TOPIC APPROVAL PERFORMA

School of Law

Program : P4BE::LL.M.

COURSE CODE : LAW627 **REGULAR/BACKLOG :** Regular **GROUP NUMBER :** LawRGD0001

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Qualification : _____ **Research Experience :** _____

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PROPOSED TOPIC : Uniform Civil Code and conflict of Personal Laws

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Final Topic Approved by PAC: **Uniform Civil Code and conflict of Personal Laws**

Overall Remarks: Approved

PAC CHAIRPERSON Name: 20889::Dr.Shailesh N Hadli **Approval Date:** 09 Mar 2017

UNIFORM CIVIL CODE AND CONFLICT OF PERSONAL LAWS

Dissertation submitted to the Lovely Professional University

in partial fulfillment of the academic requirement

for the award of the degree of

Master of Law (LL.M)

Submitted by

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May 2017

CERTIFICATE

I hereby certify that this dissertation entitled "***Uniform Civil Code and Conflict of Personal Law's*** " submitted for the award of Degree of Master of Law (LL.M) is a record of research work done by the candidate "Hanna " during the period of her study under my guidance at School of Law, Lovely Professional University, Phagwara, Punjab, India, and that the dissertation has not formed the basis for the award of any Degree, Diploma, Associateship, Fellowship or other similar titles to the candidate. I further certify that this dissertation represents the independent work of the candidate.

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D E C L A R A T I O N

I hereby declare that the dissertation entitled"**Uniform Civil Code & Conflict of Personal Law's "submitted to the School of Law,** Lovely Professional University for the award of degree of Masters of Law (LL.M) is a record of original and independent research work done by me under the supervision and guidance of Neeraj Sharama, Assistant Professor, School of law, Lovely Professional University and that the dissertation has not formed the basis for the award of any Degree, Diploma, Associateship or other similar titles.

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ACKNOWLEDGEMENT

Gratitude is a noble response of one's soul of kindness or help generously rendered by another and its acknowledgment is the duty and joyance. Writing a dissertation is one of the most important tasks of any post graduate degree and it is indeed difficult for a candidate to finish it individually and independently without with the help and guidance of one's supervisor as well as without co-operation and support of other concerned people. I am not exception to this rule. I express briefly my debt to all those people who have contributed a lot in completion of this research work. It is however difficult for me to mention about them in words as words are often inadequate to convey the feelings of heart.

It is my proved privilege to express my deep gratitude to my learned supervisor Neeraj Sharama, Assistant Professor, School of Laws, Lovely Professional University under whose dexterous guidance and supervision, this dissertation has been completed. He not only guided me all through but also inculcated in me the importance of being a true professional, disciplined, and systematic researcher and taught me the value of time and resource management in life. It was indeed a great learning experience to work under his scholarly supervision.

I am also beholden to the non teaching staff of our Law Department for being extremely cooperative with me. I am grateful to the library staff of Lovely Professional University.

I express my thanks to Librarian, who gave their support to collect the data.

My acknowledgment will be incomplete if I do not mention about the unconditional love and support of respected parents and friends who always support and encourage me despite all odds and difficulties in our life.

Dated: Hanna

LIST OF ABBREVIATIONS

AIR	All India Report
CJI	Chief Justice of India
CMA	Christian marriage Act, 1872
DA	Divorce Act, 1869
DMMA	Dissolution of Muslim Marriage Act ,1939
DPA	The Dowry Prohibition Act, 1961
GOVT	Government
HC	High Court
HMA	Hindu Marriage Act,1955
IDA	Indian Divorce Act,1896
ISA	Indian Succession Act,1925
MWDA	Muslim Women (Protection of Rights) on Divorce Act, 1986
PMDA	Parsi Marriage & Divorce Act, 1865
SC	Supreme Court
SMA	Special Marriage Act,1954
WA	Wakf Act, 1937

TABLE OF CASES

Sant Ram v. Labh Singh AIR 1965 SC 314

Sarla Mudgal v. Union of India AIR 1955 SCC 635

Seema v. Ashwani Kumar (2005) SCC 578

Srinivas Aiyar v. Sarawanthi Ammal AIR 1952 Mad 193

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

Swapana Ghosh v. Sadananda Ghosh AIR 1989 Cal 1

T Sareetha v. Venkatasubbaiah AIR 1983 AP 357

United Provinces v.Atiqa AIR 1941 FC 16

Table of Statutes

- Dissolution of Muslim Marriage Act, 1939
- Hindu Marriage Act 1955 (HMA),
- Hindus Wills Act, 1870
- Hindus Adoptions and Maintenance Act, 1956
- Indian Divorce Act, 1869
- Indian Evidence Act, 1872
- Muslim Women (Protection of Rights) on Divorce Act, 1986,
- Shariat Act, 1973
- Special Marriage Act 1954
- Special Marriage Act, 1872
- The Christian Marriage Act, 1872
- The Child Marriage Restraint (Amendment) Act, of 1978
- The Constitution of India
- The parsi Marriage & Divorce Act, 1936
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- the Transfer of Property Act 1882

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UNIFORM CIVIL CODE AND CONFLICT OF PERSONAL LAWS

CHAPTER –I

1.1 Introduction

India, a democratic country, aims at bringing equality among all the citizens irrespective of religion ,race , caste, creed and place of birth. The penal substantive statute like Indian penal code and procedural law like Criminal procedure code are already secular statutes in india. However, difference lies only in personal matters like divorce, maintenance, Adoption, Marriage, Inheritance. This is the reason behind demand for Uniform Civil Code in order to avoid social chaos.

India is a secular state which does not promote any religion. All the citizens has the right to propogate its own religion. There is no state religion in india. Every citizen has got right to religion as Fundamental Right. In Case of violation of his Right to Religion, he can move to the High Court & Supreme Court by way of Writ Jurisdiction. But the Right to Religion is Subject to Public Health and Morality.

UCC is a genuine demand. However it should be legislated and implemented in a time bound manner. As Hindus are in majority in India, there is anticipations, that the Hindu Law may become National Family Law. Owing to this doubt, there is apprehension in the minds of the Muslim that Shariat law may come in Danger, if UCC comes into being.

Besides Religious Equlity the UCC will Also ensure that same Enactments are Applicable to men & women and also there is no Conflicts between the customs Prevailing in the different group in the same community.

In Shah Bano Case 1986 maintance was granted to muslim women under section 125 of Crpc & the Court held that it was Secular Provision and Will Benefit Hindus and Muslim Equaly. But the Muslim Monirity Community Ajitated Over this matter and objected that there Personal Law should not be Tempered with. This is the Main Reason Behind Delaying in the Enactment of UCC[1].

The Framers of the Constitution Very Well Knew that India is a Heterogeneous state and it would be very difficult to make and enforce a UCC , that s why the Direction Regarding UCC has been incorporated under Article 44 of Directive Principles of state policy[2].

The views are given about different personal laws , "kept India back from advancing to nationhood" and it was suggested that a UCC "should be guaranteed to Indian people within a period of five to ten years"[3] The Chairman of the drafting committee of the Constitution, Dr. B.R. Ambedkar, said that, "We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far as the marriage and succession ……. and it is the intention of those who desire to have Article 35 as a part of Constitution so as to bring about the change."

" Though Ambedkar was supported by Gopalaswamy Ayyangar and others but Jawarharlal Nehru intervened in the debate. Nehru said in 1954 in the Parliament, I do not think at the present time the time is ripe for me to try to push it (Uniform Civil Code) through [4] Since the Uniform Civil Code was a politically sensitive issue, the founding fathers of the Constitution arrived at an honorable compromise by placing it under Article 44 as a directive principle of state policy Even after more than five decades from the framing of the Constitution, the this direction

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[1] Krishna Iyer, "*Unifying Personal Laws*" The Hindus, 6 September 2003

[2] Lok Sabha Secretariat, *Constituent Assembly Debates* Vol. III, 551, 23 Nov. 1948

[3] B. Shiv Rao (ed.), *The Framing of India's Constitution: Select Documents* Vol. II, The Indian Institute of Public Administration (IIPA), New Delhi, 1968. Debates of 14, 17-20 April 1947

[4] Virendra Kumar, "*Towards a Uniform Civil Code: Judicial Vicissitudes [from Sarla Mudgal (1995) to Lily Thomas (2000)]*" 42 JILI 315 (2000).

continued as reflected in various pronouncements of the Supreme Court from time to time".

Present study aimed to trace out that the uniform civil code was applied in our country or whether the Article .44 was not applied in india because of its non justiciable nature.

1.2 Hypothesis

1.The implementation of Article 44 has been over shadowed by its non justiciable nature.

2 The legislature and judiciary are able to resolve the conflicts of personal laws.

1.3 Research Question

How to iron out the conflicts among the personal laws?

What are the provision of legislature related to personal laws?

What are the Constitutional provisions related to uniform civil code?

What is the role of Judiciary in promulgation of Uniform Civil Code in India?

1.4 Significant of the study

The study is an attempt towards bringing out the comprehensive approach upon the Uniform civil code and the conflicts of personal laws. An attempt has been made out to reveal real position of Uniform Civil Code in India. From this study the new things about the personal laws and from this study ethical, social , political and legal problem has come out.

1.5 Review of literature:-

Uniform Civil Code : An Ignored Constitutional Imperative – 1997

By M.S. Ratnaparkhi

This book explain the all controversial aspects and new law made by the Legislation , and novel judgments given by the Supreme court on UCC. In this book the author appropriately explain the all Law's and Lacunas of Law. The Author also expain the Merit and demrits of UCC.

Uniform civil code in retrospective and prospective kiran deshta 2002

The Indian constitution envisages one society with singular citizenship . it is highly desirable that one single set of civil laws should govern all its citizen. The need and justification to have a uniform civil code, as mendated by article 44 of the constitution cannot be over emphasized.

The learned author in this timely book has taken up subject for through examination . exercise has been backed thoroughly by material of various forms . use of emimnent personalities of various communities scholars and critics have been recorded an order to make the subject important educative. Role of various agencies, namely the press , the politician, the government had been pointedly highlighted. In addition , numeruous judicial decision have been considered making the subject all the more interesting and meaningful.

Family Law Lectures: Family Law I – 2011
by Kusum (Author)

The author has discussed major recent judgments of the Supreme Court on such contemporary concerns as the status of live-in relationships and of children born of such relationships. The book also provides insights into contemporary matrimonial issues that have emerged as a result of the development of new perceptions of rights and duties, as well as alternative methods for matrimonial dispute settlement. Covers varied aspects on the subject including marriage, maintenance, division of matrimonial property, gender justice, guardianship, child welfare and domestic as well as inter country adoption, as developed by the Supreme Court and various High Courts.

Notable features of this edition are: a list of statutory provisions discussed in particular chapters,
The full text of The Prohibition of Child Marriage Act, 2006, The Protection of Women from Domestic Violence Act, 2005 and The Marriage Laws (Amendment) Bill, 2010

Muslim Law in Modern India – 2013
by Paras Diwan (Author)

This is a comprehensive treatise on the matrimonial laws of all the Indian communities including Hindus, Muslims, Christians, Parsis and Jews. Essentially the book is written for the practitioners of law and judges whose business is to provide relief to the persons/s laboring under yoke of unhappy or broken marriages. It may also help scholars, researchers and reformers of law. Along with portraying as law is today it also gives constructive criticism with the exposition of certain law or principles thereof.

Since the work is written for practitioners of law and judges. High Courts Rules framed under the matrimonial statutes Rules for registration of marriage of different states and Family Court Rules of different States are appended for easy reference.

Uniform Civil Code Fiction and Facts- 1995
By Tahir Mahmood (Author)

This book is explain the all personal Law and Legislation and explain in detail sarla mudgal judgment in detail. This book also explain the controversy related to Uniform Civil Code**.**

1.6 Research methodology

The present research work is based upon the doctrinal method of research. The research has been done by using primary as well as secondary resources.the library is used for completing the present research. Research methodology is a way to solve the research problem systematically. The research methodology includes the various methods and

techniques for conduct of research. This study is mainly based upon the uniform civil code and conflict of personal laws, constitutional provisions related to uniform civil code and Act related to personal law,newspaper articles, periodicals internet sites, reports, debates, law review, judicial decisions, and commentaries of various authors. Data will be collected from books ,reports, internet, political views, books and judgments. Primary data to that extent of the books will be referred in great depth. Secondary sources such as world wide web and lexis Nexis etc.

1.7 Scheme of Study

This Dissertation shall comprise of the following chapter

Chapter-1 introduction and historical background.

Chapter-2 deal with legislation on personal law

This chapter would provide the various legislative provisions related to the personal laws .

Chapter -3 Constitutional provisions and Personal Law's

This chapter would give details about the different Article or provisions related to the uniform civil code . And give special attention to the Article .44 of the constitutional law and

conflict in personal laws

.

Chapter- 4 Comparative Study of Personal Laws .

This chapter would explain the provisions of personal laws and comparative study of all personal laws.

.

Chapter- 5 Need of uniform civil code

This chapter would explain the several reasons that why do we need uniform civil code in India

.

Chapter- 6 judiciary on Uniform Civil Code

This chapter contains the various landmark judgments of Supreme court that how the supreme court applied the uniform civil code in India.

Chapter- 7 Conclusion and Suggestion

A summary of all that mentioned in various chapters shall be given . researcher shall be stated his own opinion that whether the uniform civil code is applied in india because uniform civil code was over shadowed by its non justiciable nature. What the court needed to be done that uniform civil code applied in all personal laws.

1.8 Historical Background of Personal Laws

Our Indian society was divided into three different legal systems - Hindus, Muslim and British[5]. The personal laws of Hinduss and Muslims find their source and authority in their religious ancient texts. Since ancient time religion regulated almost every aspect of human life both public and personal. Religion was the guiding force behind all laws including personal matters as well as crime, evidence, procedure, contract, trade and commerce. The area of applicability of laws has been reduced, and is only confined to

[5] D.K. Srivastava, *Religious Freedom in India,* p. 213 edition (1982).

such aspects of life as marriage, dissolution of marriage, maintenance, minority, guardianship, adoption, succession and inheritence. These personal laws were considered immutable and beyond the legislative jurisdiction. From a historical perspective, many areas of Hindus law and Muslim laws have remained unaffected by centuries of political Historical Background of Personal Laws and socio-economic upheavals[6]. Doubts have been expressed as to whether or not personal laws are protected under the religious freedom guaranteed by the Indian constitution.[7] The chapter is divided to cover the three different historic periods.

1.9 Personal laws in the ancient epoch :-

The basic doctrines of hindus law are found in vedas and hindus text books. The *Ramayana* and the *Mahabharata* and the *Bhagvata Gita,* the moral foundation upon which was built the Hindus law which has been in continuous application to this day[8]. The vedas were divided into two shuruti and smriti . Shruti means what the religious saints hear from the God and they write into the vedas. The vedas also contains so many points of positive law. Within this scheme of ancient Indian law, the king did not have significant authority to interfere with the personal laws of the people. In fact, the law did not derive its sanction from any temporal power; the sanction was self contained. Both the king and his subjects were equally subject to the rule of law formulated and enunciated by the sages. He executed, but seldom, if ever, formulated law.'[9]' 'Law was the king, of the king.' The king could not set the law aside. Indeed, the king was required to take a vow at his coronation that he would scrupulously respect the established laws and customs.[10] It is, however, submitted that it would be an oversimplification to contend that the Hinduss regarded the law as an integral part of their religion. Indeed, religion has its vital role to play in controlling and guiding the

[6] Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/52367/6/06_chapter%202.pdf , last seen on 10-2-2017
[7] Articles 25 & 26 of the Constitution of India
[8] U.C. Sarkar, *Epoch in Hindus Legal History,* Visheshvaranand Vedic Research Institute, p. 23 (1958)
[9] ibid
[10] A.S. Alteker, *State and Government in Ancient India* p. 100(1958).

behavior of the people, yet local customs and approved usages had also acquired the force of law.[11]

1.10 Personal laws in Medieval epoch:-

It is sometimes said that during the Muslim rule in India while "Muslim Scriptural" law was applied to the Muslim by the Qazis, there was No similar assurance so far litigation concerning Hindus was concerned. It is also claimed that application of Hindus religious law to Hinduss began in 1772 when Warren Hastings "made regulations for the administration of justice for the native population without discrimination between Hinduss and Mahomedans.[12]But this is not the correct and authentic historical fact and this has been proved by most of the legal historians of India. Muslim jurisprudence furnishes us with an example of complete union of law and religion[13]. In 'Islam', says James Bryce, Law is religion and religion is law' being both content in the divine revelation. Similarly, J. Schacht streeses that 'Islamic thought is the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.[14] The word Islam is derived from the Arabic root "SLM" which means, among other things, peace, purity, submission and obedience. In the religious sense the word Islam means submission to the will of God and obedience to his law. The connection between the original and religious meanings of word is strong and obvious. Only through submission to the WILL OF GOD and by obedience to HIS LAW, one can achieve true peace and enjoy lasting purity.[15] *Qur'an* consists of very words of God revealed to the Prophet Mohammad. The *Qur'an* is in the form of addresses which were revealed by God on different occasions starting from the time when the Prophet (SAW) made his first call to the people to submit to the religion of God, and continuing till the Prophet (SAW) completed his task in the form of a societyfully organised, well integrated and patterned with all the basic institutions.'[16]In India the Muslim rulers applied only some aspects of

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[11] Salim Akhtar and Ahmad Naseem, *Personal Laws and Uniform Civil Code,* p. 3 (1998).
[12] Sarla Mudgal vs. Union of India (1995) 3 SSC 635.
[13] James Bryce, 2. *Studies in History and Jurisprudence ,* p. 237(1901).
[14] J. Schacht, *An Introduction to Islamic Law, p. I* (1964)
[15] Hammudah Abdalati, *Islam in Focus,* p. 7 (1975).
[16] Riazul Hasan Gilani, *The Reconstruction of Legal Thought in Islam,* p. 55 (1982).

Islamic public law - e.g. Criminal law which they indeed found not drastically different from this country's own classical law. But, they surely never interfered with the religious laws and customs of the Non-Muslims relating to marriage, family and succession, etc. despite the fact that they were extremely different from Islamic laws. They did not prohibit even practices relating to *Sati* and *Dev Dasi* customs, despite their conflict with Islamic public law. How could they be expected to interfere with the other harmless institutions of Hindus religious law and customs? Eminent Arab travellers to Medieval period, have affirmed the undisturbed prevalence of Buddhist and Hindus religious laws under the Muslim rule.' Hence, during Muslim rule all Non-Muslims were governed in matters of their personal laws by their own traditional and customary laws.

In the words of Tahir Mahmood : The Muslim rulers of India enforced the public law of Islam as the law of the land. But in the areas of private law they applied Islamic law only to the Muslims. The law of Islam as a personal law thus emerged in India as one of the various personal laws, along with those of the Hinduss, Buddhist, Jains, Sikhs.[17] which were fully protected by the Muslim rulers. Hindus religious law and customs were indeed placed by the Muslim rulers of India at par with the Muslim Personal Law.

It is an indisputable historical fact that Hindus law infact reached the heights of scholarly development during the Muslim rule in the country. "Before what is commonly called Muslim rule in the country, all law was derived from what is now known as Hindus religion and its injunctions and precepts as found in the *Srutis* and *Smritis* including the Holy *Vedas, Dharmashastras,* and *Dharmasutras*. Legal treatise like the *Manusmirti, Yagyavalkya Smriti* and Kautilya's *Arthashastra,* were legal codes of their respective times based on *Vedic* and Dharmic foundations. The law given by these ancient Indian codes is now called Hindus law. Development of this law did not stop after the advent of Islam in India. Muslim rulers of the country did not interfere with non Muslims rules. it and left the process wholly free from state intervention. Vijyaneswhara's *Mitakshara* (11th century) and Jimutavahan's *Dayabhaga* (12th century) both were produced after the advent of Islam and were accepted and acted upon as veritable codes of Hindus law - (the latter in eastern India

[17] Tahir Mahmood, Muslim Personal Law : *Role of the State in the Subcontinent,* pp. 1-2 (1977).

and the former in the rest of the country) - during the reign of the succeeding Muslim rulers. Devanna's *Smriti Chandrika,* the *Dravida* code of Hindus law , was also produced in South India towards the end of 12th century A.D. In North India Vachaspati Mishra's *Vivada Chintamani* and Mitramishra's *Viramitrodaya* appeared in the 15th and 17th centuries respectively the latter during the Mughal rule. At the peak of Mughal authority in the country Western India witnessed emergence of Nikhanata's *Vyavharmayukha* (17th century). All these work were legal codes of their ages based on Hindus religious sources however taking into account the exigencies of the time. These work eventually gave birth to the four sub schools of *Mitakshara* - (Madras, Mithila, Banaras, Bombay) schools.

This massive development of Hindus law during the so called 'Muslim rule' in India confirm the historical fact of an absolute noninterference by the state at that time in the juristic evolution of indegenous law.[18] To confirm this attitude of exemption of personal law from the perview of state is reflected in the writings of Prof. M.P. Jain a well known legal historian of our time when he says about Mughal judicial systems in following words : Not much litigations came before the Kazis because of the existence of village panchayats, and also because civil causes among the Hinduss were decided by their own elders or Brahmins. The practice of the Mughal government seems to have been to leave the Hinduss free to decide their cases as best as they could.[19] Thus it is crystal clear that the Muslim ruler never interfered in the personal laws of Non-Muslims.

1.11 Personal laws in British epoch:-

The criminal law was the only law during the Muslim rule, which was largely common to Hindus and Muslims with the exception of the application of oaths and ordeals. The Muslim rule came to an end with the disintegration of Mughal Empire. Towards its end

[18] Tahir Mahmood, *Statute - Law relating to Muslims in India* : A Study in Islamic and Cosntitutional Perspective,
p. 8 (1999).
[19] M.P. Jain, *Outlines of Indian Legal History,* p. 39 edition (1972).

the Empire has already weakened to such an extent that the Governors of different provinces had virtually usurped the whole power and became independent functionaries. It is at this juncture that the Britishers came to India as innocent traders, as they were, ultimately turned out to be the mercenaries and became the forerunners of British rule in India.[20] The emergence of the British empire in India stands out as unique event in the history of the world. Unlike many other empires, the huge edifice of this empire was created by merely a company which was organized in England for fiirthering the British commercial interests in overseas countries. During the British Raj in India as a matter of colonial policy, it was politically expedient for the British not to interfere with existing personal law in so far as they related to family and inheritence rights alone. Because the main object of the East India Company, namely trade, commerce and exploitation on the natural resources of the country, their primary motive was with law relating to trade and commerce.

When the British established their hegemony over India (1757), they more or less continued the Muslim pattern of judicial administration. But in the course of time, as they consolidated their position, they completely changed the criminal law and introduced their own system to deal with various matters of civil law.[21] Legislative immunity was granted to certain specified areas of Hindus and Muslim laws which, they considered, were deeply interwoven with religion. During this period the Britishers in India followed the policy of non-interference with the religious susceptibilities of their subjects.

They thought that anything could not be wiser than to assure by legislative Act, the Hindus and Muslims of India that the private laws, which they reversely hold sacred and a violation of which they would have thought the most grievous oppression, would not be superseded by a new system of which they must have considered as imposed on them a spirit of vigour and intolerance.[22] Their attitudes towards Hindus and Muslim laws also appear to reflect the original Christian doctrine of two distinct spheres of life, the temporal and the spiritual; the first being under the

[20] M.P. Jain, *Outlines of Indian Legal History* p. 5 edition (1981).
[21] M.P. Jain, *Indian Legal History* (Bombay : N.M. Tripathi, 2nd ed., 1966).
[22] M.H. Morley, *Administration of Justice in British India,* p. 193(1858).

control of the state and the second under the control of the Church. The earliest trace of the acceptance of this policy is found in the Charter of George II, granted in 1753. The Charter of 1753 was principally of the Europeans, and the Hindus and Muslims having their own special customs were left free to dispose off their cases themselves lest difficulty may arise by their custom being broken.

The Charter Act of 1753 expressly exempted the Indians from the jurisdictions of Mayor's court and directed that such suits and disputes should be determined by the Indians themselves, unless both parties submitted themselves to the jurisdiction of the court. Warren Hastings throughout his tenure of his office adhered very tenaciously for the policy of applying the personal laws to the Hindus and Muslims. Hastings Rule reserving *'the laws of Koran'* to the Muslims and the laws of *\Shastra'* to the Hinduss was rephrased in the Cornwalis Code of 1793. Thus the rule 'to each religious community to its own personal law' was, thus, firmly established in the country when the British came here in the 17th century. Most certainly it was not a gift from Warren Hastings, who arrived here over 150 years later as Governor of the Calcutta Presidency under the Rule of the Overseas usurpers from the Britain. When in his Judicial Plan of 1772, Warrent Hastings provided for the application of 'law of the Koran' with respect to the Mohammadans and those of the *'Shastra'* with regard to the Gentoos (Sec. 23). He was simply guaranteeing continuation in force of the legal position regarding Hindus, Muslim laws well established in the country since the begining of the Muslim rule. By no dint of imagination he can be said to have introduced any new rule. What he did was to guarantee that the legacy of the Muslim rule under which Hindus law was to apply the Hinduss and Muslim law to the Muslims would not be changed. And this guarantee, notably, the British governor gave only to serve the political interest of his masters - not by way of gift to the natives.[23]

The British policy towards Hindus and Muslim laws during the period of their dominion over India may be discussed under the following heads, viz. :

(i) Legislation indicating their neutrality towards Hindus law and Muslim law;

(ii) Legislation aimed at maintaining law, and order, good government, and introducing social reform and applying them to all communities alike;

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[23] Tahir Mahmood, *Uniform Civil Code, Fictions and Facts* p. 43(1995).

(iii) Legislation on matters falling with is an the purview of Hindus law and Muslim law, and

(iv) Interference with Hindus law and Muslim law through judicial interpretation.

As discussed above the British rule from its inception followed a policy of non-interference in the religious matters of the Hinduss and Muslims. The Charter Act of 1753 exempted the Indians from the jurisdiction of the Mayor's courts and directed that all disputes should be determined by the Indian themselves, unless both parties submitted themselves to the jurisdiction of the court. In 1772 Warren Hastings exempted the Muslims and Hinduss and it was directed that the matters relating to Muslims and Hinduss will be determined according to *Koran* and *Shastra.*

The rule, requiring the application of Hindus laws to Hinduss and the Muslim laws to Muslims was later extended to His Majesty's Court of Judicature, i.e. The Supreme Court of Judicature at Calcutta, Madras and Bombay, when these were established in 1773.[24] To the list laid down by Warren Hastings, succession was added in 1781 by the Act of Settlement. In 1793 Lord Carnwallis rephrased the Warren Hasting's rule of 1774. In this way Hasting's policy of preserving Hindus and Muslim law was generally supported by the British. Similar provision was also enacted by an Act of 1797 and by the Government of India Act, 1915. The 1797 provision was passed for the guidance of courts in Madras and Bombay and 1915 provisions for the guidance of the High Courts at Calcutta, Madras and Bombay. Although the British did not directly interfere in the personal laws of Hinduss and Mushms, their judicial mechanism, however, considerably influence the growth of these laws. The plan of 1772 place the administration of justice in the hands of English judges. Although this change was inoffensive, but it tended to mouldmtraditional concepts.

The English judges used to consult Pandits and Maulvis in matters relating to personal laws of Hinduss and Muslims, but nonetheless he was a foreigner with a foreign background. He could only make his judgement conform to what he thought was the law; his principal task was to search out a legal solution. Needless to say, the role of judges in the pre-British system was primarily to put an end

[24] M.C.J. Kagzi, "Advisability of Legislating a Uniform Family Law Code", 5 *Jaipur L.J* (1965), p. 193.

to dispute brought before them, but when the administration of justice fell into the hands of British, the doctrine of precedent or *stare decisis* was introduced. Thus, the law which hitherto had potentially existed in scriptural work and treatises now came to be fixed in the case law of these new courts. Before the advent of the British judicial system, the Hindus law was developed by commentaries and digests written by Hindus jurist. It is they who interpreted the scriptural law.

But with the growth of case law this source began to dry up. In Muslim law certain misleading decisions were given by the English judges. The classic example of this is the judgement of the Privy Council in *Abul Fatah Vs Rassomoydhar Chaudhry* which was contrary to the principles of Islamic law relating to family waqfs. Thus decision led to enactment of the Mussalman Waqfs Validing Act in 1913 with a view to restoring the status quo. Another way to introduce English notions in Hindus and Muslim, personal laws by using the so called fonnula of "justice, equity and good conscience". This maxim has enjoyed a continued existence and has been repeatedly laid down in a number of laws passed by the British. In fact, in the course of time justice, equity and good conscience came to mean English law as far as applicable to the Indian situation.

1.12 Codification of Laws in British India

During the British rule in India, except towards its close, no attempt was made to codify the personal laws.[25] As had been noted above, the British felt hesitant to interfere with the customs

and religious-cum-legal principles applicable to the Hindus and Muslims. The first Law Commission had, however expressed a desire to prepare their code for the personal laws but, thereafter, it became an accepted tenet of British policy not to interfere with these systems, to leave them severely alone and to modify them only to the extent there was

[25] Derrett, "The Codification of Personal Law in India : Hindus Law", 6 *Indian Y.B of Int. Affairs* (1957), p.189.

demand for the same backed by a strong public opinion. The Second Law Commission gave vent to this policy and the same was repeated by the fourth Law Commission.[26]

- In persuance of section 353 of the Charter Act of 1833,[27] the first Law Commission was appointed in 1834 and Lord Macaulay was appointed as its Chairman. The first task set before the commission, under the instructions from the Government of India, was to prepare a draft penal code for India.
- The commission prepared the required draft and submitted it to the Government on October 14, 1837, before Macaulay's departure from India. Meanwhile the Britishers had penetrated into *Muffassils* and the absence of *lex loci* posed many problems there. There was no *lex loci* or territorial law for persons other than Hinduss and Muslims in the *Muffassils.* While within the presidency towns, a *lex loci* prevailed in the absence of personal or other special law.
- In different reports submitted by the commission from 1866 to 1869, many legislative enactments were made, such as the native Converts Marriage Dissolution Act, 1866, Indian Divorce Act, 1869. Other legislations that came into existance in the era of third Law Commission were the Hindus Wills Act, 1870; Special Marriage Act, 1872;
- The Indian Evidence Act 1872; The Christian Marriage Act 1872, which has now been amended by the Child Marriage Restraint (Amendment) Act, of 1978. A study of the legislative activities of the period of 1862 to 1872 points out that on the one hand the Third Law Commission was busy in making its contribution to the codification of the Indian law, on the other hand. Sir H.S Maine and Sir James F. Stephen, both respectively as the law members of the Government played a vital role in the shaping of the codification of the laws in various spheres.
- Some of the more legislations this time were the Married Women's Property Act 1874; The Indian Majority Act 1875, The Bengal Mahammedan Marriages and Divorces Registration Act 1876.

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[26] ibid

[27] Sections 53 of the Charter Act of 1833

- The First legislative measure relating to any subtantive provision of Muslim Personal Law was enacted in British India was Avadh Laws Act of 1876. This was an Act of regional covering ten districts of Uttar Pradesh which constituted the erstwhile Oudh state." On the suggestion of Sir Syed Ahmad Khan, the government thought it expedient to make a law empowering itself to appoint Kazis in any area if demanded by a sizeable number of local Muslims.[28]

- Hence the Kazis Act 1881 was enacted. Other important legislation which need to be mentioned in this context are the Transfer of Property Act 1882; The Guardians and Wards Act 1890; The Bengal Protection of Mohammadan's Pilgrim Act 1896. Although, the new statutes applied alike to all people irrespective of their religious affiliations, the effect of some of the provisions was to limit the Hindus and Muslim laws in their own spheres of application and to introduce in English common law.[29]The Caste Removal Disabilities Act ... abrogated the Hindus and Muslim laws of property in regard to apostates. Many laws were passed introducing reforms in the old Hindus law.
- In most cases, the innovating Acts had the support of Hindus community, but conservative and orthodox Hinduss weaved these innovations as encroaching upon their religious practices.
- The Hindus Widow Remarriage Act 1856, permitted a Hindus widow to remarry. Legislation enabling a widow's remarrige was contrary to Shastric prohibition. Although in ancient India widow remarriages were permitted in special cases and were commonly resorted to amongst certain classes in certain areas, they came to be opposed by the majority of Hinduss on religious grounds.
- The Hindus Wills Act of 1870 for the first time conferred a power of testamantory disposition on Hinduss; which were previously unknown to Hindus law.

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[28] Anam Abrol, "Codification of the Personal Laws during British Rule in India - An Appreciable Attempt",*Supreme Court Journal,* Vol. 1, 1991, p. 6.

[29] Tahir mahmood, "Legislation for Muslims in British India" in *An Indian Civil Code and Islamic Law,* 63 (1976).

- The Indian Majority Act 1875 fixed 18 as the age of majority the Act applied to Hinduss in all matters except marriage, divorce and adoption. Many other Acts such as the Hindus Inheritance (Removal of Disabilities) Act 1928; The Hindus Law of Inheritance (Amendment) Act 1929; Child Marriage Act of 1929 Hindus Women's Right to Property 1937 etc. were enacted.
- In the field of Muslim law very little legislative activity is found. Most statutes were enacted to restore the orthodox Muslim doctrines. The four central statutes were passed during the British India. The *Mussalman* Validating Act, 1913; The Muslim Personal Law *(Shariat)* Application Act of 1937; The Insurance Act of 1938 and The Dissolution of Muslim Marriage Act 1939. The *Mussalman* Validating Act of 1913 was passed to undo the effect of the judgement given by Privy Council in Abul Fata Case.[30]
- The Muslim Personal Law *(Shariat)* Application Act, 1937 was passed to fulfill the desire of Muslim community to replace customary laws which was causing hardship to Muslim women, till that time, governed by Hindus Customary law.
- The Insurance Act of 1938 was passed in order to solve certain difficulties regarding the assignment of insurance policies in regard to Muslims. The Dissolution of Muslim Marriage Act, 1939 gave Muslim women certain rights to get their marriages dissolved by the court.
- In the light of the above discussion, it is submitted that there were several factors which were responsible for the shift of British policy of neutrality towards Hindus and Muslim law, i.e. their desire to remove anachronistic practices from religion, improve the lot of women, achieve uniformity and certainty in the law, overwhelming support by religious leaders for their legislative innovations and later participation of Indian in law making process. Further it is clear that the origin of personal laws lies with different religions.[31]
- In ancient India there was not much distinction between personal law and public law. Religion played a very important role in regulating the affairs of the people. During Muslim rule in India which lasted about 700 years the state did

[30] Act III of 1872 and Arya Marriage Validation Act XIX of 1937, 371

[31] Abul Fata Vs Rassomoy dhar Chowdhary (1891) ILR 18 Cal 399

not interfere in the personal laws of the other communities i.e. Hindus, Christians.

- The Muslim personal law enjoyed complete immunity during this period. During the 150 years of British domination the position was almost similar to that of Medieval period and the personal laws of Muslims and Hinduss were to a large extent immune from state legislation. Whatever changes were introduced in Hindus law they were introduced to rectify some apparent injustice to certain sections of Hindus society.
- Whether they be untouchables, widows or minor children. Similarly, the Acts which were passed exclusively for Muslims were enacted mostly on the demands of the Muslim community either to rectify misinterpreted judgement or to restore the correct Islamic position in place of customary law applicable in many Muslim communities who had converted from Hindusism. More or less the Britishers were hesitant to introduce their ideas in the personal laws of Hinduss and Muslims. They thought that interference with the existing system of law might be resented by the Indians as an interference in their religion based laws. The Britishers were very careful not to injure the religious susceptibilities of the Indians.

However, when they consolidated their position in India they gradually introduced their system nevertheless left the personal laws of Hinduss and Muslims to perpetuate.

Chapter-2

Legislation on personal laws

2.1 The Hindus law and the legislation:-

1. In India, many laws were passes to introduce reforms in the old hindu law. The study of Hindu law discloses that in most of the cases, the innovating Acts, had the support of te enlightened sections of Hindus, but the conservative and

orthodox hindus viewed the innovations as an invasion upon their religious practices. It is thus crystal clear that the legislation touched all topics, namely, marriage, succession, caste, inheritance, etc. earlier considered sacrosanct and beyond the legislative pale. In 1856 the Hindu window Remarriage Act legalizing remarriage of Hindu widows was passed at the instance f a reformist sections of the hindus.[32]legislation on widow Remarriage was considered as being against the injunction of shastras. Although in ancient india widow remarriages were permited in special cases and were even prevalent amongst certain classes of people of certain localities before the passing of the Act,they were opposed by the majority of hinduss on religious grounds.[33] Then came the hindu womens right to property Act,1937, conferring on hindus women 's Right to property than they had previously. This Act made revolutionary changes in the area of hindus law of joint Family,coparcenary, partition, inheritance etc. The Indian Majority Act,1875, fixed the age of majority on completion of the eighteenth year. It applied to hindus in all matters except marriage,divorce, and adoption. In 1929, child marriage Restraint Act was passed to Discourage the practice of existing child marriages. The minimum marriage age for male was fixed 18 year whereas for a female it was 15 year. In 1946, the Hindus married Women's right to separate Residence and maintenance Act was enacted enabling a hindus women to claim separate residence and maintenance mentioned in the Act even without dissolving the marriage.[34] Many other Acts[35]

2.2 Muslim Law and the legislation :-

The legislative activitiy concerning muslim personal law in india during the British regime was very little. The attitude of non-interference adopted by the British administrators in the case of Hindus law Reflected much more tenaciously in case of muslim law. Changes made in the Hindus law were far greater than those made in

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[32] Krishna Bhagwan Agrawal "Advisability of legislating a uniform indian marriage code" in mohammad Imam,ed. Minorities and the law (1972),P.443

[33] U.C sarkar,Epochs in Hindus Legal History,(1959), p.369

[34] ibid

[35] The Hindus Inheritance (Removal of Disabilities) Act, 1928 and the Hindus law of Inheritance (Amendment) Act,1929

muslim law. Only a few changes through legislation were made in muslim law because of a wrong notion and misleading belief that muslim law is totally opposed to changes and is entirely devoid of Flexibility and dynamism. Muslim law as usual with other personal law is subjected to two forces pulling in opposite directions.[36] On the one hand there are conservative forces trying to keep Muslim law without any change strictly in accordance with the Koran and with the Hadith and there are, on the other hand forces trying to modify the archaic law in accordance with the changing need of the society.[37] The three Acts which affected Muslims as well are the Caste Disabilities Removal Act, 1850, the child marriage Restraint Act, 1929, and the dowary Prohibition Act,1961.

The three central statutes passed during the British period are: The Wakf Act,1937, and the Dissolution of muslim marriage Act,1939. A change was effectuated in the muslim law in 1913 when the legislature enacted the Mussalman Wakf (validating) Act. This was to undo the effect of the privy council ruling in the famous case Abdul Fata Mohammad Ishak v. Rusomoy Dhur Chowdhary. The muslims regarded this judicial dicta as being inconstant with the true view of the shariat. However, it went further and declared such a wakf void ab intio. This did appear to be an invasion. The strong emotional reaction of the Indian muslims against this decision finally obtained the enactment of the mussalman Wakf validating Act of the 1913 which nullified the decision of privy council in Abul Fata's case. This was apyrrhic victory for muslims; it's social consequences were devastating. It blocked any initiative by the muslim upper class in the direction of industry. It perpetuated a patetic class of pensioners devoid of economic initative who were in the long run, bound to become a drag on the community.

The Particular sect like " khojas, vohras menons" change his own hindu Religion and Accept the Islam . they leave our Hindus religion, but they follow the some hindu rituals which were related sucession or inheritance, they were in a uninterrupted way to observe the hindus law as customary law.[38] The orthodox Muslim opinion did not relish this situation. Therefore,in 1937, the muslim personal law (shari'at) application Act was passed with a view to abrogate these customs and bring

[36] Krishna Bhagwan Agrawal,op.cit.,p.444
[37] Ibid
[38] M.P.Jain,op.cit,pp.617-18

these communities under the Muslim law.[39] Danial Latifi is of the view that muslim personal Law (Shariat) Application Act was Passed Primarily to improve the status of muslim women by restoring the custom-eroded right due to them under the muslim law.[40] As the statement of objects and reasons points out:[41]

The status of muslim women under the so called, customary law is simply disgraceful. All the muslim womens organizations have therefore commended the customary law as it adversely affects their rights. The Act is an important land mark demand that the muslim personal law (shariat) be made applicable to them.

Another legislation enacted in 1939 was the Dissolution of the muslim marriage Act which gave the muslim wife the right of judicial separation from her been denied to certain circumstances. Such as right had been denied to her earler, perhaps because the courts followed mainly the Hanafi school of interpretation of the muslim law. The Act was based on Islamic law of the Maliki school Which is more liberal than the Hanifi school as far as the right of a muslim women to obtain a divorce is concerned.[42] as muslim women was given right to obtain dissolution of marriage on nine grounds. These are mainly the ground which a maliki school recognizes for muslim women to claim a divorce. This is the only legislative measure which has introduced a substantial reform in the muslim law over a long period of time.[43] But the Act does not in any way restrict the arbitrary power of a muslim husband to pronounce talaq.[44] The Act,though opposed by the followers of Hanifi school of Muslim was passed on the Representation of other Muslims.

2.3 Christian and Parsi Laws and the Legislature

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[39] Ibid

[40] Danial Latifi,op.cit.pp.106-07.

[41] Ibid,.p.107 Sharifa Hamid Ali and Jahan Ara Shah Nawaz were among the Leaders of the Muslim Women's movement for this Bill.

[42] Daniel Latifi,op.cit.,p.107, M.P.Jain ,op. cit.,p627, Tahir Mahmmod ,An Indian civil code,(1976).pp.59-61,70-71 and 96, H.A Gani, Reform of Muslim Personal law,(1988) .pp.18-19 , also see Krishna Bhagwan Agrawal .OP. cit., p. 453.

[43] Tahir Mahmood, Muslim Personal law,(1977),pp.54-57.

[44] M.P Jain ,op.cit.,p.606.

India, being a meeting ground of all the major religions of the world, has a multiplicity of family laws.[45] Thus like Hindus and Muslims, Christians, Parsis and Jews are also governed by their personal laws in their family matters. The Christians have their Christian Marriage Act, 1872, the Indian Divorce Act, 1869 and the Indian Succession Act, 1925. These Acts deal with the laws of marriage, divorce and succession for the Christians. The laws relating to marriage and divorce, being very old, do not fulfil the requirement of the Christian community in modern times. Keeping this fact in view a Bill, to amend and codify this law, entitled 'the Christian Marriage and Matrimonial Causes Bill', was pending before the Parliament in 1962. When that Parliament was dissolved that Bill lapsed.[46]

As far as Parsi community is concerned efforts were made, as early as 1835, by the members of the Parsi community to have laws suitable to their social requirements, but these early efforts proved abortive. Ultimately, in 1855 the 'Parsi Law Association' was established for the purpose of drafting special Bills for laws applicable to Parsi community relating, inter alia, to the law of marriage and divorce. The Act that was passed as a result of this, was the Parsi Marriage and Divorce Act, 1865.

This Parsi Marriage and Divorce Act, 1865, was based on the Matrimonial Causes Act, 1857, of England and its principal effect was to make Parsi marriage monogamous. Since then the circumstances altered. Moreover the Parsi Marriage and Divorce Act, 1865, was itself defective in many respects. Adultery by itself or adultery coupled with some other offence, were the only grounds for divorce under that Act. On no other ground could marriage be dissolved under it. Again a section of the Act empowered only the wife to ask for judicial separation on the ground of cruelty, or because her husband brought a prostitute in his house; the husband had no remedy by way of seeking judicial separation. To remedy these defects the present Act, i.e. the Parsi Marriage and Divorce Act, 1865, was enacted. In addition to this Act, the Parsi have their own separate law of inheritance contained in the Indian Succession Act, 1925, which is somewhat different from the rest of the Succession Act.[47]

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45 M.P.Jain, 'Matromonial Law in India', p. 71, 4 J.I.L.I. (1962).
46 Kumud Desai, Indian Law of Marriage and Divorce, p. 191 (4th ed., 1981).
47 M.P. Jain, Outlines of Indian Legal History, p. 491. (4th ed. 1981).

There is also the Special Marriage Act, 1954, which is a secular code of marriage law of a general nature under which any two Indians irrespective of their religion may marry. A couple married under this law comes to be governed by the Indian Succession Act, 1925.[48]

It is evident from the foregone discussion that in the British period most of the legislative ventures in the realm of personal laws were sporadic and pieces-meal, and were undertaken to meet a need here and a demand there. They were careful not to injure the religious susceptibilities of the Indians. They, however, passed corrective and reformative legislations, mostly in response to strong public opinion in favour of those changes. After independence, the Indian legislature took some significant steps of codification of Hindus law. Since the opinion of the Muslim masses is not in favour of the codification of Muslim law, very few steps have been taken in this direction.

48 M.P. Jain, Outlines of Indian Legal History, p. 491. (4th ed. 1981).

Chapter-3
Constitutional Provisions and personal laws

The Constitution of India is the Supreme Law of the Land. It is not a document which sets out the frame-work and the principal functions of the organs of the Government of a State, but it also lays down the basic principles on the touchstone of which the legality and constitutionality of other laws are determined in the prevailing socio-economic and political trends or requirement. It is because of this, the relationship between the 'Constitution of India' and 'personal laws', becomes pertinent to be discussed; the same has been attempted in the instant chapter.

For the sake of clarity this chapter deals with the 'Personal Laws and the Constituent Assembly', 'Personal Laws and Legislative Powers', 'Personal Laws and the Fundamental Rights' and 'Personal Laws and Article 44.'

3.1 Personal Laws and Legislative Powers

As far as the legislative powers on the matters relating to personal laws, are concerned, Article 372 of the Constitution is the most important article. This article provides for the "continuance of the existing laws and their adaption". It runs as follows :

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue inforce therein until arrested or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by such order make such adaptation and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the

law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and

(3) any such adaptation or modification shall not be questioned in any court of law.

(4) Nothing in clause (2) shall be deemed:

(a) To empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) To prevent any competent Legislature or other competent authority form repealing or amending any law adapted or modified by the President under the said clause.

The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, not withstanding that it or parts of it may not be then in operation either at all or in particular areas.

The phrase "all the law in force" in this article includes statutory, customary and, it reasonably seems, also personal laws.[49] The language of article 372 (1) is analogous to section 292 of the Government of India Act, 1935, which also recognized the continued application of "all law in force" then. The Federal Court in *United Provinces v. Atiqa*,[50] had held that the phrase included also non-statutory law including personal laws. Even after the commencement of the Constitution the High Courts of Rajasthan, [51] Hyderabad, [52] Calcutta, [53] Madhya Pradesh, [54] and Bombay [55] have confirmed the applicability of article 372 to personal laws. This article, in any case, is the only provision of the Constitution under which personal laws can be claimed to have been

49 Tahir Mahood, Muslim Personal Law, Role of the State in the Subcontinent, p. 97 (1977).
50 AIR 1941 FC 16
51 *Panch Gujar Kaur v. Amar Singh*, AIR 1954 Raj. 100.
52 *Motibai v. Chanayya*, AIR 1954 Hyd. 161.
53 *Naresh Bose v. S.N. Deb*, AIR 1956 Cal. 222.
54 *Rao Mote Singh v. Chandrebali*, AIR 1956 M.P. 212.
55 *Atmaram v. State*, AIR 1965 Bom. 9.

recognized. If we do not apply it to personal law, those laws are left without any constitutional recognition.[56]

As regard the constitutional postulate of continuity and change in the matter of pre – 1950 laws, at the time of the commencement of the Constitution a variety of personal laws-both codified and un-codified was applied to various religious and ethnic communities. By virtue of article 372 of the Constitution all these laws, of every variety, got a statutory lease for all such law extended till "further action", if any, by a "competent authority". As specified in article 372 (1), this "further action" could be taken in the form of alternation repeal, amendment, or adaptation. The principal "competent authority" that could take any such 'action' would, of course be Parliament or a State Legislature. An executive authority, however, could also exercise the power of delegated legislation.

The question if the power of adaption and modification of the existing laws, conferred by article 372 (2) on the President of the Republic, could be exercised by him also in respect of an uncodified law or custom has not been free form difficulty. However, since that power was not exercised by the President within the stipulated period of three years from the commencement of the Constitution, this question is now rather redundant.

It is notable that all the three lists in Schedule VII of the Constitution include even those subjects to which traditionally the personal laws should apply. List III (mentioning subject on which both Parliament and state legislatures can make laws) specifies the following:

(a) Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject toothier personal law.[57]

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56 Tahir Mahood, Muslim Personal Law, Role of the State in the Subcontinent, p. 97 (1977).
57 Entry 5. List – III Schedule VII of the Constitution of India.

(b) Transfer of property other than agricultural land; registration of deeds and documents.[58]

(c) Charities and charitable institutions, charitable and religious endowments and religious institutions.[59]

List II (specifying the subjects on which state legislatures can make law) includes burial and burial grounds,[60] "rights in or over land"[61] (covering succession to agricultural lands) and administration of justice and organization of courts at the district level.[62] In List – I reveal to Muslim law is "pilgrimage to places outside India"[63] Under this Provision Parliament can make laws regulating Haj and Ziyarat.

Thus, nearly the entire gamut of subjects which traditionally fall within the ambit of personal laws, has been placed at the disposal of either the state legislatures or Parliament.

3.2 Personal Laws and the Fundamental Rights

Although, in theory, there is no constitutional restriction on the legislative power of the State in respect of personal laws, the policy of successive governments at the Centre has lead to their continued exemption from direct interference. Thus, by virtue of the main provision of article 372, those part of pre-Constitution personal laws-both codified and unmodified and applicable to whichever community that have not unit today been touched by any "competent authority" remain in force, as before. Apart from these laws, new personal laws have been enacted by the Parliament for the majority community bringing the Hinduss, Sikhs, Jain and Buddhists under the umbrella of these new legislations. However, the traditional laws of all these communities not covered by these new enactments are still applicable to them.

The question is whether the existence of various personal laws, full of conflicting features and applicable to different religious communities, is in itself inconsistent with

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58 Entry 6. List – III Schedule VII of the Constitution of India.
59 Entry 28. List – III Schedule VII of the Constitution of India.
60 Entry 10.. List – III Schedule VII of the Constitution of India,
61 Entry 18. List – III Schedule VII of the Constitution of India.
62 Entry 5. List – III Schedule VII of the Constitution of India,
63 Entry 20. List – III Schedule VII of the Constitution of India.

the fundamental rights enshrined in Part III of the Constitution. Or, are personal laws supra-fundamental rights ? The following discussion, in this section, throws light on these issues. Intended here is the determination of the relationship between fundamental rights and personal laws.

(i) Personal Laws and Article 13

Art 13 of Part III of Constitution of India enunciated the following general principle :

> "*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*."

Clause (2) of the same article restraints the State from making any law which "takes away or abridges the Fundamental Rights". The fundamental rights include, inter alia, (a) equality before law and equal protection of laws culmination into prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth[64] and (b) religious and cultural freedom. "All laws in force" in India at the time of the commencement of the Constitution, if repugnant of to these primary fundamental rights, have to cease to apply in any manner whatsoever.

The questions is whether it is permissible under the Constitution that the Muslims, Hinduss, Christians, Parsis and Jews of Indian be governed by different sets of religion-based laws relating to marriage and inheritance, etc. Are the personal laws not hit by fundamental rights? The answer to these questions depends on whether the phrase "all laws in force" used in article 13(i) covers personal laws too or not.

Article 13 itself says that law "includes any ordinance, order by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law"[65] It further mentions that 'law in force' "includes laws passed 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 laws or any part therefore may not be then in operation either at all or in particular area"[66] Personal law

64 Articles 14&15.
65 Clause 3(a).
66 Clause 3(b).

is not specified here in this article. Are, then, the words used in article 13(3)(a)&(b) wide enough to include personal laws; or was a reference to personal laws deliberately omitted? The use of the word 'include' shows that the lists are not exhaustive and could extend to rules of conduct not specified in them. The history of enactment of this article and of some other constitutional provisions (article 19, 25, 44) shows that the Constituent Assembly did not intend to exempt personal laws from the legislative competence the State. Do then, the different personal laws becomes automatically void in terms of article 13(1)? The answer to this question is not free from difficulty.

In *State of Bombay v. Narasu Appa Mali*[67] *(*a case under the Bombay Prevention of Hindus Bigamous Marriage Act, 1946), it was argued before the Bombay High Court that the rule of Muslim personal law permitting bigamy had become void, after the commencement of the Constitution, by virtue of article 13(1), since it allowed Muslim men to have more than one wife while the Bombay Act of 1946 forced Hinduss to stick to monogamy. Chief Justice Chagla and Justice Gajendragadkar (as they then were) thereupon examined in details if article 13 (1) was applicable to personal laws; and they arrived at the negative finding. The following points were stressed by the Chief Justice.

i. The words 'custom and usage' used in article 13 do not include personal laws. 'Custom or usage is deviation from personal law and not personal law itself'.

ii. Relisting the difference between customary law and personal law, The Constituent Assembly, in defining 'law' under article 13 has expressly and advisedly used only the expression custom or usage and has omitted personal law. This is a 'very clear pointer' to the intention of the Constitution making body to exclude personal law from the purview of article 13.

iii. There are other 'pointers' as well. Article 17 abolishes untouchability…. Article 25(2)(b) enables the state to make laws for the purpose of throwing open of Hindus religious institutions of a public character of all classes and sections of Hinduss. Now, if Hindus personal laws became void by reason of article 13 and by reason of its provisions contravening any fundamental rights, then it was necessary specifically to provide in Art 17 and Art 25(2) for certain aspects of

67 AIR 1952 Bom. 84

Hindus personal law which contravened articles 14 and 15. This clearly shows that only in certain respects the Constitution has dealt with personal law.

iv. The very presence of Article 44 in the Constitution 'recognizes' the existence of separate personal laws. Entry No. 5 in the Concurrent List gives power to the legislatures to pass laws affecting personal laws.

v. It is clear from the language of article 372 (1) and (2) that the expression 'laws in force' used in this article does not include personal law, as article 372 entitles the President to make adaptations and modifications to law in force by way of rpeal or amendment, and it cannot be contended that it was intended by this provision to authorize the President to make alterations and adaptations in the personal laws of any community.

The Chief Justice concluded his arguments observing

"*Although the point urged before us is not free from difficulty on the whole, after a careful consideration of the various provisions of the Constitution we have come to the conclusion of personal law is not included in the expression 'law in force' used in article13 (1)"*[68]Justice Gajendradkar agreed with all arguments of **C. J Chagla** and added that article 13(1) applied to "what may compendiously be described as statutory laws", that is say, laws, "passed or made by a legislature or other competent authority"[69] He added that the Muslim and Hindus personal laws, whose foundations were their respective "scriptural texts", could not be said to have been passed or made by the legislature or competent authority and therefore "do not fall within the purview" of article 13 (1).[70]

Similar opinion were in later years expressed by the High Courts of Madras,[71] Punjab[72], Karnataka[73], Madhya Pradesh[74] and Manipur.[75] Until this day, the court has said that either the continued application of separate personal laws is, or the exclusive

68 AIR 1952 Bom. 89, para 13.
69 AIR 1952 Bom. 90, para 13.
70 AIR 1952 Bom. 91, para 13.
71 *Srinivas Iyer v. Saraswathi Ammal*, AIR 1952 Mad. 1993.
72 *Gurdial Kaur v. Mangal Singh*, AIR 1968 P & H 396.
73 *Suda v. Sankappa Rai*, AIR 1963 Mys. 245.
74 *Abdullah v. Chandni,* AIR 1956 Bhopal 71.
75 *H.B. Singh v. Bhani,* AIR 1959 Manipur 20.

reform of any one of them could be, ultra virus part III of the Constitution. In 1959 the Supreme Court of India of India expressed an opinion that application of different endowment administration laws of different religious communities was not unconstitutional[76]. Before and after that date in numerous cases the Supreme Court has taken the note of the existence of separate personal laws and applied them to respective communities without questioning the legality or the constitutionality of the personal-law system.

The judicial opinion of the two great judges of the time namely late M.C. Chagla and late P.B. Gajendragadkar in *Narasu Appa's case*,[77] has been dissented from by the eminent scholars like D.D. Basu,[78] H.M. Seervai[79] and Mohammad Ghause[80], who are convinced that all personal laws including their non-statutory parts are hit by article 13(1). The Chagla-Gajendragadkar verdict pronounced in 1952 has, however, been followed, though often silently and without specific reference, by all the higher courts in the country.

In its recent decision in *Krishan Singh v. Mathura Ahir*[81], the Supreme Court has categorically ruled that :

"Part III of the Constitution does not touch upon the personal laws."[82]

This judgment has been vehemently criticized by Justice A.M. Bhattacharjee in his M.N. Bose Lectures of 1981[83]. It is, however, submitted that this was the only way in which the various provisions of the Constitution relating to personal laws, apparently generating various kinds of tensions and conflicts, could have been reconciled by the Supreme Court.

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76 *Moti Das v. S.P. Hahi*, AIR 1959 SC 962.
77 *State of Bombay v. Narasu Appa Mali* , AIR 1952 Bom. 84.
78 *Commentary on the Constitution of India*, Vol. I, p. 155 (1965).
79 *Constitutional Law of India*, pp. 254-255 (1968).
80 'Personal Law and the Constitution of India' in T. Mahmood (ed.) Islamic Law Modern India, pp. 57-58 (1972).
81 AIR 1980 SC 707
82 *Krishan Singh v. Mathura Ahir* , AIR 1980 SC 712.
83 A.M. Bhattacharjee, Hindus Law and Constitution (1983).

(ii) Personal Laws and Art 14 and 15

So far as the applicability of Part III of the Constitution to non-statutory personal laws is concerned, the question that has been particularly, raised is whether the religion and sex-based diversities found in the fabric of any such laws would be affected by the equality-clauses of the Constitution contained in articles 14 and 15. It is alleged and all classical personal laws particularly those applicable to Hinduss and Muslims – abound in discrimination between persons on the basis of religion or sex. Much such alleged discrimination under various laws have been brought to the notice of the courts; but the courts –so-far convinced that Part III of the Constitution does not hit non-statutory personal laws-have generally left those laws intact.

For instance, in *Nalini v. State of Bihar*,[84] the Patna High Court held that rule that daughters cannot be coparceners is not hit by the provisions of article 15 of the Constitution. In *Mukta v. Kamalaksha*,[85] the Karnataka High Court held that the legitimate illegitimate distinction in the matter of children's maintenance rights under the conventional Hindus law does not effect an unconstitutional discrimination. The Punjab High Court once refused to test, on the touchstone of article 15, the High Court curbs on the power to dispose of ancestral property.[86]

It is interesting to note that recently, the Supreme Court of India in *Ahmedabad Women Action Group v. Union of India*,[87] dismissed three writ petitions which challenged the constitutionally of various provisions of different personal laws on the ground, inter-alia, of being violative of articles 14 and 15. The Court observed that the "questions involved in the case were the issue of State policies with which the court will not ordinarily have any concern." The same opinion was expressed by the Apex Court in *Maharshi Avadhesh v. Union of India*.[88] The judicial trend, so far, clearly indicates the reluctance of the Courts to determine the constitutionality of various personal laws on the touchstone of articles 14 and 15.

(iii) Personal Laws and Religious – Cultural Freedom

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84 AIR 1977 Pat. 171.
85 AIR 1960 Mys, 182
86 1971 Cur. L.J. 660.
87 (1997) 3 SCC 573.
88 1994 Supp. (1) SCC 713.

Article 25 of the Constitution provides :

(1) Subject to public order, morality and health and to the order provisions of this part, all persons are equally entitled to freedom of conscience and right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law.

   a. Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

   b. Providing for social welfare and reform.

Article 26 gives to "every religious denomination or any section thereof" the right "to establish and maintain institutions for religious and charitable purposes" and "to make its own affairs in matters of religion". Article 29 (1) says that any section of the citizens which has, inter alia, a "distinct culture of its owns" shall have a right "to conserve the same". The question before us is if the terms "religion", "affairs in matters of religion" or "distinct culture" include the religion-based personal laws of any community. If that is not so personal law will be a "secular activity associated with religion" which the state can regulate.

A large number of Muslims have a firm conviction that their personal law is a part of their "religion" and "distinct culture" within the meaning of these terms as used in article 25 and 29 respectively and that since it is a "matter of religion" within the meaning of article 26, their community should have a right to manage it itself. An important question in this regard is who will decide whether a particular thing is a part of religion, culture or religious affairs? Will the conviction in that behalf of a particular community itself be given any consideration in determining that question?

In *Ratilal Panchand v. State of Bombay*,[89] the Supreme Court had held that subject to the restriction which Article 25 imposes, every person has a fundamental rights "not merely to entertain such a religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are

89 (1954) SCR 1055

enjoined or sanctioned by his religion…" In another case[90] the Supreme Court said that "Religious practices or performance of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines." How would, then, religion, belief and practices be distinguished from "secular activity associated with religious practices" [art. 25(2) (a)]? Further, what is the scope of "social welfare and reform" [art. 25(2)(b)] vis-à-vis religious beliefs and practices?

In *Mulla Tahir Saifuddian v. State of Bombay*,[91] the Supreme Court observed that for the application of Article 25(2)(a) it is necessary to classify religious practices into such as are essentially for a religious character and those which are not. In *Durgah Committee v. Hussain*,[92] it said that whether a religious practice is an essential part of a religion is an objective question to be determined by the court and that the view of a religious denomination itself is not final.[93] It is in the light of these judicial decisions that we have to examine the place of personal law as an essential part of Islamic religion, a Muslim will ordinarily give an emphatic affirmative answer. There is no dearth of statements made by Muslim Ulema, lawyers and politicians, or of resolutions adopted at Muslim conferences, asserting that the Muslims personal law is a part of Islamic religion. But in view of Supreme Court decision in Durgah Committee case, their conviction is not decisive in the matter and is subject to judicial scrutiny.

As regards polygamy, the Allahabad High Court has held, in two different cases, that contracting a bigamous marriage cannot be said to be an integral part of either the Muslim or the Hindus religion,94 "It may be", said justice Oak in the first case, "that under the personal law of Muslims one may have as many as four wives. But I do not think that having more than one wife is a part of religion… So a legislative requirement to the effect that a Mussalman may not have more than one wife does not amount to interference with freedom of conscience or interference with the right to profess, practice and propagate religion."

In Narasu Appa's case Justice Chagla had said:

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90 *Comm. H.R.E. v. Lakshmindra*, (1954) SCR 1005.
91 AIR 1962 SC 853
92 AIR 1961 SC 1402
93 *Durgah Committee v. Hussain* , AIR 1961 SC 1415
94 *Badruddin v. Aisha* (1957) , ALJ 300; *Ram Prasad v. State of U.P*., AIR 1957 All. 141.

"*If religious practices run counter to public order, morality or health, or a policy of social welfare upon which the state has embarked, then the religious practices must give way…. Marriage is undoubtedly a social institution, an institution in which the state is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praise worthy institution. If, therefore, the state of Bombay compels Hinduss to become monogamists, it is a measures of social reform the state is empowered to legislate with regard to social reform under Art. 25(2) (b) notwithstanding the fact that it may interfere with the right of a citizen of process, practice and propagate religion*."[95]

The learned Chief Justice added :

"It must not be forgotten that in a democracy the Legislature is constituted by the chosen representatives of people. They 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 on the status book in order to advance the welfare of the state. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the state, then it is not for the courts of law to sit in judgment upon that decision."[96]

Thus, bigamy is not recognized by the courts either as "an essential part" of any religion or as a "religious practice." Most probably the same will be the judicial attitude toward unilateral divorce in Islamic law, since it cannot be proved by any strength of arguments that Islam enjoins as husband to away with his wife by a unilateral and arbitrary action. But how about the shares of various heirs in the scheme of inheritance which are specially the part of their personal laws to be an "integral part" of their religion. It seems that, in regard to Muslim, marriage and divorce can be more easily ascribed to realm of "secular activities associated with religion" than inheritance and succession. The matter will however, have to be decided by the courts.

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95 *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. pp. 86-87.

From the discussion so far it can be inferred that in spite of the absence of a clear cut distinction between "essentially religious" and "secular" activities, the judicial trend is such the personal laws do not find the protection of Religious Freedom guaranteed under article 25.

The place of the personal law system in the scheme of article 26 guaranteeing to every "religious denomination" the right to manage its own "affairs in matters of religion" will, of course, be determined by how one interprets the various provisions of article 25. If "practice of religion" does not include adherence to personal laws and if matters now regulated by personal laws are in fact "secular activity associated with religion", obviously Art 26 cannot apply to personal laws.[97]

But what is, or should be, the place of personal laws under article 29 of the Constitution – guaranteeing to all sections of citizens the fundamental right to "conserve" their "distinct culture"? Personal law may not be part of religion, but is it part of culture? Personal law may not be part of religion, but is it part of culture? Is it part of our culture how to from a family and live our domestic life? Or, culture only means how we dress up, sing and dance? Will it be wholly absurd if a particular section of citizens claims that its age-old personal law is a part of its "distinct culture"? Notably there is no clause in article 29 enabling the state to regulate "secular activity associated with culture." Who will, then, have the authority to adjudicate upon the assertion of a section of Indian citizenary that its distinct culture is found in its personal law? And if it accepted that personal law is a part of culture, will article 29 come into conflict with article 25 or with article 14 and 15? No answers seem to have been given to these questions.[98]

(iv) Fundamental Rights as the strategy for attaining Uniform Civil Code

In a normative constitutional system which guarantees basic human rights to the subjects any of the actions of state directly or indirectly permitting, assisting, or

97 Tahir Mahmood, Personal Laws in Crisis, p. 20 (1st Ed. New Delhi, 1986).
98 ibid

enforcing discriminatory or unjust practices made by the people even in their interpersonal relations is basically *control legem*. There is no reason why the blessings of civil liberty should not percolate to the levels of inter-personal relations. From the view point of strict constitutionalism there cannot be a different conclusion, especially in the Indian context. But unfortunately, the development of law in this regard does not augur well. The result is that the natural elasticity in fundamental rights could not be made use of the full extent to incorporate the welfares' goal of fair and just civil code.

Under Article 13 of the constitution every law contravening any of the provisions of Part III is declared to be void. Under Article 14 it is ordained that the state shall not deny to any person equality before law and equal protection of the laws. When state agency is made use for implementing customs, usages, and laws allowing discrimination in the matter of matrimonial rights, succession, partition, maintenance and guardianship. There is clear violation of Art. 14.[99] As per Art. 21 of the constitution everyone is entitled to personal liberty and its deprival shall be in accordance with the procedure established by Law. Recent decisions of the Supreme Court have established that such procedure shall be just, fair and reasonable.[100] As family is a form of association it is amenable only to reasonable restrictions by the laws on the ground of public order and morality. On the whole these constitutional provisions insist on fair conditions even in the sphere of personal law.

In addition, there are provisions enabling or directing the state to bring about social reforms. According to Article 25(2)(b) nothing in this article, (namely, Art. 25(1) guaranteeing freedom of religion) shall affect the operation of any existing law or prevent the state from "making any law providing for social welfare and reform…" Under Art. 15(3), State is empowered to make laws creating special provisions for women and children. Further the right to conserve religion under Art. 29(1) cannot be interpreted to protect personal laws either for the reason that personal law is not an essential matter of religion or for the reason that state is enable to make a social reforms under art. 25(1).

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99 This is with the nation that judiciary is also state under Art. 12 of the Constitution, a principle which is not well established.

100 *Meneka Gandhi v. Union of India*, 1978 1 (SCC) 248

The application of Part III of the Constitution as touchstone to test the constitutional validity of personal laws revolves around the issue whether personal law is law at all for the purpose of Part III of the Constitution. Logically speaking this is an unnecessary controversy because personal law either based on custom or in the form of statutes is a set of legal norms regulating the behavioural rights and obligations of people and is enforced by court of law or by state power. However, in *State of Bombay v. Narasu Appa Mali*,[101] the Bombay High Court in answering the question whether Hindus Bigamous Marriage Act, 1946 which imposed prohibition upon bigamy only upon Hinduss and not upon Muslim, held that since personal law was not law under Art. 13 the need of testing it under Art. 14 did not arise at all. Chagla C. J. and Gajendragadkar J. laid emphasis on omission of the term personal law in Art. 13 and restrictive interpretation of the phrase 'custom or usage' in Art. 13. They gathered support from Art. 17, Art. 25(2) and Art. 44 for the view that the constitution makers had assumed that different personal law were to prevail subject to modification by the State for the purpose of social reforms. According to the learned judges, if Hindus personal law became void by reason of Art. 13 then it was unnecessary to specifically provide for Art. 17 or Art. 25(2).

It is submitted with respect, the reasonings adapted by the learned judges were fallacious. Firstly, the definition of the term law in Art. 13(3) is an inclusive definition and hence the logic of omission or restrictive interpretation of 'custom or usages' cannot be sustained. The more relevant test for law under Article 13(3) is whether the concerned norms is capable of being enforced by the state poser.

Articles 17 and 25 (2) are illustrative of abundant caution and express thinking made by the Constitution makers for reforming the social habits. There is no support to the proposition that the State cannot interfere in the field of personal law through any provision of Part III of the Constitution.

In fact, the challenged legislation was a measure of social reform as the court correctly viewed, for equalizing of rights of males and females in Hindus community. The comparison between Hindus and Muslims could have been answered in this way: as

101 AIR 1950 Bom. L. This is view is criticized by A.M. Bhattacharji "Personal Law and State Action" AIR 1982 Jour, p. 113.

distinct social, cultural and historical reasons are connected with personal law of each of the communities, large scale reforms at one stroke affecting all communities cannot be enacted, but piecemeal and gradual reforms will have to be enacted reasonably choosing that community which is mature and ready to receive the reforms. The Constituent Assembly Debates on Art. 44, hint at the criterion that is to be adopted in this matter. When the basis of classification is explicable with convincing reasons from the sociological and cultural perspective, the impugned legislation could have been upheld as in accordance with Art. 14. This would have been the logical solution to the question on the ground of right to equality. By holding that personal law is not law for the purpose of Art. 13, the decision came in the way of libertarian or egalitarian influence upon personal law by judicial actions.

In *Sri Krishna Singh v. Mathura Ahir*,[102] the Supreme Court held the view that personal law is not law for the purpose of Part III of the Constitution. This case also came in a peculiar circumstance. In this case after the death of Swami Atmavivekanand of 'Sant Math' Mathura Ahir, his closest discipline was appointed as new Mahant by the 'Bhesh of Sant Math' in the formal Bhandra ceremony according to the wishes of late Atmavivekanda. Srikrishna Singh, son of Atma Vivekanand (in his purvahrama) was in possession of the properties belonging to the math. When the new Mahant claimed the property of Math, it was defend by Krishna Singh that the rule that natural son served his relations with father the moment the latter adopted sanyasa was discriminatory and that the Shudra cannot become a Mahant of Sant math. About the first point of defence the court viewed that the said rule was not discriminatory and that even if it was discriminatory since personal law was not law under Art. 13 it could not be quashed. About the second point, the court elaborately dealt with the conventions of devolution of Mahantship in Sant Math Sampradaya and upheld the validity of the appointment. The proposition that the personal law was not under Art. 13 was not essential for the decision of the case. In both Narasu Appa and Krishna Singh the impugned law or customs were in spirit not voilative of Art. 14, 15 and 16. The Court has reasoned on the basis of right to equality itself, to arrive at similar conclusion. Since judiciary was in ambivalence and

102 AIR 1980 SC 707.

since the elastic and activist content of right to equality had not emerged as an influencing for the judiciary traversed a narrow path.

In *Gurdayal Kaur v. Mangal Singh,*[103] the High Court of Punjab observed, "if the argument of discrimination base on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go the length of holding that creeds or communities can be constitutional. To suggest such an argument is rejected." It is submitted that the reasoning based on right to equality need not have been stretched to such an extreme in spite of its desirability. Unjust, discriminatory and anti-liberation principles within each personal law can surely be tackled by application of Part III. As Mohammad Ghouse observes the existence of multifarious personal law cannot be valid defence when a personal law violates fundamental rights.[104]He considers the observation of Punjab High Court as obiter dicta.

Excepting the above three decisions, the approach of the High Court and that the Supreme Court is generally to apply part III of the Constitution to test the constitutional validity of the impugned principles of personal laws. The High Court of Madras in *Srinivas Aiyar v. Saraswathi Ammal,*[105] held that the reference in the Entry 5 of the concurrent list to joint Family and Partition (which are institutions of Hindus law and unknown to Muslim Personal Law) prove that the Constitution did not rule out the validity of the principles under which different personal laws are applied to different religious communities. The court observed, it is surely an indication that it recognizes the classification already in existence that a section of the people… are subject to a system of law peculiar to them. The reason of that classification is not their religion but that they have all along been preventing their personal law peculiar to them." Hence the court treated the whole of personal laws as 'existing law' or 'law in force' under Art. 372 and Article 13.

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103 AIR 1968 Punj. 396. at 398.
104 *Gurdayal Kaur v. Mangal Singh* , AIR 1968 Punj. 396. at 398.
105 AIR 1952 Mad. 193.

In *Sheokaran Singh v. Daulatram,*[106] the High Court of Rajasthan struck down the rule of Damdupat in Hindus law as violative of Art. 14 of the Constitution. It reasoned that Damdupat was a commercial custom and thus governed by Art. 13.

The Supreme Court was called to decide the question whether personal law of Muslims relating to pre-emption as law under Art. 13 and whether it was violative of Art. 19 (1) (f), for the first time in *Sant Ram v. Labh Singh*[107] in 1965. The Court answered that the definition of the phrase 'laws in force' is dependent upon the definition of law' in Art. (3) (b) and that both the definitions control the meaning of Article 13 (1). As principles relating to preemption where based on customs and usages they was governed that it violated Article19 (1)(f) which guaranteed right to acquire hold and dispose property.

Concerning the statutory personal laws enacted after the commencement of the Constitution, the approach of the judiciary in recent times is to scrutinize them under the light of various provisions of Part III without delving into the technical question whether personal law is law. In T. *Sareetha v. Venkatasubbaiah,*[108] the Andhra Pradesh High Court considered Sec. 9 of the Hindus Marriage Act providing for retention of conjugal rights to the spouses living separately without reasonable justification as violative to personal liberty under Art. 21 of the Constitution. The Court viewed that if unwilling spouse is coerced by State power to cohabit with the other spouse there is violation of right privacy. In *Harvinder Kaur v. Hermender Singh,*[109] the Delhi High Court upheld the constitutional validity of Sec. 9 as a reasonable regulation protecting the institution of marriage in accordance with Art. 21. In *Saroj Rani,*[110] case the Supreme Court affirmed the view of Delhi High Court and rejected the view of Chaudhary J. of A.P. High Court. It is to be remembered that the issue of personal law as law did not figure in these cases. The question has become a non-issue in these cases.

About the desirability of applying Part III provision to peruse the personal laws there can hardly be any meaningful objection. The principle of equality, liberty and

106 AIR 1953 Raj.
107 AIR 1965 SC 314.
108 AIR 1983 AP 357.
109 AIR 1984 Del. 66.
110 AIR 1984 SC 1562

security have great relevance in a sphere where exploitation and discrimination prevail and the persuasions of love and affection are sometimes banished. The application of Part III will ensure just and fair legal relations in different personal laws. This much more desirable rather than quarrelling on the pedagogic concept of uniform civil code. Once the concepts of justice and liberty are instilled into the realm of personal law, Uniform Civil Code will be easier to pursue. As Mohammed Ghouse has observed: The Fundamental Rights available to a Muslim law to save it from being condemned as unconstitutional. The Muslims can have no objections to such adaptations as most of them have discarded the license to polygamy and unilateral divorce given to them"[111]

The judicial activism of purging the personal law under the aegis of part III has certain advantages. Such an approach is generally free from the defect of playing to the emotional and religious convictions of people.[112] In the backdrop of unjustifiable legislative inertia and hesitation, the activist approach of the judiciary is a ray of hope Secondly, as the 'purging' approach is from the view point of the policy underlying Part III, the result is also excepted to be fair provided that there is no substitution of arbitrariness in personal law by judicial arbitrariness.

3.3 Personal Law and Directive Principles

(i) Article 44

After 'fundamental rights' it is now the turn of the 'directive principles of state policy', contained in Part IV of the Indian Constitution. Article 44, placed in this part of the Constitution, happens to be the most controversial, misunderstood and misused provision. Although this article will be discussed at length in 'Chapter V' of this work, a brief account of its mandate becomes necessary here. It lays down that:

> "That state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".

Undoubtedly, the expression 'civil code' used in this article refers to a code of law relating to those matters which are, at present being regulated or governed by

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111 Quran, sura 2, 226 and V 2285 and v. 237 p. 232.

112 Resentment by the Muslim community about *Shah Bano* decision (AIR 1985 SC 955) is unfortunately an exception.

different personal laws. This inference is crystal clear from the debates in Constituent Assembly discussed earlier is the instant chapter. It is noteworthy take like all other directive principles specified in the Constitution, the provision of article 44 too "shall not be enforceable by any court", but it is "nevertheless fundamental in the governance of the country" and has to be "applied" by the State "in making laws".[113]

Despite its being "legally non-enforceable", the Court at times has raised the issue of the enactment of a 'uniform civil code' more often when the case did not require any such incidental generated by the obiter dicta in Shah Bano's Case,[114] Jordan Diengdesh's case[115] and Sarla Mudgal's case,[116] will be discussed in the succeeding 'chapters'.

(ii) Family Law, Religion and Social Justice

The family law, by controlling the institutions of marriage and property, determines the very course of human life. Marriage is a substantial tie in the life process of human being.[117] Family property is the source of substance and the basis of freedom of actions for the family members. Child care and maintenance are the important parental obligations. Justice in these matters is necessary for a happy home and this task is onerous when factors of love and morality do not generate fair familial relations.[118] It is for this reason that scholars have rightly observed that the test for a just social order lies in a just and fair family law.

The secular power of the modern welfare state, among other things, aims at establishing social relations within and outside the family on the non-exploitative plane of social justice and quality. The ethical considerations of familial responsibilities and the overtones of equality, liberty and justice in family life arising out of the guaranteed human rights have common ground and aim at promoting social happiness. However, application of state power becomes a must when the norms governing interpersonal relations within the family do not accord to guarantee human rights. The 'living law' of

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113 Article 37 of the Constitution of India.
114 *Mohd. Ahmad Khan v.Shah Bano*,, AIR 1985 SC 945.
115 *Ms. Jordan Dienghed v. S.S. Chopra*, AIR 1985 SC 935.
116 *Sarla Mudgal v. Union of India*, (1955) 3 SCC 635.
117 T.M. Knox, Hegel's Philosophy of Right, p. 111 (1958).
118 Steven Vago, Law and Society, p. 265-67 (1931).

the people namely, customary personal law, ought not to live in contradiction to the avowed policies and values enshrined in the Constitutional or against the well intentioned, reformist legislations.[119] It has to make way for attaining social justice within the family.

In its essence, social justice means the quality of being fair and just in social relations of human beings.[120] This noble quality is attained within the family by eschewing exploitation of the vulnerable members like women and children by the dominant members and by forbidding, the operation of irrational notions and religious beliefs of blind nature, the concept of social justice aims to attain a social arrangement wherein the good things of the society, amenities and responsibilities are justly distributed among the members of the society.[121]

At the dawn of Indian independence, the isolated pockets of different personal laws prevalent in India were not only factors of communal disharmony and disunity but were veritable instruments of injustice and exploitation. As Pandit Jawaharlal Nehru observed, "our laws, our customs fall heavily on the women folk... and men happen to enjoy the dominant position."[122]

Permission for polygamy and child marriage, prohibition on inter caste marriage and widow remarriage, absence of divorce and other matrimonial remedies, denial of woman's right to share in the family property[123] on in the property of the deceased persons and male dominance in matter like custody, guardianship and adoption of children caused unjust conditions in the Hindus social order. According to Nehru, the Birth Policy of non-interference with personal law and mechanical interpretation or

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119 Eugenue Ehrlich is advocated the idea of "living law of the people' which outpace the state made law. He held the view that the centre of gravity of legal development lies not in legislation nor in juristic science nor in judicial decisions but in society itself. However his concept of 'living law' was one which experienced permanent evolution, rather than embodiment of static rules. If customary person law does not generate and consolidate the forces of change and consequently becomes static and outmoded, the constitutional law and legislative reforms can reform them and make them live upto the expectations of evolving times. For a critical treatment of Ehrlich's idea see W. Friedmann, Legal Theory, p. 248-252 (Fifth ed. 1967).

120 K, Suibba Rao, Social Justice and Law, p. 1

121 R.W.M. Dias, Jurisprudence pp. 81-82; Also see John Rawis, A Theory of Justice pp., 3-4 (1972).

122 Nehru's Speeches Vol. III p. 444 Speech in Lok Sabha 16.09.1955 in the context of supporting the concept of divorce.

123 Steven Vago, Law and Society, p. 265-67 (1931).

perpetuation of Hindus customs stopped the natural growth of Hindus law and gave rise to petrified rules.[124] The Muslim Personal law has incorporated still more rigid and unfair usages like polygamy, unilateral divorce, non-maintenance of divorced wife and gender discrimination in matters of succession. As Pandit Nehru wrote with thoughtful perception, "Thus Hindusism and Islam, quite apart from their religious teachings, lay down social codes and rules about marriage, inheritance, civil and criminal law, political organisation and indeed almost everything else. In other words, they lay down a complete structure for society and try to perpetuate this by giving it religious sanction and authority."[125] According to Nehru, the extreme religious misplaced.[126] The attempt to extend the sphere of religion to all of the minute and changing situations of society would probably result in the weakening of the basic fibre of that religion. Giving religious sanctions to rigid social usages which increasingly comes into conflict with changing modern conditions would ultimately discredit that particular religion.[127]

Eminent scholars of personal law and sociology regard the growth of different personal laws as mere by–products of specific cultural processes rather than as the inevitable results of religious principles and practices. On the contrary in the background of broad concept of Dharma[128] (justice) or the egalitarian charter in the Shastrik writings[129] and the Quaranic emphasis on human dignity and equality[130] it is not possible for any one to justify some of the unjust, discriminatory and exploitative usages of personal laws as in accordance with the true ethos of the religions. Derret, observes, "whether the sanction behind the law be the demands of religion or merely those of age and unbroken acceptance, a careful distinction is to be maintained boundary between the two is allowed to become obscure provided that when the rules apparently authorized by the ultimate sanction cease to serve the purpose for which they were intended, there

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124 Speech of Nehru as reported in The Hindus 10.12.1951 and in Lok Sabha 16.09.1954. Donald Eugene Smith, Nehru and Democracy p. 164 (1958); The British Policy of non-interference in pointed out by several authors. M.P. Jain, Outlines of Indian Legal History 472-74(4th Ed. 1981)

125 Jawaharlal Nehru, Glimpses of World History, p. 736.

126 Nehru's Speech as reported in Times of India, 16.09.1954.

127 Donaid Eugen Smith

128 M. Rama Jois, Legal and Constitutional History of India, pp. 3-10. (Vol. 1, 1984).

129 M. Rama Jois, Legal and Constitutional History of India, pp 3-10 (Vol. 1, 1984).

130 Neil, B.E., Bailliee, Digest of Mohummudan Law pp. 62-65 (1957).

should be no obstacle to their relegation to the legal historians museum, unsurvived by their formal relations.

"Such is the outcome of the investigations whether the claim that Hindus law is based on Hindus rules. Rules that have religious foundation are, as we shall see in more detail, often neglected and without public cry. Rules which have no foundation are upheld on the formal ground that they are sanctioned, by religion. The liasion between religion and law is not close."[131] Derret has arrived at similar conclusion about Muslim personal law also.[132]

Even if religions have some influence on the broad outlook upon the social institutions like marriage and family or about interfamilial relations, the constitutions makers of free India had the indomitable conviction that "Religion must be restricted to spheres which legitimately appertain to religion and the rest of life must be regulated, unified and modified in such manner that we may evolve as clearly, as possible, a strong and consolidated nation"[133] Progress and clinging to the past, according to them would not go together.[134] Nehru viewed, "India must break with much of her past and not allow it to dominate the present. Our lives are encumbered with the deadwood of this past, all that is dead and has served its purpose has to go. We have go get out of traditional ways of thought and living which, for all the good they have done in a past age, and there was much good in them, have ceased to have significance today.[135] The only significant doctrines and values of the modern age are republicanism, secularism and social justice which move the generations and stir them to actions for social happiness. "The whole concept of the secular state is based on the elementary truth that the individual is the centre of social organization and not groups-religions or otherwise and that equal rights

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131 Duncan J.M. Derret, Religion Law and the State in India, p. 117 (1968); Prof. S.S. Nigam considers that the wide range of personal law is essentially of civil nature and matter which are inseparable from religious beliefs and usages in G.S. Sharma (ed.) Secularism; Its implications for law and life in India, p. 153 (1966).

132 It is only in the inspectional stage of Islamic law that what James Bryce viewed becomes a correct explanation. Bryce had viewed , 'In Islam Law is Religion and Religion is Law, Because both have the same source and equal authority, being both contained in the same divine revelation.' James Bryce, Studies in History and Jurisprudence, Vol. II, p. 237 (1901).

133 K.M. Munshi in Constituent Assembly Debates, Vol. VII, p. 548

134 Krishanaswamy Ayyar, On the Muslim (Protection of Rights on Divorce) Act, 1986, Eastern Book Company, Lucknow (1987). p. 549.

135 Jawaharlal Nehru, The Discovery of India, p. 509 (1962).

should be secured to the citizens through democratic devices".[136] Values promoting social justice are always to be preferred over the irrational and baseless traditional principle. Social change is necessary for this purpose.

(iii) Directive Principles, Social Change and Uniform Civil Code

"Social change means", observes Steven Vago, "modifications of the way people work, rear a family, educate their children, govern themselves, and seek ultimate meaning in life. It also refers to a restructuring of the basic ways in which people in a society relate to each other with regards to government, economics, education, religion, family life, recreation, language, and other activities"[137] The equation whether law can and should lead, or whether, it should never do more than cautiously follows changes in society, has been and remains controversial. Despite the debate, modern welfare states, make use of law as "instruments that set off, monitor, or otherwise regulate the fact or pace of social change,"[138] Law can shape social institutions directly or indirectly. It can not lead the society, in its own way, to the land of social justice provided that factor resisting social change do not counter-balance the effort of the law.[139] Further, to be successful instrument of social change, law should be free from technical defects and loopholes and should be effective.[140]

Thus, when the ability of law in bringing about social change is so much dependent upon its ability to neutralize the factors –cultural, social, psychological and economic –which resist social change, the role of constitutional morality[141] in the social transformation cannot be so vital. To the thickets of sentiments and emotions it can penetrate only minimally especially because it lacks the teeth of coercive enforcement mechanism. It is with this awareness that we have to assess the relation between Directive Principles and social change.

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136 K.T. Ramaswamy, The Hindus 14.7.1951 citied by Donaid Eugen Smith.

137 Steven Vago, Law and Society pp. 238-239 (1981); B.S. Sinha, Law and Society Social Change p. 16-23 (1983).

138 Lawrence M. Friedman, Legal Culture and Social Development, Law and Society Review 4 (1) p. 29 cited by Steven Vago.

139 For a detailed discussion of factors resisting social change.

140 The importance of technical perfection of the legal instrument and efficient handling of it by administrators of law and justice is pointed out by W. Friedman Legal Theory 177 (5th) Ed. 1967).

141 Because of the characteristic of non-enforceability, the Directive Principles of State Policy re regarded as principles of constitutional morality. H.M. Seervai, Constitutional Law of India, p. 1612 Vol. II (1984).

True to the aspiration of being a social document Indian constitution has incorporated a set of directive principles addressing the state authority to undertake to implement the plans of social and economic progress of the people and nation. The sincere effort to translate the tryst with destiny[142] into actuality can be found in the wide coverage of Part IV of the Constitution which includes the directives for economic democracy, labour welfare, fair working conditions and wages, right to work, protection against moral and material abandonment, amelioration of weaker sections, compulsory education, uniform civil code, promotion of public health and levels of nutrition, panchayat raj, upbreeding of livestock, respect for international treaties, law and peace. Thus the direction and content of social revolution and the contours of planned pleas of State policy. It is to be remembered that these are not dustbins of sentiments, or hobby horses of high ideologies, or lip sympathy embellishments.[143]On the other hand they are down to earth instructions to the power holder about the inevitable goals of welfare state and also the means of achieving them. All the forms of state power are to be geared up to this task and the legal system is to operate as a purposeful enterprise towards these ends.

The high importance given to the Directive Principles of States Policy can be understood in the language of Art. 37 which declares that Directive Principles of State Policy shall be fundamental in the governance of the State and it shall be the duty of the State to make legislations for giving effects to Directive Principles. The non-enforceable character of the Directive is counter –balanced by the high appeal of constitutional morality made to the State. They are substantive sources of inspiration for various organs of government to brig about social reforms. The phrases "fundamental in the governance of the state" and "it shall be the duty of the State" in Art. 37 point out the normative character of the Directive principles. This constitutional intention should not go waste for the sole reason that courts of law cannot be resorted to for the enforcement

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142 On August 15, 1947 Nehru said, "Long years ago we made a Tryst with destiny, and now the time comes when we shall redeem out pledge, not wholly or in full measure, but very substantially …. The achievement we celebrate today is but a step, an opening of opportunity to the greater triumphs and achievement that await us", J. Nehru, Independence and After" p. 3-6.

143 The criticisms by some of the members of constituent assembly as summarized in K.C. Markandan, Directive Pirective, principle in the Indian Constitution, pp. 123-1125. (1966).

of Directive Principles.[144] Because of the normative character of Art. 37, at least it should be regarded that State action opposed to any of the Directive Principle is unconstitutional.[145] When the supreme law of the land positively shows particular direction towards which state shall move, moving in opposite direction or withdrawal of any step taken towards the constitutionally intended direction is opposed to the constitution.[146] By holding them void, the judiciary is not 'enforcing' it for the purpose of Art. 37 but merely removing the impediments in the path of implementing the Directive Principles. Thus, the choice for the state is between implementation of the Directives partly or fully, perfectly or imperfectly a non-action. There cannot be a third alternative of going against the Directives. In the backdrop of development like passing of Muslim Women (Divorces and Maintenance) Protection Act,1986such an approach salvages the importance of the Directive Principle.[147]]

The constitution makers had no utopian idea that only by the constitution and law social change could be attained. They had the realistic approach of appreciating popular participation in the process of social transformation. For example Dr. B. R. Ambedkar viewed that Part IV of the constitution would be a measuring rod to assess the that election result would be the political sanction against non implementation of the Directives.[148] It is doubtful, except in one or two general elections, whether voting behaviour of people in India really made use of this measuring rod.

Pandit Jawaharlal Nehru viewed, "when you talk about legislative chains in a democracy, you necessarily take into consideration the fact that the people have been brought up to the required level a very large section of the people must also accept it or at any rate, actively or passively, be read to accept it."[149] Therefore, it is essential to create a background, a mental climate in favour of the proposed law with the help of the means of propaganda and percussion. Nehru advocated that along with legislative influence, there must be another influence also, 'the influence of the direct approach to

144 Upendra Baxi, "Directive Principles of Sociology of Indian Law: A reply to Jagat Narain" 1 JILI p. 258.
145 T Daxidas , "Directive Principles; Sentiment of Sense?" 17 JILI (1975) 478 at 481.
146 T Daxidas , "Directive Principles; Sentiment of Sense?" 17 JILI (1975) 478 at 481.
147 Dr. B. R. Ambedkar, in C.A. D. Vol. VII p. 476, 494.
148 Dr. B. R. Ambedkar, in C.A. D. Vol. VII p. 476, 494.
149 Tibar Mende, Conversations, with Nehru p. 93.

the people, making them accept changes.[150] Law cannot achieve every change that is desirable. According to Nehru, "through legislation on the one hand, and through education of society on the other, we can bring about charge."[151] However, when the society showed deep syndromes of social evil, 'surgical operation' through law was necessary. According to Pandit Nehru, Hindus Code Bill and agrarian reforms were such surgical operations.'

From the social change perspective, Directive Principle of State Policy can be categorized into two classes. First, the Directives which do not require mental climate created through an active propaganda and persuasion in favour of the reform. The directive principles relating to labour welfare, social security measures, economic stability and equality through equitable distribution of material resources of production, equal pay for equal work, legal aid, amelioration of weaker sections and respect for international treaties and peace can be regarded as belong to this category. In the post-constitution period it has been experienced that without influencing and generating the public opinion a number of laws have been made and enforced in these spheres. Here law itself created public opinion in support of it. People receive such law mainly because of the economic advantages and security created by them. Even though such legislations may go against the vested interests of few of popular acceptance of the same leads them to success. Further, they do not shake the traditional or sentimental beliefs, psychic egoes or religious feelings.

The second category of Directives need a favourable atmosphere welcoming their implementation. They require popular participation in the process of change. The Directives persuading for uniform civil code, compulsory education, panchayat raj, prohibition of cow slaughter and prohibition of alcoholism can be considered as belonging to this category. Social morality, religious feelings, sentiments, ignorance and traditions inhibit any change in these spheres. Imposition of change through law without regard to the feelings of people would be simply counter productive or futile in these

150 ibid.
151 Jawaharlal Nehru, Socialism by Consent p. 12.

matters.[152] As personal behavour, beliefs and group psychology are interfered by such as laws, legislator should first win the confidence of the legislative audience. However, religious fundamentalism and obscurantism should be sternly tackled by the State. The tendency of unduly wooing the favour of religious communities would defeat the very welfarist goal and fan the fanatic waves of communalism. In the post-constitution. In the post-constitution period in this second category of directives, social changes through law are meager.

Article 44 of the constitution declares, "the State shall endeavour to secure for the citizen a uniform civil code throughout the territory of India". The expression 'civil code' connotes a code regulating civil matters including marriage, divorce, inheritance and such other matters governed by personal laws. Such a code shall be uniformly applicable to all citizens irrespective of religion, race, caste and sex Art. 44 does not hint at the features of future civil code. It also does not say whether uniformity of civil law is to be attained at a stretch or by piecemeal reforms. From the views of constitution makers at the making of the constitution, it can be generated that uniform civil code is aimed to solve the problem of diversity of gender discrimination based on religion.[153] In brief, its emphasis is on uniformity with justice.

Soon after the commencement of the Constitution the Government piloted the Hindus Code Bill to bring about large scale changes in major area of Hindus law. Despite the stern opposition from the orthodox, the law was enacted ultimately. Under Hindus Marriage, Act, 1995 new concepts like monogamy, divorce valid requirement of marriage, inter-caste marriage, matrimonial remedies and alimony were introduced. Under Hindus Succession Act, 1956 the concept like widow's absolute right to property of her husband, equal shares among legal representatives without gender discrimination,

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152 The failure of prohibition law, compulsory education programmes and panchayat raj can be traced to this reason.

153 Constituent Assembly Debates Vol. VII pp. 547-550. Different systems of Hindus law in different parts of India also had posed the problem of diversity. As Derret point out demand, for unity, certainty, equality of sexes and elimination of restrictive and antique rules seemed to be the principal reasons for codification. Derret, As Justice Tulzapurkar has put it "In the context of fighting the poison of communalism the relevance of communalism the relevance of uniform civil code cannot be disputed, in facts it will provide a juristic solution to the communal problem by striking at its root cause. Nay, it will foster secular forces, so essential in achieving social justice and common nationality. Tulzapurkar, J. ' Uniform Civil Code' AIR Journal p. 17.

limitation on rule of survivorship and principles governing devolution of female's property and escheat were established. Under Hindus Minorities and Guardianship Act, principles relating to equal rights of mother and father in the custody and guardianship of minor children, protection of interest of minor against the power of guardians were recognized. Under Hindus Adoption and Maintenance Act, certain benevolent principles relating to obligation to maintain any spouse, children and parents who are unable to maintain themselves are recognized. Equal rights of women to adopt children are also recognized. Inter-caste adoption was newly introduced under the Act. Through recent amendments in Hindus Marriage Act, new grounds for divorce were introduced and the concept of divorce on mutual consent has been established. It is a notable achievement for a nascent democracy that a major segment of its population is emancipated from orthodox, irrational and discriminatory relations and in their place is governed by the principles of justice, equality and liberty.[154] The task of the law giver was not one of much difficulty as the majority of the Hindus community was ready to receive the reforms.

Regarding reforms of Muslim personal law in a large scale manner, there was distrust and protest by the representative of the Muslim community in the Constituent Assembly.[155] They had a sense of undue reverence of Quaranic prescription which were considered as the basis of their personal law. With the obsession of effacement of their cultural identity by the majoritarian interference, suspicions loomed large about the noble intention of uniform civil code and its 'imposition' upon them,[156] Nehru felt that Muslim s were not sufficiently educated to accept and approve modern values. He observed, "Now, we do not dare to touch the Muslims because they are in minority and we do not wish Hindus majority to do it. These are personal law and so they will remain for the Muslims unless they want to change them. He completely ruled out imposition in this matter. It is submitted, the tendency of overcare towards the minorities conspired

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154 The socially progressive aspects of Hindus code bill convinced Nehru to regard its as a symbol of progress inspite of the reactionary view in the social domain. According to him the spirit of liberation underlying the code made the Hindus people especially women folk free from out grown customs and shackles which had bound them. See Donald Eugene Smith.

155 This is clear from the views of Mr. Naziruddin Ahmed, Mehboob Ali Baig, Mohammad Ismail Saheb and Hussian Imam C.A.D. Vo. VII p. 540-550.

156 Sumit sarkar and Tanika sarkar, *Women and Social Reform in Modern India: A Reader ,P 540*

with the fundamentalist obsession and as a consequence, the notion of social justice became the scapegoat in this sphere unawaringly. Instead of overplaying the sympathy factor, there should have been an organized state propaganda for social justice in the area of family law.[157]

The argument for retaining status quo in Muslim personal law with the reason that Muslim law is too sacrosanct to be touched by legislature is not well-founded.[158] Enactments like Shariat Act, 1973, Dissolution of Muslim Marriage Act, 1939 and Muslim Women (Protection of Rights) on Divorce Act, 1986, show that legislations also have an important say in matters of Muslim law. In fact, the Dissolution of Muslim Marriage Act, 1939 brought about considerable changes relating to right to divorce by wife.

Except the Act of 1939 no other legislation provided for reform in Muslim personal law. The archaic customary practices usages and religious prescriptions still govern the Muslim community.[159] Because of the hesitation of judges and jurists to adopt reformative approaches, the law became stagnant. Even the perversions of religious teachings were not rectified.[160] For example, regarding polygamy, Quran stated that one can marry more than one wife (upto four) only if he is able to treat all equitably.[161] Since such a treatment is impracticable, there is virtual discardment of polygamy. About the duty to maintain divorced wife also Quranic approach is liberal.[162] Rigid usages developed because of deliberate manipulation.

In pursuance of the policy of rendering social justice and economic security to the dependents, Criminal procedure Code (the earlier Act and the present one) provided for obligation of all persons to maintain his/her spouse, minor, children, unmarried daughter and parents who are unable to maintain themselves. The duty of maintenance avoids the problem to moral and material abandonment in the family life. It is purely a

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157 Without moving the altruistic lever through emphasizing on factors of duty and coercion, the much expected social action can never be attained, as per the view of Rudolph van Ihering,

158 Mohammad Ghouse, Secularism, Society and law in India, p. 232 (1978), Tulzapurkar, J. Union Civil code AIR 1987 Jour 17.

159 ibid

160 V.R. Krishna Iyer, Social Mission of Law, p. 187 (1976)

161 Quran, sura 4:3

162 Quran, sura 2, 226 and V 2285 and v. 237.

secular measure. In *Bai Tahira*,[163] and *Shah Bano*,[164]cases the Supreme Court applied Sec. 125 of Cr.PC. providing for the duty of maintenance and the argument that Sec.125 violated the Muslim Personal law and religious freedom of the community were rejected. According to the Court, payment of *Mehr* and maintenance during *iddat* period did not absolve the husband from the duty to maintain. About the argument on the basis of religious freedom, the court viewed that for purpose of secular and welfarist provision like Sec. 125 of Cr.P.C. application of religious principle was irrelevant. Even if the religion provided for otherwise under Art. 24 of the Constitution the State has power to make legislations for social reform in the semi religious matters. However, the court viewed, after elaborate reference to the Muslim religious writings, that Muslim husband wife beyond the iddat period. The court laid emphasis upon the objective of uniform civil Code under Art. 44.

Fundamentalists raised hue and cry against the Shah Bano decision. Parliament adopted the policy of appearing the minority and enacted Muslim Women (Protection of Rights) on Divorce Act, 1986 amidst protest by the opposition. The Act absolved the husband to pay the divorced wife beyond the iddat period.[165] The responsibility of paying the maintenance[166] was imposed on the waqf Board also. The Act had the retrograde policy of preferring an archaic principle and rejecting the humanitarian approach of assisting the divorced wife who is facing social misery and economic impoverishment.[167] It is submitted, the policy underlying the statute has betrayed the constitutional intention of enacting uniform civil code and attainment of social justice.[168] The whole incident shows that the temporary will of the parliamentary majority is sometimes able to subvert the secular and egalitarian values. Such a measure as we have observed earlier, is unconstitutional.

Since the legislature has proved time and again its unreliable character and callous or partisan approach in the matter of enacting uniform civil code, hope is to be pegged on the judicial venture in this direction. Recent judicial approach on Directive

163 AIR 1979 SC 362
164 AIR 1985 SC 955
165 Sec. 4(1)
166 Sec. 4 (2)
167 Tulzapurkar, p.18
168 Generally V. Krishan Iyer, Muslim Women Protection Act (1987).

Principle is really conducive to this. At the beginning of the constitution it was judicially viewed that Directive Principles shall conform to and run subordinate to Fundamental Rights.[169] Subsequently, judiciary held that laws implementing the directives amount to reasonable restrictions.[170] Slowly an approach became established that Part III and Part IV of the Constitution stand on equal footing, mutually complementary to each other and have common objectives of achieving social justice.[171] Hence harmonious interpretation of Part III and Part IV is the only possible way of subserving the values underlying these parts. Recently, going a step further, the Indian Supreme Court has made use of elasticity of fundamental Rights to incorporate in its fold the value of Directive Principles of State Policy. For example, the court made use of Art. 14 of the constitution to effectuate the Directive Principle of 'Equal pay for Equal work' in a series of cases.[172] The principle of avoiding moral and material abandonment of children was attained through application of Art. 21 and Art. 23 of the Constitution.[173] The Directive Principle relating to social security at old age was found to be more fruitful under Art. 14.[174] The Directive Principles for worker's participation in management was given effect requiring compliance with the duty to hear workers under Art. 14 before winding up the company or closing down the industry.[175] This process of activising the Directive Principles by injective their spirit into the veins of Fundamental Rights is a high water mark of judicial activism and achievement. In attaining the goal of uniform civil code this approach can contributes very considerably.

In India, personal laws are the distinct products of multi-cultural system evolved through generations. Even though the relation between personal law and religious is considerable remote, because of sentimental reverence of people to the 'living law' of tradition, the task of attaining social justice in this sphere is resisted by some orthodox sections of the society directly or indirectly. However, the majority of the population has favourably responded to the introduction of social reforms in their personal law. But the

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169 *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.
170 *F.N. Balsara v. State of Bombay*, AIR 195 SC 318, M.*H. Qureshi v. State of Bihar*, 1959 SCR 629.
171 *Keshavanand Bharti v. State of Kerala*, AIR 1973 SC 1463, *Chandrabhavan v. State of Mysore*, AIR 1970 SC 2042; *Minerva Mills v. Union of India* (1980) SCC 625.
172 *Randhir Singh v. Union of India*, AIR 1982 S.C. 879.
173 *Kaskmikant Pandey v. Union of India* 1987 1 SCJ., P.*U.D.R. v. Union of India* AIR 1982 SC
174 *D.S. Nakara v. Union of India*, AIR 1983 SC 130.
175 *National Textile Workers Union v. Ramakrishna*, AIR 1983 SC 75.

experience of the law maker in the direction of Uniform Civil Code is that effecting changes even in an incremental manner is very difficult. In fact, Uniform Civil Code in its strict sense may not be so much essential as compared 'o the need of attaining social justice in each and every enclave of personal law. The intention of the constitution makers in enacting Art. 44 was to orient the state action towards attaining social justice in the familial relations. As the national social justice in its broad contours has the same accentuation and insistence, ultimately social justice in each and every sphere will lead to attain of Uniform Civil Code or a situation nearer to it.

The disappointing factor in this area is the total neglect of the goal by the legislature. In the area of reforming Muslim Personal Law, no sincere effort is made by the State to adopt the Nehruian two pronnged approach of implementing the law and educating the public opinion in favour of it simultaneously. On the other hand, the recent legislation i.e., Muslim Women (Protection of Rights on)Divorce Act, 1986 has shown the retrograde policy of preferring archaic notions to the secular idea of social justice. It is true that in matter of social morality, the power of the law to bring social changes is limited.[176] But if the legislator positively obstructs the desirable social change it is the betrayal of the confidence reposed in him to strive for social justice.

The analysis made above shows that there is the snag of non enforceability which hinders the Directive Principles of State Policy in becoming a powerful instrument of social engineering. The judicial process has been influenced to some extent in recent times. Judiciary has demonstrated in several cases that reading in Directive Principles into the elastic veins of Fundamental Rights is the profitable approach in translating the values goals in Part IV interstitially. However, the judicial path of attaining social justice in personal laws by application of the fundamental rights under Art. 14,15, 19, 21 and 25(2) (b) of the Constitution is strewn with self-created pitfalls. The unnecessary controversy on the question whether personal law is law for the purpose of Part III diluted the efficacy of judge made reform. However, recent pronouncements of the court (for example, pertaining to the constitutionality of Sec. 9 of Hindus Marriage Act) receive confidence in this regard. The need of judge made reform

176 Friedman W., Nehru's Speeches Vol. III p. 444 Speech in Lok Sabha 16.09.1955 in the context of supporting the concept of divorce.

on the basis of Fundamental Rights is very much felt to-day in the backdrop of legislative inertia and agonizing injustice, exploitation and discrimination in some of the uncodified personal law.

A blue print of the future in this area consists in a multipronged effort through legislative activism, propaganda for social justice.[177] in personal law and increased judicial application of Part III in relation to personal laws. There is no need for amending any provision of Part III relating to religious freedom to protect reforms in personal laws because the relation between personal law and religion is remote and also because no impediment on that ground is experienced by the judiciary or the legislature.[178] Further Art. 25(2) (b) is quite elastic.

The legal activism in the reform of personal laws should not be a unilateral intrusion of one system to other.[179] Some of the just and egalitarian principles of Mohammedan law could be introduced into Hindus and other personal laws and vice versa. For example, in Muslim law there is a principle that the power of any Muslim individual to bequeath his or her property through will is limited to one third of his/her property and two thirds of the property through will is limited to one third of his/her property and the two thirds of the property of the deceased person should devolve according to the rules of intestate succession.[180] This rule has several advantages. First, the kin of the deceased are assured of equal share and they will be protected against the whims and fancies of the testator. Secondly, the personal bequeathing can provide for additional share by his will to any of his legal representative who has assisted him/her during the old age or to a person whom he thinks as deserving because of economic weakness of that person. Third, the rule protects against bequests of whole property to any person, institution or body affecting the interest of the closest blood relatives of the

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177 In Muslim law it is recognized that Ijma i.e. consensus of the faithful is a source of law. Since enlightened and collective opinion of the community has a determining say in providing for adaptation and change, the role of educating public opinion in favour just and fair principles in family law is essential Amir Ali, Mohammadan Law.

178 Tulzapurkar, J. is of the opinion that there is the need for constitutional amendment permitting reforms in personal law notwithstanding the guarantee of freedom of religion. It is submitted, Art. 25(2) (b) is quite elastic to allow such reforms even if it is considered that personal law is part of the religion. But it is generally accepted that personal law is remotely connected with religion.

179 Prof. A.B. Shah is of this opinion in article as cited by Tulzapurkar J, Quran, sura 2, 226 and V 2285 and v. 237.

180 Neil B.B. Baillie, Digest of Mohummadan Law, p. 625 (1957).

testator. Finally, the impact of undue influence in the process of making the testament will be considerably limited. Since the rules of intestate succession are based on humanitarian principles of protecting of interests of dependents and the kith and kin the reasonable expectation of the latter are also fulfilled. Total exclusion of intestate succession by the will or the bequeath or may work as arbitrary.[181] The rule of limitation on testamentary succession can be adopted in other personal laws subject to modifications. On the whole, the future personal laws code should incorporate benevolent principles in various laws of the present. The immediate attention of legal activism should be on reforming the personal laws rather than hurrying for Uniform Civil Code. If at all Uniform Civil Code is going to be enacted it should not be on the basis of half-way-house approach of voluntary Uniform Civil Code.[182] This is for the reason that loopholes, defects and ineffectiveness in social reform legislation not only make the effort futile, but their failure even on technical ground will be a source of discouragement and inhibits future efforts.

From the social change perspective, it is to be noted that Directive Principle are not able to provide equal interest to all the goal values enshrined in Part IV. Further, when popular reception and participation are the important factors for making the reform a success, a well-planned propaganda for educating the public is an imperative need. Then only would it be possible to attain social changes of desired magnitude, direction and pace.

It is obvious from the discussions so far that inspite of the best efforts of the Muslim members, the majority of the members of the Constituent Assembly, was unwilling to provide a constitutional protection to the 'personal laws of different communities for all time to come'. Instead they introduced article 44 which envisages a

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181 According to Julius Stone, the rules of succession should aim towards protecting the family from disintegration. Explaining the English legal developments in 1938 (Inheritance Family Provision Act 1938) which introduced limits on testamentary disposition Prof. Stone observes, "Freedom of testation which favoured family stability when rules intestacy have been made adequate. the discretion give by the Act to make provision for certain members of the family despite the will, might seen topromote, by restricting testation the same interests as had formerly to be promoted by freedom of testation itself."

182 Tulzapurkar J, Quran, sura 2, 226 and V 2285 and v. 237. The idea of introducing voluntary Uniform Civil Code was mooted in Parliament in 1986.

‘uniform civil code’. The Constitution, however, adopts the policy of continuity and changes under article 372 as far as personal laws are concerned.

As regards the conformity of personal laws with part III of the Constitution, the judicial attitude shows that this part does not touch upon the personal laws. The right to freedom of religion guaranteed under article 25 of the Constitution has been so interpreted by the courts that it provides little protection to personal laws. But so far as the question of recognition of personal laws is concerned, the Constitution does acknowledge the existence of such laws under Entry 5, List III of Seventh Schedule, together with article 372. The directive of uniformity under article 44 itself is recognition of the exiting variety of personal laws.

Chapter-4

Comparative study of all Personal law's

In this Chapter the researcher would explain the few Provisions Personal Laws like Marriage , Divorce , Maintance , Adoption. Some of the Provisions are quit similar in all Personal Laws so this chapter is based on the comparative Study of all Personal Laws.

4.1 Marriage:-

Marriage is a sacred institution; it is the very foundation of a stable family and civilized society. There are, however, certain Prerequisites for a valid marriage. All personal laws lay down some condition which need to be complied with to enter into or solemnize a legal marriage. These conditions under the different statutes , are discussed below.

In some of the Marriage Laws few Requirements are Egjectly the same like monogamy, soundness of mind , age of Majority etc. there are as following.

1. Belongs to that Religion:-
   In hindu Law sec.5 HMA,1955 says that the parties to the marriage should be an hindu. Like wise in the hindu law parties should be an Hindu similarly in other religion like in Parsi law parties should be the parsi and in Christian[183] and Muslim Religion parties should be belong to that religion.
   But special Marriage Act has the overriding effect on all Laws.
2. Monogamy :- simple meaning is one man only marries to one women. The monogamy is form of marriage which is Prevailing in Hindu Law HMA, Special Marriage Act and in Christian Law CMA,1872. But in Muslim there is no Monogamy a muslim man can marry with four wifes.
3. Sound mind :- the parties should be of sound minded that they may give a valid consent for marriage . HMA,1955 says the consent given by the parties must be a vaid consent. Similarly in the SMA,1954[184] Parsi Law and also in Christian Law.

[183] Section 60 of Christian Marriage Act,1872

[184] Availableathttp://keralaregistration.gov.in/pearlpublic/downloads/The%20Special%20Marriage%20Act.pdf?tok=49sddh3ss34ff4 last seen on 30-3-2017

In Muslim Law the Partied also of Sound mind and Capable of give the Valid Consent for nikah.

4. Age of Majority:- the Parties must attain the age of Majority , in Christian ,hindu , Parsi[185]and Special Marriage Laws the age of Bride is 18 year and Bridegroom of 21 year is required for valid marriage.

   But in the Muslim Law Parties to the Marriage Must attain the Age of Puberty. Puberty Mean parties are capable for sexual intercourse. In the muslim law age of Majority for Bride and Bridegroom is 15 year.[186]

5. Beyond Prohibited Degrees:-
   - Acco to Hindu Law HMA,1955 the parties should not be within the Degrees of Prohibited Relationship.
   - The Marriage within the Spinda Relationship is Strictly Prohibited.
   - Parsi Law PMDA,1936 the Parties should not be within the Degrees of Consagunity and Affinity[187].
   - Special Marriage Act SMA,1954 the Parties should be within the degrees of Prohibited Relationships.
   - Muslim Law:- was also the same the parties should not be within the Prohibited Degrees of Relationship.

6. Ceremonies for Valid Marriage**:-**
   - Section .7 of the HMA,1955 says that's for the valid Marriage religious Rituals Must be performed
   - Religious and Customary rituals Must be Performed By the Parties.

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[185] Section 3&4 of parsi marriage and Divorce Act1936

[186] DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.124, Orient Publishing Company, Allahabad

[187] Available athttp://www.womenstudies.in/elib/legal_resources/lr_the_parsi_marriage.pdf last Seen on 29-3-2017

- Saptpadi to be performed where ever included in the Rights. Saptpadi mean Bride and Bridegroom should take seven steps around the Fire[188].
- Section.3 of Parsi Law PMDA,1936 says that the Marriage Must Be Performed By the "Ashrivad" of the Priest and within the Presence of two Witnesess and that withness should not be the Priest[189].
- Christian Law CMA,1872 sec.60 says that the ritual for Marriage should be Performed.) in the presence of licensed Priest under section 9, and of at least two witnesses other than such person, each of the parties shall say to the other— "I call upon these persons here present to witness that. 1, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife [or husband]" or words to the like effect.[190]

4.2 Muslim Law:-

muslim Marriage is known As nikah

- Where as the hindu Law is Sacrament But Muslim Marriage is Social Contract.
- As in contract Purposal and Acceptance is Necessary Like wise in Muslim Law " ijjab" and "Qubul" is necessary[191].

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[188] Section 7 in The Hindus Marriage Act, 1955

[189]Available at http://www.womenstudies.in/elib/legal_resources/lr_the_parsi_marriage.pdf last seen on 29-3-2017

[190] Available athttp://lawmin.nic.in/ld/P-ACT/1872/The%20Indian%20Christian%20Marriage%20Act,%201872.pdf last seen on 30-3-2017

[191] Dr. Mohammad Nazmi- Mohammadan Law, 2nd edn. 2008, p.43, Central Law Publications, Allahabad

- Oral contract, is required writing is not Necessary. But in sunnis two major male witness or single male or two women witness is required.
- Dower is also an Important Ritual in Muslim Marriage. Dower mean Amount of maher. basicaly the Two type of Dower prompt Dower and Deffered Dower[192].
- Prompt Dower is given to the Bride at the time of the Marriage by the family or by the bridegrooms side.
- Deffered Dower :- after the Marriage given to the wife at any occasion.

4.3 Void,Voidable,Irregular Marriage.

A marriage, which is not valid, may be void or Voidable . Avoid marriage is one which has no legal status. The Courts regard such marriage as never having taken place and no rights and obligations ensure. It is void ab intio,ie right from inception.Hence the parties are at liberty to contract another marriage without seeking a decree of nullity of the first so called marriage. A Voidable marriage on the other hand, is a marriage which banding and Valid, and continues to subsist for all purposes until a decree is passed by the court annulling the same. Thus, so long as such decree is not obtained, the parties enjoy all the rights and obligations which go with the status of marriage. A remarriage by any of the parties without a decree of nullity is illegal as it would amount to bigamy. [193]

4.4 The basic diffrence in Void and Voidable Marriage.

The basic difference in void and Voidable marriage,in a nutshell,is:

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[192] Mohiuddin v. Khatijabibi 41 Bom LR 1020;cf: DR. Nishi Purohit- The Principles of Mohammedan law,
2nd edn. 1998 p.125, Orient Publishing Company, Allahabad

[193] Kusum, *Family law lectures*, lexis Nexis, edition 2013

- A void Marriage is declared as null and void abnitio.
- A voidable marriage is at the option of the parties to declared the marriage as valid or void .
- But a void marriage is not at the option of the parties the void marriage is itself declared as null.

4.5 The position regarding void and voidable and Irregular marriage under the different personal laws is discussed below.

Hindus Law

Void marriage (Section 11 of Hindus Marriage Act, 1955) –

A marriage will be a void marriage

1. Bigamous marriage is void.
2. The marriage with in the Prohibited Degress are also void.

Special Marriage Laws :-

Similar condition are followed in special Marriage Act. SMA says if any of the Condition which is Important for the valid Marriage should be performed that Marriage should be declared as void.

Parsi law:-

The PMDA,1936, lays down that a second marriage without divorce in case of an earlier marriage is Void.

A marriage Where there is no sexual intercourse between the lawful wedlock because of some natural causes that Marriage would be declared as void.

Christian Law

Section 18 of CMA,1872 the court declared the Marriage as void only in the request of the Lawful wedlock that marriage should be declared as void.

- If any district or HC declared the Marriage void only in the request of the Lawful wedlock that marriage should be declared as void.
- If any of the Party was impotent
- Bigamous act was done by any of the party
- Consent was taken by the fraud

Muslim Law

- Under the Muslim Law void marriage is Known as Batil marriage. Batil mean null and void.
- If any person Remarry with her own wife without the Halala marriage of her wife that marriage would be declared as void[194].
- If person marry with hindu or ideal worshiper that marriage was also declared as void.
- If the person has the four wife without giving divorce to the fourt wife he would marry with the fifth wife then that fifth marriage is void.

Voidable Marriages

Voidable simple meaning is at the option of the parties to declare the Marriage as void or valid.

1. **Impotent:**- the HMA,1955 says that if any Party of the marriage was impotent then that marriage is voidable this condition is similar in Special marriage Act Christian marriage Act.
2. **Unsound mind:**-HMA ,1955 says that if any party of the marriage was of unsound mind that marriage is Void Marriage similar is in tha special marriage Act.1954 and Christian Marriage Act,1872.

[194] Syed Khalid Rashdi's - Muslim Law by V.P. Bharatiya, 4th edn. 2004, p.60, Eastern Book Company, Lucknow

3. **Lunatic and insane:-** if any of the party suffering from the attcks of insanity or Epilepsy that marriage is voidable under HMA,1955 and also in SMA,1954 ,CMA,1872 .

4. **Pregnancy**:- Pregnancy of Respondent by a Person other than the husband that marriage is void. The same condition is in HMA,1955[195] and also in SMA,1954 ,CMA,1872 .
5. **Consent taken by the fraud:-** if the consent of the party for marriage taken by fraud or coercion or in intoxication that marriage is void . The same condition is in HMA,1955 and also in SMA,1954 ,CMA,1872[196] .

Muslim Law:-

Fasid marriage:-

- the performance of formalities tells us whether the Marriage is valid or not.
- The fasid form of marriage should only recognized by the sunni law[197]
- If they could not Perform the minor formalites than marriage could not became void marriage fasid[198].
- If husband takes the consent of the wife fraudulenty then the marriage is fasid.
- Under the shia Law the marriage is not irregular marriage[199].

4.6 DIVORCE

[195] Available at http://latest-law-news.blogspot.in/2016/01/void-and-voidable-marriage-under-hindus.html last seen on 1-4-2017
[196]Available at http://feministlawarchives.pldindia.org/wp-content/uploads/INDIAN-DIVORCE-ACT-1869.pdf seen on 7-4-2017
[197] Dr. M.A. Qureshi- Muslim Law, 2nd edn. 2002, p.38, Central Law Publications, Allahabad.
[198] DR. Nishi Purohit- The Principles of Mohammedan law, 2nd edn. 1998, p.145, Orient Publishing Company, Allahabad
[199] Bashir-un-nissa vs Bunyad Ali, 50 I.C. 677; cited in DR. Nishi Purohit -The Principles of Mohammedan law, 2nd edn. 1998, p.145, Orient Publishing Company, Allahabad

Introduction:-The term "Divorce" come from the latin word "divortium", Which means to turn aside; to separate. Divorce simple meaning is to Legally Dissolve the Marriage between two persons. All the personal laws in india provide for divorce under certain grounds and conditions. Though there are different Act governing people belonging to different religions, the grounds provided for divorce are more or less the same, with minor variations though. The muslim law, however different.

4.5 The grounds for divorce in all personal Laws are as follow:-

1. **Adultery:-** if a married man made sexual intercourse with another persons wife then that is valid ground for divorce in HMA1955 , SPA1954, the divorce Act 1869.
2. **Cruelty:**- if any party do cruelty may be mental or physical cruelty this also an valid ground for divorce. HMA1955 , SPA1954, the divorce Act 1869.
3. **Conversion**:- if any of the party convert his or her religion then that is also an valid ground for divorce under the HMA1955 , SPA1954, the divorce Act 1869and also in parsi Law.
4. **Mental Disorder**:- if any party if suffering from mental illness which dangerous for the another partner this is also a valid ground for divorce under the HMA1955 , SPA1954, the divorce Act 1869and also in parsi Law.
5. **Venral Disease**:- if any of the party suffering from venral Disease that Disease of communicable nature so this is also the valid ground for the Divorce under theHMA1955 , SPA1954, the divorce Act 1869and also in parsi Law.

6. **Will full refusal for sexual intercourse**:-if any party will full refuse for sexual intercourse this is also valid ground for divorce under the HMA1955 , SPA1954[200], the divorce Act 1869[201]and also in parsi Law.

[200]Available at https://indiankanoon.org/doc/695509/ last seen on 12-3-2017
[201]Available at https://indiankanoon.org/doc/89426212/ Last seen on 20-3-2017

7. **Unsound mind:**-if any of the partner is unsound mind this valid ground for divorce under the HMA1955[202] , SPA1954, the divorce Act 1869[203]andalso in parsi Law[204]

Muslim Law

Dissolution of Muslim Marriage Act 1939

section 2. Grounds for decree for dissolution of marriage.

A woman who was married under Muslim law shall be has right to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

- if her husband is not maintaining her wife
- if her husband is punished with imprisonment of 7 years
- if the husband was impotent
- if the husband was insane for a period of two years or is suffering from leprosy or a virulent venereal disease which is of communicable nature
- if the husband beats his wife or done cruelty with her
- If his husband is forcing her to lead an immoral life, or
- The any of the court before passing of the decree gave a time of atleast year to the husband that he has to prove to the court he was not impotent. If he prove to the court then court will not pass any decree.[205]

4.6 Maintenance

Introduction:- maintance mean the husband has duty to maintain her wife before the divorce and after the divorce before the divorce in judicial separation husband has to alimony pendit lite after the divorce husband will pay permant maintence to the wife and

[202] Available at http://highcourtchd.gov.in/hclscc/subpages/pdf_files/4.pdfLast seen on 15-2 2017
[203] Available at https://indiankanoon.org/doc/7376911/Last seen on 17-3-2017
[204] http://www.womenstudies.in/elib/legal_resources/lr_the_parsi_marriage.pdf last seen on 15-3-2017

[205] Available at http://chdslsa.gov.in/right_menu/act/pdf/muslim.pdf last seen on 11-2-2017

amount of maintance will decided by the court according to the income and business and property of the husband. A wife will also get the maintance under the(Crpc) code of criminal Procedure. If the wife remarry with another person then husband is not bound to maintane the wife. while under the personal law, an Application for maintenance can be made only if there are, or have been, matrimonial Proceedings under the Act, in Case of the Cr PC, there need not be Any matrimonial litigation, and yet the wife may seek maintenace. the statutory position under the different laws is dicussed below.

PERSONAL LAWS

Hindus law:- "in Hindus Law , there are two statutes which provide for maintenace,Viz the Hindus Marriage Act 1955 (HMA) and the Hindus Adoptions and Maintenance Act 1956(HAMA)".

Section.24. Maintenance pendente lite and expenses of proceedings.- Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay the petitioner the expenses of the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.

section 25. Permanent alimony and maintenance.-(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purposes by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent. (2) If the Court is satisfied

that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just. (3) If the Court is satisfied that the party in whose favour an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.[206]

THE HINDUS ADOPTIONS AND MAINTENANCE ACT, 1956

Section 18. Maintenance of wife- (1) Subject to the provisions of this section, a Hindus wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime. (2) A Hindus wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,- (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindus by conversion to another religion; (g) if there is any other cause justifying her living separately. (3) A Hindus wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindus by conversion to another Religion.

Special Marriage Act :- section 36 and 37 of the (SMA) also provide for alimony pendente lite and permanent Alimony and maintenance for the wife, respectively. Unlike the HMA,there is no provision for maintenance for the husband. the section read as follows:

[206] http://highcourtchd.gov.in/hclscc/subpages/pdf_files/4.pdf last seen on 12-2-2017

Section 36. Alimony pendente lite.-- Where in any proceeding under Chapter V or Chapter VI it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the Court to be reasonable.

Section 37 Permanent alimony and maintenance.--(1) Any Court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case it may seem to the Court to be just. (2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the Court to be just. (3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the Court may deem just.[207]

Parsi Law

section 39. Alimony pendente lite

in any suit under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband

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http://keralaregistration.gov.in/pearlpublic/downloads/The%20Special%20Marriage%20Act.pdf?tok=49sddh3ss34ff4 last seen on 16-2-2017

order the defendant to pay to the plaintiff the expenses of the suit,. and 16 such weekly or monthly sum, during the suit as, having regard to the plaintiffs own income and the income of the defendant, it may seem to the Court to be reasonable : 28[Provided that the application for the payment of the expenses of the suit and such weekly or monthly sum during the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]

section 40. **Permanent alimony and maintenance** (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant. (2) The Court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just. (3) The Court if it is satisfied that the partly in whose favour, an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just.]

section 41. Payment of alimony to wife or to her trustee In all cases in which the Court shall make any decree or order for alimony it. may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court 12[or to a guardian appointed by the Court] and may impose any terms or restrictions which to the Court may seem expedient, and may from time to 17 time appoint a new trustee 12[or guardian], if for any reason it, shall appear to the Court expedient so to do.

Christian Law

Provisions for maintenance under the Christian Law are Contained in the Indian Divorce Act 1869, as Amended in 2001. as the relevant sections are:

section. **36**. **Alimony pendente lite**.--In any suit under this Act, whether it be instituted by a husband of a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit. Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just: Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next Collected by the All India Christian Council, www.christiancouncil.in Page 15 of 36 preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or enis confirmed, as the case may be. 37. Power to order permanent alimony.

section 37. Power to order permant alimony.-The High Court may, if it think fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties. Power to order monthly or weekly payments. Power to order monthly or weekly payments.--In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same is to the whole or any

part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

section 38. **Court may direct payment of alimony to wife or to her trustee.-**In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to' the Court expedient so to do.

Muslim Law

the personal Law statutes governing a muslim Woman's right to maintenance are the Dissolution of Muslim Marriage Act1939, and the Muslim Women (Protection of Right on Divorce) Act 1986. The former; Act provides for grounds under woman married under a muslim law can seek dissolution of the marriage. One of the grounds provided are that ' husband has neglected or has failed to provide for her maintenance for a period of two years'.[208] The latter Act, as its very title indicates, makes provisions for protection of rights of muslim women who have been divorced by, or have obtained divorce from, their husband, which includes right of maintenance as well.

As is evident from the above statutory provisions, maintenance could be interim or permanent. Interim or Pendente Lite maintenance is payable to meet the applicant's financial needs pending litigation, as well as the litigation expenses. Permanent alimony is an amount fixed at the time of the passing of decree or thereafter. This Amount can be varied on the application of the parties, if there is change in the circumstances of the parties.

There is no limit as to the amount which may be awarded by way of maintenance, which depends on the circumstances of each case. The limit of one-fifth of the husband's income in case of maintenance pendent lite, in the Parsi marriage and Divrce Act prior

[208] Section 2(ii) Dissolution of muslim marriage Act ,1939

to 1988 and in the India Divorce Act prior to 2001, have been done away with. So also the ceiling of Rs 500 under section . 125 of the Cr PC (vide amendment in 2001).[209]

4.7 Adoption

Introduction:-

Adoption simple meaning if the Lawful wedlock is not cable to give birth to there biological chid then they may adopt the child .[210] there is different ceremonies and conditions in all personal law like Hindu law Christian , parsi, but in muslim law there is no provisions for adoption.

Adoption under Hindus Law:

The Shastric Hindus Law looked at adoption more as a sacramental than secular act. In the hindus the adoption is very important. Becoz according to hindu scriptures a hindu cant attain the salvation without the son. If any person died in the funeral of that died hindu fire given by the son. And Pind Dan should also performed by the son. Without the Son hindu will not attain the salvation and heaven.so that's why in hindus Adoption is required..[211]

There is no common Law in India that provides for the adoption by people

belonging to all religions. The only existing law on Adoption is – The

Hindus Adoptions and Maintenance Act (HAMA) 1956, which provides for

adoption by Hindus only.

Salient features of the Act discussed below.

1.the person who adopt the child should be of soundb mind.
2.and the consent of the wife for adotion is also necessary.

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[209] Family Law Lectures ,Family Law I , kusum lexis Nexis. P.181-182
[210] International Encyclopedia of social sciences, Vol1,p95
[211] Available at http://www.legalserviceindia.com/articles/hmcp_adopt.htm last seen on 19-3-2017

3.minor person could not adopt the child.

4.if any person male or female adopt the child at least 21 year age diffenece is in the person who adopt the child

5.Ceremonies is also necessary for adoption and that ceremony is giving and taking ceremony.

In this ceremony natural parents gave the child to the adoptive parents.

6.Adoptive child has the equql right in the property as natural child has right in property.

Section 15. The adoption can not to be cancelled- the adoption one made it would not be cancelled by the adoptive parents or by the natural parents.

Parsi Law:- As point out at the very outser, the only personal law which permits adoption under statutes in HAMA 1956, analysed above. There is no other law governing persons belonging to other religious or communities. The parsis , who are governed in their personal law by the PMDA,1936, and part III of the Indian Succession Act 1925, have no provision for adoption. There is, however, a customary form of adoption prevalent amongst the parsis, known as 'palak'. Under this custom, the widow of a childless parsi can adopt a child on the fourth day of her husband's death , simply for the purpose of performing certain annual religious ceremonies. This child acquires no property rights.[212]

4.8 Muslim Law

Amongst the Muslims, there is no specific law of adoption. The Muslim personal Law (Shariat) Application Act 1939, which regulates the Scope and jurisdiction of Islamic Law in India, Provides Two different lists of subjects- one specifying matters in regard to which all muslims of India will be governed by the law of Islam, any contrary custom notwithstanding.[213] And the other list referring to those subjects in regard to which a muslim can opt for the law of islam by means of a declaration, the declaration being binding on the maker's minor children and their subsequent descendants. Under this

[212] Family law Lectures Family Law-I , lexis Nexis,p 267

[213] Section 2 of shariat Act 1939

List, adoption is one of the three matters mentioned.[214] There is however, no statute to which a muslim seeking adoption may resort to though he may adopt if he can prove the existence of a custom permitting adption.[215]

4.9 Christian law

As regards the Christians and their right to adoption, the Christian marriage Act 1872, the Indian Divorce Act 1869 (as amended in 2001) and the Indian Succession Act 1925, Which deal with Christian family law, make no mention of adoption. If a custom can be proved ,however, there should be no bar to adoption. In context, Philips Alfred Malvin v. VJ Gonsalves,[216] however, is a queer judgment, where, in spite of absence of any Law or alleged existence of any custom enabling Christians to adopt a child, the court legally recognized the validity of an 'adoption'. In this case, a couple 'adopted' a child with the help of the Church. The 'Adopted' child filed a suit for partition and his share in the property left by the deceased, who died intestate. It was alleged that the petitioner was adopted by the deceased and brought up as his son. The petition was resisted by the natural born children of the deceased, on the ground that there could be no adoption under the Christian law, and that the petitioner had no right to claim the property of their father. The issues before the court were; whether there could be an adoption under the Christian Law, and if so , what are the rights of the child over the property of the deceased? It is interesting to note that the court upheld the adoption. It held that the Christian Law recognizes adoption, and the adopted child has the same rights as a natural born child. The Petitioner was thus held to be entitled to the property of the deceased adoptive parents. According to the Court, the right to adopt is inherent in the right to life guaranteed under Art.21. it remarked:

The Right of a couple to adopt a son is a constitutional right guaranteed under Art.21. the right to Life includes those things, which make life meaningful. The Hindus Law, Mohammedan Law and Canon Law recognize adoption. And further. Simply because there is no separate statute providing for adoption, it cannot be said that the adoption

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[215] Family Law Lectures, kusum ,lexis nexis p.267to 268
[216] AIR 1999 ker 187.

made by the Correa couple is invalid. Since the adopted son gets all the rights of a natural born child, he is entitled to inherit the assets of George Correa Couple.[217]

[217] Family Law Lectures, lexis nexis p 268 to 269

Chapter –5

Need of Uniform Civil Code

5.1 Introduction

We want UCC from the Last so many years. India is secular country or no religion of the state but in few areas we were not secular. So we need a UCC, because our society is disintegrate soc in the name of religions, sects and gender. India is Democratic country its Aim at Bringing Equilty among all the citizens irrespective of Religion ,Race , Caste, creed, Place of Birth. The penal statute & Procedural Law are Already Secular Statutes in india like Indian Penal Code, Criminal Procedural Code. But diffrenet Citation lies only in Civil matter like, Divorce, maintance , Adoption,Marriage, Inherentance. This is the reason Behind demand for Uniform Civil Code in Order to Avoid Social Choas. Muslim was originated by the Quranic principle;but in other Religion law passed by Legislation. "There are other sets of laws to deal with criminal and civil cases, such as the Criminal Procedure Code, 1973and the Indian Penal Code, 1862 The multifarious castes and creeds and their sets of beliefs or practices are bewilderingly confusing and nowhere is a scenario like in India, of various personal laws jostling together is allowed".[218]

The main purpose for a uniform civil code basically means unifying all these personal laws toin order to have one set of secular laws dealing with these aspects that will apply to all citizens of India without any regard to the community they belong to. India has set before itself the ideal of a secular society and in that context achievement of a uniform civil code becomes more desirable. Such a code will do away with diversity in matrimonial laws, simplify the Indian legal system and make Indian society more homogeneous. It will de-link law from religion which is a very desirable objective to achieve in a secular and socialist pattern of society. It will create a national identity and will help in containing fissiparous tendencies in the country .The uniform civil code will contain uniform provisions applicable to everyone and based on social justice and gender equality in family matters.

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[218] Available at http://www.ijesls.com/Need%20for%20Uniform%20Civil%20Code-%20Milind%20Gaur.pdf, (last visited on 7-3- 2017

Personal Law makes a distinction and differentiation between man and women where constitution tries to make equality. "equality of status, and is against the spirit of natural integration". The Committee recommended expeditious implementation of the constitutional directive in Article 44 by adopting a Uniform Civil Code. [219]

Goa has shown the way and there is absolutely no reason for delay. A secular India needs a uniform civil code. To mark time is to march with the communalists.

5.2 CODIFICATION

The biggest and the most prominent obstacle in implementing the UCC, apart from obtaining a consensus, is the drafting. There is a lot of literature churned out on UCC but there is no model law drafted. General view of the people is that under the guise of UCC, the Hindu law will be imposed on all. And by far the possibility of UCC being only a repackaged Hindu law was ruled out by Mr. Atal Bihari Vajpayee(Prime Minister at that time) when he said that there will be a new code based on gender equality and comprising the best elements in all the personal laws. The UCC should carve a balance between protection of fundamental rights and religious dogmas of individuals. It should be a code, which is just and proper according to a man of ordinary prudence, without any bias with regards to religious or political considerations A Bill on voluntary Uniform Civil Code is almost ready for introduction in the session of Parliament. A voluntary uniform civil code is a contradiction in terms. The moment it is made optional it ceased to be uniform. Any attempt to make the code voluntary or optional must be opposed. Instead of framing such optional civil code, the government would do well to take immediate steps to codify each set of personal laws incorporating therein the requisite reforms making them uniformly applicable to all the members of the concerned community. There is a great possibility of the UCC being abused, but this should not

[219] Report of the Committee on the status of Women in India(New Delhi: Government of India, Ministry of Social and Educational Welfare, Department of Social Welfare, 1974) Towards equality .

eschew the Parliament from enacting the UCC; the social welfare and benefits resulting from the implementation of UCC are far greater.[220]

Uniform Civil Code, a proposal to replace the personal laws based on customs of each major religious community with a common set of laws that would cover every citizen in India in its ambit, is the need of hour.

Here are some facts to put things in perspective and some examples of people who have faced the brunt of discriminatory personal laws.

1. <u>Child Marriage</u>

Statistics:

- 30.2% of all married women, or 10.3 crore girls, were married before they had turned 18 - Census 2011
- Nearly 12 million Indian children were married before the age of 10 years, 84% of them Hindu and 11% Muslim – India Spend analysis of Census 2011
- 51.2% women in Rajasthan, aged between 20-25, were married off before the age of 18 - Annual Health Survey (2012-13)

It is known and stated several times that early marriage is the cause for poor maternal health and higher infant mortality rates apart from the reason behind low level of education.

National Family Health Survey (NFHS 3) has showed that 16% or one in six girls in the age group of 15-19 had started bearing children.

Even as judiciary has set 18 as minimum age for a girl to marry in India, the Muslim Personal Law states that a girl is "competent" to get married if she attains puberty or completes the age of 15 years.

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[220] Article on Codification on UCC , Available at: http://www.ijesls.com/Need%20for%20Uniform%20Civil%20Code-%20Milind%20Gaur.pdf , last visited on 11th march, 2017.

In various communities, where joint family culture still exists, all the girl children are married at once to save on money. An example of this is Bhauri.

Case: Presently 25, she was married at the age of seven. In an interview to a national daily, she said that her uncle had five daughters who were getting married, so her father got her married off on the same day. Two of her younger sisters also got married on that day, the youngest being two months old.[221]

2. <u>Polygamy</u>

Polygamy, the practice of having more than one wife, is another problem that Uniform Civil Code will address. According to conditional polygamy provision, Muslim men are allowed to have more than one wife. In some section of Hindus, usually in rural areas, Polygamy is accepted, often with approval by earlier wives.

In Mizoram, a Christian religious section, called the "Pu Chana páwl" or just "Chana", practices polygamy. The founder Ziona, 66-year-old man has 39 wives, 94 children and 33 grandchildren, everyone living under one roof.

It is to be noted that Polyandry has been traditionally permitted in a few Hindu tribes.

In 2014, Bharatiya Muslim Mahila Andolan made fresh efforts by drafting a law that seeks a ban on polygamy. Aimed at further codifying Islamic legal provisions regarding marriage, it will make all polygamous marriages illegal.

BMMA co-founder Zakia Soman insisted that it would allow those fighting for gender justice to have the support of the law.

Statistics:

- Latest census data showed that there are about 6.6 million more women who are "currently married" than men. The data indicated that there are a very large number of women in polygamous marriages.

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[221] Adrija Roychowdhury, Rajasthan hasn't grown out of child marriage traditions: Why has law enforcement failed? ,The Indian Express , New Delhi Updated: September 22, 2016 .

- The 2005-06 National Family Health Survey (NFHS-3) found that 2% women reported that their husband had other wives besides herself. Husbands of women with no children are more likely to have multiple wives.

Case: Zafar Abbas Merchant's wife Sajedabanu had returned to her parental home in 2001 following marital discord. In 2003, Merchant remarried without her consent. A year later, Sajedabanu filed a police complaint accusing Merchant of bigamy.

After being booked for offence of bigamy, under section 494 of the IPC, Merchant moved to Gujarat High Court in 2010. He claimed that his second marriage is not bigamous as Muslim personal laws permit a man to marry four times.

While stating that men marrying more than one women are doing it for a selfish reason, the court gave a verdict in favour of Jafar, as being a Muslim, he is governed by the Muslim Personal Law, which allows him to have more than one wife, and not under the IPC.

However, the High Court put the onus on the government to do the needful with regards to the uniform civil code.[222]

3. <u>Divorce</u>

Hindu personal law sanctions divorce on the ground that they have been living separately for a period of one year or more. Christian personal law says the time period for filing a petition for the divorce has to be after 2 years or more. Muslim personal law allows a man to divorce his wife after saying ‘talaq’ thrice.

Triple Talaq has been criticised severely in the recent times. It has been criticised by the Centre as well as the Supreme Court.

Cases: There have been several cases of women being divorced over phone, WhatsApp, post, etc due to ‘Triple Talaq’ provision.

- Afreen Rehman, 25, was divorced through 'Speed Post'.[223]

[222] Article on polygamy , available at : http://timesofindia.indiatimes.com/india/Muslim-woman-goes-to-court-against-bigamy/articleshow/48907052.cms, last visited on 20 march 2017.

4. Inheritance

An amendment to the Hindu Succession Act now gives daughters rights to ancestral wealth equal to that of the son. According to Muslim personal law, "daughters share is equal to one-half of the son's, keeping in mind that a woman is worth half a man.[224]"

5. Separation

Personal laws also make it difficult for couple to apply for divorce due to different marriage laws/act.

The Bombay High Court in 2013 held that a Hindu married to a non-Hindu in accordance with Hindu rituals cannot seek divorce under the Hindu Marriage Act.

Case: When Niranjani Roshan Rao, a Hindu, approached Bombay High Court seeking divorce from her husband Roshan Pinto, the court rejected her petition on the ground that he was a Christian at the time of marriage and was professing the same religion till today.[225]

So, it can be inferred from the above judgments that the Hon'ble Supreme Court has reiterated about the need of Uniform Civil Code again and again and has settled the controversies and ambiguities which have arisen due to the apparent conflicts in the personal laws. If the Uniform Civil Code would have been implemented for whole of the country then such kind of controversial issues would have been resolved by the statutory enactments only. India is a country of Unity in Diversity having Multi religions and cultures. So, civil matters of the citizens should be taken in the same clutches of law

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[223] Avernita mathur, Jaipur woman divorced via speed post, moves Supreme Court, India Today , http://indiatoday.intoday.in/story/jaipur-woman-divorced-via-speed-post-moves-supreme-court/1/671184.html last visited on 25 march 2017.

[224] Section 4, Section 6, Section 23, Section 24 and Section 30 of the Hindu Succession Act, 1956.

[225] NIRANJANI ROSHAN RAO V/S ROSHAN MARK PINTO, decided on Tuesday, December 24, 2013. In the High Court of Bombay, Family Court Appeal No. 124 of 2013. 24/12/2013

only then the prime constitutional goal of fraternity can be materialized in the real sense otherwise these divisive forces would continue to violate the constitutional spirit. So, in this sense uniform civil code is the need of the hour. A strong political will is required for the same along with the feeling of religions tolerance and mutual respect on part of each and every citizen of India.

CHAPTER 6

ROLE OF JUDICAIRY ON UCC

In this chapter the Researcher would try to explain that how the judiciary would take initiate for applied the UCC in india.

In india the constitutional law is Supreme Law of the Land. Where as Art.44 of the constitution explain that the state has an obligations to secure the all citizens. Where as india has different Religion and Personal Laws there is no similar Personal Law for all Religions.

6.1 Landmark Judgments of Supreme Court

The Supreme Court of India for the first time directed the Indian Parliament to frame a Uniform Civil Code in 1985 in the case of ***Mohammad Ahmed Khan* v. *Shah Bano Begum***.[226] In this case a penurious Muslim woman claimed maintenance from her husband under Section 125 of the Code of Criminal Procedure after her husband

[226] AIR 1985 SC 945

pronounced triple Talaq (divorce by announcing the word "Talaq" thrice). The Apex Court held that the Muslim woman had a right to get maintenance under Section 125 of the Code and also held that Article 44 of the Constitution had remained a dead letter. To undo the above decision, the Muslim Women (Right to Protection on Divorce) Act, 1986 which curtailed the right of a Muslim Woman for maintenance under Section 125 of the Court was enacted by the Indian Parliament. Thereafter, in the case of Sarla Mudgal Vs. Union of India[227], the question which was raised was whether a Hindu husband married under Hindu law can, by embracing Islamic religion, solemnize a second marriage. The Supreme Court held that a Hindu marriage solemnized under Hindu Law can only be dissolved under the Hindu Marriage Act and conversion to Islam and marrying again would not by itself dissolve the Hindu marriage. Further, it was held that a second marriage solemnized after converting to Islam would be an offence of bigamy under Section 494 of the Indian Penal Code. In this context, the views of Mr. Justice Kuldip Singh are pertinent: "Where more than 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the „Uniform Civil Code" for all the citizens in the territory of India."

Thus, the Supreme Court reiterated the need for Parliament to frame a common civil code which will help the cause of national integration by removing contradictions based on ideologies. The Directive Principle of enacting a uniform civil code has been urged by the Apex Court repeatedly in a number of decisions as a matter of urgency. Unfortunately, in a subsequent decision reported as ***Lily Thomas* v. *Union of India***,[228] the Apex Court, dealing with the validity of a second marriage contracted by a Hindu husband after his conversion to Islam, clarified that the court had not issued any directions for the codification of a common civil code and that the judges constituting the different benches had only expressed their views in the facts and the circumstances of those cases. Even the lack of will to do so by the Indian government can be deciphered from the recent stand stated in the Indian press. It has been reported in the Asian Age, "that the Indian government does not intend to bring legislation to ensure a

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[227] AIR 1995 SC 1531

[228] 2000 (6) SCC 224

uniform civil code because it does not want to initiate changes in the personal laws of minority communities."[229] However, this ought not to deter the efforts of the Supreme Court of India in issuing mandatory directions to the central government to bring a common civil code applicable to all communities irrespectiveof their religion and practices in a secular India. Hopefully, the Apex Court may review its findings in some other case and issue mandatory directions to the central government to bring a common civil code applicable to all communities irrespective sof their religion.

In **S.R Bommai v Union of India[230]**, it was opined by Justice Reddy as religion was a matter of faith and cannot be mixed with secular activities. The State may regulate secular activities by the enactment of laws. A uniform code has been wrongly thought to be an assault on religion. What it essentially aims at is secular reform of property relations in respect of which all religious traditions have grossly discriminated against women. A uniform civil code is, therefore, foremost a matter of gender justice. But male superiority and greed have joined with religious conservatism to forge an unholy alliance to perpetuate a major source of gender discrimination thereby impeding the modernisation of social relations and national integration.[231] A uniform civil code will focus on rights, leaving the rituals embodied in personal law intact within the bounds of constitutional propriety. A uniform civil code should not be constructed, as sometimes suggested, by putting together the best elements from various existing personal codes.

In **Daniel Latifi & other Vs. Union of India[232]**, when validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 was questioned. It was held that clause (1-a) of section 3 does not limit the duty of the husband to pay maintenance only for the period of iddat rather the duty is to make the necessary arrangements within the iddat period but the arrangements has to be made for the entire life of the wife until she gets remarried. It was also observed that clause (I-a) requires the husband to make necessary provisions for the wife which means provisions like her shelter and the similar means whereas it also requires the payment of maintenance which implies payment of Money. In this Case it was also emphasized that the Act of 1986 is only available to the divorced

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[229] August 5, 2006, by the Press Trust of India (the Official Government News Agency)
[230] 1994 (3) SCC1
[231] Available at www.lawctopus.com/academike/uniform-civil-code-gender-justice/ (Last accessed on: 13 -2-2017)
[232] 2001 (7) SCC 741

woman and therefore a woman who is still having a subsisting marriage cannot file an application under the Act. She has to file it either under the personal law or the Cr.P.C. Therefore the need for Uniform Civil Code was becoming very much necessary to bring everyone under the same code.

The situation regarding the personal laws for Christians in India was different. In their case, the courts seemed to be bolder and took a progressive stand in terms of gender equality. For example, in 1989, in ***Swapana Ghosh v. Sadananda Ghosh,***[233] the Calcutta High Court expressed the view that sections 10 and 17 of the Indian Divorce Act, 1869, should be declared unconstitutional but nothing happened till 1995. In 1995, the Kerela High Court in ***Ammini E.J*. v. *Union of India*,**[234]and Bombay High Court in ***Pragati Verghese* v. *Cyrill George Verghese*,**[235] struck down section 10 of Indian Divorce Act, 1869 as being violative of gender equality. In September 2001, a poor Muslim woman, Julekhabhai, sought changes in the divorce provisions in Muslim law as well as that polygamy be declared illegal. The Supreme Court asked her to approach Parliament, refusing to entertain the petition.

Julekhabhai had sought equality with Muslim men, requesting court to declare that "dissolution of marriage under Muslim Marriage Act, 1939, can be invoked equally by either spouse". It also requested the court to strike down provisions relating to "talaq, ila, zihar, lian, khula etc", which allowed extra-judicial divorce in Muslim personal law. [236]

Mohammed Abdul Rahim Quraishi, Secretary, All India Muslim Personal Law Board, says: "It is also to be seen that the subjects of marriage and divorce, infants and minors, wills, intestacy and succession, partition etc, are enumerated in the concurrent list of 7th Schedule of the Constitution. These are subjects on which both the central and state governments have the power to make laws. As a result, we find many regional variations affected by the state legislatures in the Hindu Laws.[237] The State should come out with

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[233] AIR 1989 Cal. 1.
[234] AIR 1995 Ker 252
[235] AIR 1997 Bom 349
[236] Nilanjana Bhaduri Jha, "*Does India really need a Uniform Civil Code?*" from website of Times of India, visited on 3-4-2010
[237] Supra note 282

specified steps to endeavor to secure the citizens a Uniform civil Code through out the country.

The Supreme Court ruled in ***Seema* v. *Ashwani Kumar***,[238] that all marriages irrespective of their religion be compulsorily registered. The Court felt that, "this ruling was necessary by the need of the time as certain unscrupulous husbands deny marriage, leaving their spouses in the lurch, be it for seeking maintenance, custody of children or inheritance of property." The Supreme Court order is a first step towards the Uniform Civil Code.[239] The Supreme Court ruled that all the marriages irrespective of their religion, be compulsory registered. Justice Pasayat, writing the judgment for the bench in a matter that was on offshoot of a matrimonial case, directed the Government to provide for "consequences of non-registration of marriages" in the rules, which should be formalized after inviting public response and considering them. The Law Commission of India recommended in 2008: "It is high time we took a second look at the entire gamut of Central and State laws on registration of marriages and divorces to assess if a uniform regime of marriage and divorce registration laws is feasible in the country at this stage of social development and, if not, what necessary legal reforms may be introduced for streamlining and improving upon the present system.[240]

In ***case Saumya Ann Thomas vs The Union Of India***[241] We do first of all look at Art.44 of the Constitution which enjoins that the State must endeavour to secure for all its citizens a uniform civil code through out the territory of India. The preamble of the Constitution declares and stipulates that the Union of India shall be a sovereign, secular, socialist, democratic republic. The core values of the constitution are declared. Secularism without any dispute is one of the basic features of the Indian Constitution. The State cannot be secular until the polity also becomes secular. Constitutional secularism is not denying religion as such. The core of Constitutional secularism is the realistic understanding and acceptance that the religions shall not transgress into domains and areas where religion is and ought to be irrelevant.

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[238] (2005) 2 SCC 578
[239] Dhanajay Mahapatra, "*All marriages must be registered*" The Times of India, 15 Feb. 2006
[240] 211th Report of the Law Commission of India which was forwarded on 17 October, 2008
[241] 2010 (1) KLT 869; ILR 2010 (1) /kerala 805

Art.44 of the Constitution mandates that there must be a uniform civil code in India. All Indians ideally will have to come under the umbrella of a uniform civil code which will contribute to the creation of national identity and character. Persons who have imbibed the core constitutional value of secularism and the constitutional dream of the polity having a uniform Indian civil laws are members of the classified group to whom this law is expected to cater. Sec.28 of the Special Marriage Act, Sec.13B of the Hindu Marriage Act, Sec.32B of the Parsi Marriage and Sec.10A of the Divorce Act are all attempts of the legislature to make the law of divorce by mutual consent applicable to this broad classification/group of individuals.

The law classifies them into one group and makes the benefit of the concept of divorce by mutual consent, unknown to their respective traditional personal law, available to them. Due to pressure of obscurantist religious groups this could not evidently be introduced simultaneously by Parliament by enacting a law applicable to all in the group. Progressively one by one the benefit has been extended to the followers of all religions. When the legislature has perceived that the time is ripe to extend the benefit of the concept to a particular community, to further discriminate them on the basis of their religion is certainly anathema to law. It offends the principle of equality. The stipulation of the longer period of mandatory separate residence, the differential, has no rational relationship to the object sought to be achieved. In short, we agree that classifying persons into one group to extend the benefit of the secular concept of divorce by mutual consent to them by progressive amendment of the personal law though in stages and later discriminating among them on the basis of religion by prescription of a longer period of mandatory minimum separate residence clearly offends the mandate of equality under Art.14 of the Constitution. We take the view that such prescription offends Art.14 and must hence be held to be unconstitutional.

A THREE-judge bench decision of the Supreme Court in **John Vallamattom and Anr. v. Union of India**[242],x was delivered on July 21, 2003. It hit the headlines of the national press, saying "Supreme Court calls for Uniform Civil Code. This instantly evoked a lively debate in the country on the issue of uniform civil code as envisaged under article 44 of the Constitution, which directs the state that it shall "endeavour to secure for the citizens a uniform civil code throughout the territory of India.11 If we decipher the pattern of debate that is taking place in the country through seminars and symposia, discussion groups and special interviews as reflected both in the print and electronic media, it tends to betray the position that is more loaded with emotions than reason. It serves to say that, although to go in for a uniform civil code is a constitutional obligation, nevertheless, its enactment would be counter-productive: it may lead to disintegration of our social fabric, inasmuch as there are religious communities which apprehend that such a code will endanger their distinctiveness and thereby their identity. This line of thinking is reinforced by saying that the Supreme Court's opinion in John Vallamattom "is more in the nature of an advice than a command.[243] It is "at best obiter dicta;" that is, "an opinion entirely unnecessary for the decision of the case."4 "[0]nly the Chief Justice, Mr. Justice V.N. Khare, chose to make a comment on the desirability of a uniform civil code while S.B. Sinha and A.R. Lakshmanan, JJ., who heard the case preferred to keep silent."[244] "The Supreme Court's recommendation is not binding on Parliament. "Given the great diversity of practices governing marriage, divorce, succession, etc., it is difficult to draft a uniform code. In this article, through a juridical analysis of John Vallamattom, the author wishes to examine how and in what manner the Supreme Court has responded to the constitutional directive contained in article 44 of the Constitution in the light of the fact situation presented before it, and what is the value of this response

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[242] Virendra Kumar,UNIFORM CIVIL CODE REVISITED: A JURIDICAL ANALYSIS OF JOHN VALLAMATTOM, JOURNAL OF THE INDIAN LAW INSTITUTE ,VOLLVII; 45 ,JULY-DECEMBER 2003.

[243] Leading Editorial " Advice not Command" The Tribune, july 25,2003

jurisprudentially in the administration of justice. Keeping in view the pattern of debate, the central issue that needs to be addressed is: 'How come the Supreme Court hit upon the issue of uniform civil code? Was this an issue to be decided as such before the court? A bare reading of John Vallamattom reveals that no reference whatsoever is made to article 44 of the Constitution either by the petitioners or by the respondent (Union of India), It is also factually true that only one of the three judges constituting the bench, namely V.N. Khare, CJI, has made a reference to uniform civil code, and that too almost at the conclusion of his opinion:[245]

If UCC is Made, it will seve the cause of nation by bringing about integration, unity by eliminating the conflicts based on religious ideologies. This single reference has given rise to the impression that this view is the view only of one of the judges constituting the bench. Since the other two judges who also heard the case 'preferred to keep silent', the value of the observations made by one judge seems to pale into insignificance. This in the author's view is an erroneous impression, because, at least in so far as reference to article 44 of the Constitution is concerned, the other two judges concur completely with whatever is stated by Khare, CJI, in his leading judgment. Sinha, J., for instance, at the very outset of his judgment states that he would like to add only a few words while "agreeing with the opinion of My Lord, the Chief Justice of India." Likewise, Lakshmanan, J., adds unreservedly: WT have the benefit of going'through the detailed and elaborate judgment prepared by My Lord the Hon'ble Chief Justice of India," and that "I am respectfully in agreement with the same." All this goes to show that the observations made by the chief justice with regard to the desirability of having a uniform civil code are the observations of the three judges together deciding the case, and not just of one single judge. The other reservations about the status of the observations in relation to uniform civil code, whether these are merely obiter or hold some potential value for others, including the

[245] 2003(5) SCALE 384 ,V.N Khare, CJI, S.B Sinha and A.R Lakshaman, J.J

executive, legislature and judiciary, are taken up during the course of considering the central issue.

In John Vallamattom, in a petition under article 32 of the Constitution, the SC was only focuse on the validity of the provisions of section 118 of the ISA, 1925 which deals with bequest to religious or charitable purposes. The Act of 1925 confers of testamentary disposition of property to person without any discriminationon the basis of caste , creed ,color,sex creed more of birth place. Section 59 of the ISA,1925 enact that a major person of sound mind can alienate his propert by way of testatmantary instrument . The execution of underprivileged wills is protected under section 63 clearly explain that the testamantory instrument shall be signed by the Person who makes the will and attested by two or more witnesses, each witness should have seen the person who makes the will and his sign or affix his thumb impression to the will. If the making of a will is made by fraud or coercion or by such opportunity, which takes away the free agency of the testator, the same shall be void under section 51 of the Act.

However, despite this all round equality stance, section 118, falling in part VI of the Act of 1925 regulating testamentary succession, deals with transfer to pious or welfare purposes at variance. No man having a brothers son or daughter any close relative shall have power to transfer any property to pious or welfare uses; except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the testamentary instrument of living persons.

These provisions, by the section 58 of the Act of 1925, specifically exclude the succession by will to the property of any Mohammedan, Hindu, Buddhists, Sikh or Jain. The effect of the provision of section 118 read with section 58 is that it singularly applies only to Christians. This means that a Christian, having a brothers son or daughter nephew or any close relative cannot Alienate his property for Pious or welfare purpose unless: (a) the will was not Executed not less than one year before the,death of testator; (b) it is submitted

within six months from its execution in some place provided by law; and (c) it remains in such submitted till the death of the Person who Makes a will. Most brazenly, these provisions discriminate against the members of the Christian community in India vis-a-vis non-Christians, inasmuch as unlike the Hindus, Muslims, Buddhists, Jains or Sikhs, or even Parsis, the Christians are practically prevented from bequeathing their estate for pious or welfare purposes unless a new will is executed on the expiry of one year, if the person who makes a testamantory instrument should not suffer from the misfortune of death within the said statutory period. The discriminatory treatment becomes pointed and sharp even more when it is realized that "welfare and kindness are preached by every religion sect . If so, why should the Christians be treated differently from non-Christians? To make out discrimination gross or self-evident, Lakshmanan, J., cites the privileged positions of Muslims and Hindus: There is no Prohobition on Mohammedan on transfer the property for pious or social welfare purposes. A Mohammedan can validly transfer one-third of his net assets, when there are testator. only restriction as regards the legator is that he should not be a minor. As regards the heir at law, it is stated that if the legatee causes the death of the legator, the Will becomes void and ineffective. Under Mohammedan Law, testamentary instrument can be according to Law made in favour of an Legettee belonging to any Religious faith. As regards the subject matter, any property can form the subject of a testamantory instrument, and both physical and Benefits can be transfered.

In Hinduism constructing a temple is considere as religious obligation. Under section 118 of the Act of 1925, Christians are discriminated against not only vis-a-vis non-Christians, but also in relation to other fellow Christians. For example, the impugned provision dimake distiction against a Christian who has a brothers son or daughter or nearer relative vis-a-vis a Christian who has no such relative. Khare, CJI, feels surprised and says that it is difficult to appreciate as to why a testator would, although be entitled to transfer his property by way of social welfare and pious Alienation. if he has a wife, but he would be prohibits from

doing so in the event he has a brothers so or daughter. "It is really baffling," Khare, CJI adds, "that no protection has been given to the near relatives [like wife] against *Moti' s Causa* gifts for non-religious or welfare purposes. This means, in terms of protection-provision of section 118, the interest of testator's wife is subordinated to his nephew or niece. Likewise, the stipulation in section 118 that a t who makes the will lives beyond the statutory period of one year is not able to execute his wishes in relation to his property unless he makes a new will is patently "unreasonable and arbitrary.

There is no reason behind ristricting the survival of the person who made a testamantry instrumet for a period of one year, and a testator who does not survive beyond the same period, in declaring the will of the former as void and that of the latter as valid. Besides, "the period or duration of life of a testator has no relation with the purpose of testamentary instrument, there appears to be no reason behind fixing one year. Moreover, testators constitute "a homogeneous class and they cannot be divided arbitrarily on the basis of duration of their survival which is unrelated to the purpose of execution of a Testamentory instrument". The period of twelve months has no nexus to performing a philanthropic act. The Supreme Court also examined the provision of section 118 in terms of the underlying objective at the time of its enactment way back in 1925. The court specifically directed its attention to find out the very purpose of imposing limitations exclusively on Indian Christians and not on persons belonging to other religious communities.[246]

[246] Supra note. 242

Chapter-7

Conclusion and Suggetions

7.1 Conclusion

The Uniform Civil Code in India envisages equality among men and women irrespective of the religion they are practicing. However, any attempt for immediate enactment of Uniform Civil Code in India, without proper deliberation, could develop a state of religious ferment.

It is reality that only those laws can survive which have support of the people.

In post independent India, the legislature has enacted several personal laws viz., Hindu Marriage Act, 1955, Special Marriage Act 1954, The Hindu Minority and Gaurdianship Act, 1956, The Hindu Succession Act, 1956, The Hindu Adoptions and Maintenance Act, 1956, The Dowry Prohibition Act, 1961, the Family Courts Act, 1984, The Foreign Marriage Act, 1969, The Maternity Benefits Act, 1961, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and Administrators-General Act, 1963. These laws have been instrumental in reforming the religious institutions and imposing injunctions within the periphery of respective religion, not to mess up them together. On other side, they touched only those personal religious customary ,practices which had become obsolete. For example, in Hindus bigamy was not restricted, but had become obsolete,

thus has been nullified through law. Further, different Hindu religious customary laws relating to marriage, adoption, maintenance, inheritance and succession spread over, among followers of Mitakshara and Dayabhaga, prominently, have been unified through codifications strictly within the periphery of Hindu religious norms with the liberty to the Hindus to observe their customary practices wherever they are strictly adhered with.Similarthinghappened with the Muslim religion putti injunction relating to right to maintenance of Muslim women after period of Iddat through the Muslim Women (Protection of Rights on Divorce) Act, 1986 and expanded by Supreme Court of India declaring secular to section 125 of the Criminal Procedure Code 1973.16

At several occasions, Supreme Court of India had opined for the Uniform Civil Code in India but had always refrained from doing so and went for piecemeal reforms through its judgments.

It is notable that whenever the court has deliver obiter for the enactment of uniform civil code in India, only religious injunctions viz., maintenance, inheritance and succession have been in its centre. The court has never delivered any obiter for the unification of personal civil laws relating to the religious institutions. Moreover, whenever the courts have passed obiter for enactment of uniform civil code in India, it has never suggested for unification of personal civil laws or imposition of personal civil laws of one religion over other (s) rather it has always opined for personal civil laws, progressive in nature, to avail equal rights and obligations to men and women to cherish the welfare State. Though emphasizing upon the enactment of uniform civil code in India, however, the courts have taken note of codified Hindu Laws but it has been misunderstood among the academics, scholars and the political arena as the court is suggesting to impose Hindu Laws upon other (s) personal laws, which is not correct. What the courts have suggested was not imposition of Hindu Laws upon other (s) personal laws but these were mere illustrations for comparison among different personal laws.

The term ‘uniform civil code’ sounds as imposition of personal laws of one religion, particularly Hindu Personal Laws, over other (s) personal laws to the academics,

scholars and politicians. This misleading sound has outraged religious sentiments of fundamentalists. It is suggested that the uniform civil code in India will lead equality, fraternity and harmony among the people. It is again incorrect and misleading. No one could support that the religious practice of Saptpadi in Hindus and Nikah in Muslims, two different religious rituals, is the reason for disturbing harmony, equality and fraternity among the people; or any other religious rituals and institutions are responsible for such disturbances. It is also suggested that uniform civil code in India will provide a platform for the development of religious followers, if it is so then why it has not happened among Hindus, it is again incorrect and misleading. Still more than thirty percent Hindus in India are condemned to live in misery. As this term is appearing misleading to the minorities in India and appears to force them to give up their religious rituals and injunctions, it would create absurdity instead of maintaining harmony, equality and fraternity among the people in India. Though the Hindu personal Laws have been codified but the Hindu religious institutions, rituals and injunctions-in-modified forms have been kept intact, so as in other religions through their personal laws. It seems that a Uniform Civil Code in India will either impose the Personal laws of one over other (s) or develop a new Civil Code to nullify all Personal Law (s). In both the situations it would be difficult to have religious stamp to adopt it heartedly. By and large, it would also be absurd to the courts to decide the matters relating to different religious institutions and injunctions; so that it may be easily acceptable by all. Constitutionally, it would stand against freedom of religion unless a consensus is developing for it amongst the people that the matters falling thereunder are secular and no longer integral to the religion. Second hypothesis of the article that the codification of uniform civil code in India is very difficult without having confidence of the people, is true; otherwise why the Constituent Assembly could has left the issue of Uniform Civil Code in India as one of the directive principals of the State policy. There were heavy roar not to enact it. Reasons were placed that it would be play with the religious institutions and injunctions, it would put an end to the religious identity and it would go against the freedoms for which they fought against the Britishers. They left it under Part IV of the Constitution of India as one of the non justiciable rights. Now days, Indian politics have been flooded with the appeasement of minorities, hence none of the

government could dare to enact it. History of sixty five years of Indian Republic is sufficient to support my argument. Further, if the present Union Government is enacting it at one go it would lead apathy among the followers of the suffered religion.

All religious injunctions should be tested, first and foremost, at the touchstone of the Constitutional mandate not on any personal laws, and accordingly reforms therein should be done. It won't lead any religious apathy or outrage. It would be also easy to be accepted by all religious followers. But this reform should be done within their religious periphery only and shouldn't be messed up with other religion(s). Here, those religious injunctions should be taken at task which have become obsolete or lost their effect among the respective followers. Adoption in Muslims, for example, was not permissible, but now under Juvenile Justice Act, 2000 (Amendment Act 2006) a Muslim can adopt a child.19 In Shah Bano20, when Supreme Court of India has declared section 125 of Criminal Procedure Code, 1973 secular and allowed to Muslim women right to get maintenance even after period of Iddat, it had been opposed by few Muslim leader only, but latter on decision of the court on the same issue in Lilly Thomas case21 has not been attacked rather has been accepted by the Muslims. Thereafter, our legislature should go for reform in the religious institutions but not in rituals by any way. As the legislature has done reform in the Hindu religious institutions such as in the matters of bigamy, sapinda and prohibited relationships, child
marriages and widow remarriages etc., in the same way it can be done in the religious institutions of the minorities. In Muslim, for example, maximum four married wives are permissible to men at a time, but in reality it is very hard to find a Muslim man who has more than one wife at a time. Muta marriage is permissible only amongst the Ithan Asariya Shiyas', but in practise they are refraining from performing the Muta marriages. These can be curbed through legislation since it won't create any religious ferment. There remains only arbitrary power of the Muslim male to pronounce Talaq, which Muslim female does not have at all with the same degree. Basically, Muslims are prominently concerned with this religious right. But if they are being convinced with the fact in the present progressive world there won't be justice unless women are not being given equal sense of matrimonial security, there is possibility that they may come along

this reforms also. Putting the justifications for uniform civil code in India that it will help in the progress of the Muslims and will bring peace, harmony, equality and fraternity among the people of all religions, will not solve the issue at task rather would disrupt it, since researches are showing that all religions are teaching for equality, liberty, fraternity and harmony. Further, the point of progress and development of particular religious community through uniform civil code in India will hold no water and would be frustrated by the illustration that if it is so then why approximately thirty percent Hindus are condemned to live in a miserable status, major portion of Hindu women are still waiving their rights, Hindu women are being killed for dowry and female foeticides are being practised in Hindus. In other words the uniform civil code in India has nothing to do with religious harmony, fraternity or development. If it can do something then that is bringing equality amongst the men and women. But achievement of this end through uniform civil code in India seems to be obstructed by the religious ferments on account of several grounds as mentioned above.

7.2 Suggestions

In my opinion, only Indian Civil Code can be helpful to freed the followers of uncodified civil laws in India from their religious Abbots, who are arbitrarily imposing their whims in the name of the interpretation of the personal civil laws. Herein, none of the personal civil laws should be compared with others; rather should be tested at the Indian Constitutional mandate of liberty, justice, equality and fraternity. Attempt should be done to dissect secular activities from the religious one. It is notable that many religious injunctions viz., maintenance, adoption, gift and inheritance have been already held secular one.

Thereafter, those secular activities should be codified in the light of the above mentioned Indian Constitutional mandates within the domain of their religion to avoid any status of ferment. In doing so we will find that very little portions of religious activities connected with the civil laws are left to be codified viz., marriages and divorce. About marriage and divorce only Muslim community is very much adhered with. It is remarkable that though in Muslim customary personal laws a Muslim male is

allowed to marry with four wives at a time but in practice it is very rare to find a Muslim male having more than one wife at a time.

In other religions in India, it is an offence of bigamy to solemnise afresh marriage while either spouse is alive. Reports are revealing that to avoid this legal sanction people from other religions are renouncing their religion and getting convert in the Islam. Muslims and Non-Muslims, all have feeling that this liberty of Islam is being misused. Thus, codification of marriage in Muslim declaring bigamy an offence would lead no religious aggravation. Unlike codified civil laws in India, the Muslim civil law avails uncontrolled power to the Muslim male to pronounce Talaq which is equally not available to a Muslim woman. This religious liberty hits the Constitution of India at several fronts viz., article 14 and 51 A (e). Article 14 guarantees the fundamental right to equality before law and equal protection of laws the people whereas Article 51 A (e) suggests renouncing the derogatory practices against the women as one of the fundamental duty.

At the touch stone of these Indian Constitutional Mandates, the issues of the divorce should be handled with. Piecemeal work can carried out to codify this issue too. This uncontrolled right of Muslim male to pronounce Talaq can be curbed down and some more rights can be given to the Muslim women too. After passes of ample of time we can go far the unification of civil laws through uniform civil code in India.

1. It encourage for true Secularism

In india we have no proper secularism. All the states are secular and no religion of the state. But in few areas we are not secular. UCC mean same law should be followed by the all citizens wheter they belong to any religion hindu, Christian, parsi, Muslim. UCC will not impose any kind of Restriction to the any citizen to follow or propogate there Religion . all the citizens they may belong to any Religion they may be Treated as Equal. That is true Secularism.

2. Every citizen of india should be Treated equal

At Present we have Different Personal Laws . which were based on the Religion where in india a muslim man can marry to the four wifes where Christian , hindu will be Punished same is with the divorce if a muslim Prnounce talaq tric but this rules was not

applied to hindu and Christians so there is no equality in Personal Laws . so the UCC is the way to ensure that all citizens should treated equally.

3. it removes the gender bias

If a UCC will enforced it will remove the gender bias. It will bring equality among all the Citizens. It will also Provide equal Rights to the women.

4. all the Developed countries has it

All the developed and Modern countries had the UCC. So our country should also need a one common Law. if UCC will enforced our country become developed like other developed countries.

5. there is ambiguity in Religion based Law's

In Religion based Law there were so many Ambiguites or Lacunas. Like our Society is dynamic mean society change with the Time. But still we follow the old Law's , our Personal Law's were also based on the old Law's for example child marriage , honor killing etc.so if the UCC will come it will change the all Personal Law which were based on the Old Principles.

6. UCC will Help to decrease the Vote Bank Political Parties

In todays time most of the controvercies were based on the Religion . Like at Present the issue of Triple Talaq, maintance of muslim women, UCC will decrease the controverses based on Personal Law which are intentional created by the Political Party in order to secure there vote bank.

7. UCC will bring Unity in India

A UCC will bring At Par People from different religious background's.

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