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UNIFORM CIVIL CODE
A WATERSHED MOMENT FOR INDIA

Nidhi Vyas

Uniform Civil Code
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By

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Foreword

Through this monograph Nidhi Vyas, a young and promising lawyer, has tried to ease the ruffled feathers of those who are caught in the ongoing storm over the plausible codification and implementation of Uniform Civil Code (UCC). She has intelligently flipped the coin to see both the sides and had articulated accordingly. Though she knows that the storm has not yet passed and the coin is still in the air.

The spine of storm whooshing around UCC would not have been religious freedom, if the cogent minds had reasoned for Article 51 A (e) and Article 51 A (f) along with Article 44 (Part IV) with the matching ardor as they are doing with the word 'Secularism' which in itself is a tangential entry in the Constitution of Bharat. The socio-political and religious bedlam that has conversed would have been effortlessly eschewed if even an iota of information about the good that it will accrue for all women and children irrespective of religion would have seen the light of the day. Nonetheless, formulation of a law, which till now was stalled for reasons best known to all 'political minds', was bound to countenance opposition and resistance. And once codified and implemented, UCC might be abused and misused but which law has not endured the analogous destiny in the history of entire mankind. So why the fate of UCC be any different from the rest. Let all the sundry voices of agreement and dissent be voiced lest the parliament forgets to weigh these voices against the social welfare benefits ensuing from UCC's implementation, if and when it is done.

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Section I

Introducing Uniform Civil Code

Law is introduced in a society to bind community and it is often driven by principles of equity. For co-existence in a society, law is a guiding factor introduced by the Sovereign. The purpose of law is to ensure protection of rights and cast certain duties upon its citizens so as to uphold the basic principles of equality and freedom in the society. Law is the combination of certain rules proclaimed by the State to which each citizen is bound. On the other hand, religion binds people through its customs and traditions. When a community continues to practice the traditions of its religion, it reinforces an unwritten law for the behaviour of an individual as well as for society. Hence, when the traditions are questioned, it is often mistaken as questioning the very existence of a religion.

The religion and the law of the land often enter into conflict as each has its own set of rules that affect the behaviour of people. The State seldom faces a situation where the traditions of religion are diverse than the law laid down by legislature. Since religion is deeply rooted and often considered as the foundation for a person's existence, there exists an inherent resistance if any of the traditions are questioned or negated by the law imposed by the state. Hence, for any sovereign, harmonizing rules of religion with the rules of state is necessary for peace and harmony in a community.

India is a multi-religious and multi-cultural country. Hinduism, Islam, Sikhism, Jainism, Christianity and Buddhism have been practiced in India for generations. Each religion has its own set of laws known as "personal laws" that have developed based on the tradition and culture

of the respective religion. Today, in India, personal laws are in existence governing affairs of people. There are personal laws for Hindus, Sikhs, Parsis, Muslims, and Christians and no codified separate Acts for Jains, Buddhists, Sikhs and Jews. Since the root of these laws are religious practices, the legislations of each religion, though deals with situations like marriage, divorce succession etc., operates differently for different religions thereby creating constant contradictions and inequality in a society. Anomalies also arise due to non-codification or semi-codification of personal laws. It often encroaches upon the freedom and liberty of an individual though guaranteed by Constitution. Many of the Central laws take a backseat when personal laws are operated.

Considering this aspect of constant conflicts, a concept of "Uniform Civil Code" is being deliberated by the governments, institutions and other organisations wherein an attempt is being made to harmonise the personal laws along with Central laws to bring uniformity among all people irrespective of religion. The Constitution of India enshrines the concept of Uniform Civil Code in Article 44 which reads :*"The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India"*.

The core idea behind the concept of Uniform Civil Code is that no person be discriminated based on religion. While the Uniform Civil Code is believed to bring unity, it cannot be simply implemented as any other enactment, ignoring its inherent complications. The Code has to satisfy the constitutional provisions of right to freedom of religion as well as corresponding effect on other central and state enactments. Unifying all personal laws into one Code is hard to formulate and harder to implement. Enacting Code at a time will in fact invite more complex problems especially in terms of its execution. Since the ground level Executive wing and the lower Judiciary would be the first

recipient of the situations, there is a room for chaos and diverse interpretation of the Code. Eventually, the underlying purpose of introducing UCC would not be served. Moreover, each personal law also need modifications suiting current situations. Amending the personal laws in direction of unification into one Code is the easier way of implementation. A phase-wise or gradual implementation is the key for its acceptance and effective execution. Before understanding the concept of unifying and codifying laws, a deeper look at the existing laws and situation as on date is required.

1.1 Origin of Uniform Civil Code

The term "Civil Code" does not necessarily mean codification of personal laws. Unification of similar areas of law will also be included in the exercise of Uniform Civil Code.

The debate on "Uniform Civil Code" is not new. It was initiated during the British Rule before Independence. Due to successive invasions, reign of Hindu kings, followed by a Mughal period and so on and so forth, people throughout India were governed by different laws and practices that varied from one ruler to another. Among Hindus, different schools of thought operated and among Mughal rulers different laws were applicable for different sects. Even within the same community many practices differed. Consequently, there was no uniformity in civil and criminal matters of State, which led the British in the direction of bringing codified law for both segments.

Lord Macaulay codified criminal matters by introducing Indian Penal Code, 1860, Criminal Procedure Code, 1861 and Indian Evidence Act, 1872 and thereafter almost all criminal matters were governed by the three enactments. Similarly, for codification of civil law matters, Civil

Procedure Code, 1908 came to be introduced. Thus, the codification of civil and criminal laws not only reduced the ambiguity and inequality, but also proved helpful for smooth administration.

An attempt to bring uniformity among Muslims was also made. In a majority of the Mughal ruled states, the Hanafi Law was practiced. The Shariat Act, 1937 came to be introduced and was made applicable in a few provinces. There were other existing laws governing various sects of Hindus for which an attempt to codify Hindu Law was made in 1941 by B.N. Rao Committee. However, it could not see the light of the day before Independence. The British did not indulge in unification of laws pertaining to religion and it remained untouched. As a result, after Independence, the task of unification of personal laws went to the Constituent Assembly.

1.1.1 Intent of Constitution Makers behind UCC

A peek into the Constituent Assembly Debates would be helpful to understand how Article 44 (draft Article 35) came to be finally inserted into the Constitution after series of proposed amendments and deliberations.

Draft Article 35 of Constitution of India, 1948 was: **"**35**.**The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India." Nawab Mohammad Ismail Khan, member of All India Muslim League proposed for amendment in Article 35:**"**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." Quoting the precedent of European Countries like Yugoslavia where the rights of Muslims to follow their law is protected, he opined:

> "Now why do people want a Uniform Civil Code, as in Article 35? Their idea evidently is to secure harmony through uniformity. But I maintain that for that purpose it is not necessary to regiment the civil law of the people including the personal law. Such regimentation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law there will be no discontent or dissatisfaction. Every section of the people, being free to follow its own personal law will not really come in conflict with others."[1]

Naziruddin Ahmad stressed upon the anomaly created by Article 19 (freedom of religion) and Article 35, and presented that right is given to state and not the subject which will encourage the state to break the guarantees given in Article 19. He emphasised that with the consent and mandate of people, gradually such change can be brought by Parliament.[2]

Those against the uniformity of laws apprehended that it would amount to interfering with personal rights and result in discontent and tyranny. Due to various systems, the question arise as to which clause should be revolutionised and apply to whole country, and how would it be determined as to law of which community is to be taken standard and

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[1]Constituent Assembly Debates, Volume VII, November, 23rd, 1948 available at https://www.constitutionofindia.net/debates/23-nov-1948/

[2] Constituent Assembly Debates, Volume VII, November, 23rd, 1948 available at https://www.constitutionofindia.net/debates/23-nov-1948/

what will be considered as basis for making all laws uniform.[3] It was even argued that the country that was suffering from economic crisis and had underdeveloped and backward areas, would not be ready enough for such a uniformity. Hussain Imam opined:

> "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 battles. Then, you can have uniform laws."[4]

It was certainly not treated as priority by the members of Constituent Assembly.

Replying to the strong reservations by fellow colleagues from Muslim League and others, K.M. Munshi vociferously advocated changing the point of view by separating religious practices from secular practices. Quoting the example of Egypt and Turkey which had uniform laws and all minorities submitted to it, he said:

> "We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession…. We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however the religious

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[3] B.Pocker Sahib Bhadur, ConstituentAssembly Debates, Volume VII , November, 23rd , 1948, Document 58 para.136available at https://www.constitutionofindia.net/debates/23-nov-1948/

[4] Ibid, Para 141

> practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation."[5]

While expressing that uniformity in law is in fact much more tyrannical to majority than minority, he argued:

> "Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many important factors which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say, "Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation."[6]

The point put forward by advocates of Uniform Civil Code was to adopt an approach to bring uniformity in matters of succession, inheritance, marriage etc. like the existing uniformity in civil, property and criminal matters. Holding that there was no use clinging always to the past[7], it was thought necessary to detach such matters from religion.

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[5]Ibid, Para 147

[6]Constituent Assembly Debates, Volume VII, November, 23rd, 1948, Document 58 para. 150 available at https://www.constitutionofindia.net/debates/23-nov-1948/

[7]Alladi Krishnaswami Ayyar in Constituent Assembly Debates, Volume VII, November, 23rd, 1948, available at https://www.constitutionofindia.net/debates/23-nov-1948/

Challenging the statement that Muslim personal law was uniform throughout the country, Dr. B.R. Ambedkar quoted instances of North-West Frontier Province that followed Hindu law and were not subject to the Shariat Law up to 1935; United Provinces, Central Provinces and Bombay followed Hindu law for succession until the Shariat Law in 1937 applied for rest of India as well as North Malabar Muslims following Marumakkathyam law and further submitted that "it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community."[8] Opposing the amendments moved and addressing the apprehension that State will enforce its law over all the people, Dr. Ambedkar remarked:

> "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. It would be perfectly possible for parliament to introduce a provision of that sort; so that the fear which my friends have expressed here will be altogether nullified."[9]

Thus, upon considering the draft article and rejecting the proposed amendments moved by the members, the motion of deleting the Article was negated and thus, draft Article 35, culminating into Article 44 came to be imbibed into the Constitution of India, 1950.

The objective of this article, by the framers of the Constitution, was to bring uniformity in application of law in respect to personal matters and it proceeds on the assumption that there is no necessary connection

[8]Ibid, para 165
[9] Ibid, para 166

between religion and personal law in a civilized society.[10] Interestingly, the Article is inserted under chapter of the Directive Principles of State Policy and not under Fundamental Rights. The idea was to give scope to the Parliament in future to enact such code considering the prevailing situations and will of people. Article 44 is often construed to be contradictory to the Fundamental Right under Article 25 of the Constitution that guarantees freedom of conscience and profession, practice and propagation of religion. Even the constitution makers contended that it will undo the rights guaranteed under Draft Article 19 (now Article 25). Responding to the anxiety, K.M. Munshi argued that the inclusion of Clause 2 of Article 19 (now Article 25) itself connotes that "if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament to make laws about it without infringing this Fundamental Right of a minority".[11] Hence, the apprehension of such violation would be unwarranted. Uniform Civil Code falls within such clause and hence Parliament can enact a law for Uniform Civil Code under the four corners of Article 25.

Thus, the debate over infringement of Fundamental rights by the Directive Principles of State policy was settled at the time of framing of Article 44. Nonetheless, even today, many issues remain unanswered as to which areas would be governed under religious practices and which

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[10]Durga Das Basu, *Commentary on the Constitution of India*, Volume-33,(Lexis Nexis Butterworths Wadhwa)8th Edition, pp. 4132 and *John Vallamattom V, Union of India* reported in 2003 (6) SCC 611: AIR 2003 SC 2902

[11] Constituent Assembly Debates, Volume VII, November, 23rd, 1948, Document 58 para. 144 available at https://www.constitutionofindia.net/debates/23-nov-1948/

under secular practices, and till what extent Parliament will have the power to frame laws.

Considering the objective behind insertion of Article 44, it is imperative that a line be drawn between essential religious practices from civil rights to ensure that all citizens are guaranteed fundamental rights that may be curtailed under the gasp of religion. Therefore, the idea of Uniform Civil Code is advocated on the premise of bringing uniformity and equality among the citizens.

1.2 Judicial Pronouncements and Current Discourse

Before being formalised into the Constitution, an attempt was made during the British era to codify Hindu laws. In 1941, a committee was constituted known as B.N. Rao Committee or Hindu Law Committee which comprised Dwarka Nath Mitter, J.R.Gharpure and Rajratna Vasudev Vinayak Joshi. The aim of this committee was to consolidate Hindu laws on marriage, succession, adoption and maintenance and it drafted a Code by blending most progressive elements of the various schools of law. However, the Hindu Code Bill could not be approved and remained as it is. The then Prime Minister Jawaharlal Nehru, during his administration, enacted the Hindu Code Bill by separating it into different parts and passed separate legislations which culminated into Hindu Succession Act, 1956, Hindu Marriage Act,1955, Hindu Minority and Guardianship Act, 1956 and Hindu Adoption and Maintenance Act, 1956, thus covering all the areas pertaining to Hindus and replacing the traditional Hindu customs and different schools of thought. This can be said to have been a step toward uniformity of laws. However, no such exercise of forming a comprehensive one-time code was made in other personal laws.

1.2.1 Judicial Pronouncements

With the passage of time, different enactments were introduced pertaining to different communities as per the changing times thereby bringing reforms in piecemeal. Due to separate provisions for different sections of people, legal complications often arose and the judiciary had to step in to solve the incongruity. On account of active intervention of the judiciary, many practical issues faced due to conflict of laws, were often resolved and law was settled for future compliance. The courts were often faced with conflicting situations and unjust practices, thereby stressing more for the introduction of Uniform Civil Code.

The Landmark case of *Sarla Mudgal V. Union of India*[12] is an example of the sheer anger of the courts toward the administration for not enacting Uniform Civil Code. Justice Kuldip Singh sarcastically remarked that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve Art.44 from the cold storage where it is lying since 1949. The issue arose as the validity of second marriage by a Hindu husband after converting to Islam, without dissolving the first marriage. The intricacies of effect of conversion, freedom to profess any religion, marriage under Hindu and Muslim laws and provisions of Indian Penal Code were under consideration. The court held that conversion into another religion would not automatically dissolve the marriage and further directed the government to take steps of bringing comprehensive legislation in keeping modern day concept of human rights of women.

The Supreme Court - while dealing with the judicial separation under Parsi Marriage and Divorce Act, 1936, in case of *Jorden Diengdeh V. S.S. Chopra* - observed in the opening of the judgement its displeasure

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[12] (1995)3 SCC 635: AIR 1995 SC 1531

for not enacting Uniform Civil Code and stressed for immediate and compulsive need for a Uniform Civil Code.[13]

The breakthrough judgement and one of the finest examples of judicial activism in judicial history is *Mohd. Ahmed Khan V. Shah Bano Begum*[14] whereby the Constitutional Bench of Supreme Court, going one step ahead of the Muslim Personal Law, recognised the rights of maintenance of a Muslim woman under the provisions of S.125 of Criminal Procedure Code. The Constitutional Bench had to deal with agonising issues under Muslim Personal Law where the husband was enjoying the privilege of discarding his wife at any point and absolved from liability of maintenance after iddat period. While referring to the verses of Quran, the intention of Parliament behind the provision of maintenance and provisions of Muslim personal law on the plight of women, the Court expressed its disappointment:

> "It is a matter of deep regret that some of the interveners who supported the appellant (husband), took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorcee should maintain herself. The facile answer of the Board is that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephews and cousins, to support her."

The Bench further observed the anomalies created by various personal laws and situations like these create injustice and infringe rights of

[13] (1985) 3 SCC 62: AIR 1985 SC 935
[14] (1985)2 SCC 556: AIR 1985 SC 945

people more particularly due to non-implementation of Uniform Civil Code. Terming Article 44 as "dead letter" it stated:

> "There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. 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 meddling. 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."

However, not in all matters could the judiciary iron out the creases due to its own inherent limitation to interfere in policy matters. A public interest litigation[15] to declare certain aspects of Muslim personal law like polygamy etc. as contrary to Article 14 and 15 of the Constitution,

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[15]Ahmadabad Women Action Group V. Union of India reported in (1997) 3 SCC 573: AIR 1997 SC 3614

was rejected on the ground that the powers to legislate on such issues was with Parliament and not with the courts. In *Madhu Kishwar V. State of Bihar*[16] it was observed that however laudable, desirable and attractive it may be, the court should not assume an activist role as it is not best equipped with legislative intricacies and focus attention on state policy to awaken them from slumber. The court observed in *Lily Thomas V. Union of India*[17] that the remarks made earlier in Sarla Mudgal (supra) were not in form of directions but mere observations.

The Supreme Court - in case of *John Vallamattom Versus Union Of India*[18],while determining the issue of discriminatory treatment to Christians under S.118 of the Indian Succession Act, 1925 preventing them from bequeathing property for religious and charitable purposes- noted the separation of religion from law and observed while parting with the judgement:

> "The aforesaid provision (Article 44) is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Art.25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles

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[16] (1996) 5 SCC 125: AIR 1996 SC 1864
[17] (2000) 6 SCC 224: AIR 2000 SC 1650
[18] 2003 (6) SCC 611: AIR 2003 SC 2902

> 25 and 26 is a suspect legislation. Although it is doubtful whether the American doctrine of suspect legislation is followed in this country…. A common civil code will help the cause of national integration by removing the contradictions based on ideologies"

Time and again, the courts encounter multiple complexities arising out of personal laws inter-se and intra-se which result in testing its validity prevailing under personal law on touchstone of fundamental rights.

In spite of various pronouncements for Article 44, no concrete steps were taken by the administration and in the year 2017, the Supreme Court came across yet another oppressive issue of "triple talaq" in case of *Shayara Bano V. Union of India*[19] under Muslim Personal Law which was the root of perpetual injustice towards Muslim women for generations. Knocking on the doors of the courts, to declare "talaq-e-ibbadat" as a violation of fundamental rights on premise of it being no more sacrosanct to tenets of Muslim religion and more particularly when it is denounced by majority of Muslim countries, again the court faced with the conflict of Personal Law vis-a-vis Fundamental Rights. The Constitutional Bench by 3:2 ratio injuncted the practice of "talaq-e-ibbadat" and further, while directing the Union of India to form a legislation in this regard, observed:

> "When the British rulers in India provided succour to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations, even in India, but not for the Muslims. We would therefore implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance.

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[19] (2017) 9 SCC 1: AIR 2017 SC 4609

> We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation."

In the absence of any uniformity in laws, the burden to reform shifts to the courts. The courts have kept Fundamental Rights as paramount while dealing with the complexities arising under personal laws and this is playing a major role in bringing about radical changes. However, the legislature cannot shirk away from its primary responsibility of bringing reforms and the courts can only facilitate or advise in that direction. Nonetheless, the role of judiciary cannot be ignored while delving into the issue of Uniform Civil Code and understanding its practicality and implementation.

1.2.2 The Current Discourse

Contrary to the impression framed by Supreme Court that the Government is not keen on implementing Article 44, the Union Government has indeed taken initiative, though piecemeal, for codification of personal laws. Various Law Commission reports have focused on amendments required in certain personal laws. The 2nd Law Commission prepared its report on laws related to marriage and divorce among Christians in India, 3rd Law Commission on law of foreign marriages, 6th Law Commission on amendments in Hindu Marriage Act, 1955 and Special Marriage Act, 1954, 7th Law Commission on Married Women's Property Act,1874, 10th Law Commission on various issues of Indian Succession Act, law of divorce for Christians, maintenance under Hindu Marriage Act, 1955, dowry deaths etc., the 12th Law Commission on removal of discrimination against women in guardianship and custody of minor children, 13th Law Commission on inter-country adoption, etc. However, all of the Law Commission

reports focused on individual personal laws rather than their consolidation.

An attempt towards codification was made by 18th Law Commission[20] which prepared a report on the consolidation of marriage and divorce laws. It suggested the enactment of Central legislation applicable to whole India irrespective of religion. It encouraged compulsory registration of marriages and divorces, thereby banning the prevalent practices of customary marriage and divorce among different communities.

In 2016, for the first time, a formal initiative was taken whereby the Ministry of Law and Justice made a reference to the Law Commission to examine all matters relating to implementation of Uniform Civil Code. On 31August 2018, the 21st Law Commission presented the Consultation Paper on "Reform of Family Law" by examining all the personal laws, studying 75,378 responses from people, inputs from civil society organisations and education institutions and concluded:

> "While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a Uniform Civil Code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition

[20] 18th Law Commission of India, "Laws on Registration of Marriage and Divorce- A proposal for Consolidation and Reform", Report no. 211 dated October, 2008 available at https://lawcommissionofindia.nic.in/report_eighteenth/

of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy."[21]

It further suggested a series of amendments to personal laws and further codification and certain other laws which are required as per changing times. However, since the term of the commission expired, the paper could not be tabled before Parliament.

The power to legislate is not merely the domain of the Centre but it finds its place in List-III Concurrent List-Entry 5, whereby even states have the power to enact laws pertaining to marriage and divorce, infants and minors, adoption, will, intestacy and succession, joint family and partition etc. Therefore, the onus not only lies on the centre, but also upon the states, that are ready and willing to bring reforms in personal laws.

Article 44 has been a distant dream since its inception, however, there is one state that had its own Uniform Code since before Independence. The Portuguese Civil Code of 1867 was applicable in Goa, Daman and Diu and following its accession to India - when all three were declared as Union Territories by virtue of Goa, Daman and Diu Administration Act of 1962 -all the laws in force in these territories before their liberation were continued. Consequently, the Goa Civil Code, having common principles on personal matters of marriage, divorce, inheritance etc. is applicable to all people residing in Goa irrespective of religion. It has progressive provisions even in matters of divorce and succession considering the equality of rights amongst men and women. It is certainly a successful example of uniformity of laws in personal

[21] 21st Law Commission of India, Consultation paper on "Reform of Family Law", 31st, August, 2018 available at https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf

matters. While the Goa Civil Code cannot be called a perfect uniform code and it may need a relook considering changing times, nevertheless it can act as a guiding tool for deliberations on Uniform Civil Code for the rest of the country.

Taking a cue from Goa, Uttarakhand Chief Minister Pushkar Singh Dhami announced his desire to bring Uniform Civil Code in the state in May 2022 and for this research work has already been started. The said decision has once again sparked debate across the country.

A Private Member's Bill came to be introduced in Rajya Sabha by BJP MP Kirodi Lal Meena in 2022 to provide for the constitution of "National Inspection and Investigation Committee" for preparation of Uniform Civil Code.[22] The bill was passed with 63 votes in favour and 23 against. A Public Interest Litigation was also moved by BJP leader and advocate Ashwini Upadhyay in Supreme Court for implementation of the Uniform Civil Code, the PIL was dismissed. Thus, debate for the code has gained limelight in recent times in the political discourse.

1.3 Conclusion

The debate of bringing a uniform code is not new and many communities and religious sects have been deliberating on it. Over a period of time, the deliberations over personal matters have acquired political connotations and have become a part of the agenda in almost every election. Minorities have been strong objectors of such a move and therefore appeasement politics has resulted in shelving of the issue. Overpowering political motives have often resulted in misinterpretation of the subject and created apprehension. Hence, till date, the right

[22]Uniform Civil Code Bill, 2020, Bill No. II of 2020

atmosphere for willing acceptance of the unification of personal laws has been missing.

The Uniform Civil Code is advocated on the principle that one nation should have one law. When different people are treated differently for the same matter, it creates inequality. Looking from the social aspect, people from a religion should not be given any differential treatment and subjected to any injustice merely due to them belonging from the said religion. Giving importance to religious law over the sovereign law is giving unfettered powers to non-state actors like the religious communities or sect heads. This further divides the people of the nation, instead of uniting them. It is necessary to ensure equality and justice among all and thus religious practices and law should be kept separate with a common law governing all people. Mixing religion with the civil matters of law, like succession, adoption, marriage etc. in fact defeats the purpose of Fundamental Rights guaranteed under constitution. The fear of minority groups that while deciding the prominent law for applicability, the law of the majority i.e., law of Hindus would be made applicable, is also misplaced. As rightly stated by K.M. Munshi in his submission before the Constituent Assembly, in fact the majority would be the most affected when such a code will be introduced. The intent behind the introduction of the concept of Uniform Civil Code in the Constitution was itself to encourage Parliament in the future, to bring such a code. While supporting the concept, Alladi Krishnaswami Ayyar, raised a question in the Constituent Assembly:

> "There is no use clinging always to the past. We are departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation. Are we helping those factors which help the

welding together into a single nation, or is this country to be kept up always as a series of competing communities?"[23]

Even after 75 years, this question is relevant and needs to be answered.

Section II

Marriage, Divorce and Maintenance

2.1 Marriage

Marriages are governed through traditions and rituals imbibed in every religion. Essentially, all religions have their own set of customs governing the rules of marriage, performance of rites and rituals, conditions for valid marriage etc. The law of marriage has its root in religions and assumes an integral part of any personal law.

Each personal law has different rules for marriage. Its rituals, ceremonies, customs and requirements under the religion have been given legal sanctity by the personal laws. Similarly, rules for divorce and maintenance also differ in each personal law depending upon the religion and its customs. The concept of divorce and maintenance is rather absent or hardly dealt with under the personal law.

Considering that the roots of marriage, divorce and maintenance are solely in religious practices, each personal law of religion deals with it

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[23]Constituent Assembly Debates, Volume VII, November, 23rd, 1948 available at https://www.constitutionofindia.net/debates/23-nov-1948/

differently. Thus, rules of valid marriage are different for Hindus and Muslims and the conditions of divorce in Muslims are different from that of Christians. Such disparity amongst the communities has often led to complications and inequalities irrespective of religion.

Hindus, Jains, Sikhs and Buddhists are governed under The Hindu Marriage Act,1955. The essential condition for valid marriage is that it is solemnized as per customary ceremonies and fulfil the criteria of age, consent, sanity etc. and they should not be from prohibited relationship or sapindas (having common lineal ascendant).

Marriages under Muslim law is essentially considered as a civil contract and not sacrosanct with essential conditions of consent, competency etc. Marriage after the Nikah ceremony is required to be registered in accordance with the Muslim Marriage Registration Act, 1981. The consent of both the parties is the utmost important aspect of marriage.

For Christians, The Christian Marriage Act, 1872 is applicable whereby sole requirements is that either or both are Christians and solemnise as per the ceremonies and customs of Church and by a minister or clergyman of Church of Scotland, or by minister of religion licensed under the Act or, in the presence of marriage registrar appointed under the Act. There is a detailed procedure of issuing notice and obtaining certificate within stipulated period for valid marriages. Under this Act, there is no prohibition of minor (not below 21 years of age) for solemnizing marriage provided the conditions are fulfilled.

There is no codified law for Jews and Jewish Marriages are solemnized as per customs and rituals.

The Special Marriage Act, 1954 is mainly applicable in case of inter-religious marriages whereby, there will be notice of intended marriage wherein any person can raise objection within 30 days for such intended

marriage. If no objection is raised or objection is disallowed, the marriage can be solemnized after completion of a period of 30 days. The act is applicable mainly when two people from different religion/caste intend to marry.

Every religion has its own rules for solemnizing and validating marriages. The state has no role in determining which ritual should be considered for recognizing a marriage as valid. However, there is an area where there can be uniformity in marriages in India. Considering all the laws pertaining to marriage, it can be inferred that for different religions, different set of rules exist for solemnizing and validating marriage. The common thread between all the laws is consent, competency, non-prohibited relationships, and the performance of ceremony for validity of marriage.

Though, different laws for solemnizing marriage do not create any inequality and discrimination amongst persons per se, it cannot be ignored that persons under Special Marriage Act or minors under Christian Marriage act, 1872, are definitely not treated at par.

2.2 Divorce and Maintenance

There are divergent provisions for divorce under different personal laws which have always created inequalities and injustice from constitutional perspective.

The Hindu Marriage Act, 1955 recognises cruelty, conversion, adultery, renunciation of world, desertion and mental illness as grounds for divorce. Notably, one ground for divorce is if the spouse is not heard as alive for period of seven years. Such ground creates injustice for the spouse who has to wait for seven years. It also contends a beneficial

provision of divorce for mutual consent, introduced in 1976, especially for a situation of irreversible breakdown of marriage. Though the Act has similar rights for men and women, it suffers from drawbacks mainly in procedure for divorces and custody of children.

The Muslim Personal Law (Shariat) Application Act, 1937 was enacted with an intent to ensure that the customary law is not replaced by Muslim Personal Law[24]. Under the act, all the questions including succession, adoption, property, marriage, talaq (divorce), etc. are considered as "rule of decisions". Thus, divorce under the Shariat Law, which mainly follows Hanafi law, is practised. Since there was no provision in Hanafi Code of Muslim Law for a married Muslim woman to obtain a decree from the court for dissolving her marriage - in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances-the Dissolution of Muslim Marriage Act, 1939 came to be introduced, whereby a wife could seek divorce on various grounds. Thus, for husband seeking divorce, the manner and method of seeking divorce was governed by Muslim Personal Law (Shariat) Application Act, 1937 whereas for wives, Dissolution of Muslim Marriage Act, 1939 was applicable. Unquestionably, both do not have common grounds for divorce and more room was given to husbands to give talaq (divorce at instance of husband) including practice of instant talaq (talaq-e-ibbadat -popularly known as triple talaq) as well as talaq-e-hasan which is instant declaration of talaq followed by period of abstinence. The wives on the other hand, governed under 1939 Act, had grounds of divorce provided it continued for a definite period of years. For instance, if husband fails to maintain her for period of two years or failed to perform marital obligations for period of three years etc. Thus, except for ground of

[24]Objects and Reasons of Muslim Personal Law (Shariat) Application Act, 1937

cruelty, majority of grounds for divorce even under 1939 Act had to fulfil other conditions, unlike Act of 1937.

After years of oppression and injustice suffered by Muslim women who were victims of instant talaq, and owing to complete non-interference by the legislature to remedy the effect, the Supreme Court intervened and set aside the practice of triple talaq as manifestly, arbitrary and unconstitutional by its landmark judgement in *Shayara Bano Versus Union of India*[25]. Consequently, the Muslim Women (Protection of Rights on Marriage) Act, 2019 came to be introduced holding "talaq" pronounced by Muslim husband in any form as void and illegal. Thus, only upon intervention from the judiciary, Parliament had introduced an enactment, which brought a great relief for Muslim women. Needless to say, there are still many other provisions existing in Act of 1939 which call for interventions.

Divorce among Christians is governed under the Indian Divorce Act, 1869 having akin provisions like that for Hindus from 2001. Earlier, the law of divorce for Christians lacked consistency as for a husband the evidence of cruelty was sufficient grounds whereas for a wife cruelty and adultery had to be proven. After the amendment in 2001, the Act came to have a provision for divorce by mutual consent. Much importance is given to adultery whereby the adulterer can also be made party to the proceedings and, the court also has to satisfy itself that there is absence of collusion. Adultery can be condoned if the conjugal cohabitation of parties has been resumed. A provision for suit by minors is also made in the Act.

The Parsi Marriage and Divorce Act, 1936 has similar grounds for divorce, like adultery, bigamy, fornication, conversion etc. However, some of the provisions are different compared to other laws. For

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[25] (2017) 9 SCC 1: AIR 2017 SC 4609

instance, ground of rape, unnatural offence, pregnancy by other man during marriage etc. cannot be raised if the application is filed after two years of knowing of such fact. Uniquely, the act provides for specific provisions of disposal of joint property, custody of children, settlement of wife's property for children etc.

Various laws have different procedures for divorce, however, adultery, unsound mind, cruelty, bigamy etc. are some of the common grounds in all family laws. The S. 498A of the Indian Penal Code, 1860 containing about domestic violence, S. 377 of Indian Penal Code,1860 containing about unnatural offence as well as Dowry Prohibition Act, 1961 dealing with the offences related to marriage which can be perused in a different manner rather than resorting to family laws. Much debate centres on the misuse of S. 498A by women to gain undue benefit which has been addressed by the judiciary time and again. Marital rape is also one of the debates that has yet not been addressed by the legislature.

In connection with divorce, ancillary issues of maintenance also play an important role. All family laws have different provisions of maintenance and have created inequality for women. The noble provision of S.125 of Code of Criminal Procedure Code, 1908 grants relief of maintenance to women and children irrespective of religion.

2.3 Reconciliation of Personal Laws

Even though the laws of marriage are sound and do not call for much interference; in reality, benefits of loopholes are taken, whereby, marriage under forceful consent, marriages between sapindas, child marriages, marriages for dowry etc. are still prevalent in remote areas. In the name of religion, polygamy is practised even by non-Islamic people, conversion is practiced by forceful inter-religious marriage.

Such practices do occur due to non-uniform laws on marriage. Considering the changing times, the existing laws on marriage also do not include in their scope same sex marriages and live-in relationships which will probably a legally and socially acceptable norm in Indian society in the near future.

In the background of family laws pertaining to divorce and the offences of marriage under other enactments, it can be concluded that from filing of divorce, ground of divorce, period consumed in it etc. is very different for all communities. Divorce is considered taboo in the Indian society and though the intent of the legislature was to ensure that divorce is a last resort and thereby elongate the procedure, such procedure is in fact more harmful to couples and families. In case of irreversible breakdown of marriage or mutual separation by couple, there should be a faster procedure as in such situations divorce is the solution and not the problem.

Marriage and divorce is essentially a private affair among partners and the interference of courts and state should be minimal. A change in outlook is required, wherein divorce should not be considered a stigma and importance is given to individuals' mental health and happiness. No religious beliefs should be reason to prolong a marriage, which is otherwise full of harassment, cruelty or unhappiness. Hence, with this lens, the ground, procedure and outcome of divorce should be amended to bring uniformity. The biggest drawback of all family laws is that they do not have simplified procedure for divorce. Since children are always the victims of long-drawn matrimonial trials, ancillary issues of their mental wellbeing and their upbringing is affected thereby setting a wrong precedent. A provision for children and their custody should be given prime importance in all family laws. Simpler and faster procedures are necessary and beneficial in curbing false allegations, ego clashes and multiple litigations.

In the area of maintenance, S.125 of the Criminal Procedure code, 19860 can be termed to be a step towards uniformity. Irrespective of any religion, maintenance for partner, children and parents is basic necessity and a right which should not be curtailed from any religious angle. A change can be brought by reforming all personal laws to eliminate conditions and procedure for maintenance and relegate it to S. 125 of the Code of Criminal Procedure to ensure uniformity. Similarly, S. 125 may be modified to ensure that women, men and other genders are included for a wholesome provision.

Marriage, divorce and maintenance are areas where religion's interference has resulted in injustice and inequalities. There are many terms and conditions attached to the procedure of divorce which creates inequalities. There are also, very limited rights in seeking divorces. In rural areas, local communities dominate the decision of couples and their interference results in injustice and inequalities. Contractual divorces, child marriages, orders of khap panchayats, issuance of fatwa, honour killing etc. conveniently escape the shackles of law in the name of religion. These methods of informal justice have resulted in loss of lives and social imbalance. The judiciary has tried to bring piecemeal reforms but a common law or commonality in laws for governing these is incumbent. No citizen should be disadvantaged and forced to live with a partner or become a victim at the hands of their partner because of religious customs.

2.3.1 Suggestions

Marriage and divorce completely fall under the domain of personal matters where interference of state, any community, or other actors should be minimal. However, in a secular and democratic nation,

religion cannot deny equal status and dignity. The role of state will only be limited to regulate the same and ensure that no citizen is deprived of fundamental rights of justice and equality under the garb of religious practices.

Uniformity can be achieved by amending few areas and bring all family laws at par with each other. Some suggestions to achieve reconciliation:

1. Rituals of each religion followed for solemnizing marriages should remain intact but registration of marriage should be compulsory and necessary considering the validity of marriage. This will ensure registration even in rural and remote areas and help in curbing child marriages, prohibited marriages, forceful marriages and such practices.
2. Marriage age should be revised to 21 years to ensure uniformity.
3. The procedure of inviting objections to intended marriage is against the principle and concept of consent amongst partners. The procedure of such objection, more particularly in Special Marriage Act,1954 and Christian Marriage Act,1872 needs to be abolished.
4. All family laws need to have common grounds for divorce with common conditions attached to it. Cruelty, bigamy, irreversible breakdown of marriage etc. all grounds should be common irrespective of gender and religion.
5. Procedure of divorce needs to be simplified, particularly considering the future of children from such marriages.
6. Since the provision of maintenance is already available under Criminal Procedure Code, all family laws can apply provisions of S.125 of the code to ensure that provisions of maintenance are complied within uniform and just manner.

7. In order to minimise informal methods of granting divorces through contracts, local communities etc., such pronouncement of divorce should not be considered valid. A divorce alters the legal status of a person. Therefore, only a court decree should be considered valid. Divorce through mutual consent should be provided under all personal laws.

Reconciliation of family laws in terms of few areas is a possibility without complete abolishment. While maintaining the religious practices, reforms from the point of view of justice and equality should be the sole concern while harmonizing family laws.

Section III

Inheritance and Succession

3.1 Inheritance and Succession

Inheritance and succession laws are mainly dependent on the family system prevailing in every religion. The type of relationship amongst the family members decides the rules of inheritance and succession. Unlike the system of marriage, it cannot be called a purely personal matter of a particular religion since the nature of the inheritance is not derived from any custom but from the relationships possessed amongst the members of a family. It can thus be considered civil law rather than a personal law. In principle, there cannot be any objection to codifying one common inheritance law for all but anomaly arises as to which law of succession will prevail for codification since all inheritance laws are just in their own way.

The Hindu Law follows two types of systems, namely Mitakshara School of Law and Dayabhaga School of Law. The Dayabhaga system prevails in Bengal, while the Mitakshara system is applicable to other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under Dayabhaga school, there is no such definite guiding principle under the Mitakshara school. Sometimes consanguinity, and at other times, religious efficacy has been regarded as the guiding principle[26]. Under the Hindu Law, rules of inheritance and succession are governed by Hindu Succession Act, 1956 whereby, succession is classified into testamentary (distribution of property by way of Will) and non-testamentary succession (distribution of property without any Will). It further enlists the legal heirs and their hierarchy for cases of non-testamentary succession. The provisions regarding devolution of property of male dying intestate and female dying intestates are also given. Birthright to property is recognised under Hindu law. Before 2005, the daughters under Hindu Law did not have birthright to property like son creating great gender injustice. After the amendment brought by legislature, daughter is also recognized as a coparcener and given similar rights as a son. The concept of Hindu Undivided Family (HUF) is also unique under the Hindu law which is deeply rooted in the traditional family system.

Despite the progressive legislation in 2005, gender inequality in matters of succession is still not completely eliminated from Hindu law. The question of devolution of property of female to her natal family is not yet given fair recognition. The idea of women leaving all her ties from her maternal family upon marriage still governs the field. In case of

26 Satyajeet. A. Desai, *Mulla Principles of Hindu law,* Volume.1 (Lexis Nexis Butterworths) 12th Edition

Omprakash V. Radhacharan[27], the Supreme Court was faced with a situation where the widow, during her entire lifetime was never supported by her marital family, was still given the share in the property over the maternal family due to absence of law. The court observed: "sentiments or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous". The Law Commission in its 174th Report[28] also highlighted the need for steps towards gender justice in the Hindu Succession Act, 1956.

Contrary to Hindu Law, the Muslim Law does not give statutory preference to the marital relation for devolution of property, but focuses on the blood relations. Muslim Law follow two types of systems- succession under Shia Law (Hanafi Law) and succession under Sunni Law. Both the systems have completely different set of rules. Notably, the concept of right by birth is not recognised and the property is inherited only upon death of the person. There is no distinction between movable property and immovable property or between ancestral property and self-acquired property. There is no such thing as a joint Mohammedan family nor does the law recognize a tenancy- in-common in a Mohammedan law. There is a presumption that cash and household furniture belong to the husband.[29] The classification of heirs under both the laws is again different and succession is guided by the school of law followed by the deceased person. Intestate succession

[27] (2009) 15 SCC 66: AIR 2009 SC (Supp) 2060
[28] 15th Law Commission of India, "Property Rights of Women: Proposed Reforms Under the Hindu Law", Report no. 174 available at https://lawcommissionofindia.nic.in/report_fifteenth/
[29] Hon'ble Mr. Justice M. Hidayatullah and R.K.P. Shankardass, *Mulla's Principles of Mahomedan Law*, (N.M. Tripathi Private Ltd. Bombay, 1968) 16th edition

under Muslim law has its own discrepancies. For instance, illegitimate children under Hanafi Law are considered to be the children of mother only, and as such they inherit from their mother and her relations. Whereas illegitimate child under Sunni Law do not inherit at all from either mother or father. Considering the rights of females are still not recognised at a par with males, progressive women's groups and social organisations have approached the Supreme Court seeking equal inheritance laws.

Succession for Indian Christians and Parsis is governed by Indian Succession Act, 1925. For intestate succession of Christians, rules laid down under Chapter II part V of the Act is applicable whereby the property will devolve to widow, lineal descendants and kindred in the prescribed order. A widower surviving his wife has the same rights as a widow has in her husband's share. Notably, the rights of widow are given due recognition under Christian Law. Intestate succession for Parsis is governed under Chapter III of Part V of the act recognising the rights of widow or widower, lineal descendants and parents. There is an express provision of bar of succession in case of remarriage during lifetime of intestate. A Parsi woman marrying outside the community does not get much recognition and hence children out of the wedlock do not get the benefit of the succession of Parsi intestate under the act. The succession of the property is simpler compared to other personal laws. The peculiarity of Indian Succession Act, 1925 is that there is no gender discrimination; however, relations built through adoption are not recognised under the act.

3.2 Reconciliation of Personal Laws

Harmonizing personal laws in the field of succession is a herculean task as none of the personal laws are based on a common foundation of

family system. Each set is governed by its own internal system and school of law. Among religions too, there are inter-se discrepancies. Matters of succession are equally said to be personal in nature as it pertains to individual family system and the right of the state to interfere in family system always needs to be first justified. Another hurdle in the unification process is the question that which system should be used as the primary draft to prepare a wholesome system of succession. All laws have conflicting views in matters of succession of various heirs like half-blood heirs, adopted heirs, illegitimate heirs, female heirs etc.

If a uniform code is to address the matters of inheritance and succession of personal laws, it will have to develop a completely new non-religious system of devolution of property which does not depend on family structure. To view from an angle of Article 300A, the transmission of rights of deceased to its heirs have to predetermine the priority of heirs, ignoring the proximity and relations of relatives with the deceased. Such uniform code may not be of much benefit in resolving inheritance issues amongst diverse heirs since succession of property cannot be solely formulated based on right to property and right to equality in wake of complex family relationships. A straight-jacket formula in this area would be difficult for people to comprehend.

Considering the complexities involved in each personal law, uniformity in inheritance law can only be brought in limited areas where there is scope for addressing inequalities such as rights of widows, illegitimate children, adopted children, maternal parents of a female etc. If, each law is scrutinized from the lens of Article 14, areas governing discrepancies can be remedied, thereby ironing out the provisions evenly. It is tough to bring one inheritance law for all the religions, considering convolution prevailing in Indian societies but those pockets that violate the constitutional provisions should be addressed and resolved on an urgent basis.

While addressing the question of reconciling the laws in matters of intestate succession, a Uniform Civil Code on succession would not serve the bona fide intention. However, 'uniformity in law' should be attempted to bring all personal laws at a par in matters of succession on the touchstone of equality. Areas of injustice should not be ignored on the premise of non-interference in personal laws. The civil society also plays an important role in bringing the attention of the lawmakers to discrimination and developing a conducive environment to scrap age-old notions. Inheritance laws of each personal law are under the obligation to be dynamic and change with time as per the rights of its citizen and hence the efforts to bring equality in succession laws should never stop.

Section IV

Adoption and Guardianship

Adoption and guardianship are covered under the arena of personal law but it essentially deals with civil law with regard to custody of children. Child custody is governed more by laws than by the customs and religious practices. The laws of adoption and guardianship focus on welfare of child. The issue of adoption is not only limited to India but also has an international context.

The Convention on The Rights of The Child adopted on 20 November 1989 recognises the importance of family for full development of a child[30]. The Hague Convention on Protection of Children and Co-

[30]Preamble to The Hague Convention on The Convention on The Rights of The Child adopted on 20th November, 1989

operation in Respect of Inter-country Adoption (Convention)[31] recognises the best interest of the child as paramount. In India, the laws for custody, adoption and guardianship are based on this principle but they still suffer from disparities especially in cases of custody of child in divorce and maintenance cases. The discrepancy is due to uncertainty, lack of judicial consensus and lack of legal framework on what exactly constitutes welfare of child.[32] Personal laws deal with the matters of adoption and guardianship to a limited extent based on their respective traditions.

4.1 Guardianship

Hindus are governed by Hindu Minority and Guardianship Act, 1956 in addition to Guardian and Wards Act, 1890 whereby it amends and codifies certain parts of the law relating to minority and guardianship amongst Hindus[33]. Under the Act, the natural guardian of a minor boy or unmarried girl is first father and after him, the mother; in case of illegitimate child, the natural guardian is mother and in the case of a married girl, the husband is the natural guardian. The definition of natural guardian under the act itself creates inequalities. It was lucidly addressed in case of *Githa Hariharan V. Reserve Bank of India*[34] which observed that father, by reason of dominant personality, cannot be

[31]The Hague Convention Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) concluded on May 29, 1993

[32]20th Law Commission of India, Reforms in Guardianship and custody laws in India, Report no. 257, May ,2015 available at https://lawcommissionofindia.nic.in/report_twentieth/

[33]Satyajeet. A. Desai, *Mulla Principles of Hindu law*, Volume.2 (Lexis Nexis Butterworths) 12th Edition

[34] (1999)2 SCC 228: AIR 1999 SC 1149

ascribed to have preferential right over mother in matter of guardianship since both fall under the same category and thereby mother can be natural guardian if father is unable to take care of minor. Notably, the legislative emphasis is placed on the welfare of child in matters of guardianship.

Except Hindus, guardianship under other religions is governed by Guardians and Wards Act,1890 and the interest of child is kept paramount.

Under Muslim law, the minority of a male or female terminates when he or she attains puberty which is presumed on the completion of fifteenth year. Under the Shia law, the mother is entitled to the custody of male child until he attains the age of two years and female child until she attains age of seven years, whereas under Shafi law, mother is entitled to custody of daughter even after she attains puberty, until she is married. The custody of illegitimate children belongs to the mother and her relations. The appointment of guardian by court for Muslims is governed under the Guardianship and Wards Act, 1890.

Guardianship under Parsi law is governed by Guardianship and Wards Act, 1890 as well as under Parsi Marriage and Divorce Act, 1936. Guardianship in Christian law is governed by Guardianship and Wards Act, 1890 and Indian Divorce Act, 1869. Unlike the situation in Hindu law, by way of Personal Laws Amendment Act, 2010, discrimination between mother and father in terms of guardianship has been removed.

4.2 Adoption

Adoption has been enshrined under the Hindu law since ancient times and it has been practiced for various reasons like heirship, succession or property. The primary consideration of the adopter of a male is to derive

spiritual benefit.[35] Adoption under Hindu law is governed by Hindu Adoption and Maintenance Act, 1956 and an outstanding feature of the Act is that it recognises adoption of both a son and a daughter.[36] The Act is also applicable to Sikhs, Jains and Buddhists. The adopted child is treated equivalent to natural born child. The capacity to adopt and procedure of adoption is also defined under the Act.

There are no codified separate law for Parsis and Christians in matters of adoption. They can take recourse to Juvenile Justice (Care and Protection of Children) Act, 2015 whereby a detailed procedure for adoption has been enumerated.

Under the Juvenile Justice (Care and Protection of Children) Act, 2015, a regulatory body, Central Adoption Resource Agency (CARA), has been set up to deal with detailed provisions of manner and method of adoption including inter-country adoption. The act is applicable irrespective of religion which makes it easier to implement. It covers within its scope a child in conflict with law, as well as children in need of care and protection. A comprehensive central legislation that is better regulated and transparent is beneficial for bringing uniform adoption procedure in the country. However, a major flaw is that the act is primarily drafted for rehabilitation and reformation of delinquent juveniles and incidentally deals with the concept of adoption. It is inadequate to address the jurisprudential questions on adoption.[37]

4.3 Reconciliation of Personal Laws

[35] Hem Singh V. Harnam Singh reported in AIR 1954 SC 581: 1955(1) SCR 44

[36] Satyajeet. A. Desai, *Mulla Principles of Hindu law*, Volume.2 published by(Lexis Nexis Butterworths) 12th Edition

[37] 21st Law Commission of India, Consultation paper on "Reform of Family Law", 31st, August, 2018 available at https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf

As the concept of custody, guardianship and adoption of children has its central focus on the interest and welfare of child, the same can be easily reconciled irrespective of its situation in personal law. Unlike in other matters, the rules of guardianship and adoption are not strictly custom-oriented. In fact, upon a bird's eye view, except Hindus, majority of communities are governed by central legislations which will make it easier for Parliament to implement a uniform law in matters of adoption and guardianship.

These areas, as they are governed today, are still full of inequalities. The existing laws, even today, make differential treatment in respect of legitimacy of children. As rightly recommended by the Law Commission,[38] the law should not make preference between parents based on gender stereotypes and in terms of roles and responsibilities. The mother and father both should be made natural guardians. Similarly, age of minor, preferential rights of father as guardian, legitimacy of children, right of adopted child in property etc. are the arenas that need attention. Rules of adoption by single parent or LGBTQIA+ couples or rights of children in case of inter-country adoption need to be addressed. Not just children, but guardianship of disabled persons, elderly people, mentally challenged persons etc. needs to be brought under one umbrella for an inclusive uniform legislation.

The Parliament in its 118th Report[39] also recommended that a new comprehensive uniform legislation is required on adoption and

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[38] 20th Law Commission of India, Reforms in Guardianship and custody laws in India, Report no. 257, May, 2015 available at https://lawcommissionofindia.nic.in/report_twentieth/

[39] Department-related Standing Committee on Personnel, Public Grievances , Law and Justice, Rajya Sabha, *Review of Guardianship and Adoption Laws,* One Hundred and Eighteenth Report (August, 2022) available at https://sansad.in/rs/committees/18?departmentally-related-standing-committees

guardianship aspects of various categories of persons that is applicable to all, irrespective of religion.

Adoption and guardianship is more rooted in rights and liberties rather than customs and rituals of any religion. Therefore, personal laws can certainly be reconciled. In fact, in case of a piecemeal implementation, the Uniform Civil Code should begin with this sector since it would be the smoothest way to frame and implement the law. Since the prominent focal point is welfare of children and other categories of persons, religion should not be considered a hurdle in bringing about change. This area suffers from uncertainties and inequalities and there is a dire need of uniform law in this area especially considering the international repercussions.

Section V

Conclusion

अयंबन्धुरयंनेतिगणनालघुचेतसाम्, उदारचरितानांतुवसुधैवकुटुम्बकम्॥

The distinction "This person is mine, and this one is not" is made only by the narrow-minded (i.e., the ignorant who are in duality). For those of noble conduct (i.e., who know the Supreme Truth) the whole world is one family (one unit).

\- *Maha Upanishad*

Indian ethos never focused on "self" but emphasized on universal acceptance treating the world as one family. This concept is reaffirmed in the principles of Uniform Civil Code.

An overview of all areas of personal laws vis-à-vis its effects, poses the question - can "one family" concept be a reality? Can Uniform Civil Code be a possibility for a country like India? Each law having different effect on same subject matter, owing to country's heterogeneity, will increasingly give an impression that uniform law is not possible for India.

The framers of law will have to first build a platform on which the pillars of the new law will rest. Fundamental Rights will be one of the standards for framing the law, however, selection of a standard concept would be difficult. For instance, in framing the Succession Law, whether the concept of "Right by Birth" of the Hindu law is to be considered for all citizens or not, regardless of their religion though such is not the case in other religions. Can the divorce procedure under the Muslim law be made applicable to all; or alternatively, an entirely new set of rules be introduced to mitigate the discrepancies arising out of diversity. Such an exercise of arriving at the premise basis which the new law will be framed, will be highly complex and potentially lead to dissent amongst the stakeholders. Each law has its pros and cons, thus making it difficult to frame a uniform law.

Where freedom of conscience and freedom of religious practice are Fundamental Rights, bringing a common law will result in a perception of an encroachment upon rights, and fuel discontent amongst the people. Since, culture and faith assume the personal identity for any Indian, an attempt to supersede his/her personal law will be perceived as losing his/her identity. Therefore, UCC at first glance, appears as a creation of a utopian concept. But, when the country is guided by the principles of universal acceptance, a view beyond "the self" is required to establish equilibrium between personal beliefs and protection of Fundamental Rights for the greater good.

A curious mind might ask, despite being enshrined in the Constitution of India, why hasn’t the Uniform Civil Code seen the light of the day for 75 years. There are multiple answers, and all of them are true in their own way. Legally speaking, replacing all personal laws with a set of new uniform laws in matters of marriage, inheritance, adoption and guardianship, has its share of complications. While enacting a new law, the legislature must consider the wider spectrum wherein there is an ancillary effect on other central and state laws. Additionally, the new law has to stand the test of constitutionality more particularly in wake of Right to Freedom of Religion and Conscience. For instance, a change in the inheritance law will also encroach upon its corresponding Property Laws, Tax Laws etc. Any change in the Adoption Law will affect the Education law, Juvenile law, Indian Penal Code etc. Beyond the conceptual and legislative challenges, a mammoth task will lie in the implementation of the law by the executive and judiciary. Particularly, the implementation by the lower courts in absence of any precedential guidelines will be a daunting task. Therefore, a complete replacement with new system is hard to frame and harder to implement.

Politically, the implementation of UCC will pose a tough challenge for the government to create an atmosphere of acceptance in society. There is an apprehension among the minorities that they will lose their identity, while the majority fears more compromise holding a higher share of the bargain. Till date, the dream of UCC is distant also due to continuous political tiff among various parties in this context. Lack of political will has been at its roots as all the parties tend to focus on their electorate and fail to give a positive direction towards UCC.

Critics from both the sides pose their views on the codification of a uniform law and its consequent repercussions in society. There is a lack of uniform opinion among people about UCC and a tendency to focus more on its demerits. Various religious and political groups have time

and again raised the debate, but lack of knowledge and vision has taken a form of either a threat or a ban. This area of law apparently affects the religious practices of people, and has a wider implication on the political mandate, as well the law and order. Considering the above, it is not surprising, that these considerations have made any government, anxious to even attempt, codifying a uniform law.

5.1 Suggestions to Implement UCC

> "Sooner we forget this isolationist outlook on life, it will be better for the country. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible a strong and consolidated nation."[40] – K.M. Munshi

Parity in law is an intrinsic and mandatory characteristic of the principles of equality. Thus, framing a uniform law does not amount to any interference in the personal law, but merely asserts the constitutional freedoms. It is not the choice, but the duty of the State to ensure that discriminatory treatments do not continue in the name of religion. It is obligated to bring all citizens at a par irrespective of their religion. Therefore, UCC is *sin qua non*, though avoided till date.

Challenges to the UCC though appear big, have simpler solutions especially at the initial stage of its formation. Replacement of all personal laws with a complete new code is more likely to bring dissent

[40]Constituent Assembly Debates, Volume VII, November, 23rd, 1948 available at https://www.constitutionofindia.net/debates/23-nov-1948/

and rejection from the people. It is also not necessary that a uniform code has to be introduced by a complete abolishment of the personal laws. Any drastic step of eliminating the law is in fact likely to do more harm than good. A better solution is to start with small steps by making smaller changes in the existing laws or replacing few portions of the existing areas with palatable amendments. Uniformity in law can be the key. As discussed earlier, a few changes in marriage and divorce laws can bring all religions at a par, without affecting the entire law. Bringing a new comprehensive law for adoption and guardianship would bring equality amongst all the religions. Initially, the legislature needs to identify the existing "areas of inequality" needing an urgent repair, followed by necessary amendments in the gradual phases. A slow and gradual change among all laws is easier for interpretation and implementation, for all stakeholders. By introducing 'Uniformity in Law', the existing laws can be amended accordingly and thereby it will be a step closer to 'Uniform Law'. More than the legislature, the process of execution is important and pivotal. Marriage, divorce, adoption, guardianship and custody are the areas that can be addressed by enactment of a sincere legislation. Uniformity in inheritance and succession of property can be taken up in the second phase as these would require greater political will and conducive social environment. A gradual implementation can be the key for better execution.

Parliamentarian Hansa Mehta rightly remarked:

> "We have too many personal laws in this country and these personal laws are dividing the nation today. It is therefore very essential if we want to build up one nation to have one civil code. It must, however, be remembered that the civil code that we wish to have must be on par with, or in advance of, the most

progressive of the personal laws in the country. Otherwise, it will be a retrograde step and it will not be acceptable to all."[41]

A conducive environment is required to be made by non-state entities such as civil societies, educational institutions, welfare organisations, religious groups, which encourage the principles of equality and educating people about the misconceptions on uniform law and benefits accrued by it. A positive political interference is incumbent for a smoother implementation of law.

5.2 Conclusion

Time has come for the people of India to look beyond personal matters for the betterment of their future. The future holds many complex problems and it is necessary that existing issues are resolved so that a consolidated nation can face situations with clarity and zeal. Apprehension of minorities and majorities about their culture is misplaced. The status quo needs to be changed. Indian culture is not so fragile that it will be endangered in the wake of a few laws. In fact, the new laws will uphold the existing culture by amending their presence in areas that suffer from stalemate.

Transition is never an easy process and there will certainly be some teething problems at the initial stage. The beauty of Indian culture lies in its capacity to adapt and reform for the greater good. The values underlying the Indian civilization are always about togetherness and an inclusive approach to implementing Uniform Civil Code derives its credibility from the same ethics of the Indian culture.

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[41] Constituent Assembly Debates, Volume XI, November, 22nd 1949 available at https://www.constitutionofindia.net/debates/22-nov-1949/#12989

समानीवआकूतिःसमानाहृदयानिवः समानमस्तुवोमनोयथावः सुसहासति॥

"United be your purpose, harmonious be your feelings, collected be your mind, in the same way as all the various aspects of the universe exist in togetherness, wholeness." –Rigveda

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About the Author

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