hindu personal law. One such example is the Hindu Succession Amendment Act of 2005, where the court had declared that even the daughters of the coparceners will have the coparcenary rights in the joint property of the Hindu undivided family. This paved the way for equal property rights of the females in the natal home. The concept of Karta was for the eldest son of the family, given to the circumstances these days the courts realized that the females can also be recognized as the Karta, so with the amendment of 2005, since the daughters were recognized as the coparceners and only a coparcener can be a Karta so the daughter got the responsibility of the Karta of the family too which was further clarified in the 2020 case of *Vineetha Sharma v. Rakesh Sharma*.¹⁵ These cases present in front of us the different lenses of the courts. At times the courts have emphasized the need of the UCC or without making a change to the personal laws, referred the victim to secular law

¹² Acharya Jagdishwaranand Avadhuta v. Commr. of Police, (1983) 4 SCC 522

¹³ Sarla Mudgal v. Union of India, (1995) 3 SCC 635

¹⁴ Shayara Bano v. Union of India, (2017) 9 SCC 1

¹⁵ Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1

or they have completely agreed that personal laws are important for the maintenance of peace and tranquility in the country.

IMPLEMENTATION OF THE UCC

Implementing UCC can help the confusion regarding a variety of personal laws, to be done away with. As it was seen in the case of Sarla Mudgal where the doubt arose whether the second marriage of Hindus during the subsistence of their first marriage, be allowed or not as the same can be allowed in Islam. So, cases like this are bound to come up and create confusion. Also, as rightly pointed out by Mr. K.M Munshi, discriminatory practices of all kinds need to be done away with. They can't be allowed to exist if we are in the favor of articles 14 and 15 of the Indian constitution. Most of the religious practices are found to be discriminatory towards women. In the case of John Vallamtham, section 114 of the Indian succession act, which applies to all the faiths except to the people of Islam, there was a discriminatory practice that did not allow the Christians to donate money or property for religious or charitable purposes. This was struck down by the court as the same should not be allowed. If the same criminal law can apply to all the people, then why not a uniformity can be brought when it comes to the personal laws. On the other hand, given the diversity of the land, we are a part of, incorporating almost every faith into a secular law is a tedious task. Many times, they overlap, but many times their practices are widely different and at these junctures finding an integral part of all the personal laws will be very difficult. Religion is a very sensitive issue as well as a social construct closest to the people. Moreover, in India, we declare ourselves as a secular nation, but we have never followed the western models of secularism, which asked for a complete separation of the church and the state, which meant that the state will not have recognition for the religion of the people. As a result, the same can be continued only in the private spheres and the people will be subjected to a common set of laws in the state. In the Indian model of secularism, the state is not biased towards any one religion, but it also does not completely shun away the religions. For the state of India, every religion is equal in the eyes of law, due to which the existence of various personal laws comes into being. The state has to give respect to religious identities. Technically, the enforcement of UCC, won't bar the people from professing and propagating their religion as the only laws related to the sphere of family and marriage will be presented under an umbrella. UCC, won't stop anyone from going to their own place of worship. The implementation of UCC in a country like India is a huge

task given to the diversity that we accommodate but this diversity has always added to the beauty of the nation. Our unique model of secularism has helped us to grow as individuals as well as a nation.

CONCLUSION

Uniform civil code has always been one of those grey areas where debates have taken place as both standpoints are equally valid. Given the history, where the erstwhile east India company, found it comfortable to divide and rule us on the basis of religious differences, the fear of the leaders was true. *“Iyer J insists that cultural autonomy is not an absolute anathema to national unity. However, religious practices cannot be justified and upheld by sacrificing the human rights and human dignity.”*¹⁶ Religion cannot and should not be allowed to suffocate dignity and freedoms of the citizens. Even today, the presence of various personal laws is giving legitimacy to many discriminatory practices. As emphasized by K.M Munshi, there is no need for religious affairs to interfere with marriage, inheritance, and succession issues, but on the other hand, in a country as wide and diverse as well as democratic as ours, if people from all the communities and religions will not be given acceptance and their values and ideas will not be embraced then disunity can again creep up. Every time success of other countries where uniform laws are applicable is cited but it is equally important to study the society of which we are a part. To solve the issue the legislature can take into consideration all the stakeholders and the views of the common people can also be invited to assess what can be the solution to the issue. The 270th law commission of India, after studying all the aspects has indicated that even if a talk has to be started on the UCC then it will be concerned with the family laws, but as per the law commission at the very present moment, UCC is not needed as well as it will not be desirable. The law commission would have surely investigated and deliberated on the issue and concluded as to why UCC will not be suited for the social structure of the Indian society. Therefore, officially the debate is put at a halt for now, but there is always a scope for discussion. Maybe, society is not ready for the UCC right now, but it can be in the future. This readiness is nothing but the idea of people being comfortable by being governed by a common law about marriage and family issues, which is yet a far-fetched idea given to the ascribed status of religion, with which a person is born and governed since they are born.

¹⁶ V. R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act, 32* (Eastern Book Company, Lucknow, 1987)

Like every coin has two sides, even UCC will give way to positive and negative consequences, but it has to be weighed, analyzed and decided how the positive outweighs the negative. And as it has been said by Heller Keller, “*Alone we can do so little, together we can do so much*”

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UCC AND GENDER JUSTICE: A BITTERSWEET HOPE

-Kriti Kabra¹

ABSTARCT

The Uniform Civil Code or the UCC is mentioned in Article 44 and is often espoused as the saviour of women's rights and harbinger of gender justice within personal laws in India. By definition, it is a code that unites the various personal laws and make them uniformly applicable to all. It remains a hot topic for academicians and legal enthusiasts to study. Even politics is not spared from this celebrity debate, where it makes regular appearances - whether it may in the form of manifestos during election campaigns or as attacks from the opposition. And one of the main pushes for this proposal to become a reality is the hope to attain a greater level of gender justice than what we have today.

Personal laws are famously home to inequalities in their treatment of different genders. Irrespective of how these issues have evolved, problems persist and continue to harm the very people they govern. From marriage to adoption to succession and all areas in between, there exists an urgent need of the hour that needs to be addressed with concrete, realistic legislation and not a mere fantasy.

This article will deep-dive into what exactly the UCC is within the context of gender justice- its history, the current legal view that courts uphold along with the good and the bad. Whether the UCC will be able to do justice to this problem and remedy it or will fall short and remain a legend within India is what we shall see ahead.

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INTRODUCTION

Gender justice, though cemented in the constitution, unfortunately does not carry forward into reality. The Global Gender Gap Report 2021 placed India at 140 out of 156 countries. Even if the 2021 report was to be considered a special case due to the pandemic, looking back at the 2020 report (112th out of 153 countries) and the ones before that, they reveal better but still disappointing results. Though the scope of the report is limited to 4 criteria – economic participation, education, health and nutrition and political participation, they still indicate one key finding – that the state of gender equality in India is in dire need of help. The government launches various schemes that supposedly target these problems, but sadly they do not reach the grassroot levels, where the changes really matter. Even if they manage to do so, the results are not enough.

What complicates many schemes and laws that could be implemented to reform many areas like land inheritance, divorce, marriage, adoption etc is religion. Since many topics like these are governed by the personal laws specific to different religions, each topic needs specialised attention catered to the religion in order to bring about change. In order to combat this, the idea of a Uniform Civil Code was formulated.

WHAT IS THE UCC AND HOW CAN IT HELP IN GENDER EQUALITY?

The Uniform Civil Code (hereinafter “UCC”) is a code that has a uniform set of laws that are applicable to each individual, irrespective of religion or ethnic background. This concept was recognised by the Constituent Assembly. Debates reveal that there was no clear conclusion on how the UCC would pan out and was hence left to future generations to decide. Due to this confusion, it was placed within the Directive Principles of State Policy as Article 44 instead of Fundamental Rights, letting it be only a guiding principle at the time instead of being a legally enforceable right that the people have.

Women have traditionally been a disadvantaged group in society. Gender injustice has, and still is a major problem in our society. Centuries of patriarchy and colonialism has reduced the status of women to be less than that of men. In their eyes, women are similar to mere objects that can be controlled, who’s only identity is in relation to the men in their lives. They are passed around from one man to another – from the father to the husband to the son. This has

far-reaching consequences in economic, social, educational and political inequalities as well. Due to this, their rights go unenforced and sometimes even unrecognised. Women are entitled to the right to equality under Article 14 just like men are, yet their rights often go unutilised.

As per Article 25 of the Indian Constitution, every individual in India is free to profess, practice and propagate their religion. It is a celebrated provision that gives people a choice which is a fundamental principle of democracy. While diversity in society should be celebrated, it should not negatively affect disadvantaged groups in the process. Right to religious freedom is important, but it is also crucial to note that many ‘social evils’ such as dowry, child marriage, triple talaq, sati etc., are propagated in the name of religious customs and permeate society. Oftentimes they are merely a means to control and oppress women. Therefore, there needs to be a segregation between what is an essential practice to a particular religion and what is a mere custom that has nothing to do with religion in order to remove practices that harm people rather than help. The judiciary has been much more proactive in making this distinction in recent years, and as a result, giving birth to several landmark judgements in the process.

Gender justice is not limited to women. It also includes other non-binary genders such as transgenders and intersex people. These communities, frankly speaking, have minimal presence in the Indian Constitution. Their absence is quite noticeable, especially personal laws. The judiciary is taking steps to improve this. The Supreme Court paved the way to “third identity” or transgender recognition and upheld their fundamental rights as per Article 14 and 214. The Madras High Court declared that the term ‘bride’ as mentioned under Section 5 of the Hindu Marriage Act also included transwomen as well⁵. This was the first case in India that affirmed the inclusion of other gender identities who identify as women to become ‘brides.’ But as commendable as these developments are, judicial improvement does not substitute legislative disregard for this, and the legislature needs to step up their game in order to contribute.

General discussions around the UCC propose that these issues would be addressed. Apart from this, there are also other benefits that it could provide such as easier resolution of disputes, removal of religion specific laws, easier enforcement and overall convenience. It would be a boon for everyone. Rather than having to sift through various personal laws, the judiciary would only have to look at one set of laws irrespective of the parties involved, making the work of the judiciary much easier. The executive would have an easier time in enforcing the law and the people would be able to comprehend it much better. Also, several personal laws

have contradicting laws. Having a single codified form would reduce this issue since clashes would be weeded out during the consolidating, drafting, and reviewing stage.

BITTER TRUTHS REGARDING THE UCC

Unfortunately, despite how the UCC seems to be an ideal solution to a number of problems regarding personal laws, it comes with its own hurdles that it will have to conquer before it will be able to make a meaningful impact on the gender inequality within society. These hurdles present issues that may act as deterrents in the UCC's creation and implementation.

No one knows what the UCC looks like. Article 44 states that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." But this statement doesn't tell us anything. It is merely an idealistic project that knows what it has to do but without of clear path of how to get there. Even the constituent assembly wasn't aware of what this would entail. Some believed that it would run alongside personal laws and others thought that it would replace them entirely. In the end, it was left to the future generations to take up this ambitious project. UCC advocates argue that gender justice is a goal of the UCC. But where is this mentioned? The reality is that we don't know. We don't know to what extent women, non-binary genders and sexual minorities will be included and be given the rights they strive to attain in marriage, adoption, divorce, inheritance etc. Several questions remain unanswered.

Even if we were to put this idea into action, drafting and implementing the UCC is a herculean task. Especially in a country like India, which is so diverse in its culture and history, to the point that even each religion has different laws for different sets of people. A prime example of this is the 6th Schedule. It makes exceptions for people belonging to the states of Assam, Meghalaya, Tripura and Mizoram within the realm of family and personal laws. The law-making power for these subjects' rests with the regional and district council rather than the Parliament. Articles 371A and Article 371G expressly exclude Nagaland and Mizoram from the purview of Parliamentary law on customary practices, unless their legislatures approve of the same. On the topic of lack of uniformity within major religions in the country, a notable example is the Hindu Code. It was created with the intention of applying equally to all Hindus

but the intention was unable to stand the test of time.² Marriage is reliant on customs of that particular community,³ inheritance rights vary from region to region, who can be adopted is also dependent on customs and usage.⁴ It gives communities the freedom to conduct their ceremonies and carry on their cultural practices without trying to interfere and regulate every aspect. This has allowed communities to live in peace as their traditions are respected and they can continue to practice them as per their choice. Lawmakers face a difficult challenge in codifying such a law that would be able to accommodate this level of diversity in a manner that would be agreeable or acceptable to various communities.

Most of the lawmakers in the Parliament are men. Though it would be incorrect to say that men cannot make laws for women, but such laws do need female input from both Houses. Only 14% of the Lok Sabha consists of women⁵ and similar numbers are seen in the Rajya Sabha as well. Even though the number of women in the Parliament are at an all-time high and will continue to increase, it might not be fast enough. Another way to obtain this input could be through parliamentary committees. However, recent times have seen that parliamentary committees are sometimes not even formulated, preferring speed over efficiency. This breakdown of consultation channels leads to ineffective legislations⁶. There is also no guarantee that the committee for the UCC will even include women or other genders in adequate numbers or that the advice given by these committees will be taken into consideration during drafting. This shows dismal prospects for diversity in involvement from different genders in bill formulation. Gender equality is linked to literacy. India's rate of literacy is increasing but its effects will only be seen in a few decades, at the earliest. Without literacy, irrespective of what the law says, people will continue to follow their own beliefs and ideologies, no matter how regressive they are. Old practices will continue without regard for what is right or wrong. People turn to religion, though not inherently a bad thing, but when socially regressive practices are pedalled in the name of religion then UCC won't do much,

² *Ambedkar And The Uniform Civil Code*, OUTLOOK INDIA, (last visited Feb 25, 2022), <https://www.outlookindia.com/website/story/ambedkar-and-the-uniform-civil-code/221068>.

³ Hindu Marriage Act, 1955, Section 7, Acts of Parliament, 1955.

⁴ Hindu Succession Act, 1956, Section 17, Acts of Parliament, 1956.

⁵ Sruthi Radhakrishnan, *New Lok Sabha has highest number of women MPs*, THE HINDU (27th May, 2019), <https://www.thehindu.com/news/national/new-lok-sabha-has-highest-number-of-women-mps/article27260506.ece>.

⁶ Maansi Verma, *Why the growing lack of consultation in law-making is damaging democracy*, THE IE (10th June, 2021), <https://indianexpress.com/article/opinion/why-the-growing-lack-of-consultation-in-law-making-is-damaging-democracy-7352004/>.

especially with lack of enforcement at the grassroots level. Education has to start from the ground up.

SO, WHAT'S NEXT?

The answer to this question has to be one that manages to maintain the delicate balance between right to religious freedom and right to equality. The best course of action would be to rectify the problems within the personal laws themselves without trying to create an entirely new legislation that would eclipse all these laws. This would consist of taking gradual steps to bringing equality within communities and genders of each religion, rather than trying to tackle the problem head on and address one gender versus the other as a whole. Maintaining a difference between religions is not inherently a bad thing. It indicates tolerance and preserves the diversity in the country's personal laws. It is not suggestive of discrimination, rather a robust democracy.

Over time, the UCC can be drafted by taking guidance from existing legislation. Society is generally a cumulative effect of the decades before that. It is heavily influenced by its thinking and mindset of their nearby ancestors and, as a result, is hesitant to change. Change is piecemeal. By slowly ridding the problems within the personal laws today and making efforts to improve the conditions of the disadvantaged groups, when the UCC is implemented, people will be more accommodating as compared to making a change cold turkey. Lawmakers will have to play the long game. The immediate effect may not be felt but over time it will prove to be beneficial to women as well as other genders. Gradual change will benefit the future generations.

At the end of the day, gender equality has to come from within society. The UCC can definitely make a difference but it merely the first step. Only when we start to see men, women and all other genders as equals, can we do something. Because no matter what the law says, societal and cultural views matter just as much and until they change, improvement will be a distant dream.

CONCLUSION

To quote the words of the court - *“It is a matter of regret that Article 44 has remained a dead letter... Common civil code will help the cause of national integration by removing desperate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is for the State, which is charged with the duty of securing a uniform civil code and it has legislative competence to do so.”*

The UCC has been up in the air for far too long. It repeatedly comes up for discussion, but progress is slow. Baby steps are being taken through court judgements and new laws that grant women and other genders the rights they deserve such as triple talaq judgement, daughter’s coparcener rights judgement or the transgender bill but the end goal seems far away. We must not lose hope and continue to work towards striving for equality in the community. Though changing personal laws and the UCC will not be able to cure all the problems, it will take care of a major chunk of the issues that torment our society and hence, the solution should not be delayed any longer.

THE UNIFORM CIVIL CODE - BEYOND SECULARISM, FOR HUMAN RIGHTS AND GENDER JUSTICE

-Diya Banerjee¹

ABSTRACT

The Preamble of the Indian Constitution enshrines India's Secular soul and there is no denying that in the country, one is free to practice their own religion, whichever manner it may be in, from clothes to traditions. India's diversity is because every religion, culture and custom are given the equal status for propagation and practice, protected by the law from discrimination. Neither does the State discriminate against any religion nor does it have an established religion that it endorses. To ensure that minorities are at par with the majority in terms of health, education and employment opportunities, certain affirmative actions have also been taken by the State, Reservation being one of them. Furthermore, to uphold the individuality of customs of the major religions India houses, the Family Law jurisprudence paves way for customary practices regarding marriage and its dissolution, inheritance, maintenance, etc., thereby earning the title of Personal Laws since they are personal to each religion. However, it has to be noted that traditions find their roots in the ancient belief system that more often than not put women subservient to their male counterparts and have a warped understanding of dharma, sin, etc. Be it a woman's share in property or rights after marriage, customary practices subjected them to accept inequality and injustice. Indian Family Law jurisprudence relies on customary practices to uphold the sanctity and validity of the personal matters, but certain practices emerged not because of the religious texts but from the culture propagated. Although interchangeable, there does exist a difference between the two which makes all the difference- from exploitation of a certain section of the society to guaranteed privileges of the other.

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In this paper, the author deliberates upon the debate surrounding the Uniform Civil Code from the tangents of Human Rights, Fundamental and Constitutional rights and Gender Justice. Case studies on the State of Goa and key countries have also been discussed to comprehend the implications enactment of the Code may hold for India. The author has relied upon secondary sources like Government statistics to experiments, surveys and reports undertaken by various legitimate organizations as well as relevant legal precedents given by the Indian courts. At the end of the paper, the reader shall have a comprehensive idea of the overall debate surrounding the sensitive topic the author has opined upon.

INTRODUCTION

India has a diverse set of Personal laws that determine key aspects of an individual's rights and liabilities, from the body to property. Since Personal laws are associated with Family law jurisprudence, it is inevitable that the rules governing men and women would also vary slightly owing to the different assumptions of gender roles. Women have historically been subjected to discrimination owing to the cultural beliefs and value systems that stem from religious understandings. The pertinent question to be raised here is whether it is the Religion that preaches differential treatment or the Culture? This can be understood by the case *Re B and G (Children)*² wherein the Judge Sir James Munby laid down the distinction between religious practices and cultural practices- he noted in this case that the "Female Genital Mutilation (FGM) has no basis in the religion whereas male circumcision is performed for religious reasons". Religious practices deserve to be protected since they have a basis in the religion one follows, however, cultural practices derive their origin from the straightjacket application of the intended religious practice and thus, do not command the 'divinity' the original practice holds. In most cases, religious practices that are biased are practiced for moral, ethical and physical policing of women be it their body, identity and/or intellectual autonomy. The crux of this typical issue is that such religious practices essentially do not align with the religious ideology it derives its authority from- on one hand, the religion preaches equality while the practices promote discrimination.

Secularism in India ensures that each community is able to uphold its sanctity through established customary practices but with higher levels of literacy and awareness, people have started to question the validity and constitutionality of biased practices that have become tools

² Re B and G (Children) (No. 2), [2015] EWFC 3.

to deprive one of equality and equity, in dignity as well as physically. Personal laws have come in conflict with Central and national legislations due to their apparent overriding effect on the applicability of legislations that are intended to be unbiased irrespective of one's caste or religion owing to the unwarranted need to uphold Secularism at every corner. The need for a Uniform Civil Code (UCC) was first felt after the landmark case of *Mohd. Ahmed Khan v. Shah Bano Begum*³ which brought out the bigotry prevailing in the Society. With the most recent case being of the Hijab Ban in Karnataka, that has been, the cry for speedy implementation of UCC has been felt all across.

THE RATIONALE BEHIND UNIFORM CIVIL CODE

Diversity in a country paints a beautiful picture capturing the intersectional heterogeneity that exists in the natural state, however, the probability of prevalence of a peaceful heterogeneity is threatened by the lack of consensus among the many factions living under its umbrella in terms of the defined laws and norms to be followed. In the words of Justice KS Hegde, "*Religion oriented personal laws were a concept of medieval times.....a society which is compartmentalised by its laws can hardly become a homogeneous unit...*". India has taken pride in it being the custodian of some of the oldest religions in the world but on the offside, human rights and gender justice activists have adamantly insisted that religion is one of the most stubborn policing methods the State has remained silent on. Ironically, it can be inferred from Part II of the Constitution of India (hereinafter, "the Constitution") that our lawmakers envisaged a 'singular' society with singular citizenship but failed to deliver one single set of civil laws that would govern the Family Law jurisprudence⁴. Article 44 of the Constitution⁵ states that "*the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*" and while 'shall' is not to substitute 'may', the Article's scope is limited since Part IV of the Constitution⁶ is not enforceable by a court, nevertheless, it is a duty on the part of the State to ensure that the principles under this Part is included in the laws formulated.

Apart from the obvious reason that Personal Laws violate human rights, it is also the brainchild of the British Raj that witnessed the advent of communal politics- their

³ Mohd. Ahmed Khan v. Shah Bano Begum, 1985 (2) SCC 566.

⁴ INDIA CONST. art. 9.

⁵ INDIA CONST. art. 44.

⁶ INDIA CONST. Part IV.

administrative policy of ‘Divide and Rule’ aimed to divide the communities not only socially but also legally. Since then, it has been normalised that Hindus are to be governed by Hindu law, Muslims by Muslim law, and so on and so forth. It is inevitable that a country that has witnessed such division for nearly two centuries would find it cumbersome to reverse this rule that had acclimatised itself in the society. There is no denying that each community was distinct from the other as was apparent from their culture, however, by legalising the differences by way of laws any aspect of unity in their family laws was thrown out the window. By bringing the religious lens to adjudicate interpersonal relationships established through marriage, be it inheritance, succession or even adoption, it was indirectly decided that human interactions, under the influence of a particular religion, change. In this manner, Communalism was already an existing issue hindering the true objective of Constitutionalism- a uniform and harmonised democratic system where the interests of each sub-group were catered to through a comprehensive legal system.

INSIGHT INTO THE DIMENSIONS OF THE CONFLICT

The broad dimensions of the issue revolving around the implementation of UCC are-

- The constitutional validity of the UCC in light of Part IV of the Constitution
- Conflict with the Secularist stance of Indian Personal laws in light of Freedom of Religion
- Both these issues against the gender discrimination faced by women as opposed to other groups

The above mentioned two issues are obvious as can be inferred from the prior brief discussion as well as the daily updates one gets from news and media sources. However, probably the most significant challenge that has to be tackled before venturing into the legal facet of this debate is the ground reality surrounding the unawareness, rather misinformation about UCC.

The conflict regarding the UCC revolves around the inherent ambiguity in the Constitution since arguments for and against UCC stem from it; apart from Article 14⁷ and Article 21⁸, Article 25⁹ states that every person is guaranteed the freedom to profess and

⁷ INDIA CONST. art. 14.

⁸ INDIA CONST. art. 21.

⁹ INDIA CONST. art. 25.

propagate religion. However, the proviso to the law is that it does not stop the State from regulating or restricting such freedom in order to secure economic, financial, political or secular activities on grounds of public order or morality. Women have historically fallen prey to gender discrimination and the same continues to be the picture even today where according to a report published by the Pew Research Center, women in majority-male workplaces report higher rates of gender discrimination¹⁰. While this is on the workplace front, one can only imagine the prejudice pertaining to the four walls of a house- before a recent judgement¹¹ by the Supreme Court of India, the rights of daughters over their father's property (self-acquired or otherwise) was restricted. This judgement empowered daughters and wives over inheritance rights under the Hindu Succession Act, 1956¹². Certainly, this judgment is bound to encourage further litigation on cases where the daughters were denied their share, this may have been avoided had there been a uniformity in laws that would stand the test of time and social change.

There is a prevalent belief among the common people that implementation of UCC is equal to losing their religious freedom but the proposed law is only going to unite the differences that lie in different religious laws on the same subject matter, for example, the quantum of shares Hindu and Muslim daughters or wives have in their father's or husband's property is different and subject to certain conditions. The concern here is that the shares women of one community would hold over the property compared to the son's would be lesser compared to a different community. Therefore, not only women as a whole are subjected to discriminatory laws, they are further divided into religious factions. Similarly, maintenance allowance would be different for different communities. The fact that lack of uniformity in laws is regressive in nature was witnessed when *Triple Talaq* was criminalised¹³ under the Muslim Women (Protection of Rights on Marriage) Act, 2019¹⁴ citing that the practice falls within the purview of Section 498A of the Indian Penal Code, 1860¹⁵ that defines what amounts to cruelty and the punishment thereof. In the past also, many a times Courts have stated that the ambiguity is because there is no scope for streamlining the many laws that exist within the Family law jurisprudence.

¹⁰ Kim Parker, *Women in majority-male workplaces report higher rates of gender discrimination*, Pew Research Center (2017).

¹¹ *Arunachala Gounder (Dead) by Lrs. v. Ponnusamy and Ors.*, Civil Appeal No. 6659 of 2011 (decided on Jan. 20th 2022).

¹² The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956 (India).

¹³ *Shayara Bano v. Union of India*, AIR 2017 9 SCC 1 (SC).

¹⁴ The Muslim Women (Protection of Rights on Marriage) Act, 2019, No. 20, Acts of Parliament, 2019 (India).

¹⁵ The Indian Penal Code, 1860, § 498A, No. 45 of 1860.

As stated above, Personal laws were a creation of the British rule in India. During the ancient period, there were no personal laws because the land was inhabited and ruled by Hindu rulers who followed the divine precedents laid down in Hindu holy scriptures and texts; during the Mughal rule, the only shift was felt when Muslims came to be ruled under the Muslim law and non-Muslims continuing under their own laws. Criminal laws were unbiased since that was considered outside the governing factors of Family law components. It was only during the British rule that the Divide and Rule/Conquer policy dominated most of the rules, regulations and orders passed out. National integration may not be possible only through regularising personal laws but it certainly is a plausible method but the ‘vote politics’ is what keeps the State from intervening in personal laws. Nonetheless, the answer to the question of whether UCC is a certain means to achieve national or collective integration can be comprehended by studying the practicality of Goa’s UCC policies-

India had retained the Portuguese Civil Code of 1867¹⁶ that was applicable on every resident of the State irrespective of the religion they followed. Subsequently, it was mandatory for marriages to be registered with a provision for a prenuptial agreement. Inheritance laws were also different since there exists no distinction between a male or female heir. In light of practices particular to a certain community, polygamy is also prohibited. On the other hand, there do exist certain loopholes in the Goa Civil Code like permitting bigamy for Hindu men in case the first wife fails to deliver a child (primary clause) or a son (secondary clause). Adoption is only available for Hindus whereas the Church is given authority to solemnise as well as dissolve marriages¹⁷.

The Goa Civil Code¹⁸ is not without its flaws but through the feedback received upon its implementation, it would be easier for the Centre to formulate a better equipped law that does not empower as well as degrade the dignity of women. While the entire argument revolving around the speedy implementation of UCC is feministic in nature, denying equality to women by refusing attempts to disassociate their dignity from orthodox, age-old religious and cultural beliefs to transition into the liberal beliefs where human worth is weighed by their gender or sexual orientation. Human Rights violation need not be as tangible and visible as the current Russia-Ukraine war has presented. Continued regressive discriminatory policies inflict

¹⁶ The Portuguese Civil Code of 1867, Charter of Law of 1st of July 1867.

¹⁷ Dibakar Dutta, *BJP vows to implement UCC in Uttarakhand if it wins Assembly elections. Here is how Goa is running its UCC programme*, OpIndia (2022).

¹⁸ The Goan Civil Code is the popular referral name for the Portuguese Civil Code of 1867 that has been retained by virtue of Section 5(1) of the Goa, Daman and Diu Administration Act, 1962.

mental, emotional and psychological trauma that can be inter-generational. Equality, fairness and justice are intricate principles of Human Rights that cannot be alienated from any individual, irrespective of their age, gender or caste. The shape of Secularism as we see it today is not only pigeonholed, built on orthodox ideas of order and discipline, they blatantly disregard the will, desires and in certain circumstances, the consent of the women. The personal laws are fragmented and promote contradictory ideologies that would be structurally codified under one single head¹⁹, further helping in the national integration by bridging such gaps existing in the legal system.

Many argue that UCC is not a needed measure to nationally integrate the country's laws but fail to acknowledge that had the Indian Penal Code, 1860²⁰ been a fragmented law with conflicting interpretations, even there the State would be urged to create a unified law since it would essentially smoothen the criminal proceedings necessary to validate chargesheet filing and subsequent trial proceedings. No law is alien from any significant statute since the primary legislations were stipulated to cater to most of the offences and their lawful counteracts, therefore, if UCC is ultimately drawn, it would be easier and efficient to correlate it with relevant provisions of statutes like the Indian Penal Code without having to go back and forth just to ensure that there exist no discrepancy in the interpretation of the personal law. Efficient interpretation of the law with respect to the just punishment would ensure justice is served on time to the victim and in case of misuse as well, the proposed law would provide precise remedies available to the aggrieved party.

Howsoever it may be put, it has to be clarified by the media that Uniform Civil Code is not a state mechanism to subjugate the interests of the minorities, instead it is to bring them at par with those in dominant positions and form the majority. Secularism in its true sense means that the State shall have no official religion neither shall it endorse one to that effect; if UCC is executed, it would further not allow the State to cherry-pick any particular religion as right or the other as wrong. If everything is brought under the same jurisdiction, the chances of misuse, abuse and preferential treatment would be furthermore tedious for no prima facie distinction shall exist to set one apart from other, although the origin of the law may be from different schools of thought.

¹⁹ Sarla Mudgal v. Union of India, AIR 1995 SC 1531.

²⁰ The Indian Penal Code, 1860, No. 45 of 1860.

CONCLUSION

The implementation of Uniform Civil Code is a possibility that is in the far future since the alleged Right-Wing stance of the current ruling party, the Bharatiya Janata Party (BJP), has continued to provoke strong reactions from minority communities (religion and class wise). What has to be understood is that the objective behind UCC is not to hijack any particular community's religious rights or freedom, rather it is to equalise the legal aspect of religious practices. It should be self-explanatory that since the law is titled 'Uniform Civil Code', it will simply compile the enforceability of the contractual obligations relationships falling under the Family Law statutes mandate. In the case of *Minerva Hills v. Union of India*,²¹ the Supreme Court held that there has to be harmony between the Fundamental Rights and Directive Principles of State Policy. Considering the discriminatory nature of Personal laws, it violates the aggrieved party's rights guaranteed under Article 19²² and Article 21; implementing UCC would essentially restore the inequity thus caused. The real-time case study of the UCC being followed in the state of Goa demonstrates that it certainly is not a tool to deprive any particular community, nevertheless, even Goa's UCC is not uniform as it is portrayed. On the basis of this as a live case study the Centre can formulate a better, holistic approach to cull out a remedy that would advance the cause of gender justice and freedom of religion, speech and expression.

²¹ *Minerva Hills v. Union of India*, AIR 1980 SC 1789.

²² The Constitution of India, 1950, art. 19.

UNIFORM CIVIL CODE: A CHALLENGE TO THE RIGHT TO RELIGION OR A STEP TOWARDS CIVIL EQUALITY?

-Gurleen Kaur¹

ABSTRACT

The Constitution in its order guarantees to carry out Uniform Civil Code and it is significant to advance gender equity for the sake of common fairness. To advance a common philosophy implementing a Uniform Common Code would be a fortifying instrument. The Constitution governs all religions and it tends to be found in its impartiality that it has no religion of its own. And Right to Religion which is enshrined in Set 25 to 28 in Major Fundamental Freedoms of Indian Constitution won't be encroached upon UCC's execution. As proviso (2) of Article 25 itself gives an exemption that State cannot be prevented to bring any changes which are associated with religious practices by its current or future actions. Indeed, it is a step towards common equity and the rise can be found in a progression of occasions, for example, Triple Talaq Act and legal executives and judiciary in a number of cases reminds lawmaking body about its capability to bring this thought of uniform common code into a presence. The Supreme Court in the Mohd. Ahmed Khan vs Shah Bano Begum and Ors. 1985 AIR 945, 1985 SCR (3) 844 referred to equity to everything is as a definitely more palatable method of administering equity than equity from one case to another.

PONDERED TAKE ON UNIFORM CIVIL CODE

The Uniform Civil Code is a law controlling the normal matters of the occupants in the country relating to issues like marriage, separation, gathering, heritage, legacy, movement to property, etc. The Uniform Civil Code, at whatever point approved, will deal with the singular laws of all severe organizations relating to the above issues which are through and through standard in the character of the Indian state, and to further develop a society of fortitude among

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inhabitants by providing them with singular law which will join the fundamental potential gains of humanism and civil equality in the whole country.²

Right off the bat, it would encroach opportunity and Right of Religion cherished in Article 25, assured proviso (2) of Article 25 gives a special case for the impact that any current or future social government assistance and change will not be influenced by the activity of this Article and State is competent body to do so.³

PROGRESSION OF THE THOUGHT

A progression of occasions occurred in India prior and then independence which cultivated the pertinence of the Uniform Civil Code. During British India, a series of acts were passed by them for the improvement of Hindu Women,⁴ for example, The Hindu Widow Remarriage Act, 1856⁵, Married Women's Property Act 1874⁶, Hindu Inheritance (Removal of disabilities) Act of 1928⁷ which was Hindu Legacy (expulsion of handicaps) demonstration, Hindu Women's right to Property Act, 1937⁸.

Thus, the tide being developed in private, personal laws and the passing of a few enactments in this setting required a powerful reaction from the public authority's side. In this way, thereafter a board of BN Rau was established in the time of 1941 which analyzed the need or significance of normal Hindu Laws to be created. The suggestions were to such an extent that it would give equivalent freedoms to women as per changing society and current patterns. The point was to change the individual arrangement of Hindu Laws.⁹

At that point, the Hindu Code Bill was resubmitted in 1952 after it was once passed. The arrangements of the Hindu Code Bill were passed in the isolated arrangement of parts, for example, Hindu Marriage Bill in May 1956, Hindu Progression Act, 1956, Hindu Minorities and Guardianship Charge of 1956, Adoption and Maintenance which were a supporting Bill of Dec 1956.¹⁰

² Shabbeer Ahmed and Shabeer Ahmed, Uniform Civil Code (Article 44 of the Constitution) A Dead Letter, 67, No. 3 IJPS 545, 546-547 (2006).

³ S. P. Sathe, Uniform Civil Code: Implications of Supreme Court Intervention, 30, No. 35 EPW 2165, 2165-2166 (1995), *ibid* at 547.

⁴ G. R. Rajagopaul, The Story of The Hindu Code, 17, No. 4 JILI 537, 538-541, (1975).

⁵ The Hindu Widow Remarriage Act, 1856, Acts of Parliament, 1856 (India).

⁶ Married Women's Property Act, 1874, Acts of Parliament, 1874 (India).

⁷ Hindu Inheritance (Removal of disabilities) Act, 1928, Acts of Parliament, 1928 (India).

⁸ Hindu Women's right to Property Act, 1937, Acts of Parliament, 1937 (India).

⁹ John A. Banningan, the Hindu Code Bill, 21, No. 17 Far East. Surv.173, 174-175 (1952).

¹⁰ *Ibid* at 174.

Fundamentalists contended against the Hindu Code that it is only about community-based measure rather a Uniform Common Code ought to be executed to lead towards genuine mainstream of thoughts within the country.¹¹

As indicated by Nehru, Uniform Civil Code was an indispensable advance and assumed a significant part to ensure the actual secularism for the country yet he would not like to constrain any local area to prepare to embrace any such thought strongly. Yet, it was set up that the Parliament would be ready to carry out the Uniform Common Code in a later stage Thus, they added this thought under article 44 of the constitution that "the state will attempt to authorize a Uniform Civil Code for residents all through the country."¹²

It provides that the State will endeavour to approve a Uniform Common Code for inhabitants all through the country but those contradictory thoughts were gone against by numerous individuals to the advisory group committees while preparing a draft for the constitution, for example, Rajkumari Amrit Kaur and Hansa Mehta.¹³

A short time after a lot of endeavors and measures were seen towards the fruitful execution of the Uniform Common Code. One can be a special marriage act under which any resident of India is secured to marry past their religion and it was a step towards the advancement of strict uniformity under the ambit of common equity.

Also, on account of Shah Bano, 1985¹⁴, Supreme Court prescribed to order the left ago rule of Uniform Common Code. It is stayed as a dead letter yet which is a pivotal difference to be viewed.¹⁵ Assuming Uniform Civil Code will be executed, strict struggles and a ton of incongruities will be settled.¹⁶

The state has the authoritative position to force it yet at the same time it isn't¹⁷. And even Nehru and other Board members during the outlining of the Constitution recommended putting the Uniform Civil Code in directive so that parliament would be ready to outline or uphold it any time in future when it appears to be ideal.¹⁸ And the word 'secular' was embedded in the Constitution by 42nd amendment act 1976 expressing that state is impartial and has no

¹¹ Id at 175.

¹² Supra note 1 at 547.

¹³ Reversing the Option: Civil Codes and Personal Laws, 31, No. 20 EPW 1180, 1180-1181, (1996).

¹⁴ Mohd. Ahmed Khan v Shah Bano Begum and Ors, AIR 1985 SCR (3) 844.

¹⁵ D. Sura Reddy, Article 44: A Dead Letter?, 38, No. 3 JILI 405, 405-409, (1996).

¹⁶ Ibid at 409.

¹⁷ S. P. Sathe, Uniform Civil Code: Implications of Supreme Court Intervention, 30, No. 35 EPW 2165, 2165-2166 (1995).

¹⁸ Supra note 1.

religion and to make India a really impressive and secular mainstream state. Parliament is able and competent to enforce this code and it can help strengthen the principle that Constitution is over all religions.¹⁹ The mainstream suggests the supremacy of common laws and a system where religion, race, position, language, etc would be subjected to the character of citizenship.²⁰

Furthermore, it is about time to carry out this philosophy and the ideological principle of Constitution makers. In the Shah Bano Case, the critical perception of the apex court was—equity to everything is as an undeniably better method of apportioning equity than equity from one case to another and the start should be made to get various societies and religions at common ruling.

GENDER UNIFORMITY AND JUSTICE

Gender uniformity is the most significant for a nation's turn of events. It tends to be fixed aside and women's rights are of unique importance and ought to be dealt with similarly. A Uniform Civil Code is significant in raising gender orientation equity as personal laws appear to be ominous to women in numerous angles.²¹ And to eliminate these aberrations or segregation, UCC is imperative to be carried out in regard of article 44 and correspondence under the equality before the law and equivalent security of law in the Indian Constitution.²²

Suggestions for UCC are genuinely portrayed in the Shah Bano Case and the legal executive in *ABC v the state (NCT of Delhi)*²³ again reminded the issue of UCC and in the Court's decision, it said—our Directive Principles of State Policy has a dream for this code however it is yet an unaddressed assumption. Then, at that point in *Jose Paul Coutinho v Maria Luiza*²⁴ for this situation again, Supreme Court prescribed Indian parliament to take a choice with regards to uniform civil code that state should try to get it for the residents all through the domains yet till date, no move has been made in such manner.

¹⁹ Romila Thapar, *The Secular Mode for India*, 41, No. 11/12 *Social Scientist* 3, 4-5, (2013), Ranbir Singh and Karamvir Singh, *Secularism In India: Challenges And Its Future*, 69, No. 3 *IJPS* 597, 598-600, (2008).

²⁰ *Ibid* at 4.

²¹ Jyoti Rattan, *Uniform Civil Code In India: A Binding Obligation Under International And Domestic Law*, 46, No. 4 *JILI* 577, 584-587, (2004), *Is Gender Justice Only a Legal Issue? Political Stakes in UCC Debate*, 32, No. 9/10 *EPW* 453, 454-455, (1997).

²² *Is Gender Justice Only a Legal Issue? Political Stakes in UCC Debate*, 32, No. 9/10 *EPW* 453, 456-457, (1997).

²³ *Abc v State (Nct Of Delhi)*, 2015 SC 609.

²⁴ *Jose Paulo Coutinho v Maria Luiza Valentina Pereira*, Civil Appeal No. 7378 of 2010.

DRIVING TOWARDS EFFECTIVE EXECUTION

An administration with a solid greater part is needed with a solid inclination which can have impact and clearly numerous individual and personal law boards will go against it and won't be prepared to take on UCC.²⁵

Yet the new cases are the confirmations, for example, Triple Talaq which is as of now endorsed at last the Muslim Women (Protection of Rights on Marriage) Act, 2019 came to secure the privileges of the wedded Muslim women and forbid the Muslim male to separate by articulating Talaq. Indeed, even after specific fights too that can be evidence leading towards successful implementation of the code as well.

Citizen's freedoms and rights are of most significance in this developing and present-day world and to advance the common thoughts, UCC is required and gender equality balance advances gender equity also.²⁶

TO THE EXTENT OF SOCIAL MONOCULTURE

By enforcing the code, there will be one common law for all religions as currently formally dressed criminal laws and after it is enforced, every one of the individual matters identified with marriage, separate, legacy, marriage, inheritance, adoption will be administered by one uniform code. In 1835, the second law commission report's focus was on uniforming the laws identified with the contract, evidence, criminal law, however, didn't have any desire to extend it to the individual laws and during pre-autonomy period sovereign victoria guaranteed that there will be an outright strategic distance in personal issues as they were planned towards monetary gains and for the most part yet after freedom state is really skillful to the source to acquire a correction in strict inconsistencies and getting them all on normal and common front.

A STEP TOWARDS CIVIL EQUALITY

It is contended that the Hindu law too before somehow oppressed women by denying them legacy, inheritance, remarriage, and separation. The condition particularly of those widows and little girls was poor because of other oppressive traditions. So after the presentation of the Hindu code, the status of women improved and the situation with uniformity among

²⁵ Supra note 1 at 550.

²⁶ Supra note 20.

residents improved, and upholding UCC can be utilized to amend the mistakes of an inflexible prejudicial society and carry more sympathy and correspondence into the social circle since the constitution is over all religions and strict practices can't be utilized to deny principal privileges and opportunity to citizens at large.²⁷

Constitution creators put UCC in order so the future parliament could make an arrangement by authorizing it and making it appropriate to all. Execution of the Hindu code is an effective advance in this setting regardless of having some resistance. The objective of the UCC is tending to the segregation by fitting various societies in common front so that overlapping of various laws would be taken out. As per Dr. BR Ambedkar, Code will apply just to the individuals who make an affirmation that they are ready to be limited by it. In the underlying stage, the utilization of the code might be simply intentional.²⁸

So that individuals would have the option to know the advantages of the code and legal administration additionally in a number of cases is reminding state about its ability to bring this code into implementation. Many adversaries of the UCC contend that executing UCC would deny numerous networks of their own personal laws and right to religion yet the articles are entirely agreeably developed and harmoniously constructed, to the point that one isn't violative of another. Article 25 proviso 2 gives that nothing in this article will influence the activity of any current law or keep the State from making any law.²⁹ Thus, carrying out UCC would not be an infringement on the Right to Religion and even it would be an incredible advance to reinforce the Indian secularism and state's impartiality in strict and personal issues.

²⁷ Supra note 3 at 550.

²⁸ Krishnayan Sen, Uniform Civil Code, 39 No. 37 EPW 4196, 4196, (2004).

²⁹ Supra note 1 at 547.

DIVORCE MECHANISM 2.0: A CRITICAL ANALYSIS OF POSSIBLE UPGRADATION TO A UNIFORM DIVORCE SYSTEM IN INDIA

- Sachin Bhardwaj & Sherry Pant¹

ABSTRACT

The framers of the Constitution of India dreamed about certain future prospects and idealism in the form of the Directive Principles of State Policy which could not be achieved due to various socio-economic constraints in the early years of independence. Uniform Civil Code was also one of such Directive Principles of State Policy which has been stimulated continuously since independence for different political and personal advantages. Variety of personal law processes have made the task of the judiciary tedious and replacing them with uniform civil law seems impossible in India as often people attach sentimental value to their personal laws. Judiciary had shown some hopes in the past on the path of uniform civil code in the form of provisions related to maintenance under the Criminal Procedure Code, 1973 and a Uniform Divorce Mechanism may be the next small step in achieving the aspirations of constitution makers. In all the existing personal laws, the mechanism of getting divorce is different and the same creates complex situations in the judicial system to solve it smoothly. A Uniform Divorce Mechanism may make the task easy with lesser monetary burden and would further benefit the parties enabling them to get on with their lives. Personal Laws may be good in one time frame but it may be exploitative in another. So, the incarnation of Divorce Mechanism 2.0 having a distinguished feature of uniformity would provide relief to every stakeholder and help in eradicating unnecessary social evils from personal laws. The article analyses all the available divorce laws in India critically and provides a possible upgradation towards the Uniform Divorce Mechanism. The article also analyses the existing divorce mechanism for uniformity in terms of procedure, the grounds of divorce and other implications.

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I. INTRODUCTION

Article 44 as a directive, even though it contains a mere persuasion rather than compulsion, necessarily reflects the hope of achieving a uniform civil law for all citizens devoid of religious differences. This paper critically analyses the divorce process through the lenses of all the dominant laws available in India and possibility of the upgradation of divorce mechanism. Every step for the uniform mechanism of divorce may be another step in achieving the dream of uniform civil code.

Divorce remedies the matrimonial strains by termination of marriage. It comes into play to alleviate the marital hardships where several factors render the marriage as an unendurable system and an impossible burden.² Divorce is a secure escape from an unbearable relationship without any fruits where no integrity to continue is left and it is better to get relieved from spoiled union instead of having devastating future destruction.

In India, the very concept and integrities of divorce are drenched in religion, age-old traditions, and customs. For instance, amongst Hindus, a union through marriage is considered a seven-births relationship and divorce is not deemed good. Different schools in Muslim law conduct different procedure for marriage and divorce.³ Most of these rituals continue from the age-old practices. Enactment of different laws has been done by the State to curb the harassment of women in bad unions and to empower them. On one hand these laws have helped a lot, but also have resulted in a further mess as the laws are being misused by a few and resulting in the degradation of the union. Some allege that this easy process of divorce attainment through the court is creating a cumulative effect to break the marriage easily. But above all, the divorce is no longer a taboo in India.

The paper recommends the ways through which divorce mechanisms can be unformalized and another step for Uniform civil code can be taken. The paper has been divided into five schemes. Beginning with introduction, the paper in the second part does a legislative analysis of all the major divorce processes available in India. It then moves on to discuss the need for upgradation of Indian Divorce Mechanism, highlighting the practicability of uniform divorce mechanism in countries like India in fourth part. The paper ends up with conclusions and recommendations in the last section.

² Dommaraju, P., *Divorce and Separation in India*, 42(2) POPULATION AND DEVELOPMENT REVIEW, 195–223 (2016).

³ ALI, KECIA, PROGRESIVE MUSLIMS, 163-189 (Oneworld 2005).

II. LEGISLATIVE AND RELIGIOUS FRAMEWORK FOR DIVORCE IN INDIA

2.1 Divorce under Hindu Law

For a Hindu person, marriage is a bond for seven births, a ceremony consecrated by gods he worships. A marriage, as per Vedas, intends for religious practice, i.e. performance of *dharma*, creation of progeny, i.e. *praja* and sexual pleasure, i.e. *rati* which makes marriage a sacrament as well as an obligation.⁴ Initially this obligation bound men and women equally but eventually the performance onus increased for women and the wife was supposed to be submissive to husband and rever him as God even if he behaved with cruelty, engaged in polygamy or other evil practices. Thus Old Hindu law did not recognise divorce as such. With time endeavours, though hesitant, were made to legally introduce the process of divorce for Hindus. Finally, *Hindu Marriage Act, 1955* was introduced which allowed men and women to legally put an end to their marriage.

2.1.1 Grounds of divorce under Hindu Marriage Act, 1955

The fault theory of divorce

The HMA, 1955 prominently provides for divorce on ‘fault’ grounds. Under section 13(1) both husband as well as the wife can seek divorce citing the following nine grounds:

- Desertion:

Under section 13(1)(ib), a decree annulling marriage can be obtained by a person who has been deserted by his/her married partner. Desertion implies permanent withdrawal or disengagement from matrimonial obligations. This desertion by the married partner must be devoid of a reasonable cause and exist for a continuing period of at least two years immediately preceding the presentation of divorce

⁴ S. Pothen, *Divorce In Hindu Society*, 20(3) JOURNAL OF COMPARATIVE FAMILY STUDIES, 377–392 (1989).

petition. Divorce on the ground of desertion u/s 13(1)(ib) would not be available if the desertion was caused with consent or wish of the party alleging desertion.

- Cruelty:

Cruelty is a conduct with respect to marital obligations which endangers the life or health, whether physical or mental, or gives rise to apprehension of such endangerment. Initially, cruelty was only a ground for seeking judicial separation but later was added as a ground for divorce by the Marriage Laws (Amendment) Act 1976. While granting the decree of divorce on the ground of cruelty, the court inspects whether the circumstances alleged as cruelly were unbearable for a reasonable human.

- Adultery:

Voluntary sexual intercourse outside marriage is construed as adultery for the purposes of grant of divorce under Hindu Marriage Act, 1955. Prior to the decision of the apex court in Joseph Shine vs. UOI, adultery by a male with a married female was punishable under section 497 of IPC.

- Insanity:

A person can seek divorce under section 13(1)(iii) of Hindu Marriage Act, 1955 the marriage partner has been suffering from unsoundness of mind either for continuous period or for intermittent ones. Such unsoundness or mental disorder⁵ should be incurable and of such a nature, degree that the person seeking divorce could not be reasonably expected to live with such a partner.

- Venereal disease:

Venereal disease includes all such diseases which can be contracted or transmitted by sexual contact such as gonorrhoea, syphilis, HIV-AIDS, HPVs, chlamydia, etc. A spouse can seek divorce u/s 13(1)(v) on the ground that the married partner is suffering from a venereal disease.

- Conversion to another religion:

On account of religious conversion of the spouse, the aggrieved married partner can seek divorce under section 13(1)(ii) of HMA, 1955. For a divorce on ground

⁵ Section 13(1)(iii)(a) defines 'mental disorder' as - "...mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia."

of conversion under the Act, the spouse should have ceased to be a hindu and converted to any other religion.⁶

- Renunciation of world:

Engaging in withdrawal from worldly activities and pursuits, i.e. renunciation of the world by the spouse whilst entering into religious order of any kind is a ground to obtain divorce under section 13(1)(vi).

- Civil death:

If the spouse is unheard of for at least a period of seven years, by persons who as a matter of course would have heard of him, if he had been alive, then the presumption of death arises. The married partner of such a person can seek divorce on ground of presumption of civil death under section 13(1)(vii). Although the period of 7 years is flexible and if the person seeking divorce owing to special instances is able to establish presumption even before the interval of 7 years, the court may grant divorce.

Section 13(2) provides for four additional ‘fault grounds’ available only to the wife:

- Husband has more than one wife at time of commencement of HMA, 1955:

If the husband had engaged in bigamy prior to the commencement of the HMA, 1955, the subsequent wife could seek divorce under section 13(2)(i) provided that the first wife is alive on the date of filing of divorce petition.

- Husband is guilty of rape, sodomy, bestiality:

A Hindu wife can seek divorce under section 13(2)(ii) if the husband has been, since the marriage between them has been solemnized, found guilty by the court of offences like rape, sodomy or bestiality.

- No resumption of cohabitation post the grant of maintenance:

If for one year or more of the decree of maintenance being passed against the husband and in favour of the wife, cohabitation has not resumed, the wife can seek divorce under section 13(2)(iii).

⁶ For the purposes of Hindu Marriage Act, 1955, the person who is a Buddhist, Sikh or Jain by religion is a Hindu. Hence, conversion to these religions would not be a ground for divorce under the Act.

- Repudiation of marriage after attainment of 15 years of age:
After the attainment of the age of fifteen, but before attaining the age of eighteen, a Hindu wife can repudiate the marriage and divorce her husband by virtue of section 13(2)(iv). This repudiation can be done whether the marriage has been consummated or not.

Irretrievable breakdown theory of divorce

Under section 13(1A) of HMA, 1955 any of the spouses can seek divorce citing following grounds:

- Non-resumption of cohabitation:
If after the grant of decree for judicial separation, the spouses have not resumed cohabitation for one year or more, then either spouse can seek a decree for divorce.
- No restitution of conjugal rights:
Where after the passing of decree for restitution of conjugal rights under section 9 of the HMA, 1955, no restitution of such rights took place for one year or more than either spouse can obtain divorce.

Mutual consent theory of divorce

Section 13B of the Hindu Marriage Act, 1955 provides for the process of dissolution of Hindu marriage by mutual consent where the husband and wife can agree for mutual divorce on concerted terms and conditions if they think that living together is not possible. They have to show at the first motion that both the parties are living separately for more than one year and then the second motion must be applied between 6 months to 18 months after the first motion.

2.2 Divorce Under Muslim Law

Concept of divorce in Muslim Law has its origin in the reforms of Prophet Mohammad and these reforms lead to entirely a new framework. Under Muslim Law, marriage is considered as civil contract which gives right to both the parties to seek divorce. Muslim Law confers a man unilateral right to divorce her wife, but this is under the cover of some restrictions. These rights of men have also been abrogated through reformative legislation the *Muslim Women (Protection of Rights on Marriage) Act, 2019*.

If we observe the spirit of divorce under Islam, procedure has numerous checks at every stage. A Muslim husband cannot divorce her wife abruptly without observing necessary rules and regulations obliged under Muslim Law. One has to go through the proper process of maintenance and dower before separating from her wife. Islam encourages divorce only in exceptional cases not just for the object avoiding troubles for each other. At one place Al-Ghazali⁷ elaborated that divorce in Islam is permissible only on just and fair grounds and troubling each other on trifles cannot be a substantive ground of divorce.

Muslims have been classified in four main schools: Hanafi School, Maliki School, Shafai School and Ismaili School. Broadly divorce has been classified into four types which are as follows:

2.2.1 Divorce by the husband:

- **Talak (Repudiation)**

Talak is the repudiation of marriage when it proceeds from the side of the husband. It consists of three forms Talaq-e-ahsan, Talaq-e-hasan and Talaq-al-bida. Talaq-e-ahsan can be pronounced by husband through a single sentence in the period of Tuhr (Period between two menstruations) which becomes irrevocable after passing the time of three consecutive periods of *tuhr* or one *iddat* period. In Talaq-e-hasan, pronouncement of divorce must be during every three periods of *tuhr* without any intercourse between husband and wife. Talaq-al-bida is considered unjust form of talaq as pronouncement of divorce is done during single *tuhr* arbitrarily without giving reasonable time which has been removed through the Muslim Women (Protection of Rights on Marriage) Act, 2019 and triple talaq has become a cognizable and non bailable offence.

- **Ila (Vow of continence)**

Ila is an obsolete form of divorce in India where the husband swears to abstain from intercourse with his wife for four months or more. In Hanafi School marriage is dissolved after the expiry of four month immediately but in Ithna Asari and Shafi'i School legal process is necessary.

⁷ Ibrahim Abdul Hamid, *Dissolution of Marriage* 3 ISLAMIE QUARTERLY 166- 175, 215-223 (1956).

- **Zihar (Injurious assimilation)**

This form of divorce is not fully developed in India and is an archaic form of divorce where the husband considers the wife as his mother. Wife can approach court for dissolution of marriage or restitution of conjugal rights.

2.2.2 Divorce by the wife:

- **Talaq-e-Tafwid (Delegated divorce)**

Talaq-e-Tafwid is a form of divorce at the instance of a wife where all the power to dissolve the marriage has been delegated in the hands of the wife. This form of divorce is considered the strongest form in the hands of the wife without any intervention of the court which is a lengthy and expensive process in India.

- **Khula (Redemption)**

Khula is another form of divorce where the wife has the right to dissolve the marriage on reasonable grounds though the husband can ask to waive her right on the amount of *mehr*. Right to Khula to the wife is parallel to man's right of Talaq so when the wife wants to get separated from husband on any ground whether it is to marry with another person or she is no longer willing to live with her husband. Section 2(9) of the Dissolution of Muslim Marriages Act⁸ supports the law of Khula that women can dissolve the marriage on any other ground valid under Muslim Law.⁹ Khula is also a kind of arbitrary divorce like Talaq-ul-biddat if not consented to by the husband. Khula has been recognised by Pakistan and Bangladesh in its original form but not as such by India.

2.2.3 Divorce by common consent:

- **Khula (Redemption)**
- **Mubaraa (Mutual freeing)**

⁸ The Dissolution of Muslim Marriages Act, 1939, Act No. 8 of 1939, Acts of Parliament, 1939.

⁹ Ahmad, F., UNDERSTANDING THE ISLAMIC LAW OF DIVORCE, 45(3/4) *Journal of the Indian Law Institute*, 484–508 (2003).

Mubaraa is a kind of divorce where both husband and wife reach the conclusion that it is not possible for them to live with each other and decide to separate mutually. Though Khula and Mubaraa are taken as same, but both are different forms of divorce, as Khula depends on the willingness of the wife while in Mubaraa mutual consent of both the parties is necessary.¹⁰

2.2.4 Divorce by judicial process:

- **Lian (Mutual imprecation)**

Right to lian is available to the wife if she finds her husband in adultery. The Quran and Hadis recommend for the dissolution of marriage if the wife finds husband in adultery and the same right available to the wife is called right to lian. A husband can also be charged for the adultery and get punished as Islam looks zina with great disfavour and condemn it vehemently.

- **Faskh (Judicial rescission)**

Though the marriage may be dissolved through the above methods on the aforesaid grounds as per Muslim law however the parties may approach court for the dissolution. Islam does not encourage the interference of court in the pious union of husband and wife but where husband and wife are not able to resolve the dispute by all means then jurisdiction of court may be invoked, this is also called rescission of contract of marriage by judicial decree. Grounds are not specifically mentioned but it may be concluded that dissolution of marriage may be done on any grounds which are not as per the duties mentioned to husband and wife. Apart from those rules and regulations mentioned in Quran, Hadis, Ijma and Qiyas shall be followed.

2.2.5. Dissolution of Muslim Marriages Act, 1939

If real spirit of Muslim law is taken into consideration, then laws are encouraging for conjugal union however different interpretation of Muslim law creates problem to the women in the society. For the purpose of avoiding misinterpretation and to clear the grounds of dissolution of marriage the Dissolution of Muslim Marriages Act, 1939 was enacted which conferred a new hope in the hands of women who were suffering in bad union due to misinterpretation related to grounds of divorce. Section 2 of the Dissolution of Muslim Marriages Act, 1939 clear the grounds where wife can seek

¹⁰ TAHIR MEHMOOD, PERSONAL LAWS IN CRISIS 79 (Metropolitan 1986).

divorce through invoking the jurisdiction of the court and further section 2(9) leaves scope to the grounds which are not incorporated under the Act. Thus, the Act at the one hand clears the major grounds of divorce and further strengthens other available grounds of divorce under Muslim law which are not mentioned in the Act explicitly.

2.2.6 Maintenance under Muslim Law

A Muslim husband has the responsibility to maintain his wife irrespective of the fact that his wife is earning or not and wife cannot be barred from claiming maintenance. A Muslim wife has also right to claim maintenance under section 125 of the Code of Criminal Procedure, 1973 if husband neglects or refuses to maintain her. There is further ground of dissolution of marriage under section 2(ii) of Muslim Marriage Dissolution Act, 1939 if the husband is not able to maintain his wife for continuous period of two years.¹¹ The amount of maintenance depends upon the facts and circumstances under which the parties are living. If the Muslim wife invokes the jurisdiction of Indian Courts System, then without any denial justice shall be provided to her.

2.3 Divorce under Christian Law

A Christian person is regulated by the *Indian Divorce Act, 1869*. The applicability of the Indian Divorce Act, 1869 is there when one of the parties is Christian and decree of dissolution of marriage can be passed by the court. Section 10 of the Act advocates the grounds of divorce which are somehow similar to the grounds under Hindu Law and Muslim Law with some variations. Section 10-A proposes for the mutual divorce between the parties if they want to get separated mutually.¹² Thus there are variations but the main purposes and principles of getting separated are the same whether it is general grounds of divorce or provision of mutual separation.

2.4 The Special Marriage Act, 1954

Under the *Special Marriage Act, 1954*, marriage of two people from different religions can be performed and provisions for the dissolution of marriage are also provided in the same Act. Grounds of divorce under the Special Marriage Act, 1954 are similar to that of the Hindu

¹¹ Anderson, J. N. D, *Reforms in the Law of Divorce in the Muslim World*, 31 STUDIA ISLAMICA, 41–52 (1970).

¹² Jacob, A, *Call for Reforms in Christian Divorce Law*, Journal Of The Indian Law Institute, 32(1), 93–96 (1990).

Marriage Act, 1955.¹³ Section 27 of the Act deals with the grounds of divorce which can be taken by any of the spouses and section 28 of the Act advocates for the divorce by mutual consent. Divorce for the marriages under the Foreign Marriage Act, 1969 are also performed under the Special Marriage Act, 1954 subject to the Foreign Marriage Act, 1969.

III. NEED FOR UPGRADATION OF INDIAN DIVORCE SYSTEM

Upon discussing all the differing divorce mechanisms in India, one can find certain factors which highlight the need for upgradation of the Indian divorce system and are as follows:

3.1 The Indian divorce system covers many laws

The Indian divorce system reflects such a system where the divorce mechanisms for all the major religions exist. In the Indian legal system three major religions are dominantly existing and all three have different divorce mechanisms. Although divorce is sought only in exceptional circumstances where either of the spouses are not willing to live in marriage due to any valid reason, the reason is one prescribed by the personal laws. Another alternative of dissolution of marriage is divorce by mutual consent if husband and wife decide to separate from each other mutually. An approach towards one uniform system can be developed to avoid examining people of different religions through different angles even though the matrimonial issue is more or less the same.

3.2 Personal Laws procedures are good for marriage, but bad for divorce

Personal laws play a significant role in marriage, divorce, maintenance, custody of children, guardianship etc., and since these laws are based on religion therefore not much interference by the government was made. Every religion is free to maintain their personal affairs without any intervention from the State. However, if the personal affairs of families are affecting one family member or the other and the aggrieved party approaches the State for the protection, then the State has to necessarily play an active role. Consequently, laws like the *Hindu Marriage Act, 1955*, *Dissolution of Muslim Marriages Act, 1939*, *Muslim Women (Protection of Rights on Marriage) Act, 2019*, the *Indian Divorce Act, 1869*, the *Special Marriage Act, 1954*, the *Protection of Women from Domestic Violence Act, 2005* and *The*

¹³ Jagadeesan, P. Secularising the Institution of Marriage with Particular reference to Tamil Nadu, 52 PROCEEDINGS OF THE INDIAN HISTORY CONGRESS, 771–777 (1991).

Dowry Prohibition Act, 1961 etc., were enacted showing a pro-active role of the state in regulating personal affairs as well.

Marriage ceremonies can be justified as rituals enacted to make an eternal bond and those are pious in nature but unnecessary harassment because of a long and unrealistic process for separation reflects no sense. Marriage rituals can be performed without any restriction as the parties are performing them with joy and happiness, but the process of separation filled with agony and other disheartening emotions must be short and smooth without any delay, especially when the parties have mutually agreed to separate.¹⁴

3.3 Resources of government can be saved through uniform mechanism of divorce

Instead of taking the undue advantage of laws, one must use the same for the benefit of social beings. In the present judicial system, the government has to set up family courts for the disposal of divorce cases. For the settlement of divorce cases of people belonging to different religions married under different personal laws, the government has to appoint judges of different expertise as well. If the process would have been uniform for all the religions, then the resources of the government will be less wasted and the parties to the matrimonial separation shall also be harassed less.

For instance, on the advent of a uniform divorce mechanism, the government need not any longer appoint judges who are experts of Muslim Law, Christian Law, Hindu Law etc. Also, uniform training could be provided to judges. Uniform mechanism will render the process of divorce less confusing for pleaders, judicial authorities. Moreover, less time and money will be involved. The uniform mechanism will put all the process at one place without any complexities of different personal laws. Therefore, the primary focus of law could be on providing remedies instead of satisfying the dispensable religious requirements which have no meaning in the modern times, as rights and protection are more important than providing consolation of lies, which have no sense and logic.

¹⁴ Nigam, S. S, A plea for Uniform law of Divorce, 5(1) JOURNAL OF THE INDIAN LAW INSTITUTE, 47–80 (1963).

3.4 Grounds of divorce must be same

Though the rituals of marriage may be different as per the historical importance and past religious ceremonies, there is no sense of dragging the weight of variation in grounds of divorce as pain and agony is same for each and every human being. The concept of adultery is adultery whether the spouse is Hindu or Muslim and it will affect the parties to a marriage on a similar note. In the same way, the other grounds of divorce like desertion, renunciation of the world, conversion to another religion, communicable disease, etc. are the same in every personal law with little changes.¹⁵ Even if the grounds are put together and fixed in one basket for everyone then things will take an easier course and further judicial process can also be followed on the same uniform line. Some of the possible common grounds of divorce can be cruelty, desertion, conversion, adultery, venereal diseases, renunciation of world, non-provision of maintenance for up to two years, imprisonment for seven years or more, conviction on the charges of rape, sodomy or bestiality (for women only).

3.5 Terms and conditions for maintenance must also be same

An effort has been made in the form of section 125 of the Criminal Procedure Code, 1973 for providing common speedy remedy where the wife, children, parents or minor unmarried daughter has been refused or neglected for maintenance. In one of the prominent cases of the Supreme Court of India *Daniel Latifi and Anr vs. Union of India*¹⁶, it was held that a Muslim wife has the right to seek maintenance under section 125 even if she is denied for maintenance in her own personal laws. Thus, to make all the provisions of maintenance uniform is not a very tedious task if it is done with proper care and caution.

3.6 Custody of Children

In view of bringing uniformity in divorce attainment, the provisions related to custody of children also need to be specified in clear terms and that too equally for all religions. Yet in most of the cases the custody of children is decided on the basis of discretion of the court, but it would be easy if the matter of custody of children is identified properly. The welfare of the children is taken to be of the utmost concern in the matters of custody which is the same for every personal law.

¹⁵ Basavaraju, U. C., & Annapurnamma, M, *Social and Legal Aspects of Marriage Versus Divorce*, 6(2), INTERNATIONAL JOURNAL OF SOCIAL AND ECONOMIC RESEARCH, 173-181 (2016).

¹⁶ Daniel Latifi & Anr vs Union Of India (2001) 7 SCC 740.

Whether it is section 17 and 19 of the Guardians and Wards Act 1890, section 13 of the Hindu Minority and Guardianship Act 1956, the jurisprudence of Muslim Law or that of Christian Laws on child custody, the 'welfare of child' is taken at the paramount concern. In *Ritika Sharan vs. Sujoy Ghosh*¹⁷ the Supreme Court of India reiterated that welfare of the child is the paramount concern in matters pertaining to child custody. Recently, in *Irfan Ur Rahim Khan vs. Farha Khan*¹⁸, the Chhattisgarh High Court had held that the welfare of child would prevail in case of conflict between it and the personal law to which the minor is subject.

3.7 Time taking process

Divorce is not deemed as pious as marriage, but it is definitely a process of breaking a bond which is considered bond of seven births in Hindus and similar strong connotations have been conferred in Muslims and Christians.¹⁹ If the ground reality of India is observed then there has never been a dispute on the process of divorce but people have wasted a lot of time and money in courts for attainment of even a simplest divorce. Litigation Process is inherently time taking if divorce is contested from one party. When people contest a divorce case it takes almost three to five years that is why mutual divorce evolved where less time and money is involved. A step to improve the contestation of a divorce case can be taken for a better society.

IV. UNIFORM DIVORCE MECHANISM: PRACTICABILITY

4.1. Uniformity in procedure for obtaining divorce

Most of the time it is said by renowned scholars that implementation of uniform civil code is not possible in a country like India where variation of personal laws and other rituals are varied at a wider level and people attach their sentiments with personal affairs. Any changes or interferences in the personal matters cannot be tolerated in such a scenario. However, after examining the jurisprudence of personal laws in India, one can easily find that dissolution of marriage has never been a part of either of their essential jurisprudence. Divorce was the last

¹⁷ *Ritika Sharan vs. Sujoy Ghosh*, 2020 SCC Online SC 878.

¹⁸ *Irfan Ur Rahim Khan vs. Farha Khan*, FAM No. 165 of 2019, [https://highcourt.cg.gov.in/Afr/courtJudgementandAFR/2022/mar/FA\(M\)165_19\(09.03.22\).pdf](https://highcourt.cg.gov.in/Afr/courtJudgementandAFR/2022/mar/FA(M)165_19(09.03.22).pdf).

¹⁹ Galanter, M., & Krishnan, J., *Personal law and human rights in India and Israel*, 34(1) ISRAEL LAW REVIEW, 101-133 (2000).

resort where the circumstances have become irretrievable in nature.²⁰ With the passage of time, culture of India has gone through the strong transition of consumerism which has also affected our relationships. The basic principles upon which the pillars of pious bond were set up, are no longer recognised. This gradual change gave birth to unusual activities like cruelty, domestic violence, etc. which today, contrary to the general notion, is not victimising the women alone. Misuse of available laws makes the union dread at the lowest level of tolerance and the real emotions between the bonds are no longer in spirit. So, the court suggested different methods of divorce based on various theories. The most prominent now-a-days is dissolution of marriage through mutual consent and the same too has its own level of compulsions and suppression since the only choice here left is separation and nothing else.

With the above discussion, the matter is no longer personal. It is more or less a social problem. The same has not been written in any personal law's texts, rather the situation is a creation of consumerism. Hence, the basic hurdles for the implementation of Uniform civil code in terms of dissolution of marriage are no longer existing and that is why legislation has enacted numerous laws for different personal laws seeking to bring them at par with each other in terms of uniformity. Now the time has come to lessen the burden of courts as well as the parties who are suffering through the uncontrolled situations, whether natural or created by human agencies. A Uniform mechanism for the dissolution of marriage will deal with it efficiently as it is no longer an issue of personal nature rather a social one and increasing continuously at an exponential rate in all religions equally.

4.2 Uniformity in grounds of divorce

Observing the grounds of dissolution of marriage under the *Hindu Marriage Act, 1955* with the grounds in the *Muslim Marriage Dissolution Act, 1939*; the *Indian Divorce Act, 1868* and the *Special Marriage Act, 1954*, one can easily find that grounds are more or less same in all personal laws. Under Muslim laws the area of grounds of divorce is wider as Muslim law provides for any other grounds specified under Muslim personal laws' jurisprudence. Yet, most of the major grounds for divorce are common in all. Hence, there must not be any difficulty in bringing uniformity in terms of grounds for dissolution of marriage.

²⁰ Nigam, S.S, *A Plea for a Uniform Law of Divorce*, 5(1), *Journal of the Indian Law Institute*, 47-80 (1963).

4.3 Divorce by mutual consent is a better solution, but the misuse of law is a harsh reality

Grant of divorce by mutual consent is a progressive step in the field of divorce law. Attainment of divorce by mutual consent seems to be an easy way out, but in many cases, it has been resorted to by the parties to avoid claiming separation on grounds like adultery, cruelty, desertion, etc.²¹ The ordinary process for obtaining a ‘contested divorce’ is a lengthy one and could take up to four to five years. It has been seen that often parties under duress comply with the demand of their spouse for filing a petition for divorce by mutual consent, which defeats the real objective of legislation permitting divorce by mutual consent.

V. CONCLUSION

The personal laws in India are a result of age-old jurisprudence, however, for divorce there is not much clarity as in most of the personal laws divorce is sought to be avoided and considered as appropriate only in exceptional circumstances. To make similar provisions for divorce and related aspects like maintenance and custody is not an unusual task and this could be another positive step to move towards the Uniform civil code which was the dream of our constitutional framers in the form of the Directive principles of state policy.

On practical grounds bringing uniformity in the divorce mechanism is the easiest task as no religious or sentimental attachments are there in the ancient jurisprudence related to divorce. The only thing preached by all is the avoidance of it. People with different religious beliefs can necessarily form consensus for a Uniform divorce mechanism to remove the societal hurdles and evils in order to bring stability to the institution of marriage.

The reservation often raised is with regard to the Muslim divorce procedure, but it can also be brought under the umbrella of Uniform divorce mechanism through little efforts in the form of harmonization of laws and spirit. Thus, the evolution of Divorce mechanism 2.0 is the best path catering to several needs, the need of bringing equality between religions; treatment of parties to marriage and recognition of their rights alike irrespective of their religion; and

²¹ Rao, A. B. S. V. R., Sekhar, K. *Divorce: Process and Correlates A Cross-Cultural Study*, 33(4) JOURNAL OF COMPARATIVE FAMILY STUDIES, 541–563 (2002).

undeniably the need of realisation of the dream of a Uniform civil code, a law uniform in text as well as in spirit.

UNIFORM CIVIL CODE: ITS TRANSPARENCY IN A MULTI-RELIGIOUS COUNTRY LIKE INDIA

-YAMINI REDDY. K & MUPPANA NIKHILA¹

ABSTRACT

The Indian constitution recognises and promotes the country's multi-religious nature. Personal laws and religious beliefs are closely intertwined with one another under the international legal system, and the highest court in the land upholds the rights of all persons, regardless of their religious affiliation.

The Directive principles of the state policy, under the heading Part IV: The Article 44 of the Indian Constitution, addresses the issue of the Uniform Civil Code. The article was inserted by Dr. B R Ambedkar with the intention to address the issue of discrimination against vulnerable individuals as well as to foster harmony among varied cultural groups. It was considered by the framers of the Law of Land at the time of its introduction 75 years ago that it was inserted in the Constitution as a feature that would be accomplished when the nation was ready to embrace it and societal acceptance to the UCC could be made.

Civil laws in India are affected by faith, although criminal laws are universally applicable regardless of one's religious views. Despite the influence of religious scriptures, personal laws enacted in civil disputes are always carried out in accordance with constitutional requirements. When crafting rules for a certain group of people, customs and religious texts are factored into the equation based on their religion, caste, faith, and belief. Hindus and Muslims get their personal norms from their sacred scriptures, which are regarded authoritative by both faiths. Laws relating to inheritance, succession, marriage, adoption, and co-parenting are all covered by Hindu personal laws. A father's obligations are passed on to his sons, who are also held accountable for paying them, and property is distributed according to Hindu concepts of maintenance, guardianship and charitable giving. Pre-nuptial agreements and wills, as well as guardianship, divorce, and pre-emption, are all covered under

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Islamic personal law as provided in the Quran. The present articles deal with the concept of transparency in Uniform Civil Code mechanisation by considering issues that rose till the date like divorce mechanisation, ban on Beef, Right to Hijab and succession laws under this concept in a broader prospect. It is believed by the researcher that UCC is a dire necessity for protection of the women's rights, foster equality and to bring harmony among the people of the country.

1. INTRODUCTION

India is a vast country with multitude of languages, variety of traditions and sects and subjects, number of ethnic groups and many great religions. The constitution of India protects the fundamental rights of every citizen to speak, write, and practise their native language and culture, as well as the right to preserve them² and it also have a primary obligation to promote harmonious relationship and a spirit of togetherness among all the citizens of India, embodying religious, linguistic, regional, and sectional differences³. The Constitution also protects the right to conscientious objection⁴. The following requirements must be met for this privilege to apply: (i) public order, health, moral standards, and other requirements of provisions of the Constitution; and (ii) any law legislating or limiting any financial, economic, political, or other secular acts that may be affiliated with religious practise, as well as any law providing for welfare programs and reform.⁵

In today's world, if anyone speaks about the need uniform civil code for a diversified country like India, they are being branded as communalist. This type of impression is always framed by the minor community, that the major community are imposing their laws on them. Theoretically speaking, such allegations doesn't hold any water. What exactly the civil code does is that it maintains unity in diversity. The main aim of UCC is to create a set of rules where it could hold up the whole nation under one law irrespective of caste, creed, religion and race. There is never a time where Hindu law governing all the Indians including Muslim's, Christian's, Parsees etc. On the other hand, when the Hindu code was made into law in 1956, old Shastric law was not even taken into account at all. There were many changes made to the new act, in the old Hindu law marriage was a holy thing, but under the new code, it is

² INDIA CONST. art. 29.

³ INDIA CONST. art. 51-A (e).

⁴ INDIA CONST. art. 25.

⁵ Fraizan Mustafa, *Why Legal Pluralism Matters*, The Indian Express, November 16, 2015.

considered as a contract.⁶ The framers inculcated the concept of equality and liberty as well in the concept of marriage in order to create a uniformness among all the religions

PERSONAL LAWS AND UNIFORM CIVIL CODE

Criminal Law in India is same for everyone, but for marriage, divorce and inheritance personal laws comes into picture. These personal laws differ from religion to religion. If we take a glimpse on personal laws during the colonial period, from 1775-78 Hindu and Muslim laws are compiled together for the ease of judgements to the European judgements. In the year of 1835, the British government brought the concept of codification of Laws, in general terms codification of laws means arrangement of laws systematically. The British government had symmetrically arranged the criminal laws and evidential systems but have excluded Hindu and Muslim personal laws as it may lead to outrage the personal beliefs of the religions.⁷

In the year 1941, B.N. Rau committee⁸ was set up to codify the personal laws, where Hindu laws are mostly codified. This process went on even after the independence till 1950 but Hindu laws were codified, and Muslim laws were left without codification. Having different laws for different religions the concept of UCC had remained emancipatory for several years. community specific laws are mostly seen as regressive as laws.

The situation is not same now, the Supreme court has from time to time provided that personal laws can be modernized. In order to live in this 21st century it is necessary that laws and regulations are not regressive in nature. If regressive social or political landscape is created, it will have an impact on the development of the economy. It's not easy to bring a social change in a country like India, which aspires to become on the superpower among the world nations. If the nation aspires for development, then 50% of the population i.e., women cannot live under suppression and patriarchy, socially acceptable policies need to be in line of equality and gender justice

India constitution is very clear at this point that, holding the principles of Humanity, democracy and secularism the Constitution doesn't favour any religion or caste. On some occasions there was a contradiction between constitutional provisions and emerged social

⁶ Gauri Kalkurni, *Uniform civil code*, Legal Services India (April. 12, 2022, 22:22 PM), <http://www.legalserviceindia.com/articles/ucc.html>.

⁷ Gouri Kulkarni, Development of personal laws, Legal Services India (April. 12, 2022, 22:22 PM), <https://www.legalserviceindia.com/legal/article-5412-development-of-personal-laws-in-colonial-india.html>.

⁸ Dube, D., Rape laws in India (LexisNexis Butterworths India 2008).

practices, where in the judiciary had to step in interpret the laws. One such case was Mohd. Ahmed Khan v. Shah Bano Begum⁹. The case is further explained below

SHAH BANO BEGUM CASE

The Supreme Court created a precedent for Muslim women's rights in 1985, while the Congress Party was in power. Many Muslim women look up to Shah Bano, who was born in Indore, Madhya Pradesh. The case started in April 1978, where in Shah Bano Begum, had the petition was lodged with a local court under Sec.125 of Cr.p.c.¹⁰ seeking maintenance from her husband Mohd. Ahmed Khan. Ahmed Khan (the appealing party) a well-known lawyer in Indore, Madhya Pradesh and Shah Bano were legally wedded in the year 1932. The couple had three daughters and two sons during their wedlock. Ahmed Khan married Halema Begum, his first cousin, in 1946, and the two women lived together for many years. But in 1975, Khan disowned her and evicted her and their children from their marital house.

Section 125 of the Cr.p.c.¹¹ casts an obligation upon the husband to give alimony to his estranged wife if she is unable to sustain herself.

An appeal was filed by her in the presence of the Judicial Magistrate of Indore in 1978, claiming that he had failed to supply her with the monthly support of Rs. 200, which he had agreed to. In order to cover her living expenses, she asked for Rs. 500 every month. He then used this as an excuse to stop paying maintenance on the basis of an irreversible triple talaq on November 6th, 1978.

Muslim personal laws mandates husbands to give alimony to estranged wife during the Iddat period only. Iddat period refers to a period of three months post Talaq, but in case of pregnancy it extends till the childbirth.

The All-India Muslim Personal Law Board (AIMPLB) agreed with Ahmed Khan that judicial intervention would be a violation of Muslim law. Muslim law dictates that shariyat courts rule on situations of divorce, support, and family difficulties for Muslims, according to shariyat requirements.

⁹ Mohd. Ahmed Khan v. Shah Bano Begum and Ors., AIR 1985 SC 185.

¹⁰ Criminal Procedure Code, 1973 (India).

¹¹ Criminal Procedure Code, 1973, §125, Acts of Parliament, 1973 (India).

But at the other hand, was successful in her lawsuit in 1979, when a local judge mandated her spouse to pay Rs.25 each month in restitution. In a further appeal to the Madhya Pradesh High Court, the alimony amount was increased to Rs. 179.80.

The case was eventually appealed to the Supreme Court, following a protracted legal struggle that lasted from 1980 to 1985. Throughout the dispute, the Supreme Court recognised the need of addressing the inconsistencies in all personal laws. On April 23, 1985, the Supreme Court confirmed the MP High Court's verdict and raised the alimony amount substantially.

No one is immune from the Code of Criminal Procedure's requirements, and the Supreme Court has declared that Section 125(3) applies equally to all people, regardless of their faith. Additionally, the court held that where Section 125 and personal law are in conflict, Section 125 takes priority over the personal law. Section 125 of the Islamic Personal Law which explains that "*a woman is entitled to maintenance only till the end of the Iddat period*" are in accord with a Muslim husband's duty to assist a divorced wife who is unable to provide for herself.

Aftermath of the decision:

As a result of the ruling, Article 44 of the Constitution's Directive Principles states that a Uniform Civil Code for the whole population of India is necessary. In his judgement, C.J. Chandrachud emphasised the importance of implementing the Act. In order to improve national unity, he said, a single civil code will remove the unequal devotion to laws with competing views.

Many Muslims believed that Islamic law had been breached by the Shah Bano ruling. In any case, the impartial verdict of the Supreme Court restored popular confidence in the legal system. As a result, in 1986, the Indian Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, allowing Muslim women to receive a huge lump sum payment from their husbands instead of a monthly payment of Rs. 500(a restriction that has subsequently been eliminated).¹²

¹² Section 2 of the Shariat Act, XXVI of 1937, provides the rule of decision in matters relating, inter alia, to maintenance "shall be the Muslim Personal Law".

TRIPLE TALAQ CASE:

Shayara Bano v. Union of India

In the context of halal marriage, the term "Talaq-ul-biddat" refers to an immediate talaq that is also known as Triple Talaq. Muslims can divorce their wives by using the word "Talaq" three times in any form, according to Muslim Law, and this was regarded lawful under Muslim Law.

With the use of the triple talaq technique, Shayara Bano and her ex-husband divorced after 15 years of marriage in 2016. As a consequence, she took her case to the Supreme Court, arguing that this form of the talaq is unconstitutional. "It violates various fundamental rights granted by the Indian constitution, including articles 14, 15, 21, and 25, as well as negatively impacting the rights of Muslim women in other ways, she said.

Issues involved in the case:

The main issues which are involved in the present case are:

1. Does triple talaq fall under the purview of Islam's constitution?
2. whether there is a requirement for Muslims to follow this religious observance?

Judgement of the case:

Triple talaq is unlawful and a violation of Muslim women's fundamental rights, according to a 3:2 court decision.

J. Abdul Nazeer and Chief Justice Jagdish Khehar's Opinion

- The practise of triple talaq is a component of Muslim personal law, and as such, it is protected by Article 25 of the Indian constitution, which protects religious freedom for all citizens. Supreme court should not interfere into personal laws of any religion

Whether the practice is lawful or not, it cannot be decided by judiciary. It can be done by parliament and only parliament by power to make law on this particular point

All legislation whether passed before the start of constitution or after the constitution must be compatible with the basic rights granted in the constitution of India. Article 13 does not interfere with the personal laws of any religion and no personal law may be challenged under this article, although the practise of triple talaq has been challenged under India's constitution's articles 14, 15, 21, and 25.

As a result, the highest court has jurisdiction over the case. Talaq is an arbitrary practise that undermines women's fundamental rights. As a result, pursuant to article 14, this court has the authority to rule this conduct unlawful based on its arbitrariness. The practise of triple talaq is prohibited by Islam. The practise was eventually included into the Muslim religion. Initially, the Muslim faith recognised talaq-ul-sunnat. Instant talaq emerged in Islam as a result of advancements in Muslim faith. As a result, it is not an integral part of Islam's religious practise. Under Muslim law, all other forms of divorce give time for reconciliation and in this time period, parties may solve their disputes, clarify all their doubts and can again re-unite. But this practice does not give time for reconciliation. According to the majority of the judges, this practise is illegal since it violates the basic human rights of Muslim women and does not constitute an intrinsic religious practise of Islam, and so violates the law.

BAN ON HIJAB

As soon as Nehru became India's first prime minister, there was renewed hope that the country's economy and social reforms could be modernised and implemented, which were previously impossible under the British Raj. Colonialism and forced servitude shackled a civilization that had been subjected to centuries of humiliation by the Mughal invasion and British rule. It was a complete shock to everyone that the Indian National Congress (INC) government prioritised codifying Hindu practises in an effort to civilise the Hindu population.¹³

It would be unfair to heap unrelenting scorn on the Nehru administration simply because we were living in the past. Why? As a possible reason, perhaps because India was still healing from its painful Partition. The pluralistic vision of our freedom fighters for the newly born republic made secularism a necessity. That resistance came from an unexpected source: a public debate by Rajendra Prasad against Nehru's attempt to codify Hindu practises in the press. A central tenet of Nehru's philosophy was the idea that progress must be made without jeopardising the values and traditions of a society.

These beliefs must be held accountable, even if it has taken us so long. According to Nehru, the greatest way to protect the interests and well-being of minorities was to create codified

¹³ Gauri Kalkurni, Uniform civil code, Legal Services India (April. 12, 2022, 22:22 PM), <http://www.legalserviceindia.com/articles/ucc.htm>.

Hindu laws that protect Muslims and Christians against long-term majoritarianism¹⁴. Section IV of the Constitution, Article 44, relates to the state's duty to adopt the Uniform Civil Code (UCC).

Despite the fact that the Portuguese Civil Code of 1867 was accepted in Goa when it became a state of India, the law continues to bind all Goans to the same set of civil standards. The state of Goa, which has a higher minority population than the national average, has been able to function efficiently because to the implementation of a unified civil code. It has its flaws, but it has set an example for the rest of the country. The unsurprising and rapid growth across the country shows that it was a political (secularist) ploy to entice and enrage Hindus. In all of these disgusting Hindu-baiting capers, which have a history dating back at least half a century, there are always thousands of willing recruits. This is extremely unsettling.

This is the crux of the debate regarding the Udupi hijab's controversy: This is a case of “venal politics rather than a discussion, with secularists and fundamentalists alike utilising Muslim female students as human shields. Because of this, the topic of the Uniform Civil Code is brought up in the aftermath of every incident like this, which is a good thing. As if that wasn't bad enough, the Supreme Court has been petitioned to recognise the headscarf as a fundamental right for Muslim women”

A fitting conclusion to what began in Udupi and has now spread across India as a collective symphony. Somehow proving the petition's authenticity was the orchestration to which large portions of enslaved academics, intellectuals, and media gleefully danced. This is similar to stating that misbehaviour is itself proof of a not-guilty finding. We don't need to delve into all the other important issues that arise from the Supreme Court's decision to accept a petition of this sort.

Over 150 human rights advocates from the Indian Muslims for Secular Democracy (IMSD) have claimed that the veil is not necessary in Islam, while discussing the hijab topic. Numerous contemporary Islamic academics, both men and women, assert unequivocally that hijab has no link to the Quran or the Prophet's teachings. To put it another way, the organisation stated that Islam does not require women to wear veils. According to IMSD, college campuses are progressively becoming communal-polarized. The petitioners in this case, who have

¹⁴Sanya Dhingra, Hijab bans in India: Where communalism and patriarchy intersect, Aljazeera, (April. 12, 2022, 22:22 PM) <https://www.aljazeera.com/opinions/2022/3/24/on-the-hindutva-urge-to-save-muslim-women-from-muslim-men>.

impressionable minds, might be protected by UCC from organisations looking to exploit their beliefs. The SDPI's student branch, the Campus Front of India (CFI), has been connected to the events of the hijab debate, but petitioners deny any involvement. In support of the petitioners, the Popular Front of India (PFI), a radical hate organisation classified by the National Investigation Agency and outlawed by numerous states, conducted a unity march on February 17 in Kota (Rajasthan). Extremism is a well-known facet of the organisation.¹⁵

In recent days, Islamic experts have also suggested that adhering to and advocating for the hijab is the consequence of years of conditioning in the Muslim community. An exiled Bangladeshi novelist claims that “Hijabs, Niqabs and Burqas all attempt to commodify women as sex objects”, Taslima Nasreen. Even if we put away worries about national security, remarks made by our leaders almost show the oppressive motivation. Hijab is an Arabic word that refers to a head covering, or parda. It is used to hide the attractiveness of young females when they reach puberty. Today, the rape rate in our country is at an all-time high. Do you know why this happened? According to Karnataka Congress MLA Zameer Ahmed, the reason is because many women do not wear the hijab.

SATPRAKASH MEENA VS. ALKA MEENA

A recent ruling by the Delhi High Court said that contemporary Indian society is becoming more homogenous, and that young people from various tribal groups, religious backgrounds, and castes should not be forced to cope with issues that come as a consequence of conflicts between personal laws.

Satprakash Meena vs. Alka Meena ¹⁶

As a result of a family court judgement that found the Hindu Marriage Act (HMA) did not apply to members of the Meena tribe, these observations were made. He contended that the HMA was important since the ceremony was done in line with Hindu traditions and customs. A court ruling that Meena is not under the authority of the HMA would put the lives of women in danger, as bigamy is recognised and might lead to the desertion of women.

¹⁵ Yogesh Baweja, Communal Harmony (April. 12, 2022, 22:22 PM) <http://pib.nic.in>.

¹⁶ Satprakash meena v. Alka Meena, 2021 SCC Online Del 3645.

It was argued that a number of court rulings plainly established that even if Hindu rituals are observed, the HMA does not automatically apply to members of a notified scheduled Tribe, as stated by the respondent wife's submission.

The Delhi High Court, after considering the facts and precedents, decided that the provisions of the Hindu Marriage Act (HMA) should be used in divorce cases when valid tribal traditions have not been proved or the parties acknowledge to following Hindu customs and rituals. As a result, the appeal was permitted, and the trial court was instructed to continue the divorce procedures.

The Supreme Court cited a 1985 ruling in *Mohd. Ahmned Khan v. Shah Bano begum* when discussing the conflict between personal law and national integration, which stated that a common civil code will help the situation of national integration by removing widely divergent loyalties to laws which have conflicting ideologies. Surely the time has now come for a comprehensive reform of the law of marriage and develop a unified civil code applied to all the people regardless of religion or caste.

When the Supreme Court handed down its decision in *Ms. Jordan Diengdeh*, it directed the Ministry of Law to initiate the process of drafting a Uniform Civil Code. The High Court said that despite three decades, no substantial steps in this regard had been taken. As a result, the court directed the Ministry of Justice to take appropriate action in light of the recent judgement. Goa is the only state in India with a UCC, which implies that all inhabitants, regardless of faith, are subject to the same personal laws.

CONTEMPRORY DEVELOPMENTS

Law commission number 21 is not required nor desired. The existence of diversity does not indicate prejudice but is a sign of a strong democracy in most nations today, and this trend is expected to continue.

- “Rise of the Right” - BJP's slogan

The problem is seen by Hindu nationalists in the perspective of the Hindu code, which they claim is secular and equal to both sexes. It was the BJP, not any other political party, that originally promised to put UCC into effect if voted to power.

- “women's rights: gender equality”

In a country like India, where women's rights are constantly debated and frequently rejected, UCC's role in promoting gender equality cannot be overstated. It was determined on July 6, 2015, that a Christian unwed mother could not be granted guardianship of her kid without her husband's permission in *ABC Vs The State (NCT DELHI)*.

- “It is necessary to emphasise that while our directive principles envision the existence of an uniform civil code, this remains an unresolved constitutional expectation,” the court observed in ruling in the lady's favour. Recently, the Supreme Court said in civil appeal 7378 of 2010 (*Jose Paul Coutinho against Maria LuziaS*), which was given on September 13, 2019:
- “While the constitution's founders planned and expected the state attempting to acquire a uniform civil code for the people throughout India's territories in article 44 of Part IV dealing with the Directive Principles of State Policy, no action has been taken in this regard to date.”

CONCLUSION

As a first step, leaders of progressive, patriotic, and forward-looking minority must join together to forge a strong national consensus on the United Nations Convention on the Rights of the Child. How can India's laws from the 1930s be enforced in a world where Islamic countries such as Pakistan and Bangladesh have modernised their own personal law systems? This must be made very apparent.

The present Indian administration must explain to the country's inhabitants why the United Nations Convention on the Rights of the Child is so important in guaranteeing women's rights and fostering equality before the law. Individuals' fundamental rights must be protected while at the same time their particular religious' convictions must be respected, and the UCC must find a way to strike a balance between the two.

A fair and acceptable code of behaviour should be able to be followed by the ordinary individual, no matter what their religious or political convictions may be. ‘With the 'Hijab' debate poisoning the brains of young people, the Uniform Civil Code is a need. Ambedkar's Counsel - a route of compromise? The future parliament may include a clause requiring the

Code to apply only to those who express their willingness to be bound by it, allowing the Code's application to be entirely voluntary in the first stage. This is entirely possible.

It has a better chance of passing now, given to the repeated exhortations of the judiciary, the strength of the women's movement, and the presence of a majority administration. The All-India Muslim Personal Law Board (AIMPLB), which has stated that it will oppose UCC adoption, has stated that it will oppose UCC adoption. However, despite the continued protests of clerics, the latest Triple Talaq Act was backed by a large majority of the population, including Muslim women. There can be no doubt that when citizens' rights are of paramount significance and the recognised position is to move toward a society that respects the rights regardless of caste, religious affiliation, geographic location, or gender, the need to legislate on a UCC cannot be contested

SYNERGIES IN GENDER JUSTICE AND PERSONAL LAWS: NEED TO REGULATE AND REFORM VIA UNIFORM CIVIL CODE

-RAJAT KUMAR & SHIKHA SRIVASTAVA ¹

ABSTRACT –

Article 44 of the Indian Constitution establishes the Uniform Civil Code as a guiding principle. Its goal is to safeguard the most vulnerable members of society while simultaneously promoting patriotic sentiment and fairness. Gender equality has always been the key argument in favor of Uniform Civil Code's implementation. In terms of personal rights, it asserts that Uniform Civil Code will provide equal legislation for males and females. This premise is invalid in two ways. As-firstly, there is no clear idea of what the Uniform Civil Code should include. The second issue is that there's no guarantee that Uniform Civil Code's discriminate. If we think the Uniform Civil Code will lead to gender parity, there will always be potential part of a community which will not accept this legislation. This includes customs like child marriage and dowry, which are still widespread behind locked doors in our Indian society. Female equality is critical in aspects such as social standing, gender prejudice, healthcare, safety, and autonomy. The Indian legal system has recognized the discrimination against women in various aspects of personal law. It has expressed its concern through a series of judgements highlighting the need for consistency in all individuals' personal concerns. This article will bring forth the conflicts between the personal law and uniform law in our Indian society and argues that there is a need to bring forth uniform civil law but in consonance with the personal law which will help in the cause of a national integration as well upliftment of female gender in the society.

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INTRODUCTION

In a democratic nation like India, which has a long history of plurality, cannot function unless the universal spirit is respected. It is also worthy to state that the Western countries has developed Pluralism after the Second World War and hence they refer pluralism as a post-modernist phenomenon as it involves two or more groups in a society to co-exist. Modernization has led to various new issues as we have personated them in our culture, but we have failed to consider our difficult social strata which involves various groups of minorities. However, it was known in India even throughout the Middle Ages. Shabeer Ahmed defines civil code as “set of laws governing the civil matters of the citizens in the country relating to matters like marriage, divorce, adoption, custody of children, inheritance, succession to property etc.”.¹

Article 44, which the framers while making the constitution included in “Directive Principles of State Policy” underneath the Nation's foundational structure, does not bind the legislature to a binding duty that it shall be legislated by constitutional and statutory procedures. Furthermore, the language used to describe it appears to indicate a desire rather than a command. The lawmaker, on the other hand, is under no less of a responsibility to attain the article's utmost desirable purpose. These are no longer religion matters, but rather societal challenges that influence the population of humans and interpersonal connections².

Article 44's phrase 'uniform' suggests that all societies must be regulated by the principle of equality and Gender Justice principles. As a result, each personal legislation must be assessed from the standpoint of social and gender equality. Personal legislation will be modernized and humanized as a result. A “Uniform Civil Code” law would not absolutely be a common law, but rather a focus on Personal legislations founded on the same ideals of gender parity and personal rights.³

¹ Shabeer Ahmed & Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, Vol. 67, No. 3 (JULY - SEPT., 2006) The Indian Journal of Political Science (2006), <https://www.jstor.org/stable/41856241>. (last visited Feb 7, 2022)

²*Ibid.*

³ S. P Sathe, *Uniform Civil Code: Implications of Supreme Court Intervention*, Vol. 30 Economic and Political Weekly (1995), <https://www.jstor.org/stable/4403156> (last visited Feb 7, 2022).

VIABILITY OF “UNIFORM CIVIL CODE”

As soon as the constitution went into effect, the necessity for a “Uniform Civil Code” became evident. This regulation could not be executed even after so many years of independence for causes that are well understood to those involved with this directive. The Uniform Code also attempts to address the individualistic and sometimes conservative elements of personal laws pertaining to minorities. As a result, bringing social transformation and elevating the status of women in our society is also a priority. In the interests of societal development and a single sense of justice for all, this “Uniform Civil Code” is highly desired as without a “Uniform Civil Code”, difficult, unreasonable, and unpleasant circumstances arise. The “Uniform Civil Code” if it is applied and legislated will be dealing with “Personal laws” of minority groups which are secular and promote equality and unity among individuals by giving them a set of “Personal Laws” that integrates basic humanist values.

Marriage is the basic cornerstone of civilization, according to the court. Once a relationship is established, the law takes over and binds the members to different roles and responsibilities. Majority of people are not interested in marriage as it is not considered as an entity. On the other hand, it is the institution's and, by extension, mankind's bedrock, and without it, no civilization can exist.⁴

As Hindu law only permits monogamy and Muslim law allows for up to four spouses in India, an unfaithful Hindu male could convert to Islam to avoid the laws of Hinduism and flee from penalties. The issue over this uniform code has taken an unusual path since it goes through three stages such as National Consolidation, Equity of Law, and Gender Equity⁵. Furthermore, if it is considered carefully, it appears that just two issues have been more concerning: first is National Consolidation and second is Gender Equity. The other concern, namely, legal equality is promoted on the basis of the previous two issues⁶. In other words, legal equality is the question of uniformity of code itself. These two issues are examined from the standpoint of equality existing in the religious groups, as equality is a multi-layered principle that functions at several levels.

⁴ Supra note 2.

⁵ Peter Ronald deSouza, Politics of the Uniform Civil Code in India 50(48) Economic and Political Weekly 51 (2015).

⁶ Shabbeer Ahmed & Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, Vol. 67, No. 3 (JULY - SEPT., 2006) The Indian Journal of Political Science (2006), <https://www.jstor.org/stable/41856241>. (last visited Feb 7, 2022).

Flavia Agnes⁷ gives a satisfying remedy while considering the situation of Hindu women following the codification of Hindu personal laws in terms of the efficacy of the code for the issue of gender equity in personal laws. She claims that since independence, uniformity in laws has not yet functioned effectively and had detrimental ramifications for Hindu women's rights. Females must not be barred from the realm of rights, and a wide strategy is essential to ensure that a female does not lose their right to dignity due to the traditional concept of cultural customs. To overcome these cultural boundaries, females demand an accessible and affordable system of delivery of justice. This observation by Agnes depicts that equality in uniform laws is not much of aid to the female in uplifting them. Therefore, on the same rationale it can be assumed that it shall be the same for other sections of females belonging to different religions in our country.

INTERVENTION OF JUDICIARY IN PERSONAL LAWS OF DIFFERENT MINORITIES

*Sarla Mudgal's case*⁸ was a recent case in which a Hindu male embraced Islam because he wanted to marry another female which would result in second wife while the first one was still alive. The Apex Court of India was compelled to question into the Central government's actions in light of Article 44, which requires it to take efforts to establish a "Uniform Civil Code" for every citizen of our country. This has revived the debate on this issue. While a "Uniform Civil Code" is undoubtedly a desirable goal, the time and circumstance for the Supreme Court's interference was unsatisfactory. Furthermore, the justices' statements are likely to be misconstrued, conveying mixed messages to distinct audiences. They have the potential to encourage both majoritarian chauvinist and minority extremism. Justice Kuldeep Singh, one of the justices described that a "Uniform Civil Code" will improve National Consolidation and that religious groups or communities should forgo their belief in the two-nation concept⁹ in favour of a "Uniform civil code" Hindus were also said to have fully

⁷Flavia Agnes, *Liberating Hindu women*, Vol. 50 Economic and Political weekly (2015), <https://www.epw.in/journal/2015/10/commentary/liberating-hindu-women.html> (last visited Feb 7, 2022)

⁸ 1995 AIR 1531.

⁹ One of the major reasons of Partition of India in 1947 was that "Hindu" and "Muslim" Groups cannot co-exist in a single nation without differentiating and oppressing each other according to the Two nation Theory.

accepted modification in their "Personal laws" and made sacrifices for national consolidation. As a result, the learned judge urged the state to take efforts to create a "Uniform Civil Code".¹⁰.

The Apex Court of India in the case of *Narasu Appa Mali*¹¹, dealt with the Validity of the "Bombay Prevention of Hindu Bigamous Marriages Act, 1946". The said Act aims to prevent a Hindu from bigamous marriages among Hindus in the state of Bombay indefinitely. The Act was disputed on the subject that it violates the fundamental rights i.e., 14,15 and 25 enshrined under our Indian constitution. It was contended that while Article 44 directs the province to safeguard for inhabitants a "Uniform Civil Code" all across India's borders, the State of Bombay has created prejudice between the groups belonging to Hindu and Muslims solely on the basis of their practice to religion and has established another Code of progressive change for Hindus from that which applies to Muslim people. Article 44 of the Constitution identifies distinctly separate personal laws, as it indicates that India will benefit from a "Uniform Civil Code" to all of its inhabitants, regardless of racial background, within a reasonable time frame. As a result, the "Hindu Bigamous Marriages Act" is an effort by the parliament to bring progressive change to a specific society that has its own personal legislation. Hindus and Muslims have opposing viewpoints on the concept of marriage. Whereas it is a sacrament for the first, it is an agreement for the other. That is also why the issue of marital divorce is approached differently by both the religions.

The Code of Criminal Procedure 1898 which is valid and applied on every citizen of our country without any bar from their religion, customs and Personal laws applicable to the community of the concerned individuals are the two main components and source of maintenance for female spouses in India. The above-mentioned ruling was pronounced by the Apex Court of India in the case of Shah Bano¹², a 60-year-old Bhopal Muslim lady, took it to court to demand compensation from her divorced spouse after "43 years" of being married. The Madhya Pradesh High Court announced the historic decision in her favor. Mohammad Khan, Shah Bano's former spouse, went to the supreme court of India and filed an appeal claiming that under Islamic laws, a former spouse is not obligated to give lifelong alimony for his ex-wife. Justice Y.V Chandrachud confirmed the decision of the Madhya Pradesh High Court and held that a female is entitled to compensation under section 125 Crpc. He described that section 125 aims to give a fast remedy to those individuals who are not in a position to

¹⁰ Supra note 3.

¹¹ State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

¹² Mohd. Ahmed Khan v. Shah Bano Begum, 1985 AIR 945.

maintain themselves after divorce from his Spouse therefore the said law is applicable to every female irrespective of their religion. The criteria which determine the applicability of the act is that a person is unable to meet their survival needs due to the neglect by a person of sufficient means, therefore these provisions are preventive in essence and thus they are not limited by any personal law.

The Members of Islamic minority were outraged by the Judge's Ruling, and the Congress, which was in force at the moment, rushed to implement the "Muslim Women (Protection of Rights on Divorce) Act, 1986", under force from the Muslim conservatives. This legislation has been made with the intention of providing a relief and a safeguard to females belonging from a Muslim community who are subject to a divorce by their spouse or have won a decree against them. The "Muslim Women (Protection of Rights on Divorce) Act 1986", on the other hand, made Muslim women's lives much more difficult and gave no remedy. It excluded Muslim males from Section 125 of the Cr.P.C¹³. It was mentioned in the Act that the husband is obligated to provide his wife alimony during her Iddat term. Beyond that, her family and the state waqf board are responsible for her care. Those who regarded the law as a loss for Muslim women condemned it. First, it made females belonging to Muslim community defenseless and dependent on family; secondly, the Wakf Board's incompetence, mismanagement and corruption, made it hard to predict whether they would be willing to handle the responsibility of providing necessary support.¹⁴ Numerous Muslim groups have stepped forward to fight for Muslim female's rights inside wedlock in order to better protect their right to maintenance. The act triggered a major controversy on 'Muslim Personal laws and lead to engagement of local groups as well as various other organizations supporting the Muslim Women.

In another case of *Jordan Diengdeh v. S.S. Chopra*¹⁵ concerned the constitutionality of the 'Special Marriage Act', 'Parsi Marriage Act', 'Dissolution of Muslim Marriage Act' and 'Hindu Marriage Act' where the petitioner who belongs to Khasi tribe of Meghalaya and her husband is a Sikh, filed a divorce on the grounds mentioned in the Indian divorce Act. Justice Chinnappa held that a comparison of the above-mentioned provisions pertaining various personal laws shows that the law relating to "separation and nullity of marriage" are distanced from being "uniform" in nature. The court also referred to the decision given in the matter of

¹³ Code of Criminal Procedure 1908.

¹⁴ Qazi Sarah Rasheed & A.K. Sharma, *Muslim Women's Rights in India: Codified Personal Laws Needed*, Vol. 51 Economic and Political Weekly (2016), <https://www.jstor.org/stable/44003703>. (last visited Feb 7, 2022).

¹⁵ *Jordan Diengdeh v. S.S. Chopra*, 1985 SCR Supl. (1) 704.

“Shah Bano” and importance is placed upon “unsatisfactory state of affairs” with reference to absence of “Uniform Civil Code”. The court further described that there needs to be a fundamental revision of the existing marriage laws which shall be uniform in nature irrespective of the grounds of caste or religion. The court believes that the time has arrived for the parliament to step in and give a “Uniform Civil Code” for marriage and divorce, as well as a legal route out of the uncomfortable situations that spouses like the current ones have found themselves in¹⁶. The court in this case took the concern of “Uniform Civil Code” very serious and gave direction that a copy of the order “may be forwarded to the ministry of law and Justice for such actions as they deem fit to take” as the time during the “Shah Bano” matter was of a nature of communal tension and confrontations between the “Hindu” and “Muslim” groups.

In the year of 1994, the petitioners in *Maharshi Avadhesh v. Union of India*¹⁷ urged the Apex Court of India to examine the question of establishing a ‘Uniform Civil Code’ and to declare the Muslim Women Act¹⁸ illegal. This Writ Petition was completely dismissed, with the justification that these are all concerns for the parliament to decide. It is unknown why the court is unable to consider the Muslim Women act’s legality. When the court proclaimed itself unfit to adjudicate on matters pertaining to the “Uniform Civil Code”, the decision became a significant benchmark. It is, for instance, quoted in “*Ahmedabad Women Action Group case (1997)*”¹⁹, in which various female’s rights activists petitioned the apex court of India to determine many sections of Muslim personal law to be unlawful. This intriguing case, in which many interest groups planned to fight deliberately in order to obtain a historic verdict but failed on the ground that the court cannot prescribe. Justice Sahai in his separate judgment stressed upon the necessity of having a “Uniform Civil Code” and said that the issue should be entrusted with the law commission of India which may consult with other minority commissions.

In 2002, the court decided on the legality of Christian personal law in *John Vallamattom*²⁰, which is considered a milestone ruling. Following previous hesitations, the court took a more assertive stance but also relying on old stereotypes. The ‘Uniform Civil Code’ is brought up again at the conclusion of the verdict, with ‘Sarila Mudgal’ arguing that religion and Personal laws have no vital relation in a civilized society. The legislature is being urged to intervene in the design of a “Uniform Civil Code” for the nation, as such a law would

¹⁶ *Ibid.*

¹⁷ *Maharshi Avadhesh v. Union of India*, (1994) Supp (1) SCC 713.

¹⁸ Muslim Women (Protection of Rights on Divorce) Act, 1986.

¹⁹ *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573.

²⁰ *John Vallamattom & Anr v. Union of India*, (2003) 6 SCC 611.

assist the process of 'national consolidation' by eradicating ideological conflicts. The court allowed the Writ and considered *Section 118* of the Indian Succession Act to be unreasonable, arbitrary, and discriminating, and so in contravention of Article 14 of the Constitution. On the one hand, the judge was bolder in this ruling than in previous decisions, where it merely ignored debating the legitimacy of personal law legislations. On the other side, the case's references to "national integration" and civilized society show communal undertones yet again.

Finally, the court has referenced Article 44 in two cases recently. The right to adopt and be adopted under the Juvenile Justice (Care and Protection of Children) Act, 2000 is considered in the matter of *M/S Shabnam Hashmi v. Union of India & Ors*²¹. This legislation is a minor step toward the purpose stated in Article 44, according to the court. While the court stated that personal views and beliefs of the religions should be respected, it also emphasized that the significance of secular legal solutions till the objective of a "Uniform Civil Code" is fulfilled²². In *Abc v. State*²³, on 6 July 2015 the court addressed the issue of a mother's guardianship over her kid who is born out of wedlock. In addition to promoting single mothers' rights, the court made generic comments on Personal law and the "Uniform Civil Code", indicating that India is a secular state, and it is a basic requirement that religions be distant from the law, and underlines that the Directive Principles envisage a "Uniform Civil Code".

GENDER JUSTICE AND THE BAN ON TRIPLE TALAQ

The Supreme court of India on 22nd August 2017, declared that Triple Talaq violates article 14 of the constitution and is unconstitutional in nature. The said judgement was declared in the case of *Shayara Bano vs Union of India*²⁴.

Marriage is referred in Muslim personal law as a dissoluble contract, with numerous means of dissolution of marriage for both spouses. Quran refers to dissolution of marriage in a limited extent, it is the scholars of Islam that has given clarity on the modes and under one of them is the Triple Talaq. This mode of dissolution of marriage refers to the pronouncement of the word "Talaq" in one sitting and is "effective" and "irrevocable". The legislation at hand is the "Muslim Personal Law (Shariat) Application Act" of 1937. There have been many incidents

²¹ M/S Shabnam Hashmi v. Union of India & Ors.(2014) 4 SCC 1.

²² Tanja Herklotz, *Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court*, Vol. 49 Nomos Verlagsgesellschaft mbH (2016) (Feb 8, 2022), <https://www.jstor.org/stable/2616007>.

²³ Abc v. State, 2015 10 SCC 1.

²⁴ Shayara Bano v. Union of India, (2017) 9 SCC 1.

where the female spouse has been divorced over social media handles like whatsapp, Facebook or Skype²⁵. This form of Talaq is only recognized by Hanafi School of Sunni Muslims while other schools of Muslim personal law doesn't accept it and it has been prohibited in 22 Islamic countries including Pakistan.

The Case of Shayara Bano was filed through a writ petition for infringement of her fundamental right enshrined under the constitution of India. She was married for 15 years, and her marriage was dissolved by her spouse on 15th October. Many major groups like the Bhartiya Muslim Mahila Andolon and Bebak collective supported the petitioner and the major entity refuting the said petition was the "All India Muslim Personal Board". The main arguments of the petitioner were that this mode of divorce infringes their fundamental rights i.e., article 14,15 and 21. The respondent argued that the constitutionality of the "Personal laws" cannot be considered or determined in the court as decided by the Supreme Court in case of Narasu Appa Mali and Women Action Group.

The Court tested the constitutionality through the following two tests. The first was whether it has been codified in the Sharia law and if it is then it is subject to scrutiny under Fundamental Rights and hit Article 13(1). They said that the Act codifies and enforces all sorts of "Talaq". The Second test was whether section 2²⁶ of the 1937 Act is unconstitutional and void. According to the court, any sort of arbitrary dissolution of marriage, wherein the wedding can be dissolved arbitrarily by a man with no attempt for reconciliation, is a violation of the fundamental rights guaranteed by Art. 14 of the Indian constitution²⁷.

Justice Nariman, Lalit and Kurian Joseph by 3:2 majority came to the conclusion that Triple Talaq is unconstitutional. Even though the judgement is landmark for Muslim Women but the issue whether Triple Talaq is protected under the ambit of article 25, it is still unclear.

ARGUMENT FOR THE UNIFORMITY OF A CIVIL CODE

Personal Laws for all religions were imposed in the ancient history and are out of sync with a contemporary culture that has caused problems and oppressed females in a number of ways. This can be alleviated by establishing a proper uniform civil code that reflects

²⁵ Pandey. G, Triple talaq: *How Indian Muslim women fought, and won, the divorce battle*, BBC News (Feb 11, 2022) , <https://www.bbc.com/news/world-asia-india-40484276>.

²⁶ Section 2 in The Muslim Personal Law (Shariat) Application Act, 1937.

²⁷ Tanja Herklotz, *Shayara Bano v. Union of India & Ors. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice*, 50 Nomos Verlagsgesellschaft mbH (2017) (Feb 11,2022), <https://www.jstor.org/stable/2642924>.

contemporary society. These personal standards were conceived in a Golden Age that is vastly different from modern female's position, ideologies, and general growth. The Atmosphere formed all around notion of religions has resulted in humanity's incapacity to understand the essence of frequent necessary adjustments in the “Personal laws” of various minorities as time passes²⁸.

The implementation of a “Uniform Civil Code” that embraces all religions while preserving their essential foundations and only removing aspects that are detrimental to females will be a blessing. Several ethnicities think that the “Uniform Civil Code” will serve to boost Hindutva and eradicate their faith. But it's important to note that only the rules that oppress women would be eliminated, not the religion's essential principles²⁹. Introducing a Uniform Civil Code will assist to put the spotlight on the urgent need for women's rights rather than any discrimination towards a religious denomination. It would serve the objective of gender parity if the uniform civil code isn't created hurriedly and with the participation of all minorities³⁰.

ARGUMENT AGAINST THE UNIFORMITY OF A CIVIL CODE

India, as a secular nation, has traditionally been controlled by numerous personal legislations governing diverse populations, which have now become an important aspect of family law practice. As a result, the repeal of existing regulations in favor of a single “Uniform Civil Code” threatens religious diversity. The motives for creating a “Uniform Civil Code” are ambiguous. Advocates of the “Uniform Civil Code” proclaim it is committed to social justice and gender equality while also promoting administrative efficiency; nonetheless, the administration's involvement with progressive goals will call secularism into doubt. Administrative measures will not be able to overcome the spiritual ideologies that underpin rules; thus the Code must explain its position.³¹ The Uniform Civil Code makers should present a clear image of the procedure that will be used to achieve female's socioeconomic advancement.

The presence of substitute legal recourse that female legal practice has effectively used during past, such as the Protection of Women from Domestic Violence Act and the Muslim

²⁸ Shefali Murthy, Uniform Civil Code v. Secular Personal Laws, Bharati Law Review (2016).

²⁹ *Ibid.*

³⁰ *Id.*

³¹ *Id.*

Women (Protection of Rights on Divorce) Act 1986, to deal with problems of female's oppression such as polygamy, triple talaq, and obtaining maintenance, custody of children, and privileges to the matrimonial home. Regardless of religion, the Domestic Violence Act may be beneficial to women³². With such strong rules in place for women, the demand for a “Uniform Civil Code” isn't quite as pressing, since it would add to the complexity of the personal laws.

Personal laws nowadays have been noticed by the community as restricting society's distinct identity. Social standards are always changing, and existing laws aren't keeping up.³³ It is merely a matter of adjusting existing rules to the current situation through personal law reforms, not that of implying that these personal laws have a harmful influence on society.

CONCLUSION

The premise behind the Uniform Civil Code execution is broad and should be fully appreciated. Law is changeable and evolves with the flow of time. “Uniform Civil Code” is also a concept for responding with biased personal laws and the changing social environment. It is a secular code for personal laws, which is required in a nation like India, where secularism is a fundamental part of the Constitution. As a result, the issue of women's rights crosses religious boundaries. To achieve this purpose, customary and statutory legislation must be directed toward women's empowerment instead of being confused with reforms in religion. What one needs to understand and realize is that there is need for social equity of women and gender sensitization must be adopted. The personal laws shall generate a female's individuality and her rights without inculcating it with her religion and beliefs.

³² *Supra* note 27.

³³ *Ibid.*

MARRIAGE AND DIVORCE LAWS IN GOA AND IN INDIA: A COMPARATIVE STUDY OF UNIFORMITY AND DIVERSITY.

- NAHEED MUSTAFA³⁴

“India is full of diversity. This diversity is our pride, and it is our strength. Diversity is the specialty of India.”³⁵

-PM SHRI NARENDRA MODI

ABSTRACT

India is a multifaceted land of diverse religions which procures the identity of every religion under the Constitution of India. To maintain peace between major and minor religions of India during British Rule, separate personal laws were granted to Hindus, Muslims and others to avoid any conflict or harsh opposition from community leaders. However, Goa was under Portuguese and Damaon colonial rule. Therefore, in Goa, personal laws were not applicable.

The Portuguese Civil code 1867 is applicable to all Goans irrespective of their religion, which includes family laws. As the law is dynamic in nature, the Portuguese Civil Code is also amended from time to time and there are a few amendments which are included for maintaining harmony between different religions.

In this paper I will make a comparative study of marriage and divorce laws which are applicable in India as well as in Goa, with a broader analysis of uniformity and diversity in them.

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³⁵ *India full of diversity, it is our pride and our strength: PM Narendra Modi*, THE ECONOMIC TIMES, Nov 14, 2015, 04:28 AM IST <https://economictimes.indiatimes.com/news/politics-and-nation/india-full-of-diversity-it-is-our-pride-and-our-strength-pm-narendra-modi/articleshow/49774433.cms?from=mdr> (retrieved on 15.03.2022).

INTRODUCTION

A family is a social group and has been defined as the smallest identifiable social unit.¹ It is one of the main regulatory institutions which lay the foundation of a society in which marriage plays a critical role in an individual's life for attaining mutual progress of the partner and ultimately benefitting the state.

State intervention in the family is an ideological, not an analytic concept.² Therefore, the state has interference in regulating laws and procedure in the family system from the day he or she is born to last rites. To maintain law and order in society each individual's choice in establishing family is safeguarded. Therefore, we have separate law to govern marriage and divorce laws for Muslims, Hindus, Christians and Parsis in India.³ But Goa is the only State which has a Uniform Civil Code for governing the entire population of Goa, The Portuguese Civil code 1867, which is applicable to all Goans irrespective of their religion, includes family laws too. However, there are some amendments, modifications for maintaining harmony in the social structure in Goan lives.

1. IMPORTANCE OF MARRIAGE

Since the genesis of civilization, marriage has been the greatest and most significant institution in human society. It has always existed in some form or another in every culture, granting societal legitimacy to a physical union between a man and a woman and attributing the foundation for the family, which is society's fundamental unit.⁴ Therefore, marriage is recognized as an institution in the whole world rather than an association of two adults. Children born from such an institution are claimants of their paternity. It promotes the interest of every individual in a family, husband, wife, children who share proportional rights and duties towards each other to maintain equilibrium as well as ensure dignity and social upliftment morally, politically and economically.

¹ IV SALUSTIANO DEL CAMPO ET. AL., SOCIAL AND ECONOMIC DEVELOPMENT 44(EOLSS Publications 2010)

² Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 835-836 (1985).

³ Law Commission Of India, *Fourteenth Report (Reform of Judicial Administration)*, Ministry of Law, Government of India, September 26, Vol. 1 (1958).

⁴ S. Nambi, Marriage, mental health and the Indian Legislation. Presidential Address, 47 *INDIAN J PSYCHIATRY* 3, 3-4 (2005).

2. MARRIAGE AS SACRAMENT IN HINDUISM AND INCLUSION OF DIVORCE

It is well settled that a Hindu marriage is a Sacrament and not a contract.⁵ That is why marriage is considered as the indissoluble union between husband and wife. Therefore, it was held by the Supreme Court of India in *Gopal Krishan Vs. Mithilesh Kumari*.⁶ *Marriage is a sacrament not merely a socio-legal contract*. In general, Hindu Law does not recognise divorce since marriages viewed as an indissoluble union between the husband and wife that extends to the next world. Despite the fact that Hindu law does not address divorce, it has been held that if it is regarded as an established custom, it would be enforceable by law.⁷ During the 19th century in India, divorce was made legal for two groups of people.

- I. Those who converted to Christianity and had their spouses refuse to live with them as a result of the Native Converts Marriage Dissolution Act, 1866, and
- II. Those who were Christians and had Christian marriages as a result of the Indian Divorce Act, 1869. However, divorce was not yet available to high caste Hindus, some of whom had enlightened views and espoused social reforms, including the enactment of divorce legislation, due to the influence of western education and contracts. Following independence, the Hindu Marriage Act of 1955 was adopted, bringing significant and dynamic changes to Hindu marriage and divorce law. In some cases, there are explicit provisions for divorce.

3. MUSLIM MARRIAGE AND DIVORCE

The institution of marriage has been ordained by Muhammadan law, sanctioning sexual relations between two members of opposite sexes with the goal of preserving the human species, establishing descent, preventing men from debauchery, encouraging chastity, and promoting love and union between the husband and wife, as well as mutual help in earning a living.⁸ If this very object of marriage is lost the marriage may fail to fulfill its purpose and sometimes even become harmful. Therefore, under Mohammadan Law, Al-Qur'an ordained Divorce under a separate chapter of '*surah talaq*' that specifically deals with the

⁵ P. Uberoi, *When is a Marriage Not a Marriage? Sex, Sacrament and Contract in Hindu Marriage*, Contributions to Indian Sociology 319, 322-323(1995).

⁶ *Gopal Krishan Sharma v. Dr. Mithilesh Kumari Sharma*, AIR 1979 All 316.

⁷ *Rup Jyoti Das v. Beron Saikia*, AIR 2006 Gau 125.

⁸ Abdur Rahim, *The Principles Of Muhammadan Jurisprudence*, 327 (S.P.C.K Press, Vepery, Madras 1911).

procedure of divorce in which mediation/counselling⁹ is there, modes of divorce as well as maintenance for wife and kids¹⁰ to safeguard the interests of wife and children born out from such wedlock

4. MARRIAGE AND DIVORCE IN CHRISTIANITY

In Christianity, marriage is also considered as a sacrament of husband and wife, further it is also added that it is an act of God, not by humans. *“This at last she is bone of my bones and flesh of my flesh; she shall be called Woman, because she was taken out of Man.”*¹¹ Question of annulment of marriage arises, therefore separate Act is constituted to deal with divorce under Indian Divorce Act, 1869 and it was said by Chief Justice Arijit Pasayat in *George Sebastian vs Molly Joseph*¹² that Court is the final authority in the dissolution of marriages of Christians and no any other tribunal/body has the right to dissolve a marriage.

5. PARI LAW ON MARRIAGE AND DIVORCE

The term 'parsi' does not refer to a religious community. He or she must be a Zoroastrian in order to be a Parsi. In essence, a Parsi marriage is a contractual union with a sacramental component.¹³ A priest performs the "Ashirvad" ceremony in the presence of two witnesses. The Parsi Marriage and Divorce Act of 1936 were further amended in 1988.

Originally, the Parsi community came from Iran's 'Pers' region. They arrived in India approximately 600 ADS, settling in Daman and Diu before migrating to other regions of the country. Parsis, being a close-knit group, preserved their own separate and distinct practises, which are shown in their marriage and divorce rituals. Marriage is regarded as a spiritual practice in Parsi Law, and the Parsi Marriage and Divorce Act, 1936 (hence referred to as

⁹ *Al -Qur'an* 4:35 (Sahih International). In this Surah Nisa'a God commanded If a couple is afraid of being separated, appoint an arbitrator from his family and another from her family; if they decide to reconcile, God will assist them. You have the option of reconciling with them equitably when the interim is completed, or proceeding with the separation equitably.

¹⁰ *Al Qur'an* 2:23(Sahih International).

It is also mentioned in Sirah Baqarah when you divorce women and they are nearing the end of their waiting time/iddat period, you can either keep them or let them leave honourably. However, do not keep them solely for the purpose of harming or exploiting them. Whoever does so is unquestionably wronging in his own spirit. Take Allah's revelations seriously. Keep in mind Allah's blessings, as well as the Book and knowledge He has sent down for your guidance. Keep Allah in mind, and remember that Allah has perfect knowledge of everything.

¹¹ *Genesis* 2 :23 (King James).

¹² *George Sebastian v. Molly Joseph*, I (2000) DMC 716.

¹³ Laxmikant Das, *Divorce under the Parsi Law : A critical analysis*, VSRDIJTNTNTR Vol. IX Issue II February 2018,41,41-42(2018).

PMDA) and its 1988 revision govern Parsi marriage and divorce in India. Divorce can be granted under this law for a variety of reasons, including non-consummation within a year of marriage, adultery, cruelty, unnatural offence, and so on.¹⁴

6. MARRIAGE AND DIVORCE LAW IN GOA

The 'Codigo Civil Portuguese,' or Portuguese Civil Code of 1867,¹⁵ which is also known as the Common Civil Code and is based on the French Civil Code (Code Napoleon), has been in effect in Goa since 1870 and has several amendments from time to time. Because the code applies to all religions in Goa, it is known as the Common Civil Code. Therefore, personal laws do not apply separately to particular communities in Goa. As per the census of 2011, distribution of different religious community is collected in Goa.¹⁶

Description	Population	Percentage
Hindu	9,63,877	66.08
Christian	3,66,130	25.10
Muslim	1,21,564	8.33
Sikh	1,473	0.10
Jain	1,109	0.08

Indian Population Census 2011

Keeping in view the dynamism of the social character of law, there were significant changes laid down in Portuguese rules, including family laws¹⁷ to maintain harmony among distinct

¹⁴ Section 32, Parsi Marriage and Divorce Act, 1932.

¹⁵ A Common Civil Code established in 1867 still exists in Goa, a small state on India's west coast that was under Portuguese dominion for 450 years (from 1510 to 1961).

¹⁶ Government of India, Indian Population census 2011, 15th National census survey. Retrieved from: <https://www.census2011.co.in/census/state/goa.html> (Mar 15, 2022).

¹⁷ The Civil Code of 1867 was extended to the Portuguese Overseas Provinces by Decree of 18 November 1869, with effect from 1 July 1870. As a result, the Civil Code of 1867 was extended to Goa, Daman, and Diu. All laws

religious groups. Hindus are in the majority consisting of 66 percent of the population so, therefore the Code of Gentile Hindu Usages and Customs of Goa, which establishes a set of exceptions to the Code's provisions on Family and Succession Law, was enacted in 1880.

7. MARRIAGE IS A SACRAMENT OR CONTRACT IN GOA

Article 1056 of the Portuguese Act¹⁸ defines the concept and purpose of marriage as a legal contract and its registration is mandatory under Article 1057.¹⁹ Therefore, marriage is a legally binding perpetual contract between two people of different sexes for the purpose of legally forming a family. Marriage was perpetual in nature in Portuguese rules, but the developments made several changes in law which enacted a law on divorce that makes civil marriages as civil contract rather than a sacrament.

8. VALIDITY OF MARRIAGE AND DIVORCE UNDER ECCLESIASTICAL COURT/CANON LAWS IN INDIA

An appeal was filed by the wife for setting aside the judgment of High Court which declares the marriage as null and void as per the Divorce Act. Second marriage was considered as illegal because there was no decree for the dissolution of marriage from the Court of Law, which has jurisdiction over it.

*“Canon Law (or personal law of Christians) can have theological or ecclesiastical implications to the parties”.*²⁰

The provisions of the Portuguese Civil Code, which are applicable to Goa, Daman, and Diu under an enactment dated November 18, 1869, or similar, were not considered in the above judgment. On the 25th of December 1910, a separate Marriages and Divorce Law was adopted, providing for divorce. The Portuguese Government published an improved version of the

in force in these territories, including the Civil Code, were remained in force after they were merged into the Indian Union under the Goa, Daman and Diu (Administration) Act 1962, until altered or repealed by a competent Legislature or other competent body. Since then, various Indian Union civil law acts, such as the Indian Contract Act 1872 and the Indian Transfer of Property Act 1882, have been extended to Goa, Daman, and Diu, The Civil Code was abolished. The Code's remaining provisions, particularly those dealing with Family and Succession Law, Property Law (save its transfer), and Tort Law, remained in effect. The Goa Succession, Special Notaries, and Inventory Proceeding Act of 2012, on the other hand, repealed the analogous provisions of Succession Law in the Portuguese Civil Code of 1867.

¹⁸ Art.1056, Portuguese Civil code 1867.

¹⁹ Art. 1057, Portuguese Civil code 1867.

²⁰ Molly Joseph v. George Sebastian , AIR 1995 Ker 16, (1996) 6 SCC 337.

Portuguese Civil Code on December 16, 1930, combining all of these amendments under one roof.

The High Court of Bombay at Goa passed another judgment related to the orders passed by the Patriarchal Tribunal of the Archdiocese of Goa and Daman and the Metropolitan Tribunal of the Archdiocese of Mumbai are constitutional or unconstitutional under Article 14 and 21 of the Constitution of India. It was held by the Court:

*“Article 19 of Decree No. 35461 is declared as unconstitutional, illegal, null and void and ultra-virus Articles 14 and 21 of the Constitution of India and is struck down. Endorsement made by the Civil Registrar pursuant to the order passed by this Court under Article 19 of Decree No. 35461, cancelling the marriage registration of the petitioner with respondent no. 4 is declared as illegal, null and void and is set aside”.*²¹

9. UNIFORMITY OF GOA CIVIL CODE WITH INDIAN PERSONAL LAWS PROVIDING SPECIAL PROVISIONS TO CERTAIN COMMUNITIES.

Family laws in India are applied differently, considering the sacredness of each religion. To maintain and sustain the social order, some exceptions are also included in the Goan family laws. Following are the changes brought from time to time in consonance with the social dictum in society.

- Bigamy: There is a general rule of monogamous marriages. But there is an exception²² because the Hindu men have a right to remarry if the wife is unable to deliver a child until the age of 25 and a male child until the age of 30.

(In Hindus, Christians and Parsis, monogamy is the rule but Muslim males may practice polygamy following justness²³ among wives). The only report on the subject Committee on the Status of Women in India, published in 1974, which found that polygamy was widespread throughout India, including among tribals

²¹ Elmas Fernandes v. State of Goa, Writ Petition Nos. 351 of 2017 & 691 of 2013.

²² Article 1 of the Decree of Gentile Hindu Usages and Customs of Goa, 1880.

²³ *Al Quran* 4: 3 (sahih international) explains the **rule of justness** among wives, And this the is the only bigamy or polygamy but it is embedded in human nature that a human being cannot love equally even their own kids, therefore Quran gave permission to marry captives, widows, orphans to promote women moral, social and economic interests and also safeguarding their chastity, If Muslim men marrying for this reason than it is justified but if they are marrying for other reasons then it is not a practice of Islam which is owed by muslim men.

(15.2), Buddhists (9.7), Jains (6.7), and Hindus (5.8). Muslims were determined to be the least polygamous (5.7).²⁴

- Catholic and Non-Catholic marriages: There is a difference of annulment in the Catholic and non-Catholic marriage. For Catholics marriage may be annulled by the ecclesiastical court and High Courts support this decision, except under extraordinary circumstances, they did not approve it and their signature in the church is sufficient for civil registration of marriage. But for non-Catholics, Marriage is not annulled by the ecclesiastical court and such power is only exercised by the civil courts. Their intent to marry before 15 days is required and for solemnization, a second signature is required due to which the problem of marriage validation arises. Most women are not aware of the law and its flaws.
- Divorce: There are different grounds of separation between husband and wife.²⁵ If adultery is committed by the wife it's a ground of separation, but if wife seeks separation then she has to prove the scandal of adultery as a public offence or he completely deserted or keeps a concubine within the same place of dwelling.
- Hindu practices were protected and gentiles Hindus were granted exemptions from the Civil Code under Article 1 of the Decree of Hindu Usages and Customs Gentile of Goa, 1880. This decree maintained the Hindu joint family institution, known in Portuguese as *sociedade*, which is more akin to a partnership than the concept of a Hindu joint family.²⁶

10. DIVERSITY OF GOA CIVIL CODE WITH INDIAN PERSONAL LAWS

- **Matrimonial Properties**

There's also the one-of-a-kind idea of marriage property rights, which is absent from the rest of India's personal laws. There is no legal idea of matrimonial property in the rest of India. Therefore, the property ends up in the names of males and is thus solely the property of the male, which he can mortgage or sell as he pleases. If nothing is stated explicitly at the time of

²⁴ S.Y Quraishi, *The polygamy myth*, *THE INDIAN EXPRESS*(July 6, 2017 12:10:24 am) <https://www.census2011.co.in/census/state/goa.html> (retrieved on 18.03.2022).

²⁵ Article 1204 of Portuguese Act 1867 also mentions distinct ground for separation between husband and wife. Adultery by the wife is sufficient cause against the wife but public adultery by the husband, or full abandonment of the wife or having a mistress in the conjugal domicile are all examples of adultery.

²⁶ Faizan Mustafa, *Explained: Why Goa's Civil Code is not as uniform as it is made out to be*, *INDIAN EXPRESS* (April 20, 2021 7:41:46 am) <https://indianexpress.com/article/explained/why-goas-civil-code-is-not-as-uniform-as-it-is-made-out-to-be-7279365/> (retrieved on 18.03.2022).

marriage in Goa, the default system is communion of assets,²⁷ which implies that upon marriage, partners shall hold as co-owners of property any assets they have individually or jointly acquired or inherited before or after marriage. Couples can opt out of this default by signing a contract with each other. A system of asset communion at the time of marriage, by entering into a pre-nuptial contract²⁸ in which they decide whether the properties were acquired before marriage will be held separately and those acquired after marriage will form a communion, or if all property is held separately, whether acquired before or after marriage. But the management solely lies with the husband.²⁹

- Religion: For the dissolution of marriage, religion is not a ground in Goa.³⁰ However, it is applicable in India.

CONCLUSION

Marriage is the most important institution in an individual's life on which many aspects of progress are dependent. If this institution of marriage lacks the foundation of mutual benefit and satisfying the needs of each other, that will perturb the "social unit" in each domain of life. But this institution of marriage, with the advancement of time, is losing its worth. Therefore, divorce is introduced into personal laws and secular laws except Muslim law. Under Islam, provision of divorce is not new because it is considered as a contract not a sacrament.

Family laws in Goa and Indian personal laws related to divorce and marriage are compared vividly with their uniformity and diversity. It is evident from the juxtaposition that the Goan civil code seems to be equal for all religions, but there are fewer exceptions on the basis of religion and gender. Hence, it is concluded that to maintain harmony between law and society, the sentiments of people must be respected. That is why some specific provisions related to matrimony and dissolution of marriage are there in Goa and in India. Goans have some privileges like bigamy in Hindus, Catholic and non-Catholic marriage registration and

²⁷ Art.1109 of Portuguese Civil code 1867 explains the Contract of asset communion between spouses - When the couples simply state in their contract that they want to marry according to local custom, the conditions of Articles 1108 to 1124 must be followed.

²⁸ Art.1096 of Portuguese Civil code 1867 defines the Contract of asset communion between spouses as per their customary laws, where the spouses simply state in their contract that they wish to marry according to local custom, the provisions of Articles 1108 to 1124 apply..

²⁹ Art. 1117 of Portuguese Civil code 1867 states about the ownership, possession, and management of the matrimonial estate's assets. During the marriage, both spouses have ownership and possession of the common assets; however, the husband is responsible for the administration of the couple's assets not excluding the wife's personal assets. Only with the approval of the husband, or during his disability or absence, may the wife manage. Only with the approval of the husband, or during his disability or absence, may the wife manage.

³⁰ Art. 1090 of Portuguese Civil code 1867 have a distinct approach towards religion and marriages of different religions are not cancelled or annulled on the basis of the contracting parties' faith. Moreover, conversion is one of the ground of dissolution of marriage in India.

their dissolution, different provision for wife and husband for alleging adultery and also maintenance of property by husband is a crystalline example of diversity. Although goans have, uniform civil code but in reality, it is quasi uniform code. These codified laws are not clear to people as the Family Laws (Marriage, Divorce and Protection of Children) enacted in 1910-11 were also not physically integrated into the body of the Goans Civil Code as they are primarily regulated by customs and encoded in the Portuguese language.

It is reasonable to conclude that, despite all of the social and political changes that have occurred in this region of India over the past 150 years, Goan Family Law has maintained a remarkable degree of uniformity. In fact, the Civil Code's rules on Family Law are not heavily influenced by addressees' religion. It is possible to classify the Code of 1867 as a quasi-uniform code.³¹

³¹ Dr. Dário Moura Vicente, Professor of Law, University of Lisbon ,FAMILY LAW IN GOA AFTER THE ACT OF 2012: KEY CONCEPTS IN THE PORTUGUESE CIVIL CODE OF 1867 AND THE CODE OF GENTILE HINDU USAGES AND CUSTOMS OF 1880,Lecture delivered in the Goa High Court, session organized by the Goa State Legal Services Authority in association with the Goa High Court Bar Association (6 Feb 2020). Retrieved at <https://www.fd.ulisboa.pt/wp-content/uploads/2020/02/Goa-FAMILY-LAW-IN-GOA-AFTER-THE-ACT-OF-2012.pdf> (15 Mar 2022).

CONCEPTUAL ANALYSIS AND HISTORICAL PERSPECTIVE OF THE PHILOSOPHY OF UNIFORM CIVIL CODE

- Shradha Oberoi¹& Dr. Ruchi Sapahia²

ABSTRACT

The personal law system is an earlier institution or invention, reflecting the recognition of different forms of belief and practice among a large population which mostly gave crucial importance to local customs. Therefore, early Christians, Jews, Parsis and later also Muslims could previously live under Hindu domination and follow their own personal law systems. Later local Muslim rulers, and then the Moghuls, also accepted the same system with some modifications and saw the advantages of cosmopolitan plurality. The British colonial structures, thus, were simply built as a kind of superstructure onto established pattern and fitted into the pre-existing Indian framework. In India the expression 'Civil Code' is used in a very specific sense, meaning thereby a code of law regulating civil matters including marriage, divorce, inheritance and those other subjects which are presently governed by different personal laws. The expression 'Uniform Civil Code' has a reference to enacting a uniform family law indented to replace different personal laws governing Hindus, Muslims, Christians, Parsis and Jews in matrimonial and other related matters. Unified Code is imperative for both for protection of the oppressed and promotion of national unity and solidarity. Thus, Justice Kuldip Singh observed in Sarla Mudgal Case that "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" is an unequivocal mandate under Art 44 of the Constitution of India which seeks to introduce a uniform personal law. Thus, the concept of Uniform Civil Code is confined to Uniform Family Code for members of all communities living in the country, not merely for the sake of uniformity but also for securing social justice to weaker sections in different communities in the spheres of marriage, divorce, custody, adoption, and inheritance. Accordingly, in this humble work, an attempt is made to

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study historical perspective of the philosophy of Uniform Civil Code.

INTRODUCTION

Uniform Civil Code as mentioned under Article 44 of the Indian Constitution consists of three terms. The word 'Uniform' means one and the same in all circumstances and is generally used as a synonym to the word 'Common' which means same in similar conditions.

The word 'Civil' when used with an adjective called Law, it means private rights and remedies of the citizen which are distinguished from criminal law. The term 'Civil Law' is not only referred in family related issues and but includes other attributes as well such contracts, compensation etc.³

The term 'Code' refers to complete work of legislation dealing with larger portion of law containing uniform principles arranged systematically.

HISTORICAL PERSPECTIVES OF UNIFORM CIVIL CODE:

ANCIENT PERIOD

In Ancient India the primitive society was dependent upon various factors. There are many external factors such as customs, usages, beliefs, natural resources, conventions and ecological background. Also the society was dependent upon other internal factors as well such as interpretation and understanding of emotions, attitudes, personality, aptitudes and will power. It is also based upon the physical structure and its formation.⁴

The Hindu Law principles as mentioned in Vedas or Hindu Texts were truly inspired in ancient India and the scriptures of Hindu Law does not contain much attributes of positive law. Various theories on secular law are mixed with ethical, religious and moral matter.⁵ Though the aim to secularise law existed even long time back but however was distinct from the sacred law.

³ A.N. Govinda Rao, *The Modern Values and Social Practices* 36 (1995).

⁴ Surendra J. Patel, *An Assessment of the Civil Code Movement: Crisis and Solutions*, 121 (Pioneer Publications, Ahmedabad 1992).

⁵ S.S. Nigam, *Uniform Civil Code and Secularism*, in G.S. Sharma's "Secularism: Its Implications for Law and Life in India" 22 (1966).

Truly, in its prolonged history there have been various attempts made occasionally to secularize the law. It is even asserted that secular law continually existed simultaneously with, however in different form and was a sacred law which was administered by the King. From around 4th century B.C., the impact of theology on the state commenced to fall. The law which is positive in nature started to be differentiated from spiritual rituals and traditional customs. The politics started to show that former one was more crucial.⁶

The Indian policies laid down the means of Hindu Sages were no longer concerned with spiritual ceremonies and rites, but additionally served as a code of ethics and morality and even ruled out social intercourse or even matters of politics and government.⁷

The state was considered as a welfare state dealing with matters of only social interest and kept itself aloof from the personal laws. The society was considered as an organisational body.

The leaders of the Hindu society were Hindu sages who laid down the universal laws for the society. These rules and regulations did not only govern the religious ceremonies and rites but even manage the social intercourse of their lives. They also govern the entire code of ethics. However, the religious and civil laws were distinguished from each other. This belief was claimed by the Hindu sages who were basically the profounders of Hindu Law and were spiritually enlightened. They were spiritually efficient to evolve practices in order to regulate the conduct of human beings.⁸

MEDIEVAL PERIOD

The evolution of Muslim rule in Medieval Period of India the Muslim Law became enforceable throughout the state. As the Muslim rulers were aloof from the Hindu System of Law, they did not follow the Hindu law but in fact started following their own Mohammedan Law. They appreciated the Hindu law system and did not interfere their machinery of state and allowed them to continue in the same manner. Hence in the administration of civil law in the state two systems were developed one of Muslim Law and one of Hindu Law. Hence the system

⁶V.D. KULSHRESHTHA, LANDMARKS IN INDIAN HISTORY 22 (1981).

⁷ B.S. NAGARAJAN, SOME GLIMPSES ON INDIAN HISTORY, CULTURE AND CIVILIZATION, 191 (Pooja Publications, Ghoshal Street Calcutta 1976).

⁸ *Ibid.*

of two personal laws started proceeding parallelly in the administration of state, thereby respecting each other's personal laws⁹ until the emergence of British era in India.

After the evolution of the concept of crimes and their theories of punishments were largely similar to those of Hindu Law and Muslim Law. These punishments were however not applicable to non-Muslims.¹⁰ The non-Muslims were categorised into two categories such as Jimmis and Mustamins. They were governed from time to time by the promulgation of the rulers. Broadly, the Jimmis were governed by the Muslim Rulers and the Mustamins were known as modern aliens who held the akin position.

It is therefore clear that all non-Muslims were governed by Muslim Rule in the Medieval Era with the privilege of enjoying their own traditional and customary laws. Hence the Hindus under the Muslim Rule enjoyed various immunities in case of proprietary and other profane concerns. They even had the privilege to exercise freedom to practice their respective religions, ceremonies and rites.¹¹

Under the Muslim era when both the parties in conflict are Hindus then in such case the judgement was given by Pandits and Hindu Lawyers. The same view was shared by Syed Ramjan and even the whole of Shara law was not discriminatory and rigid when applied to Hindus. Also, it is mentioned in the entire Shara Law that non-Muslims will not be governed by Islamic Law.¹²

There were two Muslim codes called Fiqh-e- Firoz Shahi and Fatwa-e-Alamgiri by which the Muslims were regulated, and a systematic judicial process was followed to regulate them. As per the Fatwa-e-Alamgiri the affairs of non-Muslims in this era were governed by the principles of their own religion and not as per the Islamic Law. The Hindus in this era in matters of civil law were governed by their respective religions and not as per the Islamic Code in matters of marriage, inheritance and other related concerns.

The Muslim rulers interfered with Islamic Law in the matters of Hindus only when it affected and contravenes the Muslim Law. The biggest example of this is Criminal Law where

⁹ NILIMA CHAKRAVARTY, MUSLIM RULE IN INDIA, 98 (Sumeet Publishers Limited, Asaf Ali Road, New Delhi 1981).

¹⁰ A.B.M. Habibu Uah, The Foundation of Muslim Rule in India (1945).

¹¹ *Ibid.*

¹² *Ibid.*

even non-Muslims were governed by Islamic Law. However, there were two exceptions in the matter of Ordeals and Oaths where the Muslims had to take the oath of God and Hindus had to take the oath of Cow. As the law of the land during that era was that of Islamic Law therefore legislation and judiciary both enforced Islamic Law only to administer in the matters of civil and criminal. Still, the non-Muslims had the freedom and privilege to govern themselves in matters of marriage, inheritance etc., by their own personal laws as each community was had their own personal laws.

Hence while concluding the governing policies of Muslim Law were the creation of parallel system of civil law where Muslims were governed by the Islamic Law and non-Muslims by their personal laws. Whereas in matters of Crime even the non-Muslims were governed by the Islamic Law instead of System of Punishment followed in Hindu Law.

BRITISH PERIOD

The Muslim Judicial Administration continued to remain in force even after the Britishers occupied India. The position of Britishers however changed with due course of time when they came up with their own systems to deal with civil matters and changed various aspects of criminal law.

The Britishers did not intend to hurt the religious aspects of various communities of Hindu and Muslim law which were closely interwoven with religion. Therefore, Britishers provided immunity to certain subjects of Hindu and Muslim¹³ in order to maintain friendly relations with both the communities by not interfering with their religious beliefs and imposing their laws on them. This step was initiated to maintain friendly trade relations with Hindus and Muslims.

Britishers came to India in 1601 as trading merchants and incorporated East India Company. Various trading posts were established in first seventy years at coastal places and applied the Law of England in various settlements of Madras, Bombay and Calcutta during the first century of their judicial power.¹⁴

¹³ A.N. Govinda Rao, *The Modern Values and Social Practices* 93 (1995).

¹⁴ S.J. Patel, *Legal and Constitutional History of India* 121 (1958).

During the British power in India a set pattern was followed for the application of laws on the native people which was divided into two categories: Philosophy of Neutrality and Codification of Laws.

(i) Philosophy of Neutrality:

In the British Era it was quite evident that they tried to enact new common laws applicable for all the Indians but they made sure not to intervene with the justice administration.¹⁵ In 1772 Warren Hastings came up with certain schemes to deal with disputes in civil matters such as conflicts regarding property, marriage, inheritance, partnerships and such disputes were to be decided by Mofussil Diwani Adalat of the district in which concerned dispute occurred. Such Adalat was headed by the collector of that district in the post of Judge.¹⁶

The Supreme Court of Judicature of Calcutta, Madras and Bombay were established in 1774 and dealt with cases pertaining to enforcement of Hindu Law and Muslim Law on Hindus and Muslims respectively.

The system of law at that time was quite chaotic and very confusing because of the different kinds of systems followed in Presidency Towns and Mofussil of Presidency which thereby led to uncertainty and doubts regarding the applicability of the territory. It was therefore necessary to legalise the entire system and to arrange all the provisions systematically to ensure effective administration of justice in the heterogenous system of rules and regulations.¹⁷

(ii) Codification of laws

It was observed by the Britishers that in spite of having personal laws being followed in various regions of India i.e., Hindu Law in Hindu Community and Muslim Law in Muslim Community, still there was a dire need to change the general law of the land.

Due to various personal laws applied in British India for civil matters by village courts, provincial courts and district courts, the 19th century legal system in British era was full of

¹⁵ *Ibid.*

¹⁶ Tahir Mahmood, *An Indian Civil Code and Islamic Law*, 54 (Institute of Constitutional and Parliamentary Studies, New Delhi, Published by N.M. Tripathi Private Limited, Bombay 1976).

¹⁷ *Ibid.*

ambiguous in nature and created a lot of chaos. Also, in matters of criminal cases the application of Muslim Law on Muslims, Hindus and others became obsolete. This led to the emergence of the codification of laws in India. Other reasons for fastening the process of codification of laws were creation of Law Commission by Charter Act, 1833, appointment of law member in such commission, formation of All India Legislature and huge influence of Jeremy Bentham on codification of criminal laws in order to bring uniformity and certainty.

After a lot of efforts and hard work, the criminal laws in India got codified under the chairmanship of Lord Macaulay in 1832 into Indian Penal Code, 1861 and Criminal Procedure Code, 1898. Hence uniformity was achieved but for civil laws there was no common civil code.

Before the implementation of Indian Contract Act, 1872 there were two separate contract laws applicable in India. The Hindu law of Contract applied on Hindus and Muslim law of Contract applied on Muslims. In recent trends the subject matters which are not included in the Indian Contract Act, 1872, such matters are dealt by Hindus according to their own Law of Contract and by Muslims according to their own Law of Contract.

ORIGIN OF UNIFORM CIVIL CODE IN INDIA

The National Planning Committee in 1940 raised the demand of having Uniform Civil Code in India. This idea was advocated by analysing the report submitted to Planning Committee by a subcommittee called, 'Women's Role in Planned Economy'. The report suggested for the enactment of Uniform Civil Code temporarily which can be later in future could gradually change all the personal laws followed by various religions in India.¹⁸

However, this idea was opposed by the Muslim members and even by the various other members of the National Planning Committee and other sub-committees.

All India Women's Conference in 1940 prepared a charter of Women's Rights which included various suggestions pertaining to reforms in various personal laws but did not provide for the enactment of the Uniform Civil Code in India.

¹⁸ *Supra* Note 12.

CONSTITUENT ASSEMBLY DEBATES

The Personal Laws in India are deeply rooted in India and despite the various efforts of past rulers such laws cannot be uprooted from the Indian social set up. The importance of usages, customs, scriptures, regional variations have historical importance in India. Customs hold very important place in the modern set up of personal laws and are even reflected in the multiplicity, variety, diversity in the area of personal laws in India.

The idea of Common laws was proposed to remove the multi-cultural personal laws due to which it became hindrance in the administration of justice. If the proposed Common law gets implemented then irrespective of the religion all will be governed by the Common Law which will further help in secularising and simplifying the various provisions of the Indian Constitution such as property, adoption, maintenance, guardianship and equality of justice in administration of the same. This will indeed help the Constitution to achieve its goal.

The Constituent Assembly in 1947 proposed the idea of Uniform Civil Code as the Directive Principle of State Policy which read as “The State shall endeavour to secure for the citizens a Uniform Civil Code.” The Fundamental Rights as the sub-committee on the debate of Article 35 put some recommendations for the application of clause 39 which should be done on an entirely voluntary basis for all the citizens of India.¹⁹

Even though the provision was merely directive to the state policy, but various objections were raised by the Muslim Members of the Constituent Assembly such as Mohammad Ismail, Pocker Bahadur, Mehaboob Ali Baig, Naziruddin Ahmad from Bengal and Hussain Imam from Bihar. They all even pleaded to make certain amendments in order to allow their community to let them follow their personal laws.²⁰

In the arguments of Muslim Members, one of the speaker constructed draft of Article 35 quite narrowly. It was rightly put by Mahboob Ali Baig that Article 35(which is now Article 44) did not give any right to the state to legislate on personal laws. It was recommended by Naziruddin Ahmed that although the draft clause of Article 19 contain certain exceptions related to religious practices and laws but it did not cover other religious practices and laws.

¹⁹Partha S. Ghosh, *Uniform Civil Code: History of a Controversy*, Mainstream, 17-18 (1995).

²⁰ *Ibid.*

Hence the term ‘Civil Code’ under draft of Article 35 (now as Article 44) did not contain the personal laws of the citizens.²¹

Muslim members also asserted that India being a secular country should not be intruded with the legislative power to interfere with the religious beliefs and practices of any community in India. It was pointed out by Naziruddin Ahamad that why has not been done 175 years by the Britishers and in 500 years by the Muslim Community, how can any state be given a power to interfere with the religious beliefs of the communities. As India being a secular country should be permitted to practice and preach their own religion and also the citizens should be allowed to follow their own personal laws.²²

Another reason by which Muslim members opposed the Article 35(now known as Article 44) was due to its impracticability nature and it is not expedient to enact in India which is a country with diverse population, and it is feasible to enact uniform laws in India.

Finally, the Muslim Members proposed certain amendments on Article 35 in order to relieve the state from their interference in the personal laws of the country²³. Hence as a result of lengthy debates was that Article 35 was re numbered as Article 44 without any amendments. It thus read as: “The state shall endeavour to secure for citizens a Uniform Civil Code throughout the territories of India.”

THE GOA CIVIL CODE: A PROGRESSIVE MODEL

In the 19th and 20th centuries the Portuguese rulers came up with several legislation on Family Laws which was collectively called the Goa Civil Code. The colonial laws were scrapped by the Indian Government in 1961 after the Liberalisation of Goa. In order to remove the colonial provisions the Indian Government enacted the Goa and Daman Diu Act of Administration which extended the central laws of the country to the territory of Goa but the Portuguese Laws remained in force in the territory of Goa as it was welcomed and accepted by all the religious communities of the state.

The most important principle of the Portuguese Civil Code was to strengthen the society’s backbone by making a strong relation between husband and wife, developing in them

²¹ *Ibid.*

²² Surendra J. Patel, *An Assessment of the Civil Code Movement: Crisis and Solutions*, 128 (1992).

²³ *Ibid.*

the spirit of tolerance and also to provide all kinds of safeguards in order to prevent any sort of injustice occurred by one spouse to the other. One of the most important provision of this Civil Code was provision of Public Deed before marriage which dealt with disposing off the movable and immovable properties at the even divorce or death of either spouse. At the time of marriage the parents of both the spouses have common right on the estate but at the time of divorce it has to be divided equally among all.

It is quite pleasant to observe that some provisions of Goa Civil Code are considered better and progressive than the Hindu Marriage Act and Hindu Succession Act. The dream of the makers of the Constitution of the enforcement of the Uniform Civil Code in India can observed only in the regions of Goa and Daman and Diu. Indeed it would be a regressive step to see the uniformity of personal laws in Goa to be scrapped down.

The Goa Civil Code is non-discriminatory in nature. People belonging to different castes in Goa are governed by same law in matters of marriage, divorce, succession and protection of children. Such kind of benefits are not available elsewhere in India. Also in Goa it is compulsory to get marriage registered as it is considered as a contract under the Portuguese Law. By getting their marriages registered the married women in Goa have certain benefits as they can establish their rights on the outset which is not available for other women of the country. Such compulsion of registration of marriages are sufficient proof to check the bigamous nature of marriages.²⁴

There are various modes of marital options under the Goa System such as assets separation which were in existence before marriage, after marriage mixing of properties, property being absolutely separated and total regime.

One of the most unique component of Civil Code applicable in Goa was that the properties which were in the name of the spouses before marriage, the properties which they acquired during the marriage or after the marriage are considered as the common property of both the spouses till the time their marriage remains in subsistence. At the time of death of either spouse, separation or dissolution of marriage such properties are equally divided among the two. This is the most welcoming piece of legislation for women which is not prevalent in

²⁴ Kamveer Singh Chahal, *The Crusade for the Implementation of UCC and Homogenising the Personal Laws*, (2004).

the rest of the country and due to which the women suffer and feel vulnerable at the whims of the husbands and loose legislations.

Even after the application of the Uniform Law in Goa it was not free from flaws. It gave right to the Hindu men to commit second marriage if his wife is not able to give a child till the age of 25 or a boy child till the age of 30 which was an outdated provision and was also against the sanctity of the Indian Constitution. Such laws which promote gender inequality and degrade the status of women in society are not welcomed in a liberal society like India.²⁵

After various attempts made by some Muslims Rulers to scrap down the Common Law in Goa and encouraged people through their speeches to follow the Muslim Personal law failed miserably. Finally the Muslims who were liberal won with majority and continued to follow the common law system in Goa.

THE COURT'S ROLE IN SECURING A UNIFORM CIVIL CODE

(i) Judicial Approach Before the Shah Bano Case-

Many Scholars were of the view that discriminatory personal laws should be struck down as it violates the fundamental right of Equality and is also against the Constitutional Spirit of Art 44 whereas the opposite views completely differ where the scholars were of the belief that personal laws come under the purview of right to religion which is not 'law' as per Article 13 of the Constitution, hence it is beyond the reach of Fundamental Rights.

In *State of Bombay v Narasu Appa Mali*²⁶ the court upheld the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The court stated the reason that Uniform Civil Code should be implemented in the Country, but it must be brought in stages by the state. Till then the personal laws prevailing in the country owe the origin to their religious texts and hence different codes are applicable to Hindus and Muslims.

In *Mohamad Yunus v Syed Unnissa*²⁷ the Supreme Court observed that all questions pertaining to Muslim succession, adoption, inheritance, marriages, dower, gifts, guardianships

²⁵ *Ibid.*

²⁶ *State of Bombay v Narasu Appa Mali*, A.I.R. 1952 Bom 84.

²⁷ *Mohamad Yunus v Syed Unnissa*, A.I.R. 1961 S.C. 808.

and dissolution of marriages shall be governed by Muslim Personal Law (Shariat) only and not by any other legislation in India.

(ii) ***Shah Bano and aftermath-***

In *Mohd. Ahmed Khan v Shah Bano Begum*²⁸ the wife was divorced by her husband by declaring talaq. After which the wife was not able to maintain herself and went to the court to claim maintenance under sec 125 of Cr.PC. The Muslim Personal Law, however, did not apply to the said case. After the judgement the Muslims were outraged and saw that move as an attempt to enforce Uniform Civil Code upon them forcefully. The Rajiv Gandhi Government, then under pressure passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 which overturned the Shah Bano Ruling.

In *Mrs. Jorden Diengdish v S.S. Chopra*²⁹ a Christian woman who married a Sikh man was denied divorce and got judicial separation because of unequal personal laws. The Supreme court felt the need of having Uniform Laws applicable to all irrespective of the religion.

In *Sarla Mudgal v Union of India*³⁰ another historic judgement where the Supreme Court declared second marriage committed by Hindus by converting themselves into Islam, during the persistence of first marriage as void and punishable under section 494 of Indian Penal Code.

In *Danial Latifi v. Union of India*,³¹ another landmark judgement of the Supreme Court of India where validity of the Muslim Women (Protection of Rights on divorce) Act, 1986, was challenged. Section 3(1)(a) of the Act says that Muslim men will pay maintenance depending upon their financial means which is contrary to their personal laws which clearly laws down that Muslim men to pay maintenance unconditionally during iddat period. Also the court laid down that Muslims can follow their personal laws so far it does not contravene with the social welfare obligations which are applicable uniformly to all Indians.

²⁸ Mohd. Ahmed Khan v Shah Bano Begum, A.I.R 1985 S.C. 945.

²⁹ Mrs. Jorden Diengdish v S.S. Chopra, A.I.R 1985 S.C. 935.

³⁰ Sarla Mudgal v Union of India, A.I.R 1995 S.C. 1531.

³¹ Danial Latifi v. Union of India, J.T. 2001(8) S.C. 218.

In *Shayara Bano v Union of India*³² the Supreme Court again emphasised the need of implementing Uniform Civil Code in India by putting ban on the practice of Triple Talaq by Muslims and declare it unconstitutional.

It has been noted that Judiciary has been very progressive post-independence in moulding the various discriminatory personal laws and therefore such approach must be adopted by the state as well in achieving the constitutional goals as laid down in the Art 44 of the Indian Constitution.

CONCLUSION

Uniform Civil Code is the spirit of Secularism in India which cannot be achieved by just amending the personal laws of the communities. In order to ensure that justice and harmony prevails in India, it is imperative that different personal laws should not dominate the citizens of the country, nor they should get suppressed by the enforcement of Uniform Civil Code in India. Many countries have modified their discriminatory personal laws such as Polygamy got banned in Syria, Egypt, Turkey and hence India should also aim to achieve a secular non-discriminatory law for its citizens.

In order to achieve the and assure the dignity of women in the Indian society, it is now imperative that all the discriminatory provisions of law should be shredded off from the society and uniformity and certainty in laws should be welcomed in order to protect their basic human rights.

SUGGESTIONS

- The enactment of the Uniform Civil Code applicable to all the citizens from diverse religions is indeed a positive and necessary socio-legal reform to provide with equality or equal protection of Law.
- An effective and reasonable legislation called the Uniform Civil Code would help in erasing the discriminatory practices as practiced under different Personal Laws or specific Customary Laws, without disturbing or interfering in the basic tenants or freedom in community's religious aspect.

³² *Shayara Bano v Union of India*, A.I.R 2017 9 S.C.C. 1 (S.C.).

- Implementation of Uniform Civil Code will help to achieve the goal laid down in Art 14 of the Constitution ie. Right to Equality.
- A Model Framework of Uniform Civil Code should be made in order to ensure the basic tenants of Preamble of the Indian Constitution such as Equality, Fraternity and Uniformity.

THE NEED FOR IMPLEMENTATION OF A UNIFORM CIVIL CODE IN INDIA

-PARNASHREE CHAKRABORTY¹

ABSTRACT

The civil laws relating to marriage, divorce, adoption, inheritance, etc. in India are governed by the different laws of the different religious communities (HMA 1955, ICM 1872, SMA 1954, PMDA 1869, DMMA 1939, IDA 1869, HAMA, 1956 and so on) since the country's independence. Most of these laws are not codified and are considered to be biased. Uniform Civil Code was inserted while framing the Constitution of India with the sole motive of implementing it as and when the country is ready to accept it. Seventy-five years have passed, and still, Uniform Civil Code remains untouched.

The researcher in this paper examines the reasons why implementation of a Uniform Civil Code is the need of the hour and the challenges pertaining to its implementation. The researcher further explains how an ideal Uniform Civil Code if achieved would help in providing equal treatment to all the citizens as well as ensure smooth functioning of the Indian Constitution.

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INTRODUCTION

“We are Indians, firstly and lastly.”

-Dr Bhimrao Ambedkar.¹

India is considered to be a huge nation due to the existence of the different religious communities and their religious personal laws. Succession, adoption, marriage, divorce, and other civil laws fall under this category. Under Article 44 of the Indian Constitution, the concept of a Uniform Civil Code was adopted for the sole purpose of unifying religious personal laws for everyone, regardless of gender identity, faith, social class, or other factors. However, it was moved to Part IV of the Indian Constitution (Directive Principles of State Policy) as the country was not ready for a Uniform Civil Code right after independence. Also, to make the minority religious groups feel secure in the country, there was a need to provide protection and acknowledgment to their rights. Although Article 37 of the Indian Constitution specifies that the Directive Principles of State Policy are unenforceable in a court, it does not mean that they are meaningless. The Directive Principles of State Policy (DPSP) are fundamental in nature when it comes to the country's governance.² The Indian Constitution has been in force for seventy-five long years, and yet India has not adopted a Uniform Civil Code for all its citizens.

On issues of national integrity, secularism, and gender equality, there have been heated and lengthy disputes about whether or not a Uniform Civil Code should substitute the existing religious personal laws. While the personal laws of the different religious communities are inconsistent, gender-biased, and founded on superstitious beliefs and practices, a Uniform Civil Code, on the contrary, aims to give everyone the same treatment.³

¹ B.R. AMBEDKAR QUOTES, https://www.brainyquote.com/quotes/b_r_ambedkar_380892 (last visited Mar. 14, 2022).

² Alka Bharati, *Uniform Civil Code in India-still a distant dream*, 4 AIJRHASS 167, 167 (2013).

³ Tanja Herklotz, *Dead Letters? The Uniform Civil Code through the eyes of the Indian Women's Movement and the Indian Supreme Court*, 6 SOUTH ASIA CHRONICLE 62, 62 (2016).

THE CONCEPT OF UNIFORM CIVIL CODE

The three terms uniform, civil and code when combined make the phrase “*Uniform Civil Code*”.⁴

The dictionary meaning of the word “*uniform*” is “*the form of something*”. Although the interpreters use the terms “*uniform*” and “*common*” as synonyms, the Constitution of India explicitly mentions the word “*uniform*” instead of “*common*” under Article 44. If we go by their precise meanings, these two words are different, as the term “*uniform*” refers to applying one law in all circumstances. In contrast, the term “*common*” refers to using the same law in similar cases. The term “*civil*” comes from the Latin word “*civils*” which means “*citizens*”. It has many meanings.⁵ In the legal sense, it means “*the private rights and remedies available to an individual*”, unlike the rights and remedies available on criminal, political, or other related matters.⁶ These statutes are based on family, contracts, and compensation, among other things.⁷ The concept “*civil law*” comes from the Latin expression “*jus civil*”, which refers to a State’s municipal laws. These civil laws, as opposed to criminal laws, are the private laws of a State, and do not contain public or international laws.⁸ The word “*code*” comes from the Latin term “*codex*”, which means a textbook.⁹ According to recent meaning in law, code refers to the compilation or collection of laws in a logical or concise form of all general statutes systematically arranged that govern a large province or area and are based on uniform principles.¹⁰ The word “*civil*” is often used in the expression “*civil code*”, which refers to the codified laws of a State that are impartial and govern the civil relations between the citizens.¹¹

Therefore, these three terms form the expression “*Uniform Civil Code*” when put together, and it means a set of rules that are applicable to all, irrespective of gender identity, faith, social class, or other factors.

⁴ Encyclopaedia Americana, Vol.-6 (1960), 734.

⁵ *Id.*

⁶ The Shorter Oxford English Dictionary, Vol.-1 (1973), 34.

⁷ *Supra*, note 4.

⁸ Encyclopaedia Britannica, Vol.5 (1959) 743.

⁹ Encyclopaedia Americana, Vol.-7 (1960) 194.

¹⁰ The Oxford Companion to Law (1980) 236.

¹¹ Encyclopaedia Americana, Vol.-7 (1960) 194.

HISTORICAL BACKGROUND OF UNIFORM CIVIL CODE IN INDIA

The British government first established the concept of a Uniform Civil Code in India in 1835. The then government issued a report strongly urging the implementation of a uniform civil code covering crimes, evidence, contracts, and other related matters. Personal laws, on the other hand, were excluded from such codification. When major objections to the Hindu Personal Laws were raised in 1941, the government was forced to form the B. N. Rau Committee. Following its recommendations, Hindu laws governing intestate or unwilled succession were revised and codified resulting in the enactment of the Hindu Succession Act. Not just Hindus, but Buddhists, Jains, and Sikhs are also subject to these regulations. The minority laws for Muslims, Christians, Parsis and Jews, on the other hand, are different and are yet to be codified.¹²

The Supreme Court has also emphasized the necessity for a uniform civil code in India in various decisions. It has often been asserted that Islamic practices such as polygamy and triple talaq are essentially unethical and should be abolished since they impinge on a woman's basic right to a dignified existence.¹³

THE CONSTITUENT ASSEMBLY DEBATES ON UNIFORM CIVIL CODE IN INDIA

The establishment of a Uniform Civil Code has been the subject of heated debate in India's Constituent Assembly. The majority of the Muslim members were against it. They argued that because they are members of minorities, their personal laws must be protected, and that enacting a Uniform Civil Code would be unfair to them because it would benefit the majority. However, these criticisms were addressed by emphasizing on the fact that India already has uniform laws on a lot of matters and that the unification of personal laws would only promote national integrity. It was further stated that it is essential to separate certain personal laws from religion, and that the practices covered under the personal laws which are considered to be religious, are not essential religious practices. It also ensured that no personal law would be amended forcibly if people opposed it.¹⁴

¹² UNIFORM CIVIL CODE, <https://www.drishtiias.com/daily-updates/daily-news-editorials/uniform-civil-code-1> (last visited Mar. 14, 2022).

¹³ *Id.*

¹⁴ MP Jain, *Indian Constitutional Law* 1490 (8th ed. 2021).

UNIFORM CIVIL CODE UNDER THE CONSTITUTION OF INDIA

Article 44 of the Indian Constitution defines Uniform Civil Code. It was added to Part IV of the Constitution, which addresses the Directive Principles of State Policy. A state is expected to ensure uniformity when adopting laws for the residents of India, according to this Article. The idea of a uniform civil code was proposed to address India's diversity-related challenges. Since the Constitution of India came into existence, this Article has been hardly used. The codification and secularization of the Hindu Personal Laws is the only step that has been taken so far in the direction of this Article. The Personal Laws of Muslims are yet to be codified.¹⁵

UNIFORM CIVIL CODE AS A DIRECTIVE PRINCIPLE OF STATE POLICY

The Directive Principles of State Policy are found in Part IV of India's Constitution. DPSPs are guidelines that a government should examine when enacting legislation for Indian citizens. These directives were inserted with the sole motive of looking after the welfare of the citizens because the State as defined under this Part is a "Welfare State" and not a mere "Police State". Although Article 37 specifies that the DPSPs are unenforceable in a lawcourt, it also states that the guidelines are necessary for the country's governance and that the government must make laws in accordance with the DPSPs.¹⁶

UNIFORM CIVIL CODE AND THE PERSONAL LAWS OF INDIA

Despite the fact that Article 44 of the Indian Constitution mandates the State to adopt uniform laws for all citizens, little effort has been taken to put it into practice. The only step that has been taken towards implementing such a code is the codification of the Hindu Personal Laws. However, no codification has been made yet concerning the Muslim Personal Laws.¹⁷ Succession, adoption, marriage, divorce, and other personal laws of several religions are discriminatory. One such example is the practice of polygamy. Moreover, the religious personal laws of different religions are contradictory and primarily based on superstitious beliefs and practices.

¹⁵ *Id.*, at 1490-1491.

¹⁶ Durga Das Basu, *Constitutional Law of India* 107 (3rd ed. 1983).

¹⁷ MP, *supra* note 9, at 1491.

The implementation of a uniform civil code would help strengthen secularism in the country, but it is essential to first separate law from religion for that to happen.¹⁸

In one of its historic decisions, the Supreme Court acknowledged the difficulties inherent in replacing India's personal laws with a uniform civil code. But it also stated that to give the Constitution its actual meaning, a uniform civil code must be adopted.¹⁹

UNIFORM CIVIL CODE AND THE FUNDAMENTAL RIGHTS

The implementation of a uniform civil code, critics argue, would impinge on the basic right to freedom of religion granted by Article 25 of the Indian Constitution. But this is a misconception because we need to understand that it is only faith that is protected by this Article and not any practice that is against health, public order or morality.²⁰

Furthermore, any law that is incompatible with the Fundamental Rights entrenched in Part III of the Indian Constitution is void, according to Article 13 of the Constitution.²¹

Women's fundamental rights to equality and life, as well as the LGBTQIA+ community's, are violated by personal laws, which are contradictory and should be repealed. The implementation of a uniform civil code would allow the Constitution of India to function in conformity with the fundamental rights guaranteed by it.

GENDER JUSTICE AND UNIFORM CIVIL CODE UNDER THE CONSTITUTION OF INDIA

The word "gender" is not defined in the Indian Constitution. It has only used the term "sex". However, it provides a basic idea of gender justice by including various provisions, such as the equal treatment before the law and equal protection. India is still far from achieving gender justice in its true sense²² as most of the provisions only talk about men and women and not the citizens in general. For this reason, the rights of the LGBTQIA+ community have hardly been given any recognition. As a result, gender-neutral regulations are required, and a Uniform Civil Code would be ideal for this.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*, at 1301.

²¹ INDIA CONST. art 13.

²² Legislations for Enabling Gender Justice in India (Mar 16, 2022), <https://geographyandyou.com/legislations-for-enabling-gender-justice-in-india/>.

UNIFORM CIVIL CODE AND THE INTERNATIONAL LAW

India has ratified several international conventions. The International Covenant on Civil and Political Rights (ICCPR), which was ratified in 1966, and the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which was ratified in 1979, are two of them. When an international convention is ratified by a country, it is bound to obey the provisions mentioned under it legally, according to International Law. On that account, India is obligated to enforce such provisions to achieve gender justice in the country.²³

Surprisingly, even after ratification, the citizens of India continue to face injustice, particularly in subjects related to weddings, separations, adoptions, succession, and other related matters. This is due to the fact that different religious communities have different beliefs and personal laws. Therefore, in order to eliminate such inequality and conflicting provisions of different religious communities, it is essential to substitute the existing personal laws with a uniform civil code that will not only operate in consonance with the provisions of the Indian Constitution, but as well as with the laws laid down under International Law.²⁴

JUDICIAL PRONOUNCEMENTS

A uniform civil code in India has been emphasized in a number of court decisions. The following are a few of them:

- The Supreme Court proposed taking efforts towards adopting a uniform civil code in the case of *Ms Jorden Diengdeh v. S. S. Chopra*²⁵. It looked at the various aspects of Indian marriage laws, such as judicial separation, divorce and nullification of marriage, and concluded that they are far from being uniform. The Court went on to say, “It is high time for the legislature to step in and adopt uniform marriage laws for all citizens of the country, regardless of caste, gender, religion, or other factors.”
- The Supreme Court ruled in *Mohd. Ahmed Khan v. Shah Bano Begum*²⁶ “a Muslim wife is entitled to support from her husband after the iddat period had expired”. The Court in the case proposed to enact a uniform civil code because it has been a dead

²³ Jyoti Rattan, *Uniform Civil Code In India: A Binding Obligation Under International And Domestic Law*, 46 ILI 577, 577 (2004).

²⁴ *Id.*

²⁵ *Ms Jorden Diengdeh v. S.S. Chopra*, AIR 1985 SC 934.

²⁶ *Mohd Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

letter since the Indian Constitution came into existence and there has been no indication of its formal adoption. It also stated that a uniform civil code would aid the nation's integrity by removing inequalities in the law that exist due to the conflicting ideologies of the different religious communities. The Court acknowledged the difficulties in creating a uniform civil code. Nonetheless, it emphasized that a start must be made in order to give the Constitution full meaning, and that the time has come to do so. It further stated that the State must ensure a uniform civil code for every individual and possess legislative authority.

- The court defined the concept of uniform civil code under Article 44 in the case of **Sarla Mudgal v. UOI**,²⁷ declaring that in a civilised society, there should be no required relationship between personal law and religion. It was also stated, “*while Article 25 ensures the fundamental right to freedom of religion, issues such as marriage, divorce, succession, adoption and so on are not covered*”. The court further noted that, regardless of their sacramental origins, Hindu Personal Laws are codified. The Muslim Personal Laws, on the contrary, are yet to be codified. It also encouraged the government to reconsider Article 44 and go forward with its implementation.
- In the case of **Lily Thomas v. UOI**,²⁸ the Court clarified the decision made in the case of Sarla Mudgal, stating “*although it has not provided any direction for the immediate implementation of a uniform civil code, such a code would aid in the preservation of the nation's integrity and would eliminate conflicting ideologies*”.
- The court held “*religion is a matter of personal faith that cannot be mingled with secular activity*” in **S.R. Bommai v. UOI**²⁹. By introducing a legislation, the government can control secular activities.
- The court concluded in the case of **John Vallamattom v. UOI**³⁰ that secular laws relating to marriage, succession, and other matters cannot be brought under the purview of the freedom provided by Articles 25 and 26 of the Indian Constitution. It went on to say, “*Any legislation that tries to bring such matters within the scope of Articles 25 and 26 would be regarded as a dubious religion and while Articles 25 and 26 of the*

²⁷ Sarla Mudgal v. UOI, AIR 1995 SC 1531.

²⁸ Lily Thomas v. UOI, AIR 2000 SC 1650.

²⁹ S. R. Bommai v. UOI, (1994)3 SCC 1.

³⁰ John Vallamattom v. UOI, AIR 2003 SC 2902.

Constitution of India guarantee the fundamental right to freedom of religion, Article 44 dictates the separation of civil laws from religion.”

OBJECTIVES OF AN IDEAL UNIFORM CIVIL CODE

- Help in achieving secularism:

Because of the presence of many religious communities, India is a huge country. The religious personal laws of various religious communities influence civil laws like wedding, divorce, fostering, inheritance and other related matters and are contradictory to each other. A common civil law would help to eliminate such diversities and establish secularism.³¹

- Provide equal status to everyone:

A uniform civil code would ensure that everyone irrespective of caste, creed, religion, gender, or other factors, has equal rights. Due to the diversity of religious beliefs among Indian citizens, the country has not adopted many legislations. By excluding religion and faith from codification, a uniform civil code would aid in the modification or adoption of those laws in the country. It would further reduce the vote bank politics. The politicians would not be able to use religion as a weapon during elections if all the citizens were treated equally and had the same set of rules to follow.³² A uniform civil code would provide women and the LGBTQIA+ group equal status because it would apply to everyone regardless of caste, creed, gender, religion, or other factors.

The implementation of such a code would also help reduce the power of those people who use personal laws as a weapon to suppress the weaker sections of society.³³

- Social Reforms:

Social reforms would be aided by a uniform civil code. Because Muslim Personal Laws are not codified in India, Indian Muslim women are not protected by them. Women in other Islamic nations such as Pakistan, Bangladesh, Morocco and Turkey, are protected since their religious personal laws are codified. As a result, a uniform civil code would aid in the codification of

³¹ Can We Implement Uniform Civil Code in India? Pro's & Cons of UCC -Explained, GOD OF SMALL THING (Mar 15, 2022) , <https://godofsmallthing.com/uniform-civil-code/>.

³² CAN, *supra* note 26.

³³ *Id.*

personal laws, the protection of women, particularly Muslims and Christians, and the implementation of social reforms across the country.³⁴

- Progress of other countries:

Countries that have a uniform civil code are more progressive than countries that do not have one. This sends a strong message that adopting a uniform civil code in India will contribute to the country's progress and transformation into a better democratic nation.³⁵

- Help in achieving integrity of the nation:

The law sees everyone equally. The criminal and civil laws, excluding the personal laws, are already uniform. Therefore, unification of the personal laws would curb all the differences due to the existence of different religious personal laws and would help achieve the nation's integrity.³⁶

- Supreme Court is not adequate for the personal laws:

The Supreme Court is inadequate when it comes to reforms in the personal laws as it requires the people suffering injustice to be vocal which is hardly the case, and when they do, it takes years to resolve such matters by way of litigation. It would also be impractical for the Supreme Court to deal with a variety of personal laws. As a result, a uniform civil code would aid in the elimination of the complexities while also saving precious time.³⁷

CHALLENGES IN THE IMPLEMENTATION OF A UNIFORM CIVIL CODE -

- Difficulty due to diversity:

It is difficult to create the same set of regulations for everyone since they must be neutral towards all religions. Because the cultural diversity of India is vast, the lawmakers need to

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Shalina A. Chibber, *Charting a New Path Toward Equality in India: From Religious Personal Laws to a Uniform Civil Code*, 83 ILJ 695, 707-708 (2008).

consider everybody's demands and come up with just laws. It would also be quite challenging for some people to accept uniform laws and give up their religious personal laws, which they have been practicing for a long time now.³⁸

- The fear that a Uniform Civil Code will encroach upon one's fundamental right to religious liberty:

It is believed by a lot of people that the adoption of a uniform civil code would violate their basic right to religion. One of the key reasons for the extended delay in its adoption is because of this. The minority population, particularly the Muslim Community was totally against the implementation of a uniform civil code, fearing that it would violate their basic right to freedom of religion and subsequently benefit the majority population.³⁹

- Not the perfect time:

India is not yet ready for the adoption of a uniform civil code, as the Muslim population, which is a minority, has been vocal in its opposition. They still feel insecure, and they require time to gain confidence before accepting the implementation.⁴⁰

CONCLUSION

It has been seventy-five long years since the Indian Constitution came into existence, however, Article 44 still remains untouched. If the mentality of the people cannot change a bit in 75 years, it never will and therefore, there will never be a perfect time to implement it. Although Article 37 states that the Directive Principles are unenforceable in any lawcourt, it does not mean that these principles are meaningless. These principles are essential for the country's governance and the State is bound to abide by these principles while drafting the laws for its citizens. Moreover, Article 13 states that any law that violates the Fundamental Rights enshrined in Part III of the Indian Constitution shall be void. This raises a question on the constitutional validity of the Religious Personal Laws as they infringe upon the fundamental rights of women as well as the LGBTQIA+ community.

³⁸Uniform civil code (UCC): Pros and Cons in A Nutshell, CLEAR IAS (Mar 14, 2022), <https://www.clearias.com/uniform-civil-code-ucc/>

³⁹ *Id.*

⁴⁰ *Id.*

The implementation of a uniform civil code would lead to the protection of the basic rights of everyone and not just women, which the personal laws fail to do. It would also assist in the legalisation of same-sex marriages, which is currently forbidden under the existing marriage laws.

However, an ideal uniform civil code can only be achieved when utmost precautions are taken while drafting it to ensure that the laws are not biased towards any particular community.

We must also remember that we are Indians before we are Hindus, Muslims, Christians, Parsis, Sikhs, Jains or Jews. And therefore, as Indians, all of us should be treated equally. Jai Hind!