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CONSTITUTIONALITY OF PERSONAL LAWS AND MOVEMENT TOWARDS UNIFORM CIVIL CODE IN INDIA

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Abstract: The Personal Laws based on religion have created confusion and conflict and many of provisions in some of the Personal Laws are discriminatory and are against the basic human rights and fundamental equality enshrined in the Indian Constitution. The demand for a Uniform Civil Code has been raised right from the beginning of Indian Independence and the demand is getting wider support now especially among the educated segment of the population. The paper deals with the constitutionality of Personal Laws. So the question arises that whether Personal Laws come under the purview of Indian Constitution or whether Personal Laws are constitutionally valid is analysed in detail, the movement towards Uniform Civil Code are discussed and Uniform Civil Code with its pros and cons are looked into. The paper concludes with certain practical suggestions.

Keywords: Constitutionality, Fundamental Right, Human Right, Personal Laws, Secularism, Uniform Civil Code

1. Introduction

Even though 'secularism' is a concept enshrined in the Preamble of the Indian Constitution and is considered as one of the philosophical foundations of Indian polity, the approach to personal laws is quite contrary; every community in India is governed by its own Personal Law. The Hindus are governed by

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the *Hindu Marriage Act* (HMA), 1955 and the *Hindu Succession Act* (HSA), 1956. The Muslims are governed by their own Personal Laws based on the *Koran* and customs. Such laws are largely uncodified in India. However, certain aspects of Muslim law are codified namely, the *Mussalaman Wakf (Validating) Act* (MWVA), 1913, *Shariat Act* (SA), 1937, *Dissolution of Muslim Marriages Act* (DMMA), 1939 *and the Muslim Women (Protection of Rights on Divorce) Act* (MWA), 1986. Similarly the Christians and the Parsis are governed by their own personal laws. Parsis are governed by the *Parsis Marriage and Divorce Act* (PMDA), 1936, and Christians by the *Indian Christian Marriage Act* (ICMA), 1872 and the *Indian Divorce Act* (IDA), 1869. The discrepancies are patent and several. For example, a Muslim male may have up to four wives whereas males from other communities can have only monogamous marriage. Again a Muslim male may give a unilateral divorce (*talaq*) to his wife whereas people in other communities must resort to a judicial process to get a divorce. The result is plainly obvious. No matter how one wishes to phrase it, the truth is that the Law in India does discriminate people on the basis of religion in matters relating to personal laws.

The Personal Laws based on religion have created confusion and conflict as many of the provisions in them are discriminatory and are against the basic human rights and fundamental equality enshrined in the constitution. The demand for a Uniform Civil Code has been raised right from the beginning of Indian Independence and the demand is getting wider support now especially among the educated segment of the population.

The first part of the paper deals with the constitutionality of Personal Laws and the second part is on the movement towards Uniform Civil Code. The question whether Personal Laws come under the purview of Indian Constitution or whether they are constitutionally valid is analysed in detail and the merits of a Uniform Civil Code are also examined. The paper concludes with certain practical suggestions.

2. Constitutional Provisions

The following are the relevant Articles of the Indian Constitution for the present discussion. Article 13 of the Constitution reads:[1]

> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provision of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this Article, unless the context otherwise requires –
>
> (a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
>
> (b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then operation either at all or in particular areas.

3. Two Interpretations

The Constitution is considered to be the most fundamental of all laws. It is a basic law as integrity requires an eligible interpretation of the Constitution to be one that fits and justifies the most basic arrangements of political power in the community. Keeping that in mind, one needs to consider the two contradictory interpretations with respect to the primary question – whether Personal Laws come under the purview of Indian Constitution or whether Personal Laws are constitutionally valid.

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[1]Seervai H. M., *Constitutional Law of India*, 2 vols., 4th ed. Bombay: Tripathi, 1991, 677.

The first interpretation may be read in this manner:

(1) The framers of the Constitution were keen that personal laws ought to be reformed and therefore intentionally excluded them from the ambit of Article 13 of the Constitution.

The second interpretation could possibly be:

(2) On a contextual reading of Article 13, it can be deduced that personal laws fall within its ambit and the meta-intention of the framers in excluding personal laws from the ambit of Article 13, is not well founded.

I shall examine both interpretations in our exercise of finding the interpretation that best fits and justifies the constitutional practices of India.

3.1. Elaborating First Interpretation

When the framers of the Indian Constitution dealt with the subject of Personal Laws, many of them were rightly of the view that there ought to be a Common Civil Code, without which they opined, there could be no comprehensive unity and integrity of the nation.[2] Most were also of the view that it would be best for the legislature to be given the task of reforming the personal laws and achieving the goal of a Common Civil Code. None anticipated that Personal Laws could be assailed as violative of Fundamental Right in certain scenarios and therefore they had no intention of having personal laws read within the ambit of Article 13. Hence, the Courts must accede to their wishes.

In 1952, in the *State of Bombay* v. *Narasu Appa Mali*,[3] the Court came to the conclusion that the term 'law' as defined in Article 13 (3)(a) governs Article 13(2) and the phrase 'laws in force' as defined in Article 13 (3)(b) governs Article 13 (l). Or in other words, by defining 'laws in force' the intention was to exclude 'law' and vice versa. The Court held that personal laws would not fall within the ambit of 'laws in force'.

> The expression 'law in force' in this article shall include laws passed or made by a Legislature or other competent

[2]*Constituent Assembly Debates*, vol. VII, 549-550.

[3]*State of Bombay* v. *Narasu Appa Mali,* AIR 1952 Bom 84.

authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all in particular areas.

Hence, the framers while drafting Article 13 used the term 'custom' but deliberately omitted the term 'Personal Laws' so as to immunise personal laws from being assailed as violative of fundamental rights. Thus, the Court in *Narasu Appa Mali Case*, held that the scheme of the Constitution seemed to be to leave personal laws unaffected "except where specific provision is made with regard to it and to leave it to the Legislature in future to modify and improve it and ultimately to put on the statute book a common and uniform civil code."[4]

3.2. Elaborating Second Interpretation

In 1964, the Supreme Court of India decided *Sant Ram v. Labh Singh*,[5] with the following notes:

> A line of argument that claims that since the framers did not anticipate Personal Laws from being impugned as violative of Fundamental Rights, it would be correct to say that the intention of the framers was to exclude personal laws from the purview of Article 13, is not well founded. Firstly, just because the framers did not have the foresight to imagine a situation where a personal law could be challenged as being violative of a fundamental right does not per se conclusively prove that their intention was to exclude personal laws from the ambit of Article 13. It can also be argued the other way round that since it is nowhere specifically mentioned in the Constituent Assembly debate that the Judiciary ought not to deal with matters challenging the validity of personal laws. Hence, Article 13 would include personal laws within its ambit.

Hence, on a plain reading of Article 13, and its construction given in *Sant Ram's case*, it can be gathered that the dominant conviction of the framers was to give 'law' under Article 13 an

[4] *State of Bombay* v. *Narasu Appa Mali,* AIR 1952, Bom.84, 17.

[5] *Sant Ram v. Labh Singh,* (1964) 7 SCR 756.

all-encompassing meaning. If it had been otherwise, the framers would have explicitly provided for an exception to Article 13 in favour of Personal Laws. That they chose not to do so only confirms the view that Personal Laws ought to be read in the term 'law' and 'laws in force' under Article 13. Hence, even if the majority of the framers had a concrete conviction that personal laws should be excluded from the purview of Article 13, integrity demands that the courts uphold their dominant convictions about Article 13.[6]

3.3. Conclusions Gathered

It is evident that Interpretation (2) shows the constitutional practices of India in a better light than Interpretation (1). Hence, it relies on the underlying rationality that Personal Laws are excluded from the ambit of Article 13, is a mistake. The second interpretation of the primary question fits and justifies India's constitutional practice better than the first interpretation. Possibly our analysis would have been much more complex had the two interpretations been competitive in nature. However, if the goal of progressive society is to seek a single and coherent scheme of principle, there seems to be no substantial reason why two competitive interpretations cannot be harmonized.

4. Judiciary and the Movement towards a Uniform Civil Code

In fact, the movement towards a Uniform Civil Code has been accelerated more by the Judiciary than by the Legislatures of the country. The first case that came to court regarding the conflict between right to freedom of religion and directive towards a Civil Code was *the State of Bombay* v. *Narasu Appa Mali*.[7] In this case the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged on the basis that it violated Article 14 of the Constitution which prohibited discrimination on the ground only of sex, religion, etc. It was contended that the Bombay law was unconstitutional as it applied only to Hindus while the

[6]Ashish Chug, "Too Personal to Be Uniform?" *Lawyers Collective* (July 2003), 4-10.

[7]*State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom 84.

Muslims were allowed to practice polygamy. The judgement found that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provisions of the Constitution. The court also found that the institution of polygamy was not based "on a religious necessity of a Hindu obtaining a son for the sake of religious efficacy," since there was also a provision for adopting a son, if there was no son from the first wife. Similar decisions were given in *Srinivasa Aiyar* v. *Saraswathi Ammal,* and *Ram Prasadv, State of U.P.*[8] In *Itwari* v. *Asghari* and *Shahulameedu* v. *Subaida Beevi*,[9] the right of Muslim husband for polygamy was also restricted.

However, the case that raised the greatest controversy regarding the Personal Laws was *Mohd. Ahmad Khan* v. *Shah Bano Begam*.[10] In this case, the Five Judge Bench of the Supreme Court held that although a Muslim husband is not obliged to provide maintenance to his divorced wife beyond the period of *iddat* (roughly three months); he is bound to provide for her under Criminal Procedure Code, Sec. 125, if she is unable to maintain herself. This created an uproar in the Muslim community as they considered it as an affront on their personal law, and the Government enacted the Muslim Women (Protection of Rights on Divorce) Act in 1986. In spite of this Act, in *Begum Subanu alias Saira Banu v. AM. Abdul Gafoor*,[11] the Supreme Court held that the first wife is, under Sec. 125 of the Criminal Procedure Code, entitled to maintenance when a Muslim husband contracts a second marriage. In fact the Judiciary has tried to give a harmonious construction to Sec. 125 of Criminal Procedure Code and Sections 3 and 5 of Muslim Women (Protection of Right on Divorce) Act, 1986 as evidenced

[8]*Srinivasa Aiyar* v. *Saraswathi Ammal,* and *Ram Prasadv, State of U.P.*, AIR 1952 Mad 193 and AIR 1957 All 411.

[9]*Itwari* v. *Asghari* and *Shahulameedu* v. *Subaida Beevi*, AIR 1960 All 684 and (1970) KLT 6.

[10]*Mohd. Ahmad Khan* v. *Shah Bano Begam*, AIR 1985 SC 945.

[11]*Begum Subanu alias Saira Banu v. AM. Abdul Gafoor*, AIR 1987 SC 1103.

in *Mangila Bibi* v. *Noor Hossain*,[12] *M. Alavi* v. *T. V. Sofia* and *Bishnu Charon Mohanty* v. *Union of India*.[13]

A Division Bench of the Supreme Court, consisting of Justice Kuldip Singh and Justice A. M. Sahai, requested the Government to expedite the efforts for a common civil code. The recommendation of the court came in the wake of petitions presented by some Hindu wives whose husbands had married again after conversion to Islam. The court held that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved, would be illegal and the husband could be prosecuted for bigamy. According to the court, a marriage performed under the Hindu Marriage Act could not be dissolved except on the ground available under the relevant provisions of the same Act. The second marriage would be in violation of the Hindu Marriage Act by which the Hindu husband would continue to be governed despite his conversion to Islam.[14] Although the Judges later on clarified that their request was not mandatory on the Government, the hue and cry created by it has not ceased. The Muslim League and leaders of the Muslim community opposed any intervention by the Government in the personal laws of the Muslims, while a progressive section of the community voiced support for a uniform civil code.

5. **Misconceptions Regarding the Uniform Civil Code**

In the debates on a Uniform Civil Code one often hears the argument that "One of the factors that has kept India back from advancing to nationhood has been the existence of the Personal Laws based on religion which keep the nation divided into watertight compartments in many aspects of life."[15] It is asserted

[12]*Mangila Bibi* v. *Noor Hossain,* AIR 1992 Cal 92.

[13]*M. Alavi* v. *T. V. Sofia* and *Bishnu Charon Mohanty* v. *Union of India*, AIR 1992 Cal 92. AIR 1993 Ker 21 and AIR 1993 Ori 176.

[14]*Sarla Mudgal* v. *Union of India,* 1995 (2) KLT 45.

[15]Arguments by Shri Kinoo Masani, Raj Kumari Amrit Kaur and Smt. Hansa Mehta, etc. in the debates of the Sub-Committee for

that "such a code reflecting the secular spirit of the Constitution would strengthen the existing social bonds and foster the political integration of the different religious communities by subjecting them to a common judicial procedure in respect of the Personal Law."[16] Further, it is stated that the absence of a Uniform Civil Code is an incongruity that cannot be justified. The continuance of various Personal Laws which accept discrimination between men and women, violate the fundamental rights and the Preamble to the Constitution and is against the spirit of national integration and secularism.[17]

However, these arguments are countered with equal vehemence. As S. S. Nigam points out, "The word 'uniform' in the Article has to be understood in a restricted sense. A certain degree of diversity in the laws of the country is contemplated by the Constitution itself."[18] Uniformity of laws for the entire nation is neither envisioned in the Constitution nor is it possible, given the diversity of the various regions and the peoples comprising the nation. According to Tahir Mohmood,

> As regards the notion that national integration may be achieved in any degree by enforcing rigidly common laws, let everybody remember that as many as 66 entries are there in the State List and 47 in the Concurrent List under the scheme of distribution of legislative powers in our Constitution. If strictly the same laws were the sine qua non of national integration, the very existence of the State List and the Concurrent List of subjects for law-making in the constitution would have been questionable. The fact is that a country which has adopted the principle of politic-democratic

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Uniform Civil Code quoted by Vasudha Dhagamwar, *Towards the Uniform Civil Code,* Bombay: Tripathi, 1989, 2.

[16]S. N. Balasundaram, "The Conflict between Tradition and Modernity," *Journal of Dharma* 11, 3 (July-September 1986), 237-38.

[17]T. S. Devadoss, "Social Equality in a Multi-Religious Society," *Journal of Dharma* 11, 3 (July-September 1986), 303.

[18]S. S. Nigam, "Uniform Civil Code and Secularism," G. S. Sharma, *Secularism: Its Implications for Law and Life in India* (Bombay: Tripathi, 1966), 160.

> pluralism in the form of a federal structure of polity could not have pinned its hopes for national integration on the commonness or uniformity of laws.[19]

The view of Supreme Court Judge V. R. Krishna Iyer is noteworthy in this regard. He says: "I would therefore appeal to the nation at large to discuss this issue calmly and carefully, taking note of the fact that the Hindu and the Muslim, the Christian and the Jain, the Sikh and Parsee, holds his religion so dear to his heart, to his very being, that we cannot brush him aside and do something merely by legislation."[20]

The characteristic of India is its very unity in diversity. This is reflected in every aspect of Indian life. Undoubtedly the laws of the country also should reflect this diversity. The idea that every aspect of a citizen's life in our country should be brought under a Uniform Civil Law is, besides being utopian, also unnecessary. Most often the proponents of a Uniform Civil Code have a misconceived idea of Indian secularism, the achievement of which, according to these persons, will be made possible to the degree religion is banished from the social and political life of the nation and restricted to the backyards of an individual's private life. But we have seen before that this is not the idea of the Indian secularism. The attempt to make a Uniform Civil Code with a view of reducing the influence of religion on society militates against the very fibre of Indian culture with its religious traditions dating back to thousands of years.

6. Steps towards a Uniform Civil Code

It is most likely that persons whose Personal Laws are based on religion would never accept or obey a Uniform Civil Code which is contrary to their religious beliefs and therefore the question thus is whether in the present situation in India there is any need at all to abolish all the existing Personal Laws and replace them

[19]Tahir Mohmood, "Uniform vs. Common Civil Code in India," *Journal of Dharma* 11, 3 (July-September 1986), 231.

[20]V. R. Krishna lyer, "Strategy towards a Uniform Civil Code," *Journal of Dharma* 11, 3 (July-September 1986), 219.

with a new enactment entitled Uniform Civil Code.[21] In fact, those people in India who do not want to be governed by their Personal Laws already have the option open to them of availing of the benefit of the Special Marriage Act or the Foreign Marriage Act. These Statutes in a sense are a kind of Uniform Civil Code in practice. In a country like India it is wiser to have an optional law – such as the Special Marriage Act than a mandatory Uniform Civil Code which would not be obeyed by everybody.[22]

Therefore, the idea should not be of making a Uniform Civil Code which is quite new and then imposing it on the citizens. Already there are many enactments that form part of this structure called Uniform Civil Code because they are applicable to every citizen irrespective of his religious beliefs or belonging. They are the building blocks of the Uniform Civil Code. There are also the personal laws existing in India for the various religious communities. They need not be annihilated in order to make way for a Uniform Civil Code. They also could be made part of this edifice called the Uniform Civil Code. We shall now see the proposals in this regard.

6.1. Distinction between the 'Sacred' and the 'Secular'

What we need, as a first step, is a right balance between the Church and the State, religion and society. The idea of Church-State relationship enshrined in the Constitution of India is not one of antagonism, but of mutual respect for one another. However, it does require that we distinguish between the different spheres and acknowledge their respective autonomy – the autonomy for the secular and the sacred. The Constitution of India has made this distinction. Religious freedom, i.e., freedom of conscience and the freedom to profess, practice and propagate one's own religion has been guaranteed by the Constitution, but the exercise of this freedom is subject to public order, health and

[21]Meher K. Master, "Personal Laws of Religious Communities in India," *Journal of Dharma* 11, 3 (July-September 1986), 266.

[22]Meher K. Master, "Personal Laws of Religious Communities in India," 276.

morality.[23] Besides, the State can regulate the secular activities associated with religious practices. Therefore, as S. S. Nigam points out, the task is first to extricate as much of the secular realms as possible from the meshes of religion.

> In the next place, there should be a recognition of the fact that part of the law – may be, limited in extent – is deeply embedded in religious dogmas, beliefs or usages, and it would not be possible to wrench it from its roots without destroying its essential nature. To this extent diversity would continue at any rate for the present, and it would be unrealistic to deny the religious base of such rules and attempt uniformity.[24]

6.2. Solemnization of Marriage

All the religions consider marriage as a religious matter and its solemnization is governed by strict religious rules and the non-observance of which will affect the very validity of a marriage. Thus, for example, a Hindu Marriage is solemnized by the performance of *Saptapadi* or seven steps, i.e., going around the fire seven times, although various customary rites and ceremonies have modified or replaced this ceremony in many subsections of Hinduism and in various regions of the country. Section 7 of the Hindu Marriage Act considers both these types of marriages valid, i.e., with the customary rites and ceremonies or with *Saptapadi.* If such rites include the *Saptapadi,* the marriage becomes complete only when the seventh step of the *Saptapadi* is taken.[25] A marriage is valid also if there are no Saptapdi in places where customs immemorial permit.

A Parsi marriage is celebrated by the performance of the ceremony of *Asirvad.* Any marriage which is not solemnized according to this ritual is not considered valid by the followers

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[23]Article 25 of Indian Constitution.

[24]S. S. Nigam, "Uniform Civil Code and Secularism," G. S. Sharma, *Secularism: Its Implications for Law and Life in India,* Bombay: Tripathi, 1966, 160-162.

[25]Asuthosh Mookerjee, *Marriage Separation and Divorce*, 2nd ed., Calcutta: S. C. Sarkar, 1991, 298.

of this religion. For Christians too, marriage is to be solemnized by a competent minister in the prescribed form and following the special rules in this regard. Even for the Muslims, although it is considered to be a contract, it is not a mere contract as any other ordinary contract. Certain specific formalities are required which have religious significance. Thus, the solemnization of marriage has to be considered as a religious matter and should be protected as part of practicing one's religion. Besides, any marriage solemnized according to the respective religious rules and ceremonies of a particular religion and considered valid by the religious community concerned should be considered valid also in civil law.

6.3. Declaration of Nullity

From this it also follows that the competent body to decide upon the validity of a religious marriage is the concerned religion itself. If solemnization of marriage is a religious matter, it follows that the validity of such solemnization should be determined according to the religious rules of the respective religion. Therefore, the declaration of nullity of a religious marriage should be, at least in theory, the competence of that religious body according to the rules of which the marriage in question has been solemnized. With regard to the Catholic Church, it should be true not only in theory, but also in practice. The Catholic Church has a well-established judicial system with precise laws and competent judges to determine the validity of marriage. It needs only a political decision by the government to give civil validity to the declaration of nullity issued by the ecclesiastical courts. Such a decision will avoid the trauma of many Catholic couples, whose marriages have been rightly declared null by the ecclesiastical courts, having to undergo another trial in the civil courts before they can remarry. Most other religions in India do not have such a legal system.[26]

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[31]According to Sections 19, 20, 21 of the Parsi Marriage and Divorce Act. 1936 amended by the Parsi Marriage and Divorce (Amendment) Act, 1988, there is the provision for the constitution of special courts under the Act comprising of the Chief Justice/Principal Judge and five

6.4. Competence of the Civil Law

The civil effects of marriage are rightly the competence of the State. This is very specifically mentioned in the Code of Canon Law. According to canon 1059 of Code of Canon Law for Latin Catholics (CIC)[27] and canon 780 of Code of Canon Law for Oriental Catholics, (CCEO)[28] marriages are governed by not only divine law, but also canon law without prejudice to the civil law for the civil effects of marriage. The civil effects mentioned here would include such matters as change of name for the wife, succession, inheritance and tax regulations, maintenance, custody of children and such other matrimonial relief following civil divorce or annulment of marriage also come under the competence of the civil authorities. On the other hand, if the validity of the declaration of nullity by the ecclesiastical tribunal is accepted by the State, such declaration should have effect also on the consideration of the civil effects of such marriages. The civil effects of a marriage follow where there is a valid marriage. Where there is no valid marriage in existence, there are no civil effects either.

6.5. A Common Law for Civil Marriages

For the solemnization of marriages of those who do not want to be governed by any Personal Law, there can be a Civil Marriage Law which is to be applicable to anyone irrespective of his being a Hindu, Muslim or Christian. Now we have a Christian Civil Marriage Law for people belonging to the Christian religion but do not want to be married according to the religious ceremonies

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delegates who will assist the Chief Justice/Principal Judge in determining the Matrimonial causes of the Parsis. According to sec. 24 these delegates who have to be Parsis, are appointed by the Government after giving the local Parsis an opportunity of expressing their opinion. Kumud Desai, *Indian Law of Marriage and Divorce,* 5th ed., Bombay: Tripathi, 1993, 168-69.

[27]CIC 1059, Canon Law Society of Great Britain and Ireland, *The Canon Law: Letter and Spirit*, London: Geoffrey Chapman, 1995, 58.

[28]CCEO 780, Canon Law Society of Great Britain and Ireland, *The Canon Law*, 108.

of Christianity. Then there is the Special Marriage Act which is applicable to all persons, including Christians, irrespective of their religious persuasions. A common law for all civil marriages will do away with the necessity of having separate civil marriage laws for persons belonging to various religions, because there is nothing 'religious' in a civil marriage and those who avail themselves of this possibility do not want to be bound by the niceties of the various religious practices. This is to be facultative.

6.6. Reform of Religious Laws from Within

It is quite obvious that outside influence may accelerate a much needed reform process of any law, religious or secular. However, it is ideal if the reform process is initiated from within. Therefore, reform of the purely religious laws of the various religions should be left to the respective religions concerned. It is the duty of the educated and progressive elements in the same religions to initiate and carry forward the incentive for reform and to bring their respective religions abreast of times. It is inadvisable that the State or other religious communities and political parties interfere with the purely religious practices or laws of the various religions. The response of minority religious communities to pressure from majority community is predictable

6.7. Religious Laws to Be Tested against Human Rights

No religion or religious community can be considered, however, as being above human rights and no civilized society can allow their violation, be it in the name of religion or otherwise. In fact, the very Constitution that provides for religious freedom, for its practice and propagation also makes provision against the infringement of human rights. Besides, as mentioned earlier, the provision for freedom of religion is limited by public order, morality and health and the other provisions of part III, i.e., the section dealing with the fundamental rights. Therefore, no law in force in India, which includes customs and other Personal Laws, should be allowed to violate the basic human rights and the fundamental rights envisaged in the Constitution. In fact, Article

13 of the Constitution expressly states: "all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

If 'law' includes also the personal laws, then every Personal Law would have to be consistent with equality-based human rights. If Personal Laws were tested against fundamental rights, especially the provisions dealing with equality and due process, a large number of Personal Laws would be found to be iniquitous, arbitrary and unconstitutional. This is the Article 13 solution which would have the effect of ordaining that all Personal Laws must be cleansed by the principle of equality and other provisions of the fundamental rights under Part III.[29]

In fact, the method used by the British in giving recognition to the personal laws was testing them against the requirements of "justice, equity and good conscience."[30] Thus, the Article 13 solution would enable the State to achieve the required reform of the Personal Laws by applying the internationally acknowledged human rights and the basic fundamental rights guaranteed in the Indian Constitution. This will not involve any discrimination on the part of the State on the basis of religion because the State will be protecting human rights irrespective of a person's religious affiliations.

6.8. Judiciary More Effective in Promoting Uniformity

As Rajeev Dhavan says:

> If a Uniform Code can be hammered out, it is surely devoutly to be wished. But if justice can be achieved without opening Pandora's box, why open it? Testing Personal Laws against human rights is not only a more radical solution, but also finds the right balance between religious freedom and fairness without in any way compromising gender justice.[31]

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[29]Rajeev Dhavan, "Uniform Civil Code: The Article 13 Solution," *Indian Express* (2 June 1995), 8.

[30]Dhavan, "Uniform Civil Code: The Article 13 Solution," 8.

[31]Dhavan, "Uniform Civil Code: The Article 13 Solution," 8.

As it is clear, it is the Judiciary rather than the Legislature which is the interpreter and protector of the fundamental rights and also of the human rights. Therefore, the Judiciary is to be entrusted with the task of testing the Personal Laws in the light of the fundamental rights and human rights. Such a testing of Personal Laws should take place on a case-by-case basis by the courts. It is practical, because the judiciary has done such a task as seen above. It is to be noted that in spite of the outcry the *Shah Bano* case created and in spite of the Muslim Women (Protection of Rights on Divorce) Act 1986 which was passed in order to counter the impact of the judgment in *Shah Bano* case, the Supreme Court in *Begum Subanu alias Saira Banu* v. *A. M. Abdul Gafoor* could interpret the provisions of this Act in such a way that justice is done to a Muslim woman who had to suffer injustice on account of a Muslim husband's right to polygamy.

6.9. Common Civil Law for Secular Matters

With regard to those matters that are purely secular, such as divorce, maintenance, succession, etc., the State has every right to make legislation in tune with the times. However, it will be more effective if the State did not impose its will on large sections of people who are unwilling to accept a change at the moment or are not yet prepared to face such changes. Therefore, the best policy would be making legislation for communities that are willing, such as the Christians, i.e., in order to bring the secular dimensions affecting these communities under a common civil code. However, it is to be borne in mind that the purpose is not making a civil code for Christians, Hindus, etc. It should be rather making a civil code applicable to anyone who is an Indian citizen but limited in its application for the time being for those communities who have shown willingness for such legislation.

For those communities which are not willing to accept a civil code or have not yet attained the level of readiness required for such acceptance, it should be optional to be governed either by their own personal laws or by the common civil code. In the meantime, all efforts should be made at raising the level of

education of the members of these communities. The higher the level of education, the more will be their willingness to adopt civil regulations concerning matters that are purely secular and which are applicable to every Indian citizen irrespective of their belonging to any particular religion. This will also deepen the awareness of the basic human rights and the fundamental rights enshrined in the Constitution and the need to protect them by way of civil legislation. In this way, the State can achieve the implementation of a Uniform Civil Code more effectively and with less furore, than if it had attempted to implement it with force. It may take more time. But in the final analysis it will be seen to be wiser and more lasting.

This, in my opinion, is the direction in which the problem of a Uniform Civil Code should be resolved. The problem arose when the State in an attempt to provide for a civil code, incorporated the various provisions of the respective religions into it, in the hope of one day unifying these various provisions. So, we have the Hindu Marriage Act, the Muslim Marriage Act, the Parsi Marriage Act, the Christian Marriage Act, etc. But there is nothing Hindu or Muslim in these Acts except their names. This attempt at unification is bound to fail, because it is like attempting to unify various religions themselves. What the State should do is to leave the institution of marriage and its validity to the various religions themselves. The State can make marriage laws for those who do not want to belong to any religion. The State can recognize the validity of marriages conducted according to the various religious traditions. The State can also provide for civil legislations for the civil effects of such marriages irrespective of any religion. Thus, on the one hand, the freedom of religion is safeguarded, while on the other, the secularity of the State and its duty to form a Uniform Civil Code also is safeguarded.

7. Conclusion

An objection may still arise that in a democracy, the Legislatures are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is

for them to determine what legislation to put up on the statute book in order to advance the welfare of the State. It is submitted, that such a passive approach is untenable. Neither justice nor fairness requires such an approach. It would certainly not be more just for a judge to shrug his shoulders and point towards Parliament rather than inquire if the impugned provision is offending the Constitution. Legislators are elected by the majority of the people and are in that sense constrained by their wishes. Perhaps this explains why even more than sixty-four years after the commencement of the Constitution, the legislator have failed in discharging their constitutional obligation in enacting a Uniform Civil Code. Indeed, by perpetuating the 'blanket immunity' provided to Personal Laws we are condoning the callous and defiant approach of the Parliament and the State legislatures. Fairness also does not demand such a passive approach. One must defer to fairness only when a decision will take one party by surprise or when one party, who relies on a certain practice, would be penalised by a decision that is inconsistent with such practice. However, the prophecy of the social revolution with regards to Personal Laws has been foretold in the Constitution. Several Supreme Court judgments have censured the government for not taking the initiative of enacting Uniform Civil Code. Hence, there is no impediment, on the grounds of fairness or justice, for the courts to declare that Personal Laws come within the ambit of Article 13.

One final objection needs to be taken into account. The objection is that a court should not decide on the primary question, as this could provoke a backlash from communities that have always been averse to the proposal for a Uniform Civil Code. While it is true that person's right to remedy ought to be sensitive to consequences, it does not follow that the Court ought to defer their decisions to acts or threats, which are unconstitutional per se.

All attempts at making a Uniform Civil Code applicable to every citizen irrespective of his religion have failed. This, in our opinion, is due mainly to the failure to maintain the essential distinction between the sacred and secular realms. The aim of a

Uniform Civil Code should not be the annihilation of all personal laws or banishing religion from social life to the backyards of an individual's conscience, without having any impact on society at large. Reform of the sacred realm should be basically left to the religions themselves, unless their provisions violate public order, concerns of health and morality. Besides, the religious realm has to be tested against the provisions in the Constitution of the fundamental rights and other basic human rights. This is the Article 13 solution which declares unconstitutional every law in force in the country if it violates the provisions of the fundamental rights in the Constitution.

With regard to the secular realm, gradual reform should be introduced, not applicable to any particular religious community, but applicable to every citizen. This should be made obligatory for the time being for those communities which are prepared to accept them at the moment. For others it should be made optional till the time is ripe for making them obligatory also for them. In the meantime, all efforts should be made in raising the educational standards of these communities, as education is a stronger catalyst for change than force. With the help of the progressive and educated segments of the various religious communities the desired change can be brought about from within. This will not create any sense of insecurity for the minorities. The dream of a Uniform Civil Code can be realized without wounding the religious feelings of anyone. The process is undoubtedly long, but the solution will be more durable.