

DESIRABILITY AND PRACTICABILITY OF UNIFORM CIVIL CODE

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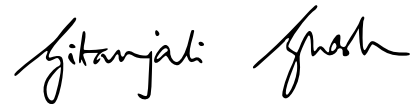
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CERTIFICATE

This is to certify that NEHA JUNEJA has completed her dissertation titled “DESIRABILITY AND PRACTICABILITY OF UNIFORM CIVIL CODE” under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

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I, NEHA JUNEJA, hereby declare that the dissertation titled “DESIRABILITY AND PRACTICABILITY OF UNIFORM CIVIL CODE” submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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- 1939 - The Dissolution of Muslim Marriage Act
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- 1948 - Universal Declaration of Human Rights
- 1950 - The Constitution of India
- 1954 - The Special Marriage Act
- 1955 - The Hindu Marriage Act
- 1974 - The Married Woman Property Act
- 1976 - The Marriage Laws (Amendment)
- 1986 - The Muslim Women's (Protection of Right on Divorce) Act
- 1986 - The Muslim Divorce Bill

TABLE OF ABBREVIATIONS

1.	AIR	All India Reporter
2.	AIWC	All India Women's Conference
3.	B.C.	Before Christ
4.	Bom. L.R.J.	Bombay Law Reporter Journal
5.	BJP	Bhartiya Janata Party
6.	BMMA	Bhartiya Muslim Mahila Andolan
7.	CAD	Constituent Assembly Debates
8.	Cr. L.J.	Criminal Law Journal
9.	Cr PC	Criminal Procedure Code
10.	D.B.	Division Bench
11.	DPSP	Directive Principles of State Policy
12.	Ed.	Edition
13.	FR	Fundamental Rights
14.	HC	High Court
15.	Ibid.	Ibidem
16.	I.L.R.	Indian Law Reports
17.	IPC	Indian Penal Code
18.	J.I.L.I.	Journal of Indian Law Institute
19.	MPMB	Muslim Personal Law Board
20.	MPL	Muslim Personal Law
21.	NDA	National Democratic Alliance
22.	NGO	Non-Governmental Organizations
23.	SC	Supreme Court
24.	SCC	Supreme Court Cases
25.	S.C.J.	Supreme Court Journals
26.	UCC	Uniform Civil Code
27.	UDHR	Universal Declaration of Human Rights
28.	UNO	United Nations Organizations
29.	Vs.	Versus
30.	W.L.R.	Weekly Law Reports

CHAPTER 1

INTRODUCTION

1.1 Research Background

“Without a Uniform Civil Code, labelling India to be a Secular nation is just an illusion.”¹

India's essence lies in its profound embrace of religious and cultural diversity, which has been a defining characteristic throughout its history and will endure in the future. India has served as a haven for every religious belief, welcoming and embracing them all. The world recognizes the profound impact of India's great religious figures, and in turn, India has warmly embraced Christianity and Islam, two global religions that emerged in more recent times. Over 2000 years, the practice of both these religions has woven them into the very fabric of India's religious-cultural traditions.

The history of India is replete with evidence of adherence to the principle of equality among religions. Despite the rule of dynasties and hereditary rulers from diverse regions of the world, religious restrictions were not imposed upon followers of other faiths. This enduring tradition of religious tolerance has persisted, with occasional deviations, shaping the social fabric of India. This age-old tradition was enshrined in the Indian Constitution following independence, making the celebration of religious diversity a cornerstone of Indian politics. Remarkably, India stands as the only country where all four major religions coexist harmoniously. Moreover, the Indian population comprises followers of Sikhism, Jainism, Judaism, and other faiths, all contributing to the rich tapestry of religious tolerance and values that profoundly influence Indian society, culturally and spiritually.

Religion has had a significant impact on Indian society. First, it has brought peace of mind and spiritual upliftment. However, certain religious practices have perpetuated social issues like sati, devadasi and untouchability. The religious beliefs and customs that are based on the personal laws of different communities have been a major source of discrimination. In the name of religion, several unjust and illogical practices are considered legal in society. This has not only created inequalities and differences among people of different religions but has also led to disparities and divisions between different

¹ Vikram Singh Slathia, ‘Quotable Quotes’ (Goodreads, 2023) <<https://www.goodreads.com/quotes/8067932-without-a-uniform-civil-code-labelling-india-be-secular-nation>> accessed 09 May 2023.

sects and sub-sects within the same religion. All of these practices are carried out in the name of religion, traditions and customs.

After the independence, the concept of secularism in this country has been widely misinterpreted and distorted. People have used and abused this term, more as per their own needs and desires. In many developed countries, including some Muslim nations, the personal law system has been modified and standardized. The laws of any country need to evolve with the changing culture and societal demands. Failing to do so results in grave injustice to different groups within society. Developing a progressive legal system is a key factor in bringing about positive social transformation.

In the early 20th century, women activists were at the forefront of supporting a uniform civil code, with the aims of promoting equality, women's rights and secularism. Before India gained independence in 1947, there were limited efforts to bring about legal reforms aimed at improving the social standing of women, specifically Hindu widows. However, these initiatives encountered considerable resistance and challenges. Nevertheless, in a momentous stride towards progress, the Indian assembly managed to navigate through these obstacles and Uniform Civil Code successfully enacted the Hindu Code Bill in 1956. This historic legislation played a pivotal role in advancing the rights and status of women, ushering in a new era of empowerment and equality.²

The foundation of the uniform civil code can be traced back to Article 44 of the Indian Constitution, which states: "The state shall endeavour to secure for the citizen a uniform civil code throughout the territory of India."³ The term "uniform civil code" comprises three key elements: "uniform," "civil," and "code." While the Constitution employs the term "uniform," it is often used interchangeably with "common" in discussions regarding this provision.

In India, the phrase "civil code" holds a specific meaning, referring to a comprehensive set of laws that govern civil matters, including marriage, inheritance, divorce and other related subjects currently regulated by various personal laws. The concept of a "uniform civil code" entails enacting a unified family law that supersedes the disparate personal

² Mahinder Pal Singh and Neeraj Kumar, 'Introduction-The Indian Legal System: An Enquiry' (*Academia*, 7 October 2020)

<https://www.academia.edu/66305563/The_Indian_Legal_System_An_Enquiry_by_Mahendra_Pal_SINGH_and_Niraj_KUMAR_edds_New_Delhi_Oxford_University_Press_xx_pp_Hardcover> accessed 09 May 2023.

³ 'What Is Uniform Civil Code, Article 44 Importance, Hindu Code Bill' (*Business Standard*, 4 April 2023) <<https://www.business-standard.com/about/what-is-uniform-civil-code>> accessed 09 May 2023.

laws governing Hindus, Muslims, Parsis, Christians and Jews in matters of marriage and other related affairs.

Thus, the notion of a uniform civil code pertains to the establishment of a consistent family law applicable to individuals of all communities residing in the country. This objective goes beyond mere uniformity, aiming to ensure social justice for marginalized sections across different communities in areas such as marriage, divorce, custody, adoption, and inheritance.

Hindus and Muslims follow their own distinct legal systems. Hindu law has undergone secularization and modernization through statutory enactments, while Muslim law remains unchanged in terms of its content and approach. Christians are governed by the Christians Marriage Act of 1872, the Indian Divorce Act of 1869 and the Indian Succession Act of 1925. Jews follow their own customary marriage law, which is not codified, and for succession matters, they adhere to the Succession Act of 1925. Parsis have their own Parsi Marriage and Divorce Act of 1936. Therefore, to establish legal uniformity, a Uniform Civil Code becomes imperative.

1.2 Understanding the Meaning of the Uniform Civil Code

Article 44 of the Indian Constitution mandates that the State must strive to establish a Uniform Civil Code for all citizens across the country. This article specifically directs the Indian government to formulate and implement a unified civil code that applies to everyone, and no other provision in the Constitution addresses the Uniform Civil Code.

A Uniform Civil Code promotes a legal system where all sections of society are treated equally, without discrimination based on religion, under a single national civil code that applies uniformly to all. This underscores the notion that there should be no correlation between religion and law in the modern context.

The expression 'Uniform Civil Code' consists of three terms- 'Uniform' 'Civil' and 'Code.' The word 'Uniform' refers to the form of a thing. The Constitution of India in its Article 44 uses the expression 'Uniform' instead of 'Common' but generally these two terms have been used as synonymous in the discussion relating to said provisions.⁴

⁴ Diksha Munjal, 'The Uniform Civil Code' (*The Hindu*, 6 November 2022) <<https://www.thehindu.com/news/national/explained-the-uniform-civil-code/article66105351.ece>> accessed 09 May 2023.

In India, the expression 'Civil Code' is used in a very specific-sense, meaning there by a code of law regulating civil matters which includes marriage, divorce, inheritance and those other subjects which are at present governed by different personal laws and the expression 'uniform civil code' has a reference to enact a uniform family law intended to replace the different personal laws governing Hindus, Muslims, Christians, Parsis and Jews in matrimonial and other related matters.

Thus, the concept of a uniform civil code is confined to having a '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 for the weaker section in different communities in the sphere of marriage, divorce, custody, adoption and inheritance.

In today's context, the implementation of a uniform civil code holds significance in achieving several important objectives. Firstly, it serves as a tool for national consolidation and integration, fostering a sense of unity among diverse communities. Secondly, it acts as a safeguard against political domination, ensuring that no particular group or religion is granted undue advantage in matters of personal laws. Thirdly, it establishes a vital link between justice and equality, promoting a fair and equitable legal framework for all citizens. Additionally, a uniform civil code brings clarity, simplicity and intelligibility to personal laws, making them easily understandable and accessible to everyone. It also aims to remove gender bias, striving for gender equality and empowerment. Lastly, the implementation of a uniform civil code has the potential to improve the position and rights of women in society, addressing existing disparities and promoting their overall well-being.

1.3 Statement of Problem

The desirability and practicability of implementing a uniform civil code is a topic that has garnered significant attention and sparked intense debates. The problem at hand revolves around the question of whether a uniform civil code, which would replace personal laws based on religion with a common set of civil laws applicable to all citizens, is desirable and feasible in a diverse and multicultural society. This issue raises concerns regarding social cohesion, gender equality, cultural diversity, religious freedom, minority rights, and the compatibility of a uniform civil code with the existing legal framework. The problem statement seeks to explore the complexities, challenges, and potential benefits associated with the adoption of a uniform civil code, taking into account the diverse perspectives, interests, and socio-cultural contexts of various stakeholders.

1.4 Detailed Literature Review

In this book titled "**Gender Injustice and the Need for a Uniform Civil Code,**" **Raina Dinanath (1996)** explores the various aspects of gender inequality resulting from the absence of a Uniform Civil Code applicable to all citizens of India, regardless of their religion, caste, creed, and community. The book highlights the significance of the Uniform Civil Code in promoting an egalitarian society and examines why it is Constitutionally binding for India. It emphasizes that Uniform Civil Code not only contributes to national unity but also plays a crucial role in ensuring gender justice and aligning the Indian personal law system with international standards. The book asserts that the implementation of the Uniform Civil Code fulfils the vision of the founding fathers of the Indian Constitution.

In the book titled "**Uniform Civil Code: An Ignored Constitutional Imperative**" written by **M.S. Ratnaparkhi in 1997**, the author thoroughly explores the necessity of enacting appropriate legislation to establish a Uniform Civil Code in India. The book provides an analytical and balanced discussion on the implementation of a Uniform Civil Code that would apply to all Indian citizens, regardless of their religion, race, or ethnicity. Ratnaparkhi refers to the Constitutional Mandate outlined in Article 44 and expresses concern over the failure to achieve compliance with this mandate even after many years of independence. Through a multi-dimensional perspective, the author offers a comprehensive examination of the subject matter and argues that unlike in India, where there exists a lack of harmony and discord between religious communities, in most other countries around the world, Muslims coexist with other religious groups and are governed by the same civil laws. The author supports this argument by citing examples from various Muslim countries where personal laws have been modified to align with prevailing conditions.

In their book titled "**Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code,**" **Nandini Chavan and Qutub Jehan Kidwai (2006)** explore the relationship between the reformation of personal laws and the empowerment of women, focusing on the improvement of women's status in society. The objective of the book is to examine the potential for reforms in Hindu Personal Laws and Muslim Personal Law from a women's rights perspective. The reformation of personal laws is a complex and ongoing discourse, with gender playing a crucial role throughout the discussion. The book emphasizes that communal forces have, under the guise of religion, heavily politicized

and communalized the issue of the Uniform Civil Code. However, the authors aim to objectively examine the entire issue through the lens of gender equality.

In the book "**The politics of Personal Law by Partha (2007)**", the primary focus revolves around the issues and concepts indicated by the book's title. It examines various aspects of personal laws and different religious laws. The codification of Hindu Law and the challenges it presents, the politics surrounding the Muslim Women's Bill, tribal culture and its identity, and the issue of women's rights are explored from multiple perspectives. The book also provides a comprehensive analysis of the changes and developments taking place in different South Asian countries.

In her work titled "**Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code,**" **Shalini A. Chhibber (2008)** raises thought-provoking questions about the existence of discriminatory laws against women in India, despite the Constitutional provisions for gender equality. The Indian government's protection of religious communities has overlooked the needs of vulnerable individuals, particularly women. Religious personal laws in India have failed to benefit women or safeguard the rights of religious communities, deepening the divide between the Hindu majority and minority religions like Islam. This has heightened tensions and reinforced opposing identities. India should transition from religious personal laws to a uniform civil code as outlined in Article 44 of the Indian Constitution. The debate on a uniform civil code is currently divided along political and religious lines, but the core issue lies in concerns over the process and control rather than the concept itself. A uniform civil code developed solely by a Hindu-majority Parliament won't be seen as legitimate by minority groups. To succeed, the process must include voices from diverse religious communities, ensuring the code reflects India's diversity and commitment to equality.

In his book titled "**Uniform Civil Code: Challenges and Constraints,**" **Ajai Kumar (2012)** engages in the debate surrounding the implementation of a Uniform Civil Code in India. The author raises a pertinent question regarding whether the Uniform Civil Code should be immediately applied or if its implementation can be further postponed, waiting for people to realize the significant consequences of not having it and voluntarily adopting it. Kumar effectively highlights the problem by emphasizing that, over several decades, a mechanism for operating under uniform laws has been developed without a corresponding set of civil laws. This development has largely gone unnoticed, as many people are unaware that politicians and political parties have made it their agenda, concealing their true intentions from the public.

In their book titled "**Uniform Civil Code for India: Proposed Blueprint for Scholarly Discourse**," **Shimon Shetreet and Hiram E. Chodosh (2015)** argue that the contemplation of a Uniform Civil Code under Article 44 of the Constitution of India has been completely neglected and disregarded. Despite more than seven decades having passed, the imperative of implementing a Uniform Civil Code has not been developed or put into practice. The book delves into the intricate interactions between legal disputes, cultural differences, and religious considerations among various communities in India. Furthermore, it proposes a blueprint for alternative frameworks based on comparative analysis, aiming to create and implement a functional Uniform Civil Code that suits the Indian scenario.

In their publication titled "**Uniform Civil Code and Conflict of Personal Laws**," **Saksham Solanki and Shaivya Manaktala (2017)** shed light on the pressing socio-political issues that need to be addressed before implementing uniformity in personal laws. They emphasize the significance of considering factors such as literacy, religious and social mobility, which are crucial for a well-planned and cautious implementation of uniform civil laws. The authors argue that the focus should be on ensuring integrity, unity, and equality among genders and communities, rather than hastily imposing a uniform code on a still-developing democracy, which may lead to intolerance and loss of diversity. During the Constitution drafting committee, it was recognized that progressive reforms in personal laws would be more appropriate than immediate legislation, as it could potentially infringe upon people's religious freedom and evoke insecurity and mistrust among communities. The Supreme Court of India, in various judgments, expressed concerns about the multiplicity of religion-based personal laws and their divergent interpretations, which have contributed to ambiguity.

In her book titled "**Challenging Aspects of Uniform Civil Code in India**," **Varuna Chakraborty (2018)** delves into the Directive Principles outlined in Part IV of the Constitution of India and explores their significance in the administration of the country. While acknowledging that directives are unenforceable and non-justiciable, the author emphasizes their importance. The book raises concerns about the non-implementation of the principle stated in Article 44 and advocates for its immediate execution in the form of a Uniform Civil Code. Despite repeated calls by the Supreme Court, this crucial directive has been neglected due to a lack of political determination. India, being a nation where people of different religions and beliefs coexist, governs their personal affairs through their respective religious personal laws. To ensure the successful implementation

of a Uniform Civil Code, it is essential to create awareness among minority communities about the anticipated beneficial provisions that such a code would offer.

1.5 Aims

This dissertation focuses on examining the effectiveness of the current legal frameworks related to the Uniform Civil Code, addressing a gap in existing research. The researcher has set specific aims to achieve this. Firstly, the researcher will critically analyze how well the current legal frameworks are working. Secondly, the researcher will assess the practical challenges and limitations of implementing these frameworks. The role of the judiciary in interpreting and evolving the legal principles of the Uniform Civil Code will also be explored. Moreover, the study will identify key court judgments that have shaped the existing legal framework. Lastly, the impact of these legal frameworks on areas such as personal laws, social cohesion, gender equality and national integration will be evaluated. This research aims to contribute to a better understanding of the Uniform Civil Code and its implications for Indian society.

1.6 Objectives

To achieve the aforementioned aims, the researcher has identified the following objectives for this dissertation:

- a) To explore the historical and legal background of the Uniform Civil Code, with a specific focus on Hindu and Muslim laws in India.
- b) To identify the legal principles, relevant case laws, and debates surrounding the practicability of the Uniform Civil Code in India.
- c) To analyse the implementation challenges and potential benefits associated with the Uniform Civil Code in India.
- d) To assess the impact of the Uniform Civil Code on issues such as personal laws, marriage, divorce, inheritance, and adoption.
- e) To compare the experiences of countries that have adopted a Uniform Civil Code, drawing insights from their successes and challenges.

1.7 Scope and Limitations

The scope of examining the desirability and practicability of a uniform civil code encompasses several key aspects. Firstly, it involves tracing the historical background and evolution of the concept and understanding its origins and development over time.

Secondly, it entails analysing the arguments in favour of implementing a uniform civil code, which includes consideration of social cohesion, gender equality, and national integration.

This dissertation focuses specifically on the Hindu and Muslim laws, de into their legal frameworks, principles, and implications. The researcher was constrained by the limitation of time. Moreover, a substantial part of the research was done using online research materials and readily available books

1.8 Research Questions

In an attempt to achieve the aims of this research, the researcher has set the following research questions for this dissertation:

1. What are the main arguments against implementing a Uniform Civil Code?
2. How does a Uniform Civil Code impact individual religious and cultural rights?
3. What are the potential benefits and drawbacks of a Uniform Civil Code?
4. What lessons can be learned from other countries that have implemented a Uniform Civil Code?
5. What challenges and obstacles exist in implementing a Uniform Civil Code?

1.9 Research Methodology

The nature of research is Doctrinal and Elaborative so the proposed study will make use of analytical and doctrinal methods to study and analyse different statutes, acts, case laws, books, previous study reports and articles related to the subjects hence primary library research shall be followed for the study of various dimensions on the subject ranging from the provisions of the Constitution of India to the various legislative endeavours.

In addition to this, several civil, criminal, social security and human rights legislation of the country pertaining to the Uniform Civil Code will be examined, for this research will consist of the concerned legal and social literature such as periodicals and journals newspapers reports, judicial decisions of Indian courts and concerned websites will also form the base of the study.

A uniform mode of citation has been adopted throughout the research. The mode of citation followed in the research is OSCOLA 4th edition.

1.10 Chapterization

To effectively achieve the aim, the research has been divided into six chapters.

Chapter One - Introduction: - This will be the introductory chapter in which the relevance of the need for a Uniform Civil Code will be tested. This chapter provides a blueprint for alternative frameworks and courses of action by taking comparative context to find the scope for the development of a Uniform Civil Code in India. Along with these, the chapter will consist of the statement of the problem, review of the literature, aim, objectives, Scope, limitation, research questions and research methodology.

Chapter Two - Historical Perspective and Legal Framework of the Uniform Civil Code: - In the historical background researcher has detailed the history of personal laws and the origin of the idea of a uniform civil code in India. There is no denying fact that India is a land of diversities and persons of various communities i.e., Hindus, Muslims and Christians etc. follow their own personal laws which to a great extent differ from one another such types of laws instead of serving the purpose of unity and integrity of the country encouraged the separatist's tendencies which are detrimental to any growing democracy. This chapter states the relation of the Uniform Civil Code with the fundamental rights, directive principles, fundamental duties and also the social impact of Muslim as well as Hindu personal law through the Uniform Civil Code.

Chapter Three – Indian Judiciary and Uniform Civil Code: -. This chapter will deal with the judicial response to the conflict between various personal laws and Uniform Civil Code in India. Some of the well-known and most celebrated cases will be critically analysed in order to know the judicial point of view on the Uniform Civil Code. The Supreme Court of India in a leading case has already regretted that Article 44 has not been given effect. How the Apex Court see the issue that, Indian Parliament is yet to step in for realizing the vision mentioned in Article 44, will be the main discussion in this chapter.

Chapter Four - Uniform Civil Code in Foreign Countries: -It can be stated that in matters of Personal laws various other Countries have adopted the Common Civil Code. Also, a large number of Countries in West Asia and North Africa have been successful in reforming the laws related to Personal status and succession. This chapter reveals the existence of the Uniform Civil Code in various countries.

Chapter Five- Uniform Civil Code - Challenges and Constraints: - In this chapter, efforts have been made to discuss critically all the possible objections relating to religion,

culture immutability, undue interference of the state and the appropriate time of enactment of the Uniform Civil Code. Apart from this, a few major constraints have been briefly highlighted and also reviews the progress made to achieve the Uniform Civil Code in India

Chapter Six – Conclusion and Suggestions: - This chapter is related to the concluding observation. This chapter not only summarises the broad conclusion of the present study but also suggests advanced ways to achieve a Uniform Civil Code in Indian circumstances.

CHAPTER 2

HISTORICAL PERSPECTIVE AND LEGAL FRAMEWORK OF THE UNIFORM CIVIL CODE

2.1 Genesis of Uniform Civil Code

The idea of a Uniform Civil Code was introduced in the national political debate in 1940 when a demand for such a code was made by the national planning committee appointed by the central government. The sub-committee for women's role in a planned economy was specifically directed to study the role women would play in the future independent India and it presented its report to the national planning committee in August 1940, the report advocated for the enactment of the Uniform Civil Code.⁵

The historical background of the uniform civil code is closely linked with the history of personal laws. In ancient and medieval period all branches of law namely civil, criminal and commercial were based on religion and custom. This religion and custom-oriented legal system were complicated and unprogressively.⁶ The British rulers attempted to bring a systematic and progressive legal system to India. British rulers gradually codified and brought secular criminal and procedural legislation. As regards to personal laws, they refrained to enact a comprehensive and secular civil code. Here British adopted the policy of non-interference in matters of traditionally linked with the religion.

The history of Indian legal development tells that after establishing political authority in India, the British attempted to bring a systematic and progressive legal system. In this connection, various schemes for the administration of justice in different parts of India were enforced. Consequently, the judicial system of the Mughals and otherwise gradually replaced with courts constituted by the British. Hence the British faced a problem as to which law should be applied in different kinds of cases by the courts.⁷

The pre-British legal system was mainly based on religious laws. Civil, criminal, commercial as well as procedural laws were all based on religion. The courts of the Mughals applied Islamic law relating to crimes, evidence and procedure whereas the ancient Indian laws and customs were applied by the courts in those places where the

⁵ Archana Parashar, *Women and Family Law Reform in India* (Sage Publications 1992) 230-235.

⁶ Akolda Tier, 'The Evolution of Personal Laws in India and Sudan' (*Journal of the Indian Law Institute*, 4 April 1984) <<http://www.jstor.org/stable/43950945>> accessed 09 May 2023.

⁷ Dr. Ranjan Kumar, *The Need for a Uniform Civil Code* (Pilgrims Publishing 2017) 61-62.

rulers were not Muslims. In this way, the law or custom of one another religion formed the rule of decision in every case.

The law based on religion was seen as complicated and unprogressively by the British. That is why they decided to reform the law and legal system. In this connection, the religion-based criminal laws of India were reformed gradually and the secular criminal code came into existence. Similarly, the Evidence Act and the Civil Procedure Code were enacted. So far as the civil code was concerned the British could not enact the secular laws for all purposes because of political compulsions. The British did not want to infuriate religious societies by imposing secular civil law for all purposes.⁸

The British were aware of the possibility of political repercussions and therefore refrained from enacting a comprehensive civil code on the line of the penal and procedure code. It may be pointed out that the British replaced religion and custom only in non-personal civil areas, which were not regarded by religious societies as important to religion as personal civil matters. That's why the British came forward with piecemeal legislation. They enacted the Contract Act of 1872 and the Transfer of property Act, 1882. Regarding other subjects in civil matters, the British adopted a cautious approach.

The history of the relationship between the personal laws and the civil code stated that it was Warren Hasting's judicial plan of 1772 under which the personal laws were given recognition. According to Prof. Tahir Mahmood, this was the first authoritative "Policy declaration" by the British rulers regarding the religious laws of the Hindus & Muslims.⁹

The Constitutional history reveals that a comprehensive codification of personal laws was generally not favoured by the British rulers. The first law commission set-up under the Charter Act of 1833 had expressed hope that soon the codes of Hindu and Muslim law would be prepared. But the second law commission appointed under the Charter Act of 1853 rejected the idea of codification. The fourth law commission too recommended against the codification of personal laws at that stage.¹⁰

Thus, in British India, no attempt was made to prepare a secular civil code. It appears that the legislative power relating to personal laws was used to bring piecemeal reform rather than to bring a civil code replacing the personal laws of various communities because

⁸ Rama Jois, *Legal and Constitutional History of India* (Universal Law Publishing Co. Pvt. Ltd. 2009) 82.

⁹ Tahir Mahmood, *Muslim Personal Law- Role of the State in the Subcontinent* (Prometheus Books 1984) 6.

¹⁰ M.P. Jain, *Codification of Law* (Generic 1990) 461-514.

they wanted to maintain law and order and they may achieve their goal i.e., profit-making form India.

2.2 Uniform Civil Code and Indian Constitution

In 1946, the Constituent Assembly was established to draft India's Constitution for its upcoming independence. The assembly consisted of members representing diverse perspectives. On one hand, some advocated for societal reform through the adoption of a Uniform Civil Code, such as B.R. Ambedkar. On the other hand, there were proponents of personal laws, with a majority of them being Muslim representatives in the assembly.¹¹ The minority communities within the Constituent Assembly voiced opposition and criticism towards those advocating for the Uniform Civil Code. As a result, only one statement regarding this issue was included in the Constitution under Article 44 in Part IV. This statement emphasizes that the State shall make efforts to establish a Uniform Civil Code for all citizens across India's territory.

However, it is important to note that the inclusion of the Uniform Civil Code in the Directive Principles of State Policy (DPSP) does not make it legally enforceable by the courts, nor has any significant political effort been made to move beyond this provision. The reluctance to pursue the implementation of a Uniform Civil Code stems from the concerns raised by minority communities, particularly Muslims, who fear that it may undermine and nullify their personal laws.¹²

The term "Uniform Civil Code" stems from the notion of a comprehensive civil law code. It entails the application of the same set of civil laws to govern individuals belonging to diverse religious and regional backgrounds. In the Indian context, the term "civil code" carries a specific meaning, referring to a code of laws that regulate civil matters such as marriage, divorce, inheritance and other subjects currently governed by various personal laws. The expression "Uniform Civil Code" pertains to the enactment of a unified family law aimed at replacing the distinct personal laws that currently govern Hindus, Muslims, Christians, Parsis and Jews in matters related to marriage and other related issues.¹³

¹¹ 'The Making of The Constitution of India: A Detailed Analysis' (*Ipleaders*, 6 October 2021) <<https://blog.ipleaders.in/making-Constitution-india-detailed-analysis/>> accessed 10 May 2023.

¹² Rajeev Gupta, 'Is It Right Time to Implement the Uniform Civil Code in India?' (*Times of India Blog*, 23 April 2023) <<https://timesofindia.indiatimes.com/blogs/myview/is-it-right-time-to-implement-the-uniform-civil-code-in-india/?source=app&frmapp=yes>> accessed 10 May 2023.

¹³ 'Uniform Civil Code (UNIFORM CIVIL CODE) In Relation to Personal Law - Divorce - India' (*Mondaq*, 28 April 2022) <<https://www.mondaq.com/india/divorce/1187730/uniform-civil-code-Uniform-Civil-Code-in-relation-to-personal-law>> accessed 10 May 2023.

Hence, the concept of a "Uniform Civil Code" revolves around establishing a uniform family code that applies to all community members residing in the country. This objective is not solely driven by the pursuit of uniformity but also aims to ensure social justice for marginalized sections across different communities in areas concerning marriage, divorce, custody, adoption, and inheritance. It is relevant here to recall that before independence Hindus were governed by their own personal laws, but after independence a large part of traditional Hindu laws were codified in 1955. In sharp contrast, till today Muslim family relations are governed by Shariat-based personal laws. As it will be evident from the discussion of the Constituent Assembly Debates the matter was fiercely debated and discussed in great detail by the founding fathers of the Constitution and there was a consensus that personal laws are part and parcel of a single uniform civil code.

Although the minority spokesperson¹⁴ advanced several arguments, to establish that personal laws are beyond the reach of a Civil Code. The crux of their arguments was that the laws relating to the minority community in family relations are primarily based upon their religion, they are immutable and are not subject to re-interpretation for various reasons and the same cannot be made a subject matter of a 'civil code' but the majority in the constituent assembly¹⁵ did not accept this view because the religion could not and should not be made just an excuse for the continuance of diversified personal laws.

Two different views can be seen about the contents of a 'Civil Code', the first school takes the view that all civil relations are covered by personal law, while the other school maintains that the law relating to marriages, divorce and inheritance largely are covered from a 'civil code'.

In India, there exist multiple systems of "personal law" that are currently in practice. The Hindu system is rooted in ancient Dharmashastras texts, which have been subject to some legislative improvements over time. The Muslim system, on the other hand, is based on the Quran and other related texts, and it too has undergone certain modifications through legislation. Additionally, there are specific matrimonial laws applicable to Christians and Parsees, while the Indian Succession Act of 1925 governs the law of succession for all Indians except Hindus and Muslims. India has embraced the ideal of a secular state and

¹⁴ Constituent Assembly Debates, Vol. VII, 540-547.

¹⁵ Constituent Assembly Debates, Vol. VII, 541.

therefore, it becomes imperative to replace the diverse systems of personal laws with a uniform civil code.¹⁶

The relevance of the Uniform Civil Code has become increasingly evident in the current communally charged atmosphere of the country. It holds the potential to serve as a powerful tool in combating the spread of communalism. It is worth noting that fundamentalism is the underlying cause of communal discord and as a result, fundamentalists often oppose the idea of implementing a uniform civil code for the entire country.

However, it remains a fact, as emphasized by Justice Tulzapurkar, that:

"In the context of fighting the poison of communalism, the relevance of fact it will provide a juristic solution to the communal problem by striking at its root cause, it will foster secular forces so essential in achieving social justice and common nationality."

Unlike the United States, India does not have dual citizenship. Indian Constitution ensures single citizenship and the concept of single citizenship demands that all citizens should be governed by one single set of civil laws. Thus Article 44 of the Constitution becomes very much important and relevant in the present socio-and political context of the country. The Supreme Court requested through the central government of India to make a uniform civil code for all the citizens of the country.¹⁷

To integrate an extremely fragmented society, the founding fathers in their wisdom, provided for a directive to the state under Article 44 of the Constitution that it shall *"endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India."*¹⁸ Such a Uniform Civil Code shall be uniformly applicable to all citizens irrespective of religion, race, caste and sex.

A single law is essential for national integration, for almost a century. An Indian citizen has been governed by uniform laws in all other areas like transfer, contract, civil and criminal procedure, penal code and so on. This is even more "Uniform" than the United States of America, where every state has its own laws.

¹⁶ Justice Tulzapurkar, 'Uniform Civil Code' (Dspace, 1991)

<<http://dspace.cusat.ac.in/jspui/bitstream/123456789/11455/1/Uniform%20Civil%20Code%20-%20A%20Challenge%20to%20Minority%20Rights.PDF>> accessed 10 May 2023.

¹⁷ *Sarla Mudgal v. Union of India* AIR 1995 SC 1531.

¹⁸ Gupta (N 12).

However, the Constitution makers insisted on the inclusion of a uniform civil code in the directive principles of state policy because they had reasoned that national integration and unity and secularism demanded it. In their view justification for the inclusion of the uniform civil code was inter-alia, that it would contribute to the secular idea and facilitate the unity of India which was otherwise hampered by a diversity of social practices and personal laws based on religion.¹⁹

A Uniform Civil Code has become relevant for the nation in achieving the following goals.

(i) National consolidation and integration: A Uniform Civil Code is not just an instrument to achieve national integration or national unity. It is a different matter that incidentally may help to achieve national integration or unity. Supreme Court also underlined the importance of the Uniform Civil Code.

In the famous "**Shah Bano case**"²⁰ Justice "**Chandrachud**" observed: "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".

In the **Sarla Mudgal** case Justice **R.M. Sahai**" observed: Freedom of religion is the core of culture, even the slightest deviation shakes the social fibre, but religious practices violative of human rights and dignity. So unified code is imperative both for the protection of the oppressed and the promotion of national unity and solidarity.

In the above case (**Sarla Mudgal case**) Justice Kuldeep Singh' also observed:

*"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, so it is necessary that all the communities should come forward and contribute to the national integration."*²¹

(ii) Safeguard against political domination: Uniform civil code is a safeguard against political domination using minority fundamentalism, as a harbinger of genuine

¹⁹ Paras Diwan, *The Uniform Civil Code: A Projection of Equality* (Indian Law Institute 1972) 420.

²⁰ *Mohd. Ahmad Khan v. Shah Bano Begum* AIR 1985 SC 945.

²¹ 'After Uttarakhand, Gujarat Seeks to Bring Uniform Civil Code: What Is It?' (*The Indian Express*, 31 October 2022) <<https://indianexpress.com/article/explained/everyday-explainers/what-is-uniform-civil-code-gujarat-uttarakhand-8238306/>> accessed 10 May 2023.

democracy, and means of preventing encouragement to communalism in order to achieve their political ends.

(iii) Linkage of Justice and Equality: Ancient Indian tradition of equality as contained in a hymn of Rigveda says: "All human beings are equal. The king should have the same regard for his subjects that a mother has for her sons." Secularism, justice, liberty, equality and fraternity all are inseparable from one another. No one of them can stand without the others. Justice without equality or fraternity is meaningless. The cornerstone of a democratic society is equality. Everything that characterises a democracy flows from this nation of equality. Without equality, there can be no justice.

True justice cannot be based on unjust laws though it has possible to have a law-abiding society even with the most unjust laws. The concept of justice also changes with the dynamics of the age. Laws that evolved and were deemed sacred in primitive times should not continue if they do not satisfy the condition of the doctrine of equality.²² Recognition of equality and justice in the preamble also guaranteed under Articles 14, 15, 16 etc. is a unique feature of the Constitution.

Personal laws are not a law under Article 13 of the Indian Constitution and therefore don't have to conform enshrined in Article 14. But if personal laws were tested against the doctrine of equality under the law and due process, a large number of them would be found unjust, arbitrary and unConstitutional.²³ Article 14 of the Indian Constitution mandates equality before the law which, it read with Article 44, would make the framing of a Uniform Civil Code not only a guideline for the state but would make it compulsory to frame such a code. In Sarla Mudgal's case, based on the rule of natural justice, a second marriage after conversion to Islam was declared void. This shows that court-led emphasis on the doctrine of equality.

"Thus, a uniform civil code is one of the finest expressions of civilised behaviour. No single community has a monopoly on ethical values. All Citizens need those values and have to strive together. All citizen doesn't want to be compartmentalised; they want to be unified under a rational, fair, humane umbrella."²⁴

²² Chaudahri Hyder Hussein, 'A Unified Code for India' (1968) AIR Journal 71-72.

²³ Maniyar Zahid, 'Personal Laws Vis-À-Vis Fundamental Rights, Part III of The Constitution' (*cjp* 19 March 2021) <<https://cjp.org.in/personal-laws-vis-a-vis-fundamental-rights-part-iii-of-the-Constitution/>> accessed 11 May 2023.

²⁴ Aashank Dwivedi, 'Overview on The Uniform Civil Code' (*Times of India Blog*, 1 April 2022)

<<https://timesofindia.indiatimes.com/readersblog/aashank-dwivedi/overview-on-the-uniform-civil-code-42260/>> accessed 11 May 2023.

(iv) Clarity, simplicity and Intelligibility of the Personal laws: Uniform Civil Code will ultimately lead to simplification and modernisation of personal laws. Simplicity, accessibility and intelligibility are the stock arguments in favour of the Uniform Civil Code.

(v) Improvement in women's position: - A uniform civil code has been a demand of the women's movement from pre-independence days. Women's struggle for equality is intrinsically secular and it is a cardinal principle of that struggle that barriers to achieve equality founded in the name of religion, caste, customs tradition has to be dismantled.

The Supreme Court has also accepted that due to the absence of a Uniform Civil Code, women have not found equal rights compared to men and this is a direct violation of the provision of Article 15 of the Indian Constitution.²⁵

The concept of a uniform civil code has two aspects. Uniformity between communities as well as uniformity within communities. A gender-just code would have to take into account in both aspects, otherwise, it could end up as a code for the uniformity of male privilege.

A Uniform Civil Code is not in complete concord with any religion. It does not seek, the predominance of any religion. A Uniform Civil Code calls for a modern outlook in keeping with present-day needs of fair play, gender equality and reformative ideas.

2.3 Constitutional Provisions

Some of the provisions of our Indian Constitution speak about the Uniform Civil Code. Especially Article 44 which is enshrined under part IV of the Constitution of India. The Constitutional makers dreamed that in the coming future article 44 will be converted into a separate act but still, the dream is not fulfilled due to a lack of political will. The following provisions of the Indian Constitution narrate about Uniform Civil Code.

- i. **The Preamble of the Constitution of India:** India is a secular country, according to the preamble of the Indian Constitution. It denotes the absence of a state religion. A secular state must not discriminate against anyone based on their religious beliefs. Religion's personal law, on the other hand, discriminates against others.

²⁵ Shimon Shetreet and Hiram E. Chodosh, 'Comparative Lessons and the Case of India, Uniform Civil Code for India: Proposed Blueprint for Scholarly Discourse' (*Oxford Academic*, 23 April 2015) <<https://academic.oup.com/book/35404/chapter-abstract/302791939?redirectedFrom=fulltext>> accessed 11 May 2023.

ii. **Article 13 of the Constitution of India** addresses laws inconsistent with or derogatory to fundamental rights. It states that any laws in force before the Constitution's commencement that are inconsistent with the provisions of this part shall be void to the extent of such inconsistency. The state is prohibited from making laws that take away or limit the rights conferred by this part, and any law contravening this clause shall be void. The term "law" encompasses various legal instruments with the force of law. "Laws in force" includes laws enacted before the Constitution's commencement and not previously repealed, even if they are not in operation. However, this article does not apply to any amendment made to the Constitution under Article 368.

Today several Acts and laws abridge the provision of the Indian Constitution. According to Article 13, the Apex court and High Courts of States are the power to declare any law, Act, or ordinance as void which is inconsistent with the provision of the Indian Constitution.²⁶

iii. **Article 14 of the Constitution of India:** Equality before Law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 14 guarantees the fundamental right of equality before the law. This means all are equal before the law irrespective of their caste, religion, etc. But in India for a different religious person, different personal law is applicable.²⁷

iv. **Article 25 of the Constitution of India** guarantees freedom of conscience and the right to freely profess, practice, and propagate religion, subject to public order, morality, health, and other provisions of this part. However, this freedom does not affect the operation of existing laws or prevent the state from making laws to regulate or restrict secular activities associated with religious practice or to provide social welfare and reform. It also allows for the opening of Hindu religious institutions to all sections of Hindus. The wearing of kirpans is considered part of the Sikh religion. Additionally, the references to Hindus in clause (2)(b) include Sikhs, Jains, and Buddhists, and the reference to Hindu religious institutions includes institutions of these religions.²⁸

²⁶ The Constitution of India 1949, art 13.

²⁷ The Constitution of India 1949, art 14.

²⁸ 'Article 25 Freedom of Conscience and Free Profession, Practice and Propagation of Religion - Constitution of India' (*Constitution of India*, 1 April 2023) <<https://www.Constitutionofindia.net/articles/article-25-freedom-of-conscience-and-free-profession-practice-and-propagation-of-religion/>> accessed 12 May 2023.

- v. **Article 44 of the Constitution of India** - The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.²⁹ Article 44 expressly mandates the government to introduce a uniform civil code that would include such items as marriage, inheritance and divorce.

Part IV of the Indian Constitution, which deals with directive principles of state policy, includes Article 44. Fundamental rights are enforceable in India; however, directive principles of state policy are not. As a result, Article 44 remains in place, preventing it from becoming a separate Act.

- vi. **Article 372 of the Constitution of India** states that all laws in force in India before the commencement of the Constitution will continue to be in force until altered, repealed or amended by a competent legislature or authority. The President is authorized to make necessary adaptations and modifications to bring existing laws in line with the Constitution and such adaptations or modifications cannot be challenged in court.³⁰

On the one hand, the Constitution recognizes the continuous presence of personal law, which is why Article 44 anticipates that India will have a uniform civil code at some point in the future. On the other side, some provisions guarantee equal rights, such as Articles 14 to 19. Article 15 would render personal law unlawful because personal laws for distinct groups are fundamentally unequal. Article 15 also prohibits discrimination based on gender. Whereas, Muslim law favours the man in many cases, especially in the issue of divorce and polygamy.

2.4 Uniform Civil Code and Directive Principles of State Policy

The subcommittee of the Constituent Assembly on Fundamental Rights had included the Uniform Civil Code as one of the Directive Principles of State Policy. Clause 39 of the Draft Directive Principles of State Policy read: “The state shall endeavour to secure for the citizens a Uniform Civil Code.” Debating the draft, the subcommittee on Fundamental Rights decided to recommend that clause 39 should be drafted to make it clear that while a Uniform Civil Code for all citizens was highly desirable, its application should be made on a voluntary basis.³¹

²⁹ The Constitution of India 1949, art 44.

³⁰ ‘Article 372 Continuance in Force of Existing Laws and Their Adaptation’ (*Constitution of India*, 12 March 2023) <<https://www.Constitutionofindia.net/articles/article-372-continuance-in-force-of-existing-laws-and-their-adaptation/>> accessed 12 May 2023.

³¹ B. Shiva Rao, *Framing of the Indian Constitution* (Tripathi Publishers and Distributors 1968) 132.

When this provision was debated in the constituent assembly, Article 36 (as clause 39 was renumbered) was strongly opposed by members of the Muslim community, even though it was only a part of the Directive Principle of the State Policy. Important representatives like Shri Mohammed Ismail Sahib, Shri Pocker Bahadur Sahib, Shri Mahboob Ali Baig Sahib Bahadur, all from Madras; Shri Naziruddin Ahmed from West Bengal, Shri Hussain Imam from Bihar etc pleaded for amendments which allowed them to keep their own personal law. Shri Mahboob Ali Baig Sahib wanted a categorical provision that “nothing in this article shall affect the personal laws of a citizen.”³²

The further provision provided that the personal law of any community which has been convinced by the state shall not be changed except with the previous approval of the community determined in such manner as the Union Legislature may decide by law.³³ The members proposing the amendments argued variously that they were speaking on behalf of not only Muslims but other communities as well, and that this provision would run contradictory to the Articles which guaranteed freedom of religion. Shri Munshi said that you have to think of the benefits that may accrue to the whole community. As to Europe, anyone who went to a European country had to abide by the laws of that country. He felt that a Uniform Civil Code was essential if we wanted a unified and secular country.³⁴ Dr. Ambedkar said that he was surprised by the argument that India was too vast a country to have one law. This is precisely what we did have. We had a Uniform Criminal Code, Uniform Property Acts, and practically a Uniform Civil Code in all matters save those of Marriage and Succession. He added that it was not true that the Muslim law was immutable and uniform throughout India up to 1935. The Sharia law did not apply to the North-West Frontiers of the Provinces. It followed the Hindu law for Succession and other matters so much so that in 1939, the Central Legislature had to abrogate the application of Hindu law to the Muslims of North-West Frontier provinces and apply Sharia law to them. The same was true of Muslims in various parts of the United Provinces, Central Provinces and Bombay, Where Muslims were largely governed by the Hindu law for Succession. In North Malabar, Marumakkathayam, a Matriarchal Law of Succession, applied to Hindus and Muslims.³⁵

³² N Qamar, *Need of Uniform Civil Code: A Critical Study* (Laxmi Book Publications 2015) 188.

³³ D.M Raju, *Uniform Civil Code- A Mirage?* (Delhi Media House 2016) 44-49.

³⁴ Asha Rani, ‘A Term Paper on Uniform Civil Code. International Journal of Advance Research, Ideas and Innovations in Technology’ (2016) 64 IJARIIT <<https://www.ijariit.com/manuscripts/v2i6/V2I6-1279.pdf>> accessed 11 May 2023.

³⁵ K. Deshta, *Uniform Civil Code: In Retrospect and Prospect* (Deep and Deep Publications, 1995) 114-115.

The bare reading of Article 44 in its placement under the scheme of the Constitution makes it clear that it is an imperative duty of the state to make efforts in this regard. This provision has been incorporated with part IV of the Constitution after a detailed deliberation. Thus, it reflects the obligation of the state to enact appropriate legislation by upholding its objective. In this regard, the words ‘Endeavour’ and ‘secure’ are the two important words indicating that the state can follow a liberal approach and can adopt mediating role for securing the Uniform Civil Code for all the citizens of India. The word ‘State’ used in Article 44 is of wide amplitude and has a close reference to Article 12 of the Constitution of India. By an in-depth study of Article 12, the judicial interpretation given from time to time makes it profusely clear that the state includes, Government and Parliament of India,

Government and State Legislature of each of the States and all local or other authorities either within the territory of India or under the control of the Government of India.³⁶ In this way, all authorities functioning within the territory of India are under obligation to make efforts towards one Civil Code under the Constitution. The Constitutional scheme regarding the division of power between the Centre and State, further, provides justification in this regard. The relevant provision, which authorizes the Parliament as well as the State Legislature towards the Uniform Civil Code, is Entry 5 of this list III of Schedule VIII of the Constitution. This entry reads as follows:

“Marriage and divorce; infants and minors; adoption; wills; intestacy; and succession; joint family and partition; all matters in respect of which in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.”³⁷

The combination of Article 44, List III, Entry 5 and Article 12 of the Constitution makes it clear that it is not only the duty of the legislature but of each and every functionary to make efforts towards securing a common code for citizens of this country so that our infant democracy may grow with the passage of time. The very purpose of our democratic system is to remove all kinds of barriers i.e., religion, caste, and creed and to provide a law that may help to maintain a rule of law in the Indian Society.³⁸

Thus, we cannot read this provision in isolation from other provisions of the Constitution, which provides for equality before the law and equal protection of the law. It gets added

³⁶ The Constitution of India 1949, art 12.

³⁷ The Constitution of India 1949, Entry 5 of Concurrent List.

³⁸ ‘Uniform Civil Code’ (*Google Books, 2023*)

<<https://books.google.co.in/books?id=NEaxh3WcuWMC&pg=PA45&lpg=PA45&dq>> accessed 14 May 2023.

importance even from the preamble to the Constitution, which clearly provides for justice; political, economic and social. The idea of justice is envisaged in the preamble i.e., social justice we could achieve only when we have a single law for all citizens.

For this purpose, Government and other authorities have to rise above their own stakes to provide a concrete shape to this Constitutional provision. Thus, the idea behind incorporating this provision in the Constitution is to convert our heterogeneous society into a homogeneous one. The truth that remains even today is that like in the pre-independent era, present India was also divided on religion and caste basis.³⁹ But the wise founding fathers of our Constitution endeavoured in their true spirit to generate an environment of homogeneity by putting earnest efforts to incorporate sufficient provisions with our Constitution. The reason which compelled the majority members to pass through this provision (Art.44) in the assembly was to save this newly-born democracy from disintegration. In this way, this provision is binding on the whole country and there is no justification to reject it.

Directive Principles of the state policy Part IV under Article 36-51 of the Indian Constitution characterizes two Constitutional processes. Firstly, they are not enforceable in any court and therefore, if directive principles are not obeyed or implemented by the state or they cannot be secured through judicial proceedings. Secondly, they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws in future.

In the Directive Principles of the State Policy, Article 44 is the only provision, that aims at the unification of Family laws, and says, “The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India”.⁴⁰ But this provision of the Constitution does not straightly direct any law-making body to enact Uniform Civil Code. Article 44 is mentioned the term ‘State’ as in part III of the Constitution, Article 12, which means Government and Legislature but does not include Judiciary.

So, it also points out that Article 44 cannot be read in its own context alone. In fact, it may be interpreted on other parts of the Constitution, especially Fundamental Rights. Therefore, the demands of Article 44 and its implementation are to be determined by the provisions of part III of the Constitution. So far, the relationship between the Directive

³⁹ ‘Environment Protection under Constitutional Framework of India’ (*Press Information Bureau*, 4 June 2014) <<https://pib.gov.in/newsite/printrelease.aspx?relid=105411>> accessed 14 May 2023.

⁴⁰ The Constitution of India 1949, art 44.

Principles and Fundamental Rights is reflected in the beginning part of the Constitution itself. This problem came before the courts of India through various cases of which a few are,

- i. State of Madras vs. Chembakam Doriarajan⁴¹
- ii. I C Golaknath and others vs. Union of Punjab⁴²
- iii. Kesavananda Bharati vs. State of Kerala⁴³
- iv. Minerva Mill vs. Union of India⁴⁴

Through different judgments and consequent Constitutional amendments, Supreme Court took the view that the Directive Principles of State Policy cannot be given preference over Fundamental Rights. However, this interpretation was diluted subsequently as the Supreme Court saw harmony between Fundamental Rights and Directive Principles of State Policy.⁴⁵ Later the court held that it does not see any conflict overall between the provisions contained in Part III and IV and they are complimentary and supplementary to each other.⁴⁶ Finally, in *Minerva Mills Ltd. vs. Union of India*⁴⁷; Supreme Court held that the harmony and balance between Fundamental Rights and Directive Principles of State Policy is an essential feature of the basic structure of the Constitution.

2.5 Constituent Assembly debates

The development of the Uniform Civil Code in the Constituent Assembly begins during the Indian Constitution-making process committee stages. The Sub-Committee on Fundamental Rights was charged with compiling a list of fundamental rights to be included in the Indian Constitution. The subcommittee's first action was to ask its members to come up with their own personal drafts of fundamental rights. We discover provisions in the contributions of Ambedkar, Munshi, and Mino Masani that urge the adoption of a uniform civil code. The subcommittee submitted its report to the Advisory Committee about the fundamental rights. They divided fundamental rights into two parts

⁴¹ *State of Madras v. Chembakam Doriarajan* AIR 1951 SC 226.

⁴² *I C Golaknath and others v. Union of Punjab* AIR 1967 SC 1643.

⁴³ *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461.

⁴⁴ *Minerva Mill v. Union of India* AIR 1980 SC 1789.

⁴⁵ *Mohd. Hanif Qureshi v. State of Bihar* AIR 1958 SC 731.

⁴⁶ *C B Broading and Lodging v. State of Mysore* AIR 1970 SC 2042.

⁴⁷ *Minerva Mills Ltd. v. Union of India* AIR 1980 SC 1789.

i.e., Justiciable and non-justiciable. The Uniform Civil Code gets the position in second i.e., is non-justiciable fundamental rights.⁴⁸

The discussion surrounding the Uniform Civil Code within the Constituent Assembly was marked by intense debate. The assembly witnessed a division of opinions regarding the placement of the Uniform Civil Code within the chapter on fundamental rights. To resolve this matter, a vote was conducted. The fundamental rights sub-committee, led by Sardar Vallabhbhai Patel, ultimately determined, with a majority of 5:4, that the provision fell outside the purview of fundamental rights. Consequently, the importance attributed to the Uniform Civil Code was considered to be less significant than the freedom of religion.⁴⁹

The assembly positions were separated into two camps. On one hand, some wanted to use the Constitution's legal authority and position to change religious practices and promote secularization and legal conformity among all religious organisations. For example, KM Munshi advocated for the confinement of religion to the private realm and the promotion of societal unity and integration based on civic national identity. On the other hand, some people argued that a Constitution should represent the nation's current spirit rather than imposing significant social and cultural changes.⁵⁰

2.5.1 Arguments against Uniform Civil Code as addressed at the Constituent Assembly:

On November 23, 1948, the Constituent Assembly took up the question of a Uniform Civil Code as part of Article 35 of the Constitution. There were passionate arguments on the subject, which the Times of India described as "a succession of full-blooded remarks" on November 24, 1948. Five Muslim Members of the Constituent Assembly - M. Muhammad Ismail, Naziruddin Ahmad, Mahboob Ali Baig, B Pocker, and KTM Ahmed Ibrahim – tabled modifications to the Draft.⁵¹ Their overwhelming viewpoint was that Uniform Civil Code's implementation was "autocratic" and that the state had no right to interfere in any community's personal laws. They argued that because the British had not

⁴⁸ 'Sub-Committee on Fundamental Rights - Constitution of India' (*Constitution of India*, 16 April 1947) <<https://www.Constitutionofindia.net/committees/sub-committee-on-fundamental-rights/>> accessed 12 May 2023.

⁴⁹ Faizan Mustafa, 'Explained: After CJI'S Remarks on Uniform Civil Code, A Look at its Status, Debate around It' (*The Indian Express*, 3 April 2021) <<https://indianexpress.com/article/explained/explained-after-cji-bobdes-remarks-on-uniform-civil-code-a-look-at-its-status-debate-around-it-7249410/>> accessed 12 May 2023.

⁵⁰ 'Speech on National Integration in Simple and Easy Words' (*Infinity Learn*, 2022) <<https://infinitylearn.com/surge/english/speech/national-integration-speech/>> accessed 12 May 2023.

⁵¹ 'The Framing of India's Constitution A Study', (*Archive*, 16 January 2017) <https://archive.org/stream/in.ernet.dli.2015.275967/2015.275967.The-Framing_djvu.txt> accessed 12 May 2023.

interfered with any community's religious laws, there was no need for independent India to do so.

However, the Constituent Assembly debate on the Uniform Civil Code Is eye-opening. It demonstrated that there was always a thin line separating groups and that when it came to religious identification, religious identity transcended national identity. Minority populations were particularly vulnerable to this, and the majority society at the time thought it was more important to cater to partisan politics than to develop India's basis.

The first member to propose an amendment to Article 35 was M. Muhammad Ismail. He advocated adding the following proviso: "*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.*"

He stated that one of the fundamental rights is the freedom to follow one's own laws and that if the state decides to regulate subjects of religion and culture, it will be equal to intrusion.

Another member of the constituent assembly proposes an amendment to Article 35 in further ways, "Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law."⁵²

He also took a sobering stance when he advised against radical Constitutional provisions: "I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the state to make the Civil Code uniform is in advance of the time. What the British in 175 years failed to do or were afraid to do, what the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do all at once. I submit, sir that we should proceed not in haste but with caution, with experience, with statesmanship, and with sympathy".⁵³

According to Mahoob Ali Baig, the above provision is to be added to Article 35. "Provided that nothing in this article shall affect the personal law of the citizen." He believes that the term "Civil Code" does not include a citizen's completely personal law.

⁵² '[Bar Speaks] Dr. Ambedkar's 'Little Corner': The Uniform Civil Code' (*Law Beat*, 30 April 2022) < <https://lawbeat.in/bar-speaks/bar-speaks-dr-ambedkars-little-corner-uniform-civil-code>> accessed 12 May 2023.

⁵³ 'UNIFORM CIVIL CODE: A Rational Choice of Historical Significance' (Blog *Ipleaders*, 4 November 2021) < <https://blog.ipleaders.in/ucc-a-rational-choice-of-historical-significance/>> accessed 12 May 2023.

"The Civil Code contains laws of this nature," he explained, "such as laws of property, transfer of property, contract law, evidence law, and so on." Article 35 does not include the law as it is observed by a particular religious community. In any case, in order to explain the issue, Article 35 has no bearing on a citizen's personal law.⁵⁴

Another member of the Constituent Assembly Mr.B. Pocker voted in favour of Baig's motion with the following proviso: "Provide 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."⁵⁵

Further elaborating on the amendment which is suggested by him in Article 35, he stated that it is a very moderate and reasonable amendment to this Article 35. Now I would request the House to consider this amendment not from the point of view of the Mussalman community alone, but from the point of view of the various communities that exist in this country, following various codes of law, with reference to inheritance, marriage, succession, divorce, endowments and so many other matters.

The House will note that one of the reasons why the Britisher, having conquered this country, has been able to carry on the administration of this country for the last 150 years and over was that he gave a guarantee of following their own personal laws to each of the various communities in the country.⁵⁶ That is one of the secrets of success and the basis of the administration of justice on which even foreign rule was based. I ask, Sir, whether by the freedom we have obtained for this country, are we going to give up that freedom of conscience and that freedom of religious practices and that freedom of following one's own personal law and try or aspire to impose upon the whole country one code of civil law, whatever it may mean, - which I say, as it is, may include even all branches of civil law, namely, the law of marriage, law of inheritance, law of divorce and so many other kindred matters?"⁵⁷

2.5.2 Arguments in favour of Uniform Civil Code in Constituent Assembly:

In the discussions held within the Constituent Assembly regarding the implementation of the Uniform Civil Code, it becomes evident that a certain segment, representing the

⁵⁴ Lakshmi Parameswaran, *Debates in the Constituent Assembly and Thereafter on Uniform Civil Code* (1st edn, Indian Policy Foundation 2020) 9-12.

⁵⁵ Shefali Jha, 'Secularism in the Constituent Assembly Debates 1946-1950' (*Jstor*, 2 August 2002) <<http://www.jstor.org/stable/4412419>> accessed 12 May 2023.

⁵⁶ 'British Raj | Imperialism, Impact, History, & Facts' (*Britannica*, 2 August 2002) <<https://www.britannica.com/event/British-raj>> accessed 12 May 2023.

⁵⁷ 'Constituent Assembly of India Debates' (*Loksabha*, 30 December 2022) <<https://loksabha.nic.in/writereaddata/cadebatefiles/C30121948.html>> accessed 12 May 2023.

minority, expressed their belief that their personal laws should not be subject to legislation and that the government should refrain from interfering in matters of faith. Several of the points made against the Uniform Civil Code were addressed in the subsequent counter-debate, and many of the anxieties were calmed by individuals who spoke in support of the Uniform Civil Code. K. M. Munshi was one of the members in favour of the Uniform Civil Code. He opted to focus on the two main arguments made against Uniform Civil Code that it infringes fundamental rights and that it is oppressive to minorities. He emphasised that the principle has already been adopted by the House. He focused, "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."⁵⁸ It means Parliament has a right to enact a uniform civil code whenever it is necessary. In response to the argument that enacting a Civil Code would be dictatorial to minorities, he cited Turkey and Syria as examples to show that "nowhere in advanced Muslim countries has the personal law of each minority been recognized as so sacrosanct as to prohibit the passage of a Civil Code."

The religious freedoms guaranteed by the Constitution were seen as jeopardized by Uniform Civil Code. However, there were numerous arguments in favour of a uniform civil code. K.M. Munshi was adamant in his rejection of assertions of majoritarian hegemony over minorities. He stated that,

*"It is not therefore correct to say that such an act is a tyranny of the majority. If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority has to submit to the Civil Code. It is not felt to be tyrannical to the minority. The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in the course of time be unified and secular. 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. What have these things got to do with religion I really fail to understand."*⁵⁹

Since the right to equality had already been established as one of the most prized rights, the inadequate treatment of women and men under the law could no longer be justified. As a result, activities that harmed a woman's right to equality would have to be eliminated.

⁵⁸ 'Uniform Civil Code: One Nation One Code' (*Legalserviceindia*, 4 January 2020)

<<https://www.legalserviceindia.com/legal/article-685-uniform-civil-code-one-nation-one-code.html>> accessed 12 May 2023.

⁵⁹ Constituent Assembly Debates (Proceedings), Vol. VII, Tuesday Nov. 23, 1948.

A common civil law controlling personal concerns would gather all women under one tent, and discriminatory behaviours would be eliminated regardless of nationality or religion.

Shri Alladi Krishnaswamy Ayyar provides a much more realistic basis for aiming for a Uniform Civil Code, based on the myth of communities having stringent water-tight existences. He claims that in a country like India, there is a lot of interaction between communities, which leads to differences in personal laws.⁶⁰ Not only are there clashes, but one legal system is impacted by another. He narrates,

“In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. 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.”⁶¹

He raises serious concerns about the pros and downsides of excessive universalism. Separate personal laws ruled solely by religion, which has many interpretations as its adherents, would restrict reform options. Unlike Munshi, who cited examples of other Islamic countries where forcible implementation of majoritarian law was justifiable as long as it brought reform, he pushed the discussion of K.M. Munshi to a new level by presenting uniformity as a necessary evil.

When the Constituent Assembly framed the Constitution in 1947, the chairperson of the drafting committee, Dr. B.R. Ambedkar, advocated for the creation of a uniform civil code, but it was strongly opposed on the grounds that it would infringe on the right to religion guaranteed by Article 25 of the Indian Constitution, as well as being a tyranny to the minority. The first ground was rejected because it does not impinge on the right to freedom of religion, and Article 25(2) protects secular activity.⁶² In his response, Dr. B R Ambedkar pointed out that the country already had a uniform code of laws that covered practically all elements of human relationships, indicating that a uniform civil code was

⁶⁰ ‘Constituent Assembly of India Debates’ (N 57).

⁶¹ Parameswaran (N 54).

⁶² ‘Estate, Real et al. Why Ambedkar Supported Uniform Civil Code’ (*The Hindu Businessline*, 15 April 2021) <<https://www.thehindubusinessline.com/opinion/why-ambedkar-supported-uniform-civil-code/article34320070.ece>> accessed 14 May 2023.

feasible. On the 2nd of December 1948, Ambedkar concluded the argument on Uniform Civil Code by saying,

“All that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. Therefore, no one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or any other community in India ... Sovereignty is always limited, no matter even if you assert that it is unlimited because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No Government can exercise its powers in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad government if it did so”.

In his assertion, Dr. Bhimrao Ambedkar was extremely specific:

“There is no obligation upon the State to do away with personal laws. It is only giving power. Therefore, no one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or any other community in India.”⁶³

B. R. Ambedkar was an active supporter of the Uniform Civil Code as well. He rejected arguments that establishing a uniform civil code in such a large country as India would be impossible. He further states that,

“I quite realise their feelings in the matter, but I think they have read rather too much into article 35, which merely proposes that the State shall endeavour 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. 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. Parliament may feel the ground by some such method. This is not a novel method.”⁶⁴

It is well known that Ambedkar has always been a vocal opponent of Hinduism as a dominating religion. In 1936, he had already highlighted one of Hinduism's numerous doctrines, namely casteism and untouchability, to the point where he rejected himself as a Hindu. Despite this, he denied in the Constituent Assembly that Uniform Civil Code was a platform for the majority or that majority rule existed. He added that the Shariat Act of 1936, which was made applicable to all Muslims in India, was an example of how

⁶³ ‘What Ambedkar Really Said About Uniform Civil Code | News click’ (*News clicks*, 13 December 2022) <<https://www.newsclick.in/what-ambedkar-really-uniform-civil-code>> accessed 14 May 2023.

⁶⁴ Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948.

useful uniformity in legislation is, and that it was appreciated by Muslim brothers. For their own benefit, the Muslims who were controlled by Hindu laws in distinct locations were all collectively and consistently brought under the ambit of this unified law. Similarly, if any majoritarian religious concepts, such as Hinduism, were adopted into the Uniform Civil Code, it would be because they were appropriate for a progressive society, not because they belonged to Hinduism.⁶⁵

He further states that,

“Therefore if it was found necessary for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindus law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by article 35, I am quite certain 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.”

This remark by Ambedkar says a lot about his commitment to establishing a Uniform Civil Code to bring about much-needed changes in an Indian's personal dimensions, regardless of religion or community. His tooth-and-nail campaign to pass the Hindu Code Bills after independence, which eventually resulted in his resignation from the cabinet, is just another example of his commitment to the Uniform Civil Code. Despite the fact that the proposed modification to Article 35 of the Indian Constitution did not pass, and there was no clear majority on the Uniform Civil Code issue, some of the reservations resurfaced in the 2016 debates.⁶⁶

2.6 History of Personal Laws

2.6.1 Hindu Period

The classification of the history of the Indian sub-continent in religious terms is the Ancient or Hindu period, the Medieval or Muslim Period and the modern or Christian (British) period.⁶⁷ During ancient times, the basic principles of Hindu law were found in the Vedas and Upanishads, which were believed to have been divinely inspired. The Vedas and other scriptures of Hindu law are, however, both ethical and humane in the sense, which were administered by the king. Later, the Arthashastra of Kautilya complied with all these laws, which seems to be the earliest code purely in human character. But

⁶⁵ Dr. B.R. Ambedkar, *The Annihilation of Cast: The Annotated Edition* (Narayana Publication 2014) 11.

⁶⁶ Constituent Assembly Debates (Proceedings), Volume VII, Tuesday 23rd November, 1948.

⁶⁷ N Fung, *Religion and State Formation: Envisioning Regional Futures* (Anthem Press 2013) 68- 74.

Vedic scriptures began to decay gradually due to degeneration. All the scientific and human scriptures began to be practised as mere rituals and customs with total ignorance.

According to Hindu jurisprudence, both the king and his subjects were equally subject to the rule of law and enunciated by the Sages. The king had no power to change them at his own will. It appears that in Hindu India the society was given dominance over the state and the religion. The Hindus regarded law as an integral part of their religion.⁶⁸ The theory of the king's divinity was confined to a few great countries like India. Dr. A S Altekar opines that laws, though regarded as divine, were based upon social customs and traditions.

The study of Hindu Legal History shows that during the Hindu period, there was no interference of the state with Hindu law. They enjoyed complete immunity and their personal laws regulated the whole affairs.⁶⁹ The state used to keep its hands off the personal law and it was considered as a welfare organization dealing with any matter involving social interest. The speculation of Hindu laws by these Sages was undoubtedly the result of their mature inspiration and supreme realization.⁷⁰ During Ancient times, there was no question of state neutrality or interference in matters of religion in India. The society was the organizational unit and there existed no state. The leaders of society were Hindu sages. The entire Hindu law in ancient India was almost identical to the Hindu conviction and since there were no other religious communities. Though there were small differences of opinion on personal laws among the small Hindu communities, the uniformity of law was a general rule without any exception.

2.6.2 Development in Hindu Law

Britishers played a great role in the development of the Hindu law in India. The Hindu society was leading towards civilization and the superstitious era was changing because of the Western cultural influence. Many social reformers took the initiative to end the superstitious rituals and culture like Sati. This period opened the door for the judiciary to intervene in religious matters.

There were so many ill practices in Hindus for which Britishers took the initiative like firstly, abolition of Sati, act against discrimination, remarriage of widows, disposition of

⁶⁸ U. C. Sarkar, 'Hindu Law: Character and Evolution' (*Jstor*, 30 September 1964) <<http://www.jstor.org/stable/43949804>> accessed 15 May 2023.

⁶⁹ Qamar (N 32) 36.

⁷⁰ Sarkar (N 68).

property and many more. They took initiative against the child marriage and also provided some rights to women without any discrimination.⁷¹

The Hindu society was mostly changed far beyond what it was during the time of commentaries and digests. Some significant reforms were brought in the personal laws of specific religious communities after the enactment of the Constitution, those were:

The Hindu Code Bill in order to reform Hindu Civil Laws, Dr. Ambedkar drafted this bill. Under the effect of this bill, divorce was legalized in Hindu marriages, polygamy was opposed, and the rights of inheritance to daughters were extended.⁷² In the situation of intense criticism and opposition to the bill, a mitigated version of the bill was passed by the legislature through four different enactments- Hindu Marriage Act, Adoptions and Maintenance Act, Minority and Guardianship Act and Hindu Succession Act.

2.6.3 Muslim Period

The Muslim period marks the beginning of a new era in the legal history of India. In the eighth century, Arabs were the first Muslims who came to India. The Arabs conquered the Persians, Afghans and Turks and converted them to Islam. By the end of the eleventh and the beginning of the twelfth century, began the downfall of the Hindu Period. Foreign invaders of the Turkish race attacked and defeated local Hindu kings.

The political history of this period is full of constant struggles between a few powerful states for supremacy.⁷³ The prophet, who was the religious leader of Muslims, was gradually elevated to be the head of the state. With the death of Mohammed, the Muslims faced the problem of a leadership crisis. The leading members of the Muslim community decided to have a single leader and they selected Abu Baker as the first Imam.⁷⁴

The purely Islamic civil code governing the laws of inheritance, marriage and other analogous matters of the Muslims did not apply to the Hindus. The Hindus were allowed to be governed by their own laws on these topics of civil law.⁷⁵ Dr. H.A. Gani opines that

⁷¹ Kanksha Raina, 'How Did Sati Get Abolished in India' (*Feminism India*, 29 October 2018) <<https://feminisminindia.com/2018/10/29/sati-history-india/>> accessed 15 May 2023.

⁷² 'The Hindu Code Bill—Babasaheb Ambedkar And His Contribution to Women's Rights in India' (*Medium*, 17 April 2019) <<https://dalithistorymonth.medium.com/the-hindu-code-bill-babasaheb-ambedkar-and-his-contribution-to-womens-rights-in-india-872387c53758>> accessed 15 May 2023.

⁷³ Aditya Nigam, 'Marxism and Power' (*Jstor*, 30 June 1996) <<https://www.jstor.org/stable/3517788>> accessed 15 May 2023.

⁷⁴ Jois (N 8) 49.

⁷⁵ N. Chavan and Q.J. Kidwal, *Personal Law Reforms and Gender Empowerment* (Hope India Publications 2006).

during the Mughal Period, Islamic law was also the law of the land. The Islamic civil and criminal laws that existed were enforced and administered by the judiciary.

However, the non –Muslims had the freedom to follow their own religion or customary law in matters of marriage, inheritance etc.⁷⁶ In short, during the medieval period, each community had its own personal laws. Islam claims its control over every aspect of Muslim life. With the establishment of Muslim rule in India, Muslim law also became the law of enforceable through the machinery of the State. As the rulers were strangers to this country, they did not accept Hindu law for themselves, nor did they abolish the Hindu system altogether. Hindu law was allowed to be reserved for the Hindus alone in which the Muslim rulers did not interfere. The result was that the Muslims followed Muslim law and the Hindus followed their own laws. Thus, there existed two distinct systems of personal laws on parallel lines which remained to be modified later only at the time of British administration.

2.6.4 Development in Muslim Law

Except for the legislations which were of regulative, procedural and administrative nature, no substantive law was passed in the area of Muslim personal law.

The Muslim Law, though successively replaced, remained the basis of criminal law, applicable to all inhabitants in Bengal and other Muslim parts of British India until 1862. The Islamic law of evidence was not entirely abolished until 1872. As regard the law of family and inheritance and matters relating to wakf, gift, pre-emption etc. The continued validity of the Shariah for Muslims was guaranteed by section 7 of the famous Regulation of 1780.

There are certain enactments like the Mussulman Wakf Validating Act, 1913 which reaffirm the continued applicability of Muslim Law to Muslims, yet others like the Dissolution of Muslim Marriages Act, 1939 and the Shariat Act, 1937, which though professing to apply Muslim Law to Muslims, yet make certain innovation in the law.

The Muslim Personal Law (*Shariat*) Application Act, of 1937 abolished several ill practices in Muslim society. It also provided scope for a little modern approach to Muslim Personal Law. Classical Hanafi Law lacks in any piece of law to which we can apply to the majority of Indian Muslims.

⁷⁶ Qamar (N 32).

The life of a Muslim woman becomes very pitiful when she gets her marriage dissolved through the court as under Muslim law the husband is not under any obligation to give maintenance to his wife. The Jurists of the *Hanafi* School provide that if the legal propositions propounded under Hanafi Law make worse the situation then the aggrieved party may seek help through the legal principles laid down under Hanbali, Maliki or Shafiq. It is the only *Ulema* who is competent to issue a *Fatawa* according to the circumstance contrarily a Muslim woman is not allowed to seek a decree for the dissolution of her marriage as enumerated in Section 2 of the above Act.

During this period mainly the Kazis Act of 1880, Mussulman Wakf Act of 1923, Mussulman Wakf Validating Act of 1930 and at the state level Bengal Mohammedan Marriages and Divorces Registration Act of 1886, Jammu Kashmir Muslim Dower Act of 1920, Mapilla Wills Act of 1928, Mapilla Manumak Kottayam Act of 1939, Jammu-Kashmir Dissolution of Muslim Marriage Act of 1942, Assam Moslem Marriages and Divorces Registration Act of 1935 were enacted.

CHAPTER 3

INDIAN JUDICIARY AND UNIFORM CIVIL CODE

3.1 Overview

The Unification of the Civil Code may create heat and resentment among India's political elite, but the judiciary has made it clear that the community as a whole must be prepared to accept it as a measure of social reform. The courts have always believed that Article 44 of the Constitution is very important in reducing social tension and it has been emphasizing the implementation of the Uniform Civil Code. The Court is also of the opinion that the institution of polygamy is not based on any necessity. A visit to the judicial approach to this problem makes it very clear that Uniform Civil Code should be made a reality of the Constitutional framework.

It is true that directives are not enforceable by the court of law, yet they are fundamental in the governance of the country. In a democratic country, the judiciary plays an important role as dispute resolving mechanism. It has very wide powers to interpret the provision of the Constitution and to put into practice the basic philosophy underlying the provisions. The Constitution of India guarantees all person equality, freedom of conscience and religion. The State is under Constitutional obligation to make an earnest effort towards the establishment of one civil code for all persons. Although the court has sought to effect uniformity in personal laws, but the wave to codify has been firmly upset by parliament because of political considerations.⁷⁷

However, the courts have consistently emphasized the need for the Uniform Civil Code. The Uniform Civil Code is required not only to ensure uniformity of law between communities but uniformities of law within communities ensuring equality between rights to men and women but diverse personal law exist in India that applies to all religious groups in the matter relating to their family relationships such as marriage, divorce, maintenance, custody of children, guardianship of children, inheritance and succession and adoption. The absence of uniformity in the law governing these important personal relationships has resulted in the denial of Constitutionally mandated equality before the law and equal protection of laws of all citizens.

⁷⁷ Sikha Goel, 'What is Uniform Civil Code?' (*Jagranjosh*, 15 April 2023) <<https://www.jagranjosh.com/general-knowledge/why-uniform-civil-code-is-necessary-for-india-1477037384-1>> accessed 18 May 2023.

3.2 Judicial Approach: -

The history of judicial practice reveals that at an early stage, it adopted a literal interpretation of the Constitutionality of personal laws as well as the implementation of the Uniform Civil Code. One of the earlier cases in which the question relating to personal law was involved was the case of *State of Bombay v Narasu Appa Mali*⁷⁸

3.2.1 Narasu Appa Mali Case:-

The first case was the State of Bombay v Narasu Appa Mali where the legislative provisions modifying the old Hindu law were challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution. The Bombay High Court held that the Bombay Prevention of Hindu Bigamous Marriage Act, 1946⁷⁹ was contrary to the Constitution. The Act imposed severe penalties on a Hindu for contracting a bigamous marriage. The validity of this act was attacked on the ground that it violated the freedom of religion guaranteed by Article 25 and permitted classification on religious grounds only, forbidden by Article 14⁸⁰.

It was argued that among the Hindus, the institution of marriage is a sacrament and marriage is a part of Hinduism that is governed by scriptures. It was also argued that Hindu Marriage is not only for the sake of bonding with their partner but also to maintain their family by the birth of sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having a son when he is dead and to the spirits of his ancestors and that there is no heavenly realm for a sonless man.

The institution of polygamy was justified as a requirement for the Hindu to obtain a son for religious influence because a son has a unique position in Hindu society. M.C. Chagla Chief Justice while upholding the validity of the Bombay Act, cited three reasons, **firstly**, what the state protected was religious faith and belief, but not all religious practices. **Secondly**, he claimed that polygamy is not an integral part of the Hindu religion, **finally**, if the state of Bombay compels Hindus to become monogamist, and if it is a measure of social reform then the state has the right to make laws concerning social reform under Article 25(2) (b), even though it may interfere with the right of a citizen freely to profess, practice and propagate his religion. Chief Justice Chagla relied heavily on *Davis v. Beason*.⁸¹ In this case, the Constitutionality of an Idhao statute of 1882, was challenged.

⁷⁸ *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84.

⁷⁹ Hindu Bigamous Marriage Act 1946.

⁸⁰ The Constitution of India 1949, art 14.

⁸¹ *Davis v. Beason*, (1889) 133 U.S 637.

It was argued that the disputed act violated the church and violated the First Amendment of the United States. In those days the members of that church used to practice polygamy as a part of their religion. The Supreme Court rejected the contention and observed:-

"However, free the exercise of religion may be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

With regard to the discrimination made by the act on religious grounds, it was argued that only the Hindu community was chosen for the purpose of legislation while Muslims were allowed to practice polygamy. Justice Gajendra Gadkar thought that the classification made between Hindus and Muslims for the purpose of the legislation was reasonable and did not violate the equality provision of the Constitution contained in Article 14.

Chagla Chief Justice also considered that Article 14 does not contain any legislation that the state may enforce and should be universally embraced. The state may rightly decide to bring about social reform in stages, and the stages may be territorial or community-wise and the discrimination made by the act between the Hindus and Muslims does not offend the equality provision of the Constitution. Chagla Chief Justice further observed that:

"There is no doubt that the Muslims have been excluded from the operation of the act in question. Even section 494, the penal code exempts them"

The other point which emerges from his judgement is that religious freedom guaranteed by Article 25 is the protection of religious faith and belief, not all religious practices. It can be concluded from the judgement that polygamy is not an integral part of Hindu religion.

However, these arguments raised two questions. **First**, are the judges qualified to determine what an integral part of a religion is? **Second**, does the Constitution only protects the essence of religion? The answer to both these questions is not in the affirmative.

Further relying on the passage⁸² the court held that religious belief is protected by the Constitution and religious practice is subject to state regulation observed by the High Court. In the case⁸³ where it was held by the court that the religious practice may be controlled by legislation if the state thinks that in the interest of social welfare and reform

⁸² *Reynold v. U.S.*, 98 U.S. 145 (1878).

⁸³ D.K. Shrivastava, *Religious Freedom in India* (Deep and Deep Publishing 1982) 255.

it, is necessary to do. Thus, the Court held that in a democracy it is the legislature that determines the policy of the state and determines what laws to put on the statute book for the advancement of the welfare of the state. Moreover, the next interference that can be drawn is that the state can take the right decision to bring about social change in stages and these steps may be territorial or community-wise.⁸⁴

Again, in *Ram Prasad v. State of Uttar Pradesh*,⁸⁵ an almost identical issue was raised before the Allahabad High-court, upholding the validity of the statutory provision prohibiting bigamy among Hindus.

3.2.2 The Shah Bano Case: -

The next important case relating to Muslim personal laws and Uniform Civil Code is *Mohd. Ahmad Khan v. Shah Bano Begum*

In this case the appellant Mohd. Ahmad Khan who was an advocate by profession was married to the respondent Shah Bano in the year 1932. Three sons and two daughters were born at that marriage. In 1975, the appellant expelled his wife from the matrimonial home. In April 1978, Shah Bano filed a petition against her husband under section 125 of the Code of Criminal Procedure in the court of Judicial Magistrate Indore asking for maintenance at the rate of Rupees 500/- per month. On November 6, 1978, the appellant divorced the respondent by an irrevocable Talaq. The defence of the appellant to the petition of the defendants for maintenance was that she had ceased to be a wife because of the divorce granted by him so he was not bound to provide maintenance that he had already given to her at the rate of Rs. 200/- per month for about two years and that he had deposited a sum of rupees 300/- in the court by way of dower during the period of Iddat. In August 1979 the magistrate directed the appellant to pay a sum of Rs. 25/- per month to the respondent by way of maintenance. The respondent alleged that appellant earns a professional income of about Rs. 60,000/- per year. In July 1980 in the revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. Against the order of the High-court, the husband filed an appeal before the Supreme Court.

In this case, the question before the Supreme Court was:-

"Does the Muslim personal laws impose no obligation upon the husband to provide for the maintenance of his divorced wife and whether the

⁸⁴ Ronald Bayer, 'The Continuing Tensions Between Individual Rights and Public Health' (Ncbi, 8 December 2007) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2267241/>> accessed 18 May 2023.

⁸⁵ *Ram Prasad v. State of Uttar Pradesh* AIR 1957 All 411.

divorced Muslim wife is entitled to apply for maintenance under sec. 125 of criminal procedure code"

The Outcome of the Shah Bano Case:-

This case was heard by a full bench of the Supreme Court comprising V. Chandrachud C.J., D.A. Desai, O. Chinnapa Reddy, E.S. Venkataramiah and R.N. Mishra.

The Chief Justice delivered the verdict on behalf of the unanimous bench. In this case, the Supreme Court analyzed in detail the law relating to maintenance under Muslim law and the criminal procedure code. Apart from the observation relating to the maintenance of Muslim divorcees, the Supreme Court held that:-

- i) There is no conflict between provisions of section 125 of the Criminal Procedure Code and Muslim personal law in the matter of maintenance of divorcee, however, in case of any conflict section 125 shall prevail over the personal law.
- ii) That a Muslim divorcee has a right to maintenance under section 125 of the CrPC till her remarriage or death and if she is unable to maintain herself, her former husband has to maintain till her remarriage or death.
- iii) That if the husband, even being a Muslim, marries another woman, the wife has the right to refuse to live with him and yet obtain maintenance from him.
- iv) Moreover, the Supreme Court has strongly criticized the Indian government for its reluctance to enact Uniform Civil Code considering the sensitivity of the Muslim community.

Regarding the implementation of Article 44 of the Constitution, the Court pointed out the apathy of the legislature that it has not been sincere enough to bring the Uniform Civil Code into practice.¹⁵ The Court further observed that the government's inaction has rendered meaningless the direction contained in Article 44 of the Constitution of India and asked the government to take steps to implement Uniform Civil Code without any regard to the Muslim reaction.

Essentially, the role of the reformer has to be assumed by the court as it is beyond the endurance of a sensitive mind and allows injustice to be suffered when it is palpable.⁸⁶

But the court's piecemeal efforts to bridge the gap between personal laws cannot take

⁸⁶ Ranganathan Anand, 'Inconvenient Judgments' (*News Laundry*, 5 September 2013) <<https://www.newslaundry.com/2013/09/05/inconvenient-judgments>> accessed 18 May 2023.

replace the common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

In the course of its judgement, Chief Justice Chandrachud also referred to and touched on the issue relating to the Uniform Civil Code and observed:

"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."⁸⁷

There is no evidence of any official activity in framing a common civil code for the country. It seems to have found ground that the Muslim community will take the lead in reforming its personal laws. A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws that 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.

The Shah Bano judgement attracted the most controversy. The progressive and secular section of the society welcomed the judgement but radical sections of the Muslim community openly opposed the judgement. The judgement was interpreted as putting Islam in danger. It was seen as an interference with Shariat law i.e., the Personal law of the Muslim community. It was alleged that the Judgement would help to impose Uniform Civil Code over the Muslim community.

The critics of the Judgement argued that maintenance of the divorcee would lead to contract and proximity and adultery. The Muslim law is immutable and marriage under it is a sacred contract and therefore unchangeable. The entire concept of the Uniform Civil Code was once again challenged and legislation was demanded to undo the effects of the judgement.

Subsequent developments of Shah Bano show that initially, the government was in favour of the decision but it changed its stand in the face of strong opposition from huge Muslim processions and rallies. To reduce the impact of the verdict the central government

⁸⁷ 'Uniform Civil Code Should Not Remain a Mere Hope: Delhi HC Backs Uniform Civil Code, Asks Centre to Take Necessary Action' (*Swarajyamag*, 9 July 2021) < [https://swarajyamag.com/news-brief/uniform-civil-code-should-not-remain-a-mere-hope-delhi-hc-backs-Uniform Civil Code-asks-centre-to-take-necessary-action](https://swarajyamag.com/news-brief/uniform-civil-code-should-not-remain-a-mere-hope-delhi-hc-backs-Uniform-Civil-Code-asks-centre-to-take-necessary-action)> accessed 19 May 2023.

enacted the Muslim Women's (Protection of Right on Divorce) Act.⁸⁸ It was clear that the move of the government was guided by political considerations.

The idea expressed by the Supreme Court at the end of the judgement, regarding the Uniform Civil Code, was unnecessary as an attempt to put a new glass on Qur'anic verses. The enthusiastic support given by the court for Muslims was highly sensitive, and that too can be interpreted as a decision directly related to Islamic personal law. This obiter in the judgement could easily have been avoided without affecting in the least its 'ratio decidendi.'⁸⁹

Thus, the decision of Shah Bano was limited given in terms of section 125 of the Code of Criminal Procedure.

3.2.3 Jorden Diengdeh Case (1985):-

Ms Jorden Diengdeh v. S. Chopra's case is yet another example that focused on the urgent and compulsive need for a uniform civil code. The fact of this case highlights the completely unsatisfactory situation that arose due to the lack of a uniform civil code.

The facts of the case were noble and peculiar. The wife, the petitioner, belonged to the Khasi tribe of Meghalaya, born and brought up as a Christian. The husband was a Sikh. They were married in the year 1975 under the Indian Christian Marriage Act of 1872. The petitioner filed a petition for a declaration of nullity of marriage or judicial separation in the year 1980 under the Indian Divorce Act, 1976. The prayer for the declaration of nullity of marriage was rejected by the High Court but a decree for judicial separation was granted, on the ground of cruelty. The wife filed a special leave petition against the judgement of the High Court and sought a declaration of nullity of marriage on the ground of the impotency of the husband.

The Supreme Court found that marriage was irrevocably broken, but there was no way out for the couple as neither mutual consent nor irretrievable breakdown of marriage was a ground for divorce under the Indian Divorce Act, of 1869. In this case, the Supreme Court analyzed the provision of the said act and compared it with other enactment and laws which provide for decrees of nullity of marriage, divorce, and judicial separation. The court emphasized the need to have a uniform civil code in India. In light of the fact of this case, Justice Chinnappa Ready put:

⁸⁸ Muslim Women's (Protection of Right on Divorce) Act 1986.

⁸⁹ Tahir Mehmood, *Uniform Civil Code: Fictions and Facts* (India and Islam Research Council 1995) 21.

“Thus, it is seen that the law relating to judicial separation, divorce and nullity of marriage is far from uniform, surely the time has now come for a complete reform of the law of marriage and making a uniform law applicable to all people irrespective of religion or caste and in all cases, it appears necessary to introduce irrevocable break down of the marriage and mutual consent as a ground for divorce.”

The Supreme Court directed that the time has come for the intervention of legislature in these matters to provide for a uniform code of marriage and divorce and by law to provide a way out of the unhappy situations in which couples like the present have found themselves. In this case, the Supreme Court also directed that a copy of the order might be forwarded to the Ministry of Law and Justice for appropriate action.

In 1986 the Supreme Court⁹⁰ was again asked to clarify the position that after the state's Law Act of 1951, the members of the Indian Christian community in matters of intestate succession would be governed by either the Travancore Christian Succession Act or the Indian Succession Act of 1925.

The issue decided by the Supreme Court in Shah Bano Begum Case was again raised before the court.⁹¹ The question that came up for consideration before the Supreme Court was whether a Muslim wife whose husband has married worse than a Muslim wife whose husband has taken a mistress to claim maintenance from her husband. The main defence was that since the husband is permitted by Muslim law to have more than one wife, his second marriage cannot provide a legal basis for the wife to live separately and claim maintenance but the supreme court reiterated that irrespective of the husband's right under his personal law to take more than one wife if he takes a second wife then his first wife would be entitled to claim maintenance and separate residence.

The Supreme Court went a step further in analyzing the provision of sub-section (3) of Section 125 and held that the explanation has to be construed with reference to the two classes of injury caused by the matrimonial rights of the wife and not with reference to the husbands right to marry again. Thus, the woman chosen by the husband to replace the wife as a legally married wife or a mistress is immaterial. Therefore, the respondent's contention that his taking another wife will not entitle the appellant to claim separate residence and maintenance cannot be sustained.

⁹⁰ *Mary Roy v. State of Kerala* AIR 1986 SC 10.

⁹¹ *Begum Sabanu alias SairaBano v. A.M. Abdul Gafoor* AIR 1987 SC 1103.

Thus, the Supreme Court upheld the decision of Shah Bano Begum and laid down a solid foundation for the uniform civil code despite the Muslim Women (Protection of Rights on Divorce) Act of 1986.

3.2.4 Sarla Mudgal Case:-

The Sarla Mudgal case created a big controversy in the history of the Uniform Civil Code. After the Shah Bano judgement, this case is important because, for the first time, the Supreme Court dared to ask the executive about the steps taken to implement Article 44 of the directive principle of the state policy. The court's activism once again put the issue of a Uniform Civil Code on the national agenda.

In this case, four petitions were filed under Article 32 of the Constitution. The leading petition was filed by Ms. Sarla Mudgal, the president of a registered society working for the welfare of women. In all four petitions, the facts were similar and the question for consideration before the Supreme Court was whether a Hindu husband, married under Hindu law by embracing Islam, can solemnize a second marriage. Whether such marriage without having the first marriage dissolved under the law would be a valid marriage qua for the first wife who continues to be a Hindu. Whether the apostate husband would be guilty of the offence under section 494 of the Indian penal code.

Once again, a very controversial decision was delivered by the Supreme Court of India which once again raised the question of the enactment of a Uniform Civil Code. The judgement became very controversial due to its uncalled-for 'obiter dicta'. The issue raised before the court was as follows:-

- i. Article 44 is based on the concept that there is no necessary connection between religion and personal laws in a civilized society.
- ii. Article 25 guarantees religious freedom, whereas Article 44 separates religion from social relations and personal law. Marriage, Succession and matters of secular character cannot be brought within the guarantees enshrined under Articles 25, 26 and 27 of the Constitution.
- iii. Article 44 is a decisive step towards national integration.

Justice Kuldeep Singh observed that:

" The personal laws of the Hindus such as marriage, succession have a sacred origin in all, in the same way, Muslims & Christians have renounced their feelings for national unity and integration. Therefore, the

Constitution mandates the establishment of a common civil code for the whole of India."

In this case, the Supreme Court analyzed the statutory provisions relating to the uniform civil code. The judgement was delivered by a division bench comprising Justice Kuldeep Singh and Justice Ram Sahai both judges delivered separate but agreed opinions. The court held that the second marriage of a Hindu husband after conversion to Islam would be void without having his first marriage dissolved under the law. The second marriage would be void under the provisions of section 494 of the Indian penal code and the apostate husband shall be guilty of offence under sec. 494 of the Indian Penal Code.

The Supreme Court highlighted the problem of polygamy and its misuse by non-Muslim males. In light of this matter, the Supreme Court once again quoted the judgement of Shah Bano and Jordan Diengdeh with approval and emphasized the need for a Uniform Civil Code. The court not only emphasized having a Uniform Civil Code in India but also went one step ahead and requested the government of India through the Prime Minister to take a fresh look at Article 44 of the Constitution and endeavour to secure the Uniform Civil Code for citizens throughout the territory of India. Showing the judicial activism, the Supreme Court further directed the government of India to file an affidavit in the court indicating therein the step taken and efforts made by the government of India, towards securing a Uniform Civil Code for the citizens of India.

3.2.5 Ahmedabad Women Action Group Case:-

After the judgement in Sarla Mudgal's case, another verdict in the form of ratio decidendi came in 1997⁹² and some important issues were raised by the petitioner about the Muslim personal law in this case. A petition was filed as a public interest litigation to challenge different parts of personal law. The petitioner raised the issue of Muslim law that permits Muslim men to have four relationships, alongside the husband having the authority to separate by the expression of the term 'Talaq' without judicial methods and this may occur without the women's consent.

The petitioner urged the court regarding Muslim personal law:-

- i. Polygamy under Muslim personal law was challenged as it is against Articles 14 and Article 15 of the Indian Constitution.

⁹² *Ahmedabad Women Action Group v. Union of India* AIR 1997 SC 573.

- ii. Unilateral talaq from Muslim men was challenged against Articles 13, 14, and 15 of the Indian Constitution.
- iii. Muslim husbands taking more than one wife was challenged because it is an act of 'cruelty' within the meaning of clause VIIIth (F) of section (2) of the Dissolution of Muslim Marriage Act of 1939.
- iv. The Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged against Articles 14 and 15 of the Constitution.
- v. The Inheritance laws of Muslim personal law (both Shia and Sunni laws) were challenged as discriminatory against female children.

The other two petitions prayed for similar relief regarding sections 2(2), 5(ii),6(ii) and an explanation of section 30 of the Hindu Succession Act of 1956. Section 2 of the Hindu Marriage Act of 1955, Section 3(2), 6 and 9 of the Hindu Minority and Guardianship Act, 1956 read with section 6 of the Guardians and Wards Act 1890, Section 10 and 34 of the Indian Divorce Act of 1869, and Section 43 to 46 of the Indian Succession Act.

The Supreme Court did not take comprehension and saw that the issues brought up include the issue of the state strategy with which the judiciary does not have any concern. The cure lies with the legislature and not the courts.

The Court supported its judgement based on its observation in earlier decisions, where the Court held that the remedy lies elsewhere and not by knocking at the doors of the court. The court quoted several judgements where similar issues came up for adjudication. One such earlier petition was *Maharishi Avadesh v. Union of India*⁹³

In this case, the Supreme Court of India dismissed a writ petition under Article 32 of the Constitution. The relief prayed for in this case was as follows:-

- i. To issue a writ of mandamus to the respondent to consider the question of enacting a Common Civil Code for all citizens of India.
- ii. To declare the Muslim Women (Protection of Right on Divorce) Act of 1986, as void being arbitrary and discriminatory and in violation of Articles 14, 15 and Articles 44, 38, 39 and 39 A of the Constitution of India; and

⁹³ *Maharishi Avadesh v. Union of India* AIR 1991 All 52.

- iii. To direct the respondents not to enact the Shariat Act of 1937 in respect of those adversely affecting the dignity and rights of Muslim women and against their protection.

The court dismissed the petition saying that these are all matters of state legislation and that the court cannot legislate on these matters.

The Court raised the issue in *Reynold Rajmal v. Union of India*⁹⁴ to add new grounds of divorce, like divorce by mutual consent for those already specified in the Indian Divorce Act. It was emphasized that the court can give the fullest dimension of meaning to the existing provision. The court further emphasized the already established trends in various cases clarifying the fact that making law or amending law is a slow process and the legislature tries to take measures where the need is felt more. Such defect which is most acute can be removed by the process of law at stages.⁹⁵ In this case, the validity of sections 15, 16, 17, 29(5) and 144 of the Andhra Pradesh Charitable Hindu Religious and Endowments Act of 1987 were challenged one of the questions before the court was whether it is necessary that the legislature should make law uniformly applicable to all religious or charitable or public institution and endowments established and maintained by people professing all religions.

The Court held that a uniform law though highly desirable enactment at once, may be prejudicial to the unity and integrity of the nation, making law or amendment to a law is a slow process and the legislative attempts to remedy where the need is felt most. Therefore, it would be unfair and incorrect to think that all laws should be applied uniformly to all people at once.

3.2.6 Danial Latifi Case:-

In the judgement of *Danial Latifi v. Union of India*,⁹⁶ the right of maintenance of a woman was upheld for life or till her remarriage.

In the field of Islamic law in India, this case plays a significant role. In addition, it was necessary to advance women's rights address the shortcoming of Muslim personal law, and remove the chaos created by the Shah Bano verdict of 1985. In the historical case of *Mohd. Ahmed Khan v. Shah Bano*,⁹⁷ Shah Bano was represented by Danial Latifi who

⁹⁴ *Reynold Rajmal v. Union of India* AIR 1982 SC 474.

⁹⁵ *Pannalal Bansilal Pitti v. State of A.P.* AIR 1996 SC 1023.

⁹⁶ *Danial Latifi v. Union of India* AIR 2001 SC 740.

⁹⁷ *Mohd. Ahmed Khan v. Shah Bano* AIR 1985 SC 945.

filed a writ petition in the apex court challenging the Constitutional validity of the Act which overturned the verdict of the case.

The validity of the Muslim Women (Protection on Divorce Act), 1986 was challenged by Daniel Latifi, who was Shah Bano's Lawyer. It was argued that it was discriminatory against Muslim women and violated the right to equality under Articles 14 and 15 and the right to life under Article 21 of the Indian Constitution. The Act was passed to appease certain sections of the society, who claimed that the proposed decision in the Shah Bano case was contrary to Sharia Law.

The Muslim Women (Protection on Divorce Act), 1986 was considered valid by the court. The provisions of the same do not oppose the ideals of the Constitution. The balance between the Act of 1986 and the code of criminal procedure was established by the court. It revived the principles of the Shah Bano case that the husband's obligation to maintain his wife does not end with the Iddat period. As long as the husband fulfils his obligations under section 3 of the Muslim Women (Protection on Divorce Act) of 1986, the woman is also entitled to maintenance under section 125 of the Code of Criminal Procedure. A divorced Muslim woman who has not remarried and is unable to maintain herself after the period of Iddat may be maintained by her relatives who will inherit her on her death under section 4⁹⁸ of the Muslim Women (Protection of Divorce Act), 1986.

Thus, it is observed by the researcher that the Daniel Latifi case was successful in effectively integrating both personal laws and codified laws in such a way that it addressed all sections of society and minimized the possibility of sectarian conflicts and political disputes. The judgement showed that social responsibility plays an important role in the decision-making process of the judiciary.

3.2.7 Shabnam Hashmi Case 2014:-

The Petition was filed to ask the Supreme Court for optional guidelines for the adoption of children irrespective of religion.⁹⁹ A Muslim had filed a petition under Article 32 of the Constitution. He petitioned for recognition of her as the parent of his adopted daughter. As per the adoption in Muslim personal law, the petitioner was not recognized as the parent of his adopted daughter and was recognized only as her guardian.

⁹⁸ Muslim Women (Protection on Divorce Act) 1986, s 4.

⁹⁹ *Shabnam Hashmi v. Union of India* AIR 2014 SC 1281.

The Petitioner sought legalization of adoption under the guidelines of CARA (Central Adoption Resource Agency), notified under the Juvenile Justice (Care and Protection of Children) Rules, 2007 and Juvenile Justice Act 2000. The Muslim personal law board raised objections to the petition on the applicability of the Juvenile Justice Act to Muslims.

The Supreme Court held that the Juvenile Justice Act is secular law that applies to everyone, including Muslims and was created for the welfare of the children, allowing any child to be adopted.

Thus, it is observed that in India, a standard civil code is required for adoption law. It does not violate the fundamental right to freedom of religion. Furthermore, the fundamental principles of state policy require that it promote uniformity in its laws. The passing of secular laws would allow different Indian religions to legally adopt a child. This will also help reduce the number of children without parents. The issue of the Uniform Civil Code on personal law matters like adoption is raised by the courts as the need.

3.3 Triple Talaq and Indian Constitution:-

It is simply understood that Triple talaq is a form of divorce in Muslim law where the husband says the word "talaq" three times in oral, written, or electronic form. Triple talaq also known as talaq-e-biddat. Instant divorce is a form of Islamic divorce that has been used by Muslims in India, especially adherents of Hanafi Sunni Islamic schools of jurisprudence.

3.3.1 Triple Talaq and its Effects on Muslim Marriage:-

About 50,000 Muslim women and men have signed a petition asking that the practice of *talaq-e-biddat* under which the husband can dissolve the marriage by pronouncing talaq three times in the presence of at least two persons and not necessarily in the presence of the wife must be banned, along with polygamy these practices go against the sanctity of marriage. It was further supported by NISA (A women's organization seeking to declare sections in Muslim personal law unconstitutional by the practice of triple talaq, polygamy, Nikah halala and inequality in interstate succession (A person who has died without having made a will)).

It is true that triple talaq has devastated the lives of many women and children deprived of any opportunity to settle down. This mode of divorce has been the subject of criticism

in many Muslim countries and has brought about reform through codification. Countries like Turkey, Tunisia, Syria, Egypt, Morocco, Iran, Malaysia, Indonesia, and Pakistan have either completely reformed the law or taken stringent legally enforceable preventive measures in this area. If Muslim countries can bring about reform in family laws, India must follow complete reform in such areas. In the words of Justice Hidayatullah:-

"If the lead is coming from Muslim countries, it is hoped that over time the same measures will be applied in India also."

3.3.2 Background of Triple Talaq: -

The issue has been breaking news since a Muslim organization, Bhartiya Muslim Mahila Andolan (BMMA) launched a campaign to ban triple talaq and "*Nikah-halala*"

- In 2015, Shayra Bano, a resident of Uttarakhand filed a petition in the supreme court seeking a ban on the practice after her husband ended 15-year marriage by sending a letter pronouncing the word talaq thrice.¹⁰⁰ Her petition seeks the Supreme Court to declare triple talaq, polygamy and Nikah- halala illegal and unConstitutional on the grounds that they violate the rights guaranteed by the Constitution under Articles 14, 15, 21 and 25.
- In 2015, only the Supreme Court registered a suo-moto Public Interest Litigation (PIL) petition titled 'In Re: Muslim Women's Quest for Equality' to examine if arbitrary divorce, polygamy and nikah halala violate women's dignity.

3.3.3 Constitutional Provisions involved in Triple Talaq:-

- Article 25 of the Indian Constitution guarantees religious freedom, freedom of practice and propagation of religion.
- Like all other fundamental rights, it is subject to restriction and does not protect religious practices that can negatively affect the welfare of citizens.
- Hence, Article 25 is overridden by Article 14, which guarantees the right to equality as triple talaq deny Muslim women equality before the law.
- Article 25 is also subject to Article 15(i) which states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, or sex since

¹⁰⁰ *Shayara Bano v. Union of India* AIR 2017 SC 1.

triple talaq does not work in the favour of women. It violates Article 15(1) of the Constitution.

- However, section 2 of the Muslim Personal Law (Shariat) Application Act of 1937 recognizes triple talaq as a statutory right, bringing it under the ambit of Article 13 of the Constitution. Article 13 defines 'law' and says that all laws, framed before or after the Constitution shall not be violative of the fundamental rights.

3.3.4 Supreme Court verdict on Triple Talaq: -

On 22 August 2017, a five-judge bench of the Supreme Court in a split verdict held that the practice of instant triple talaq in the Muslim community is unconstitutional. The bench set aside the practice by a majority of 3:2.

❖ The key point of the Supreme Court ruling:-

(a) Majority Verdict:-

- i) Three Judges of the bench said that triple talaq must be struck down as it goes against the Constitution and is unacceptable.
- ii) They said the Muslim Personal Law (Shariat) Application Act of 1937 recognized and enforced triple talaq, therefore, it should not be considered a personal law but a statutory law. Hence it comes under the ambit of Article 13 of the Constitution.
- iii) Article 13 mandates that any law, framed before or after the Constitution, should not be violative of fundamental rights.
- iv) Triple Talaq is manifestly arbitrary and was violative of Article 14 and did not enjoy the protection of Article 25(i) of the Constitution.

(b) Minority Verdict:-

- i) Two judges ruled that triple-talaq enjoys the status of fundamental rights as it is a part of Muslim personal law.
- ii) They were in favour of putting the practice aside for a period of six months allowing parliament to legislate on it.
- iii) They asked political parties to set aside their difference and introduce new laws on the practice, taking into account concerns of Muslim bodies and Sharia law.

The judgement was historic for women's empowerment in the country granting equality to Muslim women. The court has opened a golden window for all communities to push for progressive reform in personal laws that impact all women, men and children and other reforms like the uniform civil code.

Thus, it is observed by the researcher that the survey of judicial attitudes towards a Uniform Civil Code makes it clear that the court is very interested in resolving social and economic tension in society so that the state can create a social order in which political, economic, and social justice is enjoyed by all. In fact, the judgements of the many cases towards making of Uniform Civil Code make it clear that they are very much concerned that fragment age matrimonial laws should be invaded into Uniform law. The Judicial response to enhance the Constitutional philosophy of the Uniform Civil Code has always been highly commendable. The supportive and suggestive attitude of the judiciary towards achieving the goals of the Uniform Civil Code to the state must be followed by the state to fulfil the dream of Constitution-makers contained under Article 44 of the Constitution.

CHAPTER 4

UNIFORM CIVIL CODE IN FOREIGN COUNTRIES

4.1 Overview

It can be stated that in the matters of personal laws various other countries have adopted different courses of action. Countries like Turkey and Albania are predominantly Muslim and they have been successful in replacing Muslim personal laws and other personal laws in Common Civil Code. Some secular countries like Senegal, Indonesia, Mali, Chad and Nigeria have retained their traditional law and Islamic law, without any substantive reforms. Also, a large number of countries in West Asia and North Africa have been successful in reforming laws related to personal status and succession.

The idea of codification emerged during the Age of Enlightenment when it was believed that all spheres of life could be dealt with in a conclusive system based on human rationality. The first attempts at the international level for codification were made in the second half of the 18th Century when the German states of Prussia, Bavaria and Saxony began to codify their laws. The first statute that used this denomination was the Codex Maximilianeus Bavaricus Civilis of 1756 in Bavaria. It was followed in 1792, by a legal compilation that included civil, penal and Constitutional law. The Allegmenies Landrecht fur die Pressuichen Staaten (General National Law for the Prussian States) (promulgated by King Frederick II the Great never satisfied the standards of the modern law-codification movement¹⁰¹.

In Austria, the first step towards fully-fledged codification was the yet incomplete Codex Theresianus (compiled between 1753 and 1766). The Josephina Code (1787) and the complete West Galician Code (enacted as a test in Galicia in 1797). The final Austrian Civil Code was only completed in 1811.¹⁰²

Meanwhile, the French Napoleonic Code¹⁰³ (Civil Code) was enacted in 1804 after only a few years of preparation, but it was a child of the French Revolution, which is strongly reflected by its content. The French Code was the most influential one and was adopted in many countries standing under French occupation during the Napoleonic wars, but it

¹⁰¹ Caterina Fitzgerald, *The Reforms* (Cambridge University Press 2017) 424-443.

¹⁰² Antonio Padoa, *The Early Modern Period (Sixteenth–Eighteenth Centuries)* (Cambridge University Press 2017) 229-402.

¹⁰³ Schlosser Hans, 'Codex Maximilianeus Bavaricus Civilis' (*Brill*, 2015)

<https://referenceworks.brillonline.com/entries/encyclopedia-of-early-modern-history-online/codex-maximilianeus-bavaricus-civilis-COM_018100> accessed 20 May 2023.

has lasting influence much beyond that. In particular, countries such as Italy, Spain, Portugal, Latin American countries, the state of Louisiana in the United States and all former French colonies base their civil law systems to a strong extent on the Napoleonic Code.

4.2 German Civil Code:-

German Civil Code is the body of codified private law that went into effect on 1 January 1900 and was considered a massive and groundbreaking project. The code evolved out of the desire for a national law that would override the often-conflicting customs and codes of the various German territories. The Bürgerliches Gesetzbuch (BGB) is the civil code of Germany. It became effective and was considered a massive and groundbreaking project. The German Civil Code served as a template for the regulations of several other civil law jurisdictions, including mainland China, Japan, South Korea, Taiwan and Greece.¹⁰⁴

The introduction in France of the Napoleonic Code in 1804 created in Germany a similar desire for obtaining a civil code, which would systematize and unify the various laws that were in effect in the country. However, the realization of such an attempt during the life of the German Confederation was difficult, for the appropriate legislative body did not exist.

However, in 1871 the various German states were united into the German Empire. In the beginning, civil law legislative power was held by the individual states, not the Empire (Reich) that comprised those states. An amendment to the Constitution passed in 1873 (called "Lex Miquel- Lasker" - referring to the amendment's sponsors, representatives Johannes von Miquel and Eduard Lasker) transferred this legislative authority to the Reich. Various committees were then formed to draft a bill that was to become a civil law codification for the entire country, replacing the civil law systems of the states.

The first draft code, in 1888, did not meet with favour. A second committee of 22 members, comprising not only jurists but also representatives of financial interests and of the various ideological currents of the time, compiled a second draft.¹⁰⁵ After significant

¹⁰⁴ 'German Civil Code BGB' (*Gesetzeiminternet*, 2 January 2002) <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html> accessed 20 May 2023.

¹⁰⁵ Steve Allen, 'The German Civil Code and The Development of Private Law in Germany' (*Oxford University Comparative Law Forum*, 27 July 2017) <<https://ouclf.law.ox.ac.uk/the-german-civil-code-and-the-development-of-private-law-in-germany/>> accessed 20 May 2023.

revisions, the German Civil Code was passed by the Reich legislature in 1896. It was put into effect and has been the central codification of Germany's civil law.

German Civil Code, German Bürgerliches Gesetzbuch, the body of codified private law that went into effect in the German empire in 1900. Though it has been modified, it remains in effect. The code grew out of a desire for a truly national law that would override the often-conflicting customs and codes of the various German territories.

The code is divided into five parts. The first is general, covering concepts of personal rights and legal personality. The subjects of the other four parts are obligations, including concepts of sale and contract, things, including immovable and movable property, domestic relations; and succession.

The concept of law embodied in the code was *gammes Recht*, the common law based on the 6th-century codification of Roman law put in force by the emperor Justinian. In family law and to some extent in the law of property, some elements of Germanic tribal law also influenced the code. Although altered to some extent by feudal law, customary law again came under Roman influence in the 15th century, when Roman law was received into Germany in an effort to systematize customs and legal institutions. In some areas, it superseded custom, particularly when there was no conflict between the two, in others, Roman and customary law existed side by side, with custom prevailing when there were insurmountable differences.

Throughout the 19th century, German legal scholars argued about the type of national code that should be written and indeed, whether one should be written at all. The arguments were intense enough to have the effect of delaying codification. Only with the formation of the Reich ("empire") in 1871 was it possible to undertake a program of national codification. Commissions were established and when the first draft of the code was presented for critical appraisal in 1888, it was rejected as being too Roman. A second draft was promulgated in 1896 and went into effect in 1900.¹⁰⁶

The German Civil Code has had an important influence on the private law of other countries, particularly Japan, Switzerland, and Greece. It has influenced the law of Austria and, in conjunction with the Swiss Civil Code, that of Russia and the

¹⁰⁶ Steinmetz George, 'Workers and the Welfare State in Imperial Germany' (*Jstor*, 30 April 1991) <<http://www.jstor.org/stable/27671962>> accessed 20 May 2023.

Scandinavian countries, among others. Compare Napoleonic Code and Prussian Civil Code.¹⁰⁷

4.3 Civil Code for China:-

China has a chance to improve the rule of law by securing property, family, and personal rights. According to the Chinese Constitution, the National People's Congress is the most important political body nationwide, with the power to legislate, oversee the operations of the government, and elect the major officers of the State. However, critics say that these powers are just de jure and that, in fact, the Communist Party decides on all major issues, which is why the National People's Congress has been commonly referred to as a "rubber stamp" Parliament by Western media. Unlike the National People's Congress, the Communist Party of China has no legislative power. As its own name suggests, the Communist Party of China is a consultative body with many of its 2,000 members not members of the Communist Party. Among them are some of China's most popular figures, like the actor Jackie Chan, the basketball player Yao Ming and Wang Jianling, the owner of Wanda Group and also China's richest businessman.¹⁰⁸

During the two sessions, the Communist Party announced its intention to introduce a comprehensive Civil Code, designed to improve the existing civil rules that are expanded throughout many pieces of legislation. This is part of a broader plan to reform the country's legal system by 2020. The ambitious reform agenda was announced three years ago during the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China (CPC), in October 2014.

Following the inauguration of the civil code, many laws currently regulating various aspects of a civil nature, such as contract law, tort law, adoption law, marriage law, etc., will most likely be completely or partially abolished. The civil code will follow the general principles of civil law¹⁰⁹ and the principles set out in the Chinese Constitution. However, the new code is expected to shed more light on some rather obscure areas of law that need further legislation, for instance with regard to property, family relations, and personal rights.

¹⁰⁷ Uwe Kischel, 'The Context of Common Law: Comparative Law, 2019' (*Oxford University Press*, 20 February 2019) <<https://academic.oup.com/book/35270/chapter-abstract/299857182?redirectedFrom=fulltext>> accessed 20 May 2023.

¹⁰⁸ Lindsay Maizland, 'The Chinese Communist Party' (*Council on Foreign Relations*, 6 October 2022) <<https://www.cfr.org/background/chinese-communist-party>> accessed 21 May 2023.

¹⁰⁹ 'Civil Rights Act (1964)' (*National Archives*, 8 February 2022) <<https://www.archives.gov/milestone-documents/civil-rights-act>> accessed 21 May 2023.

Private property is protected under Article 13 of the 1982 Chinese Constitution, as amended in 2014. The discussion on property rights becomes sensitive when it comes to land ownership. In China, a country with a powerful socialist heritage, land can only be owned by the state or by collective organizations and private entities can only buy the right to use the land for a limited number of years. According to the existing legislation, land-use rights or "usufructuary rights" can be granted for a maximum of 70 years, after which the law is not very clear on what will happen. Thus, individuals in China can own their houses and apartments, but they cannot own the land on which these buildings are constructed, nor can they own the natural resources underneath. The land-use rights are transferable; however, observers say that the market for land prices is monopolized by the government, even when the land is owned by a collective.

The poor enforcement of real estate property rights is mirrored by the numerous land seizures seen during the past years, many a direct consequence of China's urbanization process. This situation is particularly damaging for businesses, as it makes investors reluctant to engage in economic activities, knowing that the land on which they are conducting their businesses is vulnerable to government decisions, sometimes at a moment's notice. The new private property guidelines are thus expected to strengthen the property rights regime and provide more protection for private property, by narrowing the interpretation of "public interest" as a means to prevent abusive expropriations. Likewise, a mandatory condition for all acts taken by the state in relation to private property to be publicized would highly contribute to increasing political trust in China.¹¹⁰

The Chinese Civil Code will touch upon family relations as well. However, it is not clear how deep the new rules will go into the matter since China already has in place several laws pertaining to adoption, marriage and other aspects related to family life. Whether the Civil Code is going to replace these laws remains to be seen. More importantly, in recent years, China has become aware of major challenges approaching at a fast pace, among which the ageing of its population raises the most concerns. In a United Nations Report, it was estimated that, by 2050, each retiree in China will be supported by 2.1 people in the workforce. Against a background of vowing economic growth, this prediction does not seem very optimistic.¹¹¹

¹¹⁰ Wenbiao Sha, 'The Political Impacts of Land Expropriation in China' (2023) JODE 1029.

¹¹¹ 'How Severe Are China's Demographic Challenges?' (*China Power*, 15 March 2023) <<https://chinapower.csis.org/china-demographics-challenges/>> accessed 22 May 2023.

But perhaps the most worrisome for the public consciousness is the fact that an ever-increasing number of elderly people are being abandoned by their children, who plunge headlong into very competitive urban centres in search of a better life. This phenomenon is aggravated by the similar situation of the many children left behind by parents who leave their homes seeking higher incomes, hopeful that they will be able to provide a better future for their children. The new guidelines are thus expected to address the guardianship issue and to put in place better protections for these highly vulnerable people.

Every day 24,000 people turn 60 in China, meaning one person every four seconds. Considering that, the National People's Congress proposed a series of measures to improve elderly care services, including crafting a multi-pillar, fairer and more sustainable social security system by 2020.¹¹² The plan is to offer basic old-age insurance coverage for 90 percent of residents and basic medical insurance for more than 95 percent of them; also, government-run nursing homes will account for at least 30 percent of the nation's total nursing beds for the elderly. Other efforts will be directed toward improving elderly access to technology and enriching their cultural life.

Another anticipated major headline in the new civil legislation is represented by the so-called "personality rights," which call for a dedicated section in the civil code. Personality rights are a series of freedoms and liberties that each individual enjoys upon birth, such as the right to life, physical and mental integrity, freedom of speech, the right to privacy, health, reputation, etc. These rights and freedoms are inherent to the human person and the law merely encodes them. However, their free exercise needs to be guaranteed and protected by the state through legal provisions and specialized bodies designed to prevent and punish any acts of violation.

Personality rights are currently guaranteed under Chapter II of the Chinese Constitution, but such provisions cannot be cited in court, due to the absence of a Constitutional Court that would ensure the uniform interpretation, protection, and enforcement of such provisions.¹¹³ Should anyone invoke the claim that a law or administrative act is unconstitutional, there is no specialized organ to control rule upon such matters. A possible explanation as to why China didn't also establish a specialized Court to rule on

¹¹² 'One Chinese Citizen Turns 60 In Every Four Seconds - CGTN' (*Cgtn*, 9 March 2017) <https://news.cgtn.com/news/3d557a4e776b6a4d/share_p.html?t=1489040397568> accessed 22 May 2023.

¹¹³ 'The National People's Congress of The People's Republic of China' (*Npc*, 2 July 2023) <http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372964.htm> accessed 23 May 2023.

Constitutional matters at the moment when the Constitution was adopted, China rejected the separation of powers doctrine, out of concern that it would undermine the authority of the Communist Party. Hence, without an autonomous judicial body to ensure that the fundamental law prevails within the state, the Constitution is left at the moment with only a symbolic role in China.

The importance of guaranteeing the free exercise of personality rights is unquestionable and the new Civil Code should avoid, by all means, rendering the protection regime dubious and rigid. The legislators play an essential role in this; therefore, they should be cautious when defining and enumerating these rights, and make sure they establish an efficient enforcement mechanism. Though the outlook is not optimistic. China is known for allowing restrictions when it feels that too much liberty could weaken state authority or challenge the leadership of the Communist Party.

All these are key areas in which Chinese legislation needs to be further strengthened. But the legal system cannot truly improve unless it ensures that citizens' personal rights, property rights, basic political rights and other inherent rights are guaranteed and protected by the state as inviolable. Although the enactment of a Civil Code represents a big step forward in the direction of a rule of law system, the legislative work in China needs to continue. Likewise, the systems and mechanisms through which the law is enforced need to be bettered, while at the same time facilitating public participation in the process.¹¹⁴

4.4 European Civil Code:-

The European Civil Code (ECC) is a proposed harmonization of private law across the European Union. The ultimate aim of a European civil code is like a national civil code, to deal comprehensively with the core areas of private law. Private law typically covered in a civil code includes family law, the law of inheritance, property law and the Law of Obligations. The law of obligations includes the law of contracts, torts and restitution. It was through the framework of European contract law that the push for a comprehensive European civil code arose. The development of a European civil code has primarily focused on creating a unified law of contracts. Thus, the term 'European Civil Code' is

¹¹⁴ 'Constitution of The People's Republic of China' (*Npc*, 20 November 2019)
<<http://www.npc.gov.cn/englishnpc/Constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>>
accessed 23 May 2023.

often used in specific reference to the harmonization of contract law throughout the European Union.

4.4.1 The Lando Commission

The idea of a Unified European Civil Code can be traced to the idea of a unified Europe and the creation of the European Union. The European Parliament requested the creation of a European Civil Code in 1989, 1994 and 2000. A pragmatic approach has seen the proponents of a European Civil Code develop uniform laws in discrete areas before working towards a comprehensive European Civil Code.¹¹⁵

The development of a European Code for contract law began in 1982 with the formation of the Commission on European Contract Law. At the same time, UNIDROIT began similar studies leading to their 1994 publication *Principles for International Commercial Contracts*. The Lando Commission focused on creating its *Principles of European Contract Law (PECL)*. The first part of the PECL was published in 1995, followed by Part II in 1999 and the final Part III in 2003. These *Principles of European Contract Law* may eventually form one part of the European civil code.

4.4.2 Towards a European Civil Code

In 1997 the Dutch Government, as the Chair of the European Union, held a conference titled *'Towards a European Civil Code'*.¹¹⁶ The conference considered the feasibility of such a code and led to the creation of a book titled *Towards a European Civil Code*. The third edition was published in 2004 and although the primary focus is European contract law, it considers other areas of private law that may form part of a European civil code as well. The years following this conference have seen the development of many academic groups focusing on different areas of private law. These include:

- The Study Group on a European Civil Code, formed in 1997 and chaired by Professor Christian von Bar at the University of Osnabruck.
- The Acquis Group (official name: Research Group on EC Private Law) at the University of Munster focuses on existing European Community private law.

¹¹⁵ Hesselink Martijn, 'The Principles of European Contract Law: Some Choices Made by The Lando Commission' (*Go Gale*, 2001)
<<https://go.gale.com/ps/i.do?p=AONE&u=googlescholar&id=GALE|A85250885&v=2.1&it=r&sid=googleScholar&asid=e6e426ef>> accessed 23 May 2023.

¹¹⁶ 'WTO | Dispute Settlement - Chronological List of Disputes Cases' (*Wto*, 16 February 2023)
<https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 24 May 2023.

- The Commission on European Family Law is based at Utrecht University.
- The European Group on Tort Law, also called the Spier/Koziol group, is in association with the European Centre of Tort and Insurance Law in Vienna.
- The Common Core of European Private Law project was conducted by Mauro Bussani and Ugo Mattei at the University of Trento.
- The Academia des Privatizes Europeans at the University of Pavia, headed by Giuseppe Gandolfi. It published a Draft Code ('avant- project') in 2002.
- The Leuven Centre for a Common Law of Europe was founded in 2001 by Professor Walter Van Gerven, who wrote several European casebooks together with Basil Markesinis.
- The Joint Network on European Private Law has also been created and includes several of the above groups.

4.4.3 Common Frame of Reference

On 11 July 2001, the European Commission issued a Communication in relation to possible developments in European contract law. Following the review of submissions on the Communication, the Commission released an Action Plan for a more coherent European contract law in 2003. The Action Plan began the process of creating what is known as the Common Frame of Reference (CFR). This was followed in 2004 by the publication of "European Contract Law and Revision of the Acquis: the way forward". The CFR is intended to provide a structure and guideline for the development of harmonized European private law but has a specific focus on contract law. It was hoped that the creation of a unified European contract law would be achieved by 2010.

The Draft Common Frame of Reference (DCFR), a joint project of the Study Group and Acquis Group (funded by the European Commission for €4.3 million), was published in December 2007.¹¹⁷ Although the European Commission downplayed the CFR's expected future importance in a July 2006 report, a March 2006 European Parliament resolution stated that "Even though the Commission denies that this is its objective, it is clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be a European code of obligations or even a full-blown European

¹¹⁷ Galateia Kalouta, *The Draft Common Frame of Reference in The Courts* (Oxford University Press 2015) 696.

Civil Code."¹¹⁸ Economist Gerhard Wagner hailed "the drafting of a coherent set of rules" for all of Europe, such as the DCFR, as "an immense scientific achievement".¹¹⁹

¹¹⁸ Mark Beunderman, *Academic Handbook Could Form Basis for EU Civil Code* (Euro Observer 2017) 246-248.

¹¹⁹ Wagner Gerhard, *The Common Frame of Reference: A View from Law & Economics* (Sellier European Law Publishers 2009) 204.

CHAPTER-5

UNIFORM CIVIL CODE- CHALLENGES AND CONSTRAINTS

5.1 Overview

India is a country where exist innumerable communities and customs and where the roots of personal laws are deeply sowed. Presently, these personal laws have been a major reason for social disturbance, political instability and conflict among the citizens of the country. In the history of Independent India, it has been witnessed on several occasions that personal laws of some communities have violated and stood against the provisions of the Constitution and for this reason, a need is being felt to administer a common set of secular laws so that all the citizens irrespective of their religion, caste or region can be treated equally.

The principle of 'Secularism' as mentioned in the Preamble of the Constitution of India has always been abiding by the state. All religious communities in India have been managing and maintaining their civil matters according to their own respective personal laws. But, in the name of personal laws and religion, people have been subject to brutality and violation of rights and no resolution has yet been provided to prevent such atrocities in the name of religion and communal pride.¹²⁰

By adopting the principle of secularism as a Constitutional imperative, it has been clear by the state that India is a nation, which does not recognize any one particular religion as the official religion of the state. This denotes that the state there is no dependency of the state of any kind on any religion for seeking guidance in taking decisions and also state won't tolerate any kind of influence by any religious community in the process of policy-making. Also, the term 'Secularism' in the Constitution denotes that the state will not interfere with the religious matters of any person or community and no person or community will be allowed to interfere with the efficacy of the state.

Religions in India are not only the basis of culture but also have a substantial influence on the political system of the country as well as the community as a whole. In India, religion guides the way of life for the different religious communities and has been an integral part of the entire traditional Indian cultural heritage. To complement this diversity

¹²⁰ 'Secularism' (*Pwonlyias*, 24 October 2023) <<https://pwonlyias.com/upsc-notes/secularism/>> accessed 29 May 2023.

of India, the demand for a common civil code in order to bring uniformity of law in the society and among the people of different religious communities has been raised.

The notion of a Uniform Civil Code was created to demonstrate a contemporary and progressive society that opposes discrimination based on religion, ethnicity, caste, gender, and place of birth. Despite more than seven decades of independence and India's commitment to secularism, there is an urgent need to address the misapplication of personal laws for personal and political gain. Implementing a Uniform Civil Code will aid in combating this problem while also promoting equity and fairness for all residents. It would be an expression of India's commitment to building an equitable and inclusive society.

Uniform Civil Code is a resonation for 'One Country, One Rule', to be applicable throughout the territory of India and also applied to all religious communities in India. The term 'Uniform Civil Code' is explicitly inculcated in the Constitution of India in Part 4, Article 44. Article 44 says, "*The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.*" Article 44 of the Constitution is the component of Directive Principles of the State Policy that can be interpreted as- the state shall take necessary steps in order to bring all the citizens in the effect of common laws irrespective of any distinction based on their caste, creed and religion.¹²¹

The idea of the Uniform Civil Code illustrates that all sections of the society shall be treated equally before the law according to a common national civil code, which shall apply to all the citizens of the country uniformly irrespective of their religion. Uniform Civil Code covers major civil affairs like- Marriage, Divorce, Succession, Maintenance, Adoption and Inheritance. This concept is based on the ground that there shall be no relation between religion and law as per the demand of the modern conception of state and civilization.

The need was felt during the preparations of the Constitution only and the provision regarding uniform civil code was embodied in Art. 44 of Part 4 of the Constitution of India & this imperative was added by the framing fathers of the Constitution in the form of the Directive Principles of State Policy. To show this will of the framers of the Constitution of India, the directive to the state to take essential steps to secure a Uniform

¹²¹ 'Law Commission Seeks Views on Uniform Civil Code: What Is the Uniform Civil Code and the Debate Around It' (*The Indian Express*, 18 June 2023) <<https://indianexpress.com/article/explained/explained-law/law-commission-uniform-civil-code-8671382/>> accessed 29 May 2023.

Civil Code all over the country for all the citizens of India was provisioned.¹²² This is the only Article in the Constitution that provisions for and directs the state to make and implement a Uniform Civil Code for the entire country and no other arrangement in the Constitution says anything about such a common code to govern civil matters of the people of India.

In the inculcation of Article 44 in the Constitution of India, the framers of the Constitution had expressed that we do not have common civil laws in India and might be for this reason only they did not mention the term 'Secularism' in the original Constitution. We have the arrangement of all the common criminal laws applied to all without any exception but the personal laws are different for every community. While there is a criminal code that applies uniformly to every citizen of the country irrespective of their religion, race, tribe and habitation in India, no comparative code is arranged to oversee civil matters including marriage, divorce, maintenance, adoption and succession which are governed by the respective personal laws which differ with every religious community.

Though denotes personal concern, personal law unfortunately has no consideration of and nothing to do with the individual legal rights of a person. Backed by customs, these personal laws dealt with all the civil matters which, by law, are to be governed by personal choice, under the influence of religious beliefs and the consideration of the choice of the person is not a subject of the application of these personal laws. Laws governing our own lives like laws related to marriage, divorce, maintenance, adoption, succession and inheritance are known as personal law. Religion is the essential affinity during the birth of a child and it is gone through at one's own particular will by the laws that we distinguish as personal to him. That if we take out the personal laws by impulse, we trench upon the most intimate feelings of a person.¹²³

In contemporary India, the debate related to Uniform Civil Code has been created by the contradiction between thoughts of rights mentioned in Part 3 of the Indian Constitution.

Part III of the Constitution of India consists of 'Fundamental Rights' which are entitled to every citizen and the availability of which can be interpreted in both ways, as an 'individual' and as an 'individual of a system'. The first one is related to the rights given in Article 14 to Article 24, which aims to assure a person the freedom of correspondence and flexibility and the second way is associated with Article 25 to Article 30, which

¹²² L. Orgad, *The Preamble in Constitutional Interpretation* (Oxford University Press 2010) 714-738.

¹²³ Joydip Ghosal, 'Understanding Uniform Civil Code and Its Problems in Implementation' (*Researchgate*, 18 September 2019) <<https://www.researchgate.net/publication/335821723>> accessed 29 May 2023.

guarantees religious opportunities along with government and social privileges to minorities. The second way causes the issue that different religious groups take the undue privilege of being represented by their 'own communal laws' and since personal laws of every community cause victimization of women, the conflict over the Part 3 of the Constitution exists because of inconsistency and contradiction between the rights guaranteed to women as individuals and the rights of religious groups and minorities being collective units of a polity.¹²⁴

The possibility of giving the guarantee of the equality before law to all the citizens (as the objective of the state) is shown in Part IV of the Constitution i.e., Directive Principles of State Policy, where the state has been directed to realize the imperative of a Uniform Civil Code. Since the 1990s, outlining a Uniform Civil Code has been a specific goal and this has become an issue of national concern. Moreover, the contest between political parties and religious communities for the implementation of a Uniform Civil Code has been acting more like a women's rights issue. Both majority and minorities of the population have got their own arguments in favour and against the Uniform Civil Code.¹²⁵

According to the Hindu Majoritarian supposition, a Uniform Civil Code is required to protect women of minority communities as the arrangements under religious uncodified personal laws inspire discrimination against women. This argument is supported by the fact that Hindus have already given their women rights in a legal official manner. But, in contrast to this, the pioneers of minority communities come up against the implementation of the Uniform Civil Code as according to them- such a code would devastate minority social character, the protection of which is of significant importance for the majoritarian government of the country.¹²⁶

5.2 Arguments for the Implementation of Uniform Civil Code

The idea of a Uniform Civil Code is inculcated in our Constitutional as a duty of the State. This reflects that in some way in the nation's interest Uniform Civil Code is necessary

¹²⁴ Partha Ghosh, *Politics of Personal Law in India: The Hindu-Muslim Dichotomy* (South Asia Research 2009) 16-17.

¹²⁵ According to Article 37 of the Constitution of India, the Directive Principles, though they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law, but they are expressly made non-justifiable.

¹²⁶ 'Uniform civil code neither necessary nor desirable at this stage, says Law Commission., Uniform Civil Code Neither Desirable nor Necessary at This Stage, Says Law Commission' (*The Hindu Blog*, 28 November 2021) <<https://www.thehindu.com/news/national/uniform-civil-code-neither-desirable-nor-necessary-at-this-stage-says-law-commission/article61498390.ece>> accessed 29 May 2023.

to be implemented and the reasons being given on a regular basis for its implementation are:

i. Necessary for National Integrity

The restoration and protection of national integrity was the major concern of Constitutional makers after Independence and while drafting the Constitution, this concern was the most prominent determinant of deciding on the provisions targeting the restoration of communal harmony in India. As India is a country of numerous religions, traditions and customs, there exists a sheer need of maintaining communal harmony and cooperation among different communities. No other than a Uniform Civil Code can help us in a better way to maintain the integrity of the nation. Such a code will bring uniformity and equality for everyone in the country and ensure equality before the law irrespective of caste, religion or gender.

ii. Personal Laws Promote violation of the Constitution

Communal or religious personal laws are the loopholes in our judicial system that promote the exploitation of the weak by those in power. Continuously, Panchayats have been delivering judgements that are against the Constitutional directives and provisions and may be under social pressure or in the allurements of personal benefits people do not interfere with or do not try to prevent it. The incidents of female feticide and honour killing enhance the violation of Human Rights throughout the country. The acceptance of personal laws has constituted an alternate Judicial System that hasn't received any reforms and still running on centuries-old value systems. The only way to change this system and to make it more rational is Uniform Civil Code.

iii. Uniform Civil Code will Enhance Rights of Women

The status of women in India and their condition is highly vulnerable and of peculiar level. The social structure in India is still male-dominated and in such patriarchal and misogynistic conditions. A Uniform Civil Code only can be effective in changing these ancient traditions based on religion as such discriminatory and outdated laws shall have no place in a society where we do understand that women also deserve fair treatment and entitlement to equal rights. Only a Uniform Civil Code can help in improving the position of women in India.

iv. Uniform Civil Code is a sign of a Modern Progressive Nation

A modern progressive nation doesn't give importance to any factor that aims at the division of society on any basis. Such a nation is supposed to have moved away from the barriers of caste and religion-based consideration and there is no place for caste and religious politics in such a progressive nation. Despite securing the highest growth of the economy we are far behind when it comes to social growth. This would not be wrong if we say that we have degraded socially and culturally to that extent were calling ourselves modern is not justified at all.¹²⁷ We are at a stage where we have already lost our traditional values and also and we failed in inculcating modern trends. A Uniform Civil Code will help our society in adapting modern values and in moving forward to become a developed nation.

v. All Indians should be Treated Equally and in Uniformity

In India, in the name of secularism, separate personal laws based on religions are governing and sustaining. These personal laws are not given equal weightage under the law. While a Muslim man can marry multiple times, a Christian or a Hindu will be prosecuted for this act. As per the opinion of the majority, the laws related to or governing civil affairs like marriage, adoption, divorce and inheritance etc should be equal for all citizens of India because this is the only way to guarantee that all Indians are equal in the eyes of law. This kind of arrangement can only be ensured by implementing a Uniform Civil Code.

vi. Uniform Civil Code will Promote Real Secularism

A democratic system ensures uniformity of laws and entitlement of equal rights for all its subjects and these values are the prerequisite of any secular democratic state. India as the Constitution provides, is a secular nation and Art. 44 of the Indian Constitution lays down that attempt to bring a uniform civil code shall be made by the state for all the citizens residing within the territory of India.¹²⁸ True secularism in India can only be ensured by Uniform Civil Code. Despite repeated suggestions and directions for its enactment by the Parliament of India, successive governments have been neglecting this Constitutional imperative since independence. Secularism in India has divided society instead of enhancing social and communal harmony. Indian version of secularism has

¹²⁷ 'Module 4: Economic, Social and Cultural Rights of Women' (*Library*, 8 December 2022) <<http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module4.htm>> accessed 2 June 2023.

¹²⁸ Ashok Bhan, 'The Uniform Civil Code - The Sunday Guardian Live' (*Sunday Guardian Live*, 11 February 2023) <<https://sundayguardianlive.com/legally-speaking/uniform-civil-code>> accessed 2 June 2023.

created a divide in society and segmented the population into majority and minority. The Preamble of the Indian Constitution proclaims the country to be a Secular Democratic Republic but the absence of a Uniform Civil Code has prevented the same from taking place. India still doesn't have a Uniform Civil Code even though we have a Uniform Criminal Code which covers all citizens of India irrespective of their religion.

vii. Will ensure a more Coherent Legal System

A Uniform Civil Code can ensure the infusion of a much-required parity between various religions in the Indian Legal system in terms of different personal laws. A Uniform Civil Code will help build a more coherent legal system in India by codifying and unifying separated and distinctive personal laws of various religious communities. The existing confusion for the judiciary in deciding which personal law is to be prevailing will be reduced by the enactment of a Uniform Civil Code and this will help in enabling an easier and more comprehensively effective administration of laws in India.

It has been said that logically, after the partition of India in 1947 on a religious basis and giving away Pakistan as demanded by the Muslim League, the truncated territory of India should have been declared a Hindu republic state as the division on a religious basis left no scope and need of setting up a secular state.¹²⁹ A bogus Indian version of 'secularism' was imposed on the country or better we say the majority Hindu population, where anything which is anti-Hindu, minority oriented and is of utility for divisive politics may be regarded as 'secular'.

The only reason for discarding Uniform Civil Code is the politics of **pseudo-secularism**¹³⁰ in India. Despite being provisioned in Article 15(1) of the Constitution of India, which prohibits discrimination against people based on religion, Indian governments have been giving special rights and privileges to minorities and discriminating against Hindus.

The practice of pseudo-secularism has paralyzed the Indian system and is responsible for the division of the nation between two classes i.e., majority and minority. It has also promoted and ensured the implementation of discriminatory laws, especially on a

¹²⁹ 'The Partition of India' (*The Hindu Blog*, 22 December 2002) < <https://frontline.thehindu.com/other/the-partition-of-india/article30247187.ece> > accessed 2 June 2023.

¹³⁰ Ratan Sharda, 'True secularism demands a Uniform Civil Code' (*The Times of India*, 11 September 2017) < <https://timesofindia.indiatimes.com/india/true-secularism-demands-a-uniform-civil-code/articleshow/60455808.cms> > accessed on 2 June 2023.

gender basis and compelled successive governments in India (both in the centre and states) for regulating minority-appeasing policies.

5.3 Arguments against the Uniform Civil Code

Uniform Civil Code is a sensitive and debated topic that has attained the attention of politics and the legal fraternity throughout the country. The task of crafting or formulating a compilation of rules that will govern civil matters of all communities is highly intimidating and tough keeping in mind numerous distinctive interests and sentiments to be accounted for. Those who oppose Uniform Civil Code argue that the origin of personal laws was divine and they originated from religious beliefs and are traditional in nature. These opponents further opine that being of divine nature the practice of these personal laws is supposed to be maintained in their existing way and it is better not to disturb the system of personal laws because there lies a risk of engendering huge enmity and tension between different religious communities in India. The efforts for the implementation of a Uniform Civil Code have been challenged by several arguments and standpoints. The major arguments given against the implementation of the Uniform Civil Code are:

i. Diversity in India and Difficulty in Practicing Uniform Civil Code

India is a country of diverse cultures and is a land for all the religions that exist on the globe. These religions have been practising and professions for centuries. In these conditions, blindly adopting and implementing a legal trajectory prevalent in the West is simply not possible because the social structure in Western countries is just not similar to India. So, such a code endangers the identity of Muslim minorities as it seems to be favouring the majority population of Hindus and more likely it will be a uniform Hindu code rather than a uniform Civil Code. Thus, it is practically not possible to come up with a common code to govern personalized affairs like marriage, divorce, inheritance etc. due to the immense cultural diversity of the country. Bringing people, who are identified more as being members of different communities based on different religions, castes, regions and languages, under the effect of one common law seems to be a tough task.

ii. Uniform Civil Code is a Move Against Secularism

Expecting people of varied cultures and traditions to follow the same practices or to act according to common laws is somewhat absurd. In a country full of diversity like India,

expecting a population of 1.2 billion to be governed by a uniform system seems foolish.¹³¹ This argument lies in the fact that unity in diversity is a feature of Indian polity, which the people of India take pride in. And, for maintaining this diversity, it is much needed to respect the traditions and civil laws of every minority community.

Assurance of respect and recognition of the personal laws of minorities is the factor that has maintained the peace and harmony of this nation for such a long period. It is to be considered whether the infringement of personal laws and religious customs is acceptable. This is to take note that 14.2% share of the total population of India are Muslims and any step towards the realization of the Uniform Civil Code has been receiving massive criticism and opposition and led to nationwide protests by Muslims.¹³² It has been argued that imposing views of a majority community on the rest of the population comprising several minorities will be nothing but injustice to minorities and especially to Muslims who are a considerable share of the total population of the country.

The minorities of India are demanding a country that respects diversity and distinct identities and such a secular India was promised by the founders of the Indian Constitution when they were formulating the same. This is opined by minorities that the respect of the emotions of minorities population shall be maintained by the government and decide on the violation of personal laws and implementation of the Uniform Civil Code.

iii. Uniform Civil Code Will Encroach Freedom of Religion

Art. 25 of the Constitution of India guarantees religious freedom in the form of the liberty of conscience and free practice and propagation of religion & Art. 26 of the Constitution of India provides the ability to manage religious affairs. Whenever an attempt to the formation of a Uniform Civil Code has been initiated, the entitlements made in the above two Articles build a defence against the application of such a code. A general assumption about Uniform Civil Code is that it stands against the right to religious freedom. Numerous communities in India, particularly religious minorities perceive the Uniform Civil Code as an incursion into their right to religious freedom.

¹³¹ 'Key Facts About the Religiously and Demographically Diverse States of India' (*Pew Research Centre*, 13 December 2021) <<https://www.pewresearch.org/short-reads/2021/12/13/key-facts-about-the-religiously-and-demographically-diverse-states-of-india/>> accessed 4 June 2023.

¹³² Ziya Us Salam, 'Muslim bodies say the Law Commission's move inviting suggestions for Uniform Civil Code is 'against the spirit of the Constitution' (*The Hindu Blog*, 19 June 2023) <<https://www.thehindu.com/news/national/muslim-bodies-say-the-law-commissions-move-inviting-suggestions-for-uniform-civil-code-is-against-the-spirit-of-the-Constitution/article66986663.ece>> accessed 4 June 2023.

They are afraid that a common civil code will vanish away their cultural heritage and deny their traditions. They fear that Uniform Civil Code will impose laws influenced by the majority communities and mostly dictated.

iv. Uniform Civil Code will Enhance State's Interference in the Personal Sphere

In India, the right to freedom of religion and liberty of conscience, professing and propagating the religion of one's own choice has been provided by the Constitution. As listed in part III of the Constitution of India, this freedom is recognized as a fundamental right, which makes it completely an individual concern and prevents it from interference by the state. It has been perceived and opined by the people of religious minorities that the codification of Uniform laws or a Uniform Civil Code and its mandatory application will reduce the scope of religious freedom and enhance the possibility of interference of the state in this right in particular and also in other personal affairs.

v. Implementing Uniform Civil Code is a Sensitive and Tough Task

The Indian version of secularism demands an inclusive approach by the state towards the diversity that exists in the country. Inclusion of all religious communities in the agenda of policy making and respect for their diverse beliefs and cultures has been in the intent of the Indian Constitution since its enactment. Thus, a Uniform Civil Code, in its true spirit, must be constituted by adopting the most relevant and fair arrangements from different personal laws, making imperceptible changes in each provision picked, ensuring judicial proclamation for gender equality, and bringing in suitable interpretations on the civil and personal affairs like marriage, divorce, maintenance, succession and adoption by granting privileges that each religious community secures from the other religious communities.

The realization of this imperative will demand so much time and human resources. So, the government needs to be working more sensitively and impartially on each stage while dealing with the issues of both majority and minority communities because a biased attitude or insensitive consideration of the personal law of any community may lead to serious consequences or may be turned up into disastrous results in form of communal riots and violent protests. The realization of a Uniform Civil Code is quite a sensitive and tough task that requires a balanced and inclusive approach by the government towards the religious beliefs of all communities in India.

vi. The Suitable Time for this Reform hasn't Come Yet

The major opposition on the issue of implementing the Uniform Civil Code in India has been received from the Muslim community. This conflict of ideologies has been overlapping by the events like controversies over beef, love jihad, school and college curriculum's saffron zing, and most prominently the silence received from the top leadership on these issues. All these indicate that so much time is still required to instil confidence in minority communities, especially Muslims. Without considering this requirement, making constant efforts towards Uniformity of laws will develop insecurity and vulnerability for the minority classes, particularly Muslims. This may make them getting attracted towards extremism and fundamentalist ideologies which will not be good for the security and integrity of the nation.

An extremely relevant concern has been raised by the minorities in India where does the government stand in deciding what laws need reformation and what laws will suitably constitute the skeleton of the Uniform Civil Code? This is a diligent question raised by minorities in India. The task of implementing a Uniform Civil Code is tremendous for the present government because it is to be ensured that the formulated code will be acceptable to all the communities which in present conditions seems more of an imagination and almost an impossible job. It is expected that all the communities in India will ardently oppose a common code, doesn't matter what it affects and to what extent, it is sure that the formulation of a Uniform Civil Code will be perceived as interference with religions and considered to be government's plan to completely wipe out the ideology.

Besides, picking up the laws that are to be exonerated government should also focus on justifying that the practice of those laws promotes the violation of basic human rights and thus they are to be scrapped in order to ensure welfare governance.

The implementation of the Uniform Civil Code aims at bringing a much-awaited and needed transformation and it tries to put an end to the judicial confusion that which law is to be applicable. These changes are mandatorily needed but, some of the consequences it offers make it hard to be implemented, even after seven decades from when this imperative was proposed for the first time for Indian polity.

As per the direction given in Art. 44 of the Indian Constitution it is in the interest of the nation to enact a law on the Uniform Civil Code that will apply to all citizens irrespective of caste creed and religion. By implementing Uniform Civil Code, it would be made

sure that personal religious laws shall be abandoned and all personal affairs including marriage, inheritance, divorce, maintenance etc.¹³³ shall be governed by the uniform personal law formulated as a replacement for several distinct personal laws. This civil code would not consider any personal laws regarding any cultural or religious norms and it would apply similarly to all citizens of the country irrespective of their religion, caste and colour.

The formulation and implementation of a Uniform Civil Code is probably the most controversial and debated issue presently in society and politics also. While a large number of people oppose this imperative, a massive share of the population has shown agreement with the idea of implementing a common civil code to govern personal affairs. Those who are favouring the idea opine that the presence and practice of so many personal laws develop an atmosphere of confusion for the judiciary and such a confusing system of civil affairs is simply tough to follow.

5.4 Who Opposes Uniform Civil Code

Those who are against the implementation of the Uniform Civil Code have been openly opposing the idea and they argue that such an amendment is completely unConstitutional because the background Uniform Civil Code is carrying and the issues it aims to provide resolution for are part of freedom of religion and culture provided to citizens of India by the Constitution itself. According to them, Uniform Civil Code will violate the cultural and religious rights of minority communities as well, which were guaranteed by the founders of the Indian Constitution to them. Some sections of the society in India are opposing the implementation of the Uniform Civil Code and they are carrying their own justification for:

(a) Naga Community

The Naga Community is one of the minority communities in India and they are highly upset by the proposal for the formulation of a common code. The Bar Association of Nagaland has released a warning for the Centre that the implementation of the Uniform Civil Code may lead to real trouble in society and politics as it would bring about a threat to the dignity and culture of the Naga People.

¹³³ Zeenat Shaukat Ali, 'The Implementation of a Uniform Civil Code' (*India Foundation*, 5 January 2023) <<https://indiafoundation.in/articles-and-commentaries/the-implementation-of-a-uniform-civil-code/>> accessed 5 June 2023.

A letter in this regard was sent to the Prime Minister's office in which they stated that-

*"It will cause social disorder, and if a Uniform Civil Code is introduced covering the entire country, it shall cause so much hardship and social disorder to the Nagas as the personal and social life of the Nagas is quite distinct from the rest of people in the country."*¹³⁴

(b) Political Parties

Some of the political parties in India, both national and regional parties have also shown their disagreement with the initiative taken for the implementation of the Uniform Civil Code. These parties have openly come up with support for minority opinions that a Uniform Civil Code will be an absolute violation of minority rights. Political parties which are against the Uniform Civil Code have also raised some other points due to which implementation of a Uniform Civil Code is almost impossible. The main concern raised by them lies in their argument that the implementation of the Uniform Civil Code seems virtually impossible in a country like India with so much cultural and religious diversity.

All the political parties representing Muslims of India are against the Uniform Civil Code because there is one constant fear of the Muslim community presently is that the implementation of the Uniform Civil Code is an intense conspiracy aiming at defying the views and opinions of the minority communities and this Uniform Civil Code is dedicated to mandatory imposition of Hindu Personal Law on everyone in the country.

(c) Muslims

The questionnaire circulated by the Law Commission received an evident and clear rejection by the Muslims because the All-India Muslim Personal Law Board (AIMPLB) disregarded the questionnaire on Uniform Civil Code completely and also appealed to their people to boycott it.

The General Secretary of All India Muslim Personal Law Board Mr. Maulana Wali Rehmani stated while appealing for the boycott of the questionnaire that-

*"Uniform Civil Code is divisive and will lead to social unrest, and it is against the spirit of the Constitution, which safeguards the right of citizens to practice their culture and religion."*¹³⁵

¹³⁴ 'Is Uniform Civil Code Necessary?' (*Sage-Tip*, 4 November 2022) <<https://sage-tip.com/questions/is-uniform-civil-code-necessary/>> accessed 5 June 2023.

¹³⁵ 'AIMPLB, Muslim Outfits Oppose Questionnaire on Civil Code' (*The Indian Express*, 14 October 2016) <<https://indianexpress.com/article/india/india-news-india/aimplb-muslim-outfits-oppose-questionnaire-on-civil-code-3080588/>> accessed 05 June 2023.

It is reflected by the minority's views that if needed a public referendum should be taken out by the Union Government on the issue of Triple Talaq and Nikah Halala and it must not only consider what has been the viewpoint of the majority on the issue. They further said that the practices are parts of Muslim Personal Law which is why only Muslims are supposed to be deciding upon the issue and any kind of interference by the people of other religions and communities will not be accepted.

(d) Khasi, Jaintia and Garo tribes

Meghalaya, with its Khasi, Jaintia and Garo tribes, treasures its distinct customs on marriage, divorce, adoption, and inheritance. The state's multiculturalism and diversity make imposing a single custom or code impossible. The inclusion of hill tribes in the Indian Constitution's sixth schedule empowers them to enact laws on their customs. Meghalaya opposes a uniform civil code, as it would undermine its rich traditions and cultural identity. Leaders and activists stand united in preserving their unique practices, highlighting the essence of India's diversity.

(e) Mizo Community

Article 371G of the Indian Constitution safeguards the Mizo ethnic groups' social and religious practices, customs, and land ownership in Mizoram. The ruling government in Mizoram has firmly opposed the Uniform Civil Code, passing a unanimous resolution against its implementation. The diverse Mizo community, consisting of various subtribes and denominations, presents practical challenges for a uniform civil code. The unique norms of land ownership and inheritance among different tribes underscore the need for preserving their distinct identities. Mizoram's resolution reflects the concerns about instability and the importance of respecting the region's cultural diversity.¹³⁶

5.5 Political Discourse on Uniform Civil Code in India

Uniform Civil Code is probably the most recent issue that has emerged in India's political discourse. The issue has been highlighted because recently many women of the Muslim community have started approaching the Supreme Court of India to protect their basic rights of liberty and equality in keeping with provisions made in the Constitution of India. These women are affected adversely by the practices enforced by personal laws in the name of religion. Responding to this appeal, the Union Law Ministry has released

¹³⁶ A. Mathur and A. Hussain, 'How Will UCC Affect Northeast? 220 Ethnic Tribes Fear Potential Impact' (*India Today*, 1 July 2023) <<https://www.indiatoday.in/india/story/how-will-ucc-affect-the-northeast-220-ethnic-tribes-dread-potential-impact-2400655-2023-07-01>> accessed 4 July 2023.

directions for the law commission to examine the issue in relation to the formulation and implementation of the Uniform Civil Code.

It has been highlighted so many times on the canvas of Indian politics that, it was a mistake made by the founding fathers of the Constitution of India that they did not implement a Uniform Civil Code in the very beginning. According to the people who are in favour of implementing a Uniform Civil Code, there are three major reasons why the implementation of common civil law is necessary:

There is hope in the majority of the Indian population (including some sections from minorities also especially women) with the Modi government approaching Law Commission to look for the scope of implementation of a common code that the realization of a Constitutional imperative which has been in limbo for so long, would ultimately be in action. This, according to them, may eliminate the reverse discrimination taking place with the majority of Hindus in the name of equity.

It has been said by the supporters of the Uniform Civil Code that India being a secular democratic republic must bring all its citizens under the effect of the same law and there shall not be any reason to treat them differently. They are not agreed upon the concept of different laws for different communities with different religious affiliations. As per them, it weakens the integrity and unity of the nation and opens spaces for divisive and separatist forces.

The people supporting the implementation of the Uniform Civil Code also feel that for decades the rights of women have been violated and restricted by personal laws in the name of religion. According to them, a Uniform Civil Code may bring change in the status of women of minority communities and the present conditions of women will not be the case anymore with a common civil code. It has been pointed out that the Shah Bano case was not the only event where the Supreme Court advised the implementation of the Uniform Civil Code but in many other major cases as well in which either Supreme Court or other courts have awarded similar rulings.

5.6 Recent Progress in the Matter

In Indian politics, It is supposedly assumed that the next big target of the recent government's agenda, after prohibiting Triple Talaq and repealing Article 370 (special status of Jammu and Kashmir), would be the implementation of the Uniform Civil Code.

The Law Commission submitted a report in August 2018 named “Reform of Family Law”, and this report presents to us the social and cultural diversity exists in India and also directs that how the weaker sections of our population must not be in lost in the whole process of personal law reforms.¹³⁷

This was also hinted in the report that the Commission had focused more on dealing with laws that are discriminatory and partial and choose not to give more unnecessary emphasis on the implementation of a Uniform Civil Code as it is not desirable for all the communities.

The report has shown a firm belief that Uniform Civil Code is not the only way forward but this may be the reformative codification of personal laws also as it suggests that amendments in personal laws may bring change in the situation so that the stigma and prejudice associated with them could be highlighted and tested on the grounds of fundamental rights. These are the justifications on which the opposition in India had been obstructing and impeding the bill on Uniform Civil Code.

Since independence, numerous petitions have been filed which have highlighted the urgent need for Uniform Civil Code in order to promote national integration and for the protection of virtues like Justice, Equality and Dignity of Women. These petitions have been demanding the replacement of personal laws with the Uniform Civil Code, a common set of rules to govern every citizen of the country which would be constituted by integrating the scriptures and customs of different religious communities of India. Such a code would apply to everyone in the country and there would be no exception for anyone in that code. It is hoped that such a code will be supported by every community as it would be based on the inculcation of the best of the arrangements taken from different religious personal laws.

5.6.1 The Views of Political Parties on the Issue

There have been factors like public uprising and the political agenda of the ruling party for the implementation of the Uniform Civil Code which are causing pushing effect for the code to be formulated. The directions by the Law Commission to prepare a draft of the Uniform Civil Code covering the matters such as uniform minimum age of marriage; common grounds of divorce; uniform arrangements on maintenance and alimony;

¹³⁷ C.K Matthew, ‘Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach’ (*The Hindu blog*, 26 October 2019) <<https://www.thehinducentre.com/the-arena/uniform-civil-code-the-importance-of-an-inclusive-and-voluntary-approach/article64931357.ece>> accessed 05 June 2023.

guardianship and adoption; and succession and inheritance of property. It is also assumed that the nationwide application of the Uniform Civil Code will end religiously distinct personal laws promoting intolerance among various groups and communities across the nation. The implementation of the Uniform Civil Code will also fulfil the dream of the party in power in the Centre of India.

The implementation of the Uniform Civil Code is quite a contest between different political parties in India and many national and regional parties are carrying different opinions in this regard. The Law Commission invited the people of India to mark their opinion on the issue involving the revision and reformation of personal laws. The questionnaire which was circulated by the Commission had sought responses to questions like- *‘whether the codification of existing personal laws and customary practices is needed and whether it would benefit the people of the country.’*¹³⁸

The debate over implementing a Uniform Civil Code is started again with every political party keeping their own respective stand on the subject. Several political parties reacted in the face of Muslim institutions opposing the Uniform Civil Code, whereas some political parties came up as the representative of the will of the minorities. While the Congress party opined that its implementation is near to impossible, the ruling Bhartiya Janta Party asserted that this is basically a move aiming towards the formation of a progressive society. Recently, other political parties are observed opposing and accusing the Bhartiya Janta Party government in the centre of attempting the ‘polarization’ of people ahead of Assembly elections in so many states of India. Earlier to this, the All-India Muslim Personal Law Board and some other Islamist groups opposed and boycotted the questionnaire on the Uniform Civil Code, including the abolition of Triple Talaq. Here, we need to know, where political parties in India stand on the subject:

i. Bhartiya Janta Party (BJP)

BJP is a party that has constantly been supporting and advocating for bringing reforms in personal laws and the implementation of the Uniform Civil Code. Being the ruling party in the centre, in recent scenarios BJP has officially opposed triple talaq as a response to an order released by the Supreme Court of India to the government asking its stand on the subject. By directing the Law Commission to examine the feasibility of the Uniform Civil Code, the BJP-led central government has indicated that they are in favour of the reforms

¹³⁸ Dwivedi (N 24).

in the existing personal law system and the existing government is open to a change in personal laws across religions.

The party's stand towards the uniformity of laws throughout the country is constant and under the present leadership it is assumed that after abolishing triple talaq and repealing Article 370, the next big move of the party will be Uniform Civil Code.

ii. Congress

Congress has shown an inconsistent attitude towards the issue. Recently, somehow the party has backed the Uniform Civil Code but it is also skeptical about the government's intentions of implementing a Uniform Civil Code.¹³⁹ Earlier, the party has been maintaining that Uniform Civil Code would interfere with personal laws and religious beliefs and will harm the dignity of various religious minority communities. But, for a change, now Congress has opined that there must be a political consensus and social survey on the draft of the Uniform Civil Code before any further step is taken by the government.

iii. Janata Dal-United

JD(U) has been asking on this issue that why the government is focusing on Muslims. It is not the right time to begin such a debate. The party however has been opposing the idea of the Uniform Civil Code. The reason is that the party feels that it would be interfering in the religious matters and freedom of religion of the minority communities.

iv. CPI(M)

According to the Communist Party of India (Marxist), any move to emphasize the agenda of the Uniform Civil Code, the way is being pushed forward by the recent government directly and through its institutions, is beneficial for the rights of women and in achieving the goals of gender equality. The party is skeptical of the government's intentions behind the move and wants to ensure that any reforms in personal laws are uniform across religions and there should not be any biased approach.

v. Shiv Sena

Shiv Sena has been favouring and supporting the BJP's claim and is in favour of enforcement of the Uniform Civil Code. According to them, the Muslim Law Board

¹³⁹ Gupta (N 12).

should support the Uniform Civil Code as it will be helpful for the community. Uniform Civil Code is effective especially for women to come out of misery.

vi. AIMIM

The party says that the people pushing for Uniform Civil Code are not aware of India's pluralism and cultural diversity. Leaders of AIMIM say that BJP is trying to impose a 'Hindu Rashtra' on the country in the name of the Uniform Civil Code. AIMIM has been opposing Uniform Civil Code, and claims that a Uniform Civil Code is not suitable for a 'pluralistic and diverse country like India'. AIMIM has claimed that Uniform Civil Code is nothing more than a move to divert attention from failed governance.¹⁴⁰

The political leadership pushing for Uniform Civil Code is emphasizing the importance of Uniform Civil Code on the ground of gender equality. It has been argued that different laws for different religions have proved costly for many Indian people- especially for women, and particularly for Muslim women since the personal laws of Muslims affect their rights of inheritance and the arrangements for Muslim women in terms of divorce cases are highly discriminatory.

5.6.2 Drafting of Uniform Civil Code: A Major Concern

The biggest and most prominent obstacle in the implementation of the Uniform Civil Code, apart from obtaining a consensus, is to prepare a draft of the code. There have been numerous discussions conducted and best of the studies framed but no model law has been drafted. It is a general perception in the minorities that under the guise of the Uniform Civil Code, Hindu Law will replace all the other personal laws and the Uniform Civil Code will impose Hindu personal laws. The absence of a draft code has caused this misconception and disappointment in minorities. It has been opined that a Uniform Civil Code should be based on gender equality and comprise the best elements from all the personal laws prevalent in India. The Uniform Civil Code for India is expected to create a balance between the protection of fundamental rights and the assurance of freedom of religion to all.

Proposed legislation regarding the implementation of a voluntary Uniform Civil Code is currently in its final stages before being presented in Parliament. However, the concept of a voluntary uniform civil code presents an inherent contradiction. Once it becomes

¹⁴⁰ 'Will it be Uniform Civil Code for Muslims and Hindu Code for the Majority' (*The Hindu blog*, 10 November 2022) <<https://www.thehindu.com/news/national/telangana/will-it-be-Uniform-Civil-Code-for-muslims-and-hindu-code-for-the-majority-asks-owaisi/article66120849.ece>> accessed 06 June 2023.

optional, it loses its essence of being uniform. Therefore, any attempt to introduce a voluntary or optional code should be opposed. Instead of pursuing an optional civil code, the government would be better served by taking immediate action to codify each set of personal laws and incorporating necessary reforms to ensure their uniform applicability to all members of the respective communities. While there is a potential for misuse or exploitation of the Uniform Civil Code, it should not deter the Parliament from enacting it, as the overall social welfare and benefits that would arise from its implementation far outweigh any concerns.

5.7 Uniform Civil Code: Challenges in its Implementation

The task of preparing a set of laws that will be capable of governing civil matters of all communities in India is a very intimidating and uninteresting one. Since a huge range of interests and sentiments are to be accounted for and extracting the best out of them in order to cater for the whole population with so much diversity is quite a challenging thing. There are three major challenges in the implementation of the Uniform Civil Code:

- 1. Misinformation about the Uniform Civil Code-** The absence of a draft or the missing content of the Uniform Civil Code has let minorities perceive and believe that Uniform Civil Code is a way of imposing majority views and rules on them.
- 2. Lack of Political Will-** Due to the complexity of the subject successive governments since independence had been avoiding raising this issue on the political canvas of Indian politics. The involvement of religious beliefs makes Uniform Civil Code a sensitive issue which makes political parties and governments not touch or highlight the need for the code.
- 3. Different Religious Communities-** Every religious community in India have been governed by a distinct set of personal laws and addressing these personal laws by the state led to the politicization of the debate on the Uniform Civil Code.

CHAPTER-6

CONCLUSION AND SUGGESTIONS

6.1 Conclusion

India is the world's largest democratic country. India has the world's lengthiest and bulkiest Constitution. It was framed after much deliberation, discussion and clause-by-clause consideration of each Article. Article 44 was one such Article, which attracted much debate in the Constituent Assembly. Uniform Civil Code had been enshrined in Part IV of the Directive Principle of State Policy. Even today, it has been a debated issue. There is a need for such an adequate and gender-just law that could not only regulate every aspect of people's lives but also bind them together with the feeling of commonness and brotherhood.¹⁴¹ The topic "Desirability and Practicability of Uniform Civil Code" was chosen to find out the feasibility of the Uniform Civil Code in India and the following points were formulated for the proper guidance of the study:

- It seems that the present personal laws are less adequate in the context of the Uniform Civil Code.
- It seems that the judicial approach is positive towards the Uniform Civil Code.
- It seems that the personal laws in foreign countries are uniform in their implementation.

The historical backdrop of the uniform civil code is intricately connected with the evolution of personal laws. During ancient and medieval eras, all categories of law, encompassing civil, criminal and commercial aspects, were heavily swayed by religious beliefs and cultural practices. This religion-centred legal framework grew convoluted and stagnant as time progressed. The British colonial rulers endeavoured to introduce a more progressive legal system in India. They systematically formulated and enforced non-religious criminal and procedural statutes. Nonetheless, their primary objective lay in maintaining political dominion rather than initiating sweeping social reforms, hence they did not have the intention of completely excluding civil affairs from their agenda of legal reform.

The Constitutional history of India demonstrates that the British rulers generally opposed the comprehensive codification of personal laws, as they did not want to interfere with the religious sentiments of Indian society. Their approach can be seen as a strategy of "divide

¹⁴¹ Constituent Assembly Debates, vol. VII, 540-547.

and rule." They chose not to intervene in the personal laws of Muslims, allowing them to maintain their distinct identity and separatist tendencies.

The first significant step towards the development of a Uniform Civil Code was taken soon after India gained independence in 1948. This step was marked by the introduction of the Hindu Code Bill, which aimed to consolidate the diverse customs and laws followed by Hindus in different regions, serving as an initial stride towards a Uniform Civil Code for all citizens. The Hindu Code Bill sought to codify various aspects related to women and men, such as systems of diversity, property practices, succession order, maintenance laws, marriage regulations, divorce procedures, adoption rules, guardianship norms, and minority rights. Dr. Ambedkar supported the Hindu Code Bill and showcased his aspiration for a Uniform Civil Code. The Hindu Code Bill aimed to supersede the prevailing set of Hindu personal laws, which had undergone partial modifications under British rule, with a comprehensive civil code.

The topic of the Uniform Civil Code was officially raised in the Constituent Assembly. Initially, there was an attempt to include it in the chapter on fundamental rights, but the sub-committee on fundamental rights unanimously decided to place it in the chapter on Directive Principles. Some Muslim members in the Constituent Assembly opposed the idea of a Uniform Civil Code, leading to several proposed amendments by Dr. Ambedkar.

After a long hour's debate, it was incorporated under part IV of the Constitution of India.¹⁴² Hence it cannot be enforced by the direction of the court. The founding fathers of the Constitution were of the view that this country needs a uniform civil code but that was not the time to enforce Uniform Civil Code because the citizens of this country were not mentally prepared for that. They were assured that at a point in time, the government would implement this Constitutional mandate.¹⁴³

The Indian Constitution has various Articles that are either directly or indirectly linked to the Uniform Civil Code. The unified civil code has been broadly addressed in terms of basic rights, directive principles and fundamental duties.¹⁴⁴ Article 44 of the Indian Constitution states that "*The state shall endeavour to secure for its citizens a Uniform Civil Code throughout the territory of India.*"

¹⁴² The Constitution of India 1949, arts 36 to 51.

¹⁴³ Tulzapurkar (N 16).

¹⁴⁴ The Constitution of India 1949, Part III and IV.

Article 44 of the Indian Constitution, which falls under the Directive Principles of State Policy, was incorporated to promote the uniformity, secularization, justice and non-discrimination of laws. The Indian Constitution's preamble proclaims the country as a secular, democratic, republic, meaning that there would be no official state religion and no governmental discrimination based on religion.

The implementation of a Uniform Civil Code necessitates finding a delicate balance between the distinct legal frameworks of various religions, safeguarding the fundamental rights of different communities and respecting religious principles, which encompass diverse elements and are rooted in different ideologies. Secularism, in its informal association with objectives like the Uniform Civil Code, seeks to maintain a clear distinction between matters of personal faith and secular activities. The case of *S.R. Bommai v. Union of India*¹⁴⁵ emphasized that religion is a personal matter of faith and should not be intertwined with secular affairs.

In India, spiritualism is characterized by personal belief within the framework of positive secularism. Positive secularism represents a broad principle of secularism that is embraced by countries like the United States and certain European states, where a clear separation exists between religion and the state. This acceptance stems from the historical progression of Renaissance, Reformation, and Enlightenment in these countries, enabling them to enact laws that ensure non-interference of the state in religious matters.

The Indian Constitution's preamble proclaims the country as a secular, democratic republic, meaning that there would be no official state religion and no governmental discrimination based on religion.¹⁴⁶

The Uniform Civil Code serves as a means to unite people from diverse backgrounds into one nation. It contributes to the promotion of fraternity and unity within the country, concepts that hold significant importance and are prominently highlighted in the preamble of the Constitution. According to Article 51A(C) of the Indian Constitution, every citizen has a duty to preserve and protect the nation's sovereignty, unity and integrity.

The Uniform Civil Code is a positive step for women, as it can help in minimizing the negative impacts of personal laws. Moreover, every citizen has to reject practices that degrade the dignity of women. Therefore, the fundamental duties and the objectives of the Uniform Civil Code align in this regard. It can be argued that the fulfilment of fundamental

¹⁴⁵ *S.R. Bommai v. Union of India* AIR 1994 SC 1918.

¹⁴⁶ The Constitution of India 1949, art 51 A(c).

duties necessitates the enactment of the Uniform Civil Code and such a law would be in accordance with the emerging principle of rationality within the Indian Constitution.¹⁴⁷

Objections and concerns regarding the Uniform Civil Code have been raised by certain minority communities. One of the primary objections is based on religious grounds, asserting that the implementation of a uniform civil code would infringe upon religious freedom by seeking to replace personal laws associated with different religions. However, this objection cannot be fully accepted since social life is not solely dependent on religious faith.

Moreover, it is important to note that the Constitution allows for state regulation of secular activities that are connected to religion. Additionally, in many European countries, citizens accept and abide by uniform civil laws without considering them tyrannical or oppressive, even among minority communities.¹⁴⁸

Muslim members have expressed opposition to the Uniform Civil Code, citing concerns about potential infringement on their religious freedom. However, it is important to recognize that equality, gender justice, and national unity can only be achieved through the implementation of a Uniform Civil Code.

One objection raised against the Uniform Civil Code in India is that imposing uniform civil laws on people may undermine their cultural practices. It is argued that enforcing homogeneity could lead to alienation from the state. Critics claim that law and the legal system are deeply intertwined with the cultural fabric of society and therefore, protecting personal laws becomes essential for safeguarding culture. However, it is worth noting that culture encompasses various aspects of life and is dynamic in nature. Improving one component of culture does not necessarily harm the overall cultural landscape. Moreover, it is true that discriminatory personal laws cannot be justified or protected under the guise of cultural preservation.

To facilitate the execution of the Uniform Civil Code in India and address any objections based on cultural grounds, it is recommended that a proviso be added to Article 29(1)¹⁴⁹ to explicitly state that nothing in this clause shall prevent the state from enacting laws aimed at promoting social welfare and social reform, particularly in matters associated with secular activities linked to culture. It is evident that a democratic government should not

¹⁴⁷ The Constitution of India 1949, art 51A(e).

¹⁴⁸ Narmada Khodie, *Reading in Uniform Civil Code* (Tacker Company Ltd, Bombay 1975) 8.

¹⁴⁹ The Constitution of India 1949, arts 29-30.

aim to suppress the sentiments of any segment of the population. However, this does not justify any government's inaction. It is the Constitutional responsibility of the government to actively involve and garner the support of all citizens, preparing them mentally, emotionally and psychologically to progressively embrace the social goals outlined in the Constitution.

The objections against reforms in Muslim law are not only religious or legal but also political. Rather if one goes deep into the problem, they are much more political. Uniformity of laws and procedures is a concept of paramount importance in the modern world and the solidarity of a nation depends on it. The lack of uniformity hinders the homogenous character of the people. Different laws and procedures for different communities of people living in the same nation led to an inherent weakness and impoverishment in the political body.¹⁵⁰

Another objection raised against the Uniform Civil Code is the argument for the immutability of personal laws. However, this argument was put forward and rejected in the constituent assembly. The notion of immutability has had negative consequences in India, hindering progressive interpretation and secularism and impeding the natural growth of communities in a rapidly changing world.¹⁵¹ It can make a community stagnant, orthodox, and blind to social progress. Hence, it is contended that the notion of personal laws being unchangeable should not prevail in India, as it can undermine the Constitutional objectives of equality, justice and secularism.

Regarding the implementation of the Uniform Civil Code, it is evident that there is a lack of trust among religious minority groups, as they fear it may infringe upon their right to practice and profess their religion. One potential answer to these problems is to make the Uniform Civil Code a "Grund norm" in India. Instead of rewriting all customary laws, a set of recommendations addressing regulations that degrade women's position can be formed. This method seeks to conserve the richness and diversity of Indian culture and religion, which is sometimes lacking in the Western world, where uniform civil norms are already in place.¹⁵²

The diversity of laws, procedures and jurisdiction of different courts presents a worrying and sometimes shocking spectacle in India today. It produces more injustice when added

¹⁵⁰ Dr. Pankaj Dwivedi, *Uniform Civil Code* (1st edn, Vayu Education of India 2016) 128.

¹⁵¹ Virendra Kumar, 'Towards a Uniform Civil Code: Judicial Vicissitudes' (2000) JILI 327.

¹⁵² K.B Agrawal, *Advisability of Legislating a Uniform Indian Marriage Code* (Institute of Foreign and Comparative Law 1972) 442-443.

to this diversity in the disparity of the economic development policies of the government of India with regard to different states. Uniform Civil Code is the need of the hour.¹⁵³

The implementation of the Uniform Civil Code would streamline the resolution of disputes for the judiciary, eliminating the need to navigate through individual laws of each religion, which can be time-consuming. This would contribute to expediting the trial of cases related to civil conflicts. The current situation calls for the implementation of the Uniform Civil Code, as there is a growing recognition of the significance of human dignity and human rights, surpassing the primacy of religious beliefs. It is the opportune time to prioritize the principles of equality and justice inherent in a Uniform Civil Code.

Society has evolved and is now seeking comprehensive progress. The implementation of the Uniform Civil Code can foster equality and create a sense of unity among the citizens of India. Ensuring uniformity can have a transformative impact on the socio-legal framework of various personal laws. One significant outcome of adopting a Uniform Civil Code would be the eradication of child marriage, providing women with the opportunity to pursue education and marry at an age when they are physically and mentally prepared.¹⁵⁴ Early forced marriages would no longer go unchecked. Furthermore, the implementation of the Uniform Civil Code would put an end to the practice of polygamy under Muslim law.

This would be a corrective step towards bringing about positive change in society, improving the status of women and ensuring their safety and security. The application of the Uniform Civil Code would strike a balance between divorce and women's rights, introducing legally accepted methods for both men and women to dissolve their marriages. Consequently, it would empower women and contribute to their overall empowerment within society.¹⁵⁵

The implementation of a uniform civil code would contribute to strengthening national integrity, even in a nation as culturally diverse as India. Despite the existence of diverse cultural values, the adoption of a unified personal law that is not based on gender, caste, creed, etc., would promote national unity.¹⁵⁶

¹⁵³ Khodie (N 148).

¹⁵⁴ Deepika and Manisha, 'Alarming need for Uniform Civil Code: A Human Rights Prospective' (2017) IJARIE 395.

¹⁵⁵ Ahmed, 'Uniform Civil Code (Article 44 of the Constitution) A Dead Letter' (*Jstor*, 28 September 2006) <<https://www.jstor.org/stable/41856241>> accessed 06 June 2023.

¹⁵⁶ Tahir Mahmood, 'Family Law and Social Change' (*Jstor*, 30 March 1977) <<https://www.jstor.org/stable/43950467>> accessed 06 June 2023.

Regarding the right to religion and the judicial trend, it is important to acknowledge that India, with its rich cultural heritage, encompasses various beliefs and practices deeply rooted in customs that have been followed since ancient times. Each individual in India carries an identity shaped by factors such as caste, race, social status and religion from birth. Religious sentiments and practices are highly sensitive matters, often leading to conflicts and tensions, as observed during the pre-independence era. After Independence, with the enforcement of the Indian Constitution, the right to practice any religion was Constitutionally guaranteed under Part III of the Indian Constitution.¹⁵⁷

In the case of the *State of Bombay v. Narasu Appa Mali*¹⁵⁸, it was established that a clear distinction should be made between religious faith and belief. If religious practices conflict with public order, morality, or health, which are concerns addressed by the state, then such religious practices must yield for the greater good of society. Practices motivated by religious beliefs are acceptable as long as they do not cause harm to society.

The Indian judiciary has a critical role in addressing any gaps or shortcomings in laws pertaining to religion. It is evident that the state can only regulate secular actions, while the Indian Constitution protects against state interference in religious matters. Ultimately, it is the judiciary that has the authority to intervene in issues concerning religious practices.¹⁵⁹

There may be an uproar among political parties over the integration of the civil code but the judiciary has made it clear that the entire community should be ready to accept it as a measure of social reform. Ever since the Indian Constitution came into force in 1950, the court has always believed that Article 44 of the Constitution is important in reducing social tension and has been pushing for the introduction of the Uniform Civil Code.¹⁶⁰ The court is also of the view that the institution of polygamy is not based on necessity. Thus, the court is ready to do what the government is unwilling to do.¹⁶¹

Thus, the judicial approach with respect to a uniform civil code has been positive and particularly the Supreme Court has come out in favour of it. In short, the judiciary has been instrumental in bringing about change in the attitude of the ruling class towards a uniform civil code and has been successful in creating a strong public opinion in favour of the uniform civil code.

¹⁵⁷ The Constitution of India 1949, arts 25-28.

¹⁵⁸ *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84.

¹⁵⁹ D.D. Basu, *Uniform Civil Code for India* (2nd edn, Oxford University Press 1997) 25-26.

¹⁶⁰ M.P Raju, *Uniform Civil Code - A Mirage* (Media House 2023) 92-93.

¹⁶¹ *Minerva Mills v. Union of India* AIR 1980 SC 1789.

6.2 Major Observations

At present, various personal laws in India are in vogue to regulate personal issues such as marriage, divorce, maintenance, adoption, guardianship, succession, inheritance, will and gift etc. Under these personal laws the criteria for deciding these rights vary from religion to religion, community to community and place to place. Hence, there is no equality of law for all citizens in terms of personal laws.

Polygamy is not allowed in personal laws other than Muslim law and in some tribal communities. This is because polygamy undermines the rights of the first wife under Muslim law, as subsequent marriages by her husband worsen her situation. Typically, the husband's income is insufficient to support all the wives equally, which affects the upbringing of children.

In the case of *Khurshid Ahmed Khan v. State of Uttar Pradesh*¹⁶², the Supreme Court held that polygamy is not a mandatory practice in Islam. Under Hindu law, there is excessive emphasis on the ceremonies of Hindu marriage. The recognition of marital status relies on the performance of specific rituals and in the absence of these rituals, the marriage is deemed null and void. However, these customs and ceremonies vary across different regions and communities, leading to confusion and complexity. Many women are unaware of the specific rituals applicable to their marriages. They may happily exchange garlands, apply vermilion, and proclaim their marriage with God as a witness, without realizing that these actions do not hold legal validity and are merely symbolic in nature. This undue emphasis on ceremonies has enabled individuals accused of bigamy to evade legal consequences.

Discrimination in property rights continues to persist under Section 15(1) of the Hindu Succession Act. When a woman passes away, her husband's family takes precedence over her own parents when it comes to inheritance. On the other hand, when a man passes away, his relatives inherit the property. This clear inequality goes against the principle of equality stated in Article 15(1) of the Indian Constitution. In many states, laws concerning agricultural land ownership do not grant women equal inheritance rights. Sons receive the land while daughters are often left with very little or nothing at all.

The rights of inheritance for children born out of illegal relationships under Muslim personal law are limited. Various schools of thought adopt different approaches when it

¹⁶² *Khurshid Ahmed Khan v. State of Uttar Pradesh* AIR 2015 SC 1429.

comes to the inheritance rights of children born under specific circumstances. For example, according to the Hanafi School, a child born out of an extramarital relationship is unable to inherit from their father but can inherit from their mother. Conversely, under Shia law, an illegitimate child does not have the right to claim any inheritance from either parent, as they are regarded as a child of 'Zina'.

Considering the age of puberty as the age of marriage among Muslims is not acceptable in the present era. Early marriages have led to several socio-political problems and ambiguities, and they have an adverse impact on human resources.

It is imperative that all citizens are allowed to marry only after reaching the age of majority. Another pressing issue that requires immediate attention is the criminalization of marital rape. Currently, the legal definition of rape does not include sexual acts with a minor girl above the age of 15 years if she is married to the perpetrator. Laws should be in place to protect married girls between the ages of 15 to 18 years from any form of forced sexual acts by their spouses.

There are certain practices in Muslim law, such as the system of '*Pardah*', where *pardanashin* women are not permitted to leave their homes and are expected to cover their entire body, including their face. One of the main concerns regarding gender prejudice in society is the fact that a Muslim woman is not allowed to marry a non-Muslim, while a Muslim man has the freedom to do so.

As regards the provision of gifts under personal law there are specific chapters incorporated under the Transfer of Property Act. Sections 112 to 129 of the Transfer of Property Act are very clear and are of a nature that can be applied to all citizens.

However, section 129 of the said law should be repealed, as it is again forming the limit of the gift given by a Muslim.¹⁶³ Many provisions of the Indian Succession Act also separate religion from religion. Some of its provisions provide exceptions for some religions. Such provision should be removed from the Indian Succession Act. Equal and uniform provisions of the Indian Succession Act should be applied to all citizens.

The absence of proper education poses a major obstacle in the realm of personal laws. Introducing consistent reforms in personal laws throughout India has the potential to bring

¹⁶³ Transfer of Property Act 1882, s 129.

about a ground-breaking Uniform Civil Code. There is a need to differentiate between social matters and religious matters so that secular reforms can be introduced.

6.3 Suggestions

In light of the Observations, the researcher humbly submits the following suggestions:

1. There should be an intra-religious debate in reference to personal law and the Uniform Civil Code among the people of a particular religion so that they could understand the shortcomings of personal laws in comparison to Uniform Civil Code. In this debate, women must have equal participation. Only Religious leaders should not be allowed to participate in this debate. The debate should be done in an atmosphere of trust and equality. Feedback can be taken from the public.
2. Centre government should appoint a Commission or Committee for analyzing the personal laws of different communities in India. The commission will consolidate provisions of different laws which could be best fitted to the Indian society. This process will be helpful for the drafting of the Uniform Civil Code.
3. Uniform Civil Code is a social transformation. So, it needs to be done gradually, not at once. It may create chaos in the society. Any section of the society that takes benefit from the existing laws either personal laws or codified laws may protest against them. Government should take steps to make understand the people the benefits of the Uniform Civil Code. A social campaign is necessary for the awareness of the people. Various tools can be used for this purpose. A legal awareness camp can be organized for imparting knowledge at the ground level. For this purpose, social media, newspapers and verbal lectures can be used. Various women's organizations and NGOs's can help in this matter.
4. Government must have an implementation of laws that disallow any violence in the name of God or nationalism. People love to talk about Hindus and Muslims. A few people talk about real issues like Uniform Civil Code, health, care, jobs, growth, national integrity and gender justice etc. People should wake up. They should realize that talking about irrelevant issues is just stupidity. They ought to socially ostracize people who speak about absurd things that had no relevance to India's growth, integrity and progress. Indians should be aware of the benefits of the Uniform Civil Code.
5. The executive branch of the government has not adequately supported the judicial determination to implement the Uniform Civil Code. It is recommended that political considerations should not be utilized as an excuse to impede the progressive judicial approach towards the Uniform Civil Code.

6. Currently, it is important for political leaders to actively intervene in addressing the issues faced by communities that suffer from a culture dominated by men. Regardless of their political beliefs, the central government should adopt processes that align with the goals of unity, integrity and fraternity stated in the Indian Constitution. To continue the nation-building process, we must embrace the true spirit of the Constitution in a positive manner. It is essential to listen to the concerns of minority groups and not treat them as mere voting tools.
7. To establish a uniform civil code, it is essential to create a comprehensive draft bill. This draft should be formulated by a panel of experts in consultation with the minorities' commission, taking into account the principles of human rights.
8. The Law Commission should conduct a comparative analysis of the diverse personal laws followed by various communities in India. A systematic classification should be developed to identify the similarities and differences among these personal laws.
9. In the initial phase, the implementation of a uniform civil code should focus on areas where there is minimal controversy. For matters that are highly contentious, the principles of natural justice should be employed in formulating the uniform civil code. Encouraging and promoting inter-religious, inter-caste and inter-citizen marriages is crucial for fostering consensus and achieving Constitutional objectives.
10. While respecting religious sentiments, it is essential to prioritize national interest and the unity of the nation over religious considerations. No community should be allowed to impede the legislative authority of the parliament in the name of religion.
11. As the custodian of the Constitution, the Supreme Court possesses the inherent authority to issue necessary directives in order to ensure complete justice. Therefore, it has the power to instruct the state to enact legislation for the implementation of a uniform civil code, to promote the welfare of the nation.
12. The media including electronic and print media should be persuaded to play its national role in the building of a healthy and balanced society and it must be reminded of its educative role to mould the public opinion, especially of minorities in favour of the enactment of uniform civil code.
13. Proper education like **"We are Indian first, then the people belonging to any particular caste or community"** and **"We, the people of India"** is essential for the uniform civil code. Therefore, all-out efforts should be made to facilitate the adoption of the uniform civil code through education.

14. The progressive-minded people in the various communities will have to launch a campaign for making reforms in all the personal laws. The reformatory measures may ultimately yield the formation of a uniform civil code.
15. A helping hand should also be sought from non-governmental organizations (NGOs) which are proving a boon for handling and solving many social problems as compared to political bodies and government machinery.

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