CONTENTION BETWEEN UNIFORM CIVIL CODE AND THE PRINCIPLE OF SECULARISM IN THE INDIAN CONSTITUTION

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ABSTRACT

The "question of what secularism means in the Indian context has long been a subject of academic inquiry. The answer, in its many avatars, often centres on distinguishing India's constitutional and political experience from that of other liberal, mostly Western, democracies. India's constitutional commitment to secularism is neither indifferent to nor impartial regarding religion; rather, it seeks to ensure that all religions are accorded equal treatment, while simultaneously subjugating religious freedom to the project of social reform. The need to study the secular ideal becomes all the more important considering the raging contemporary debate about the Uniform Civil Code. A uniform civil code administers the same set of secular civil laws to govern all people irrespective of their religion, caste and tribe. This supersedes the right of citizens to be governed under different personal laws based on their religion or caste or tribe. Such codes are in place in most modern nations. In this paper an attempt will be made to study how far considering the secular nature of our constitution, the idea of having an Uniform civil code is feasible. Paper will analyse how far the idea of Uniform Civil Code will be beneficial for the nation as a whole and what are the possible challenges also in implementing the same. Further, this paper will also take a look into by critically analysing the recent triple Talak judgement and other important judgement relevant to the issue of enforcing a Uniform Civil Code."

***Keywords*: Uniform Civil Code, Secularism, Diversity, Constitution, Judicial Approach.**

UNDERSTANDING UNIFORM CIVIL CODE UNDER INDIAN CONTEXT

India "is a secular state and nation, which means that it does not follow any religion for the country. In this paper mainly talks about the concept of the uniform civil code and its legal perspective. It commences with the introduction to the Uniform Civil Code in which it defines the concept of the Uniform civil code and also discusses about its origin. It refers to the common set of secular civil laws which will govern all citizens of India with no consideration of their Religion, Caste, language or Tribe. India has a common code for laws related to contract, transfer of property, penal laws and other civil laws which are independent of religion.[i] The further areas of laws which will be governed under it are the personal laws related to Adoption and Maintenance, Marriage, Divorce and Inheritance and acquisition and Administration of property. In Part IV of the constitution, article 44 of Directive Principle of State Policy (DPSP) Directs the state to make a Uniform Civil Code. In spite of the fact that these principles are non-enforceable yet are crucial in the administration of the nation. One, such principle given under Article 44 of the constitution which makes an Obligation on the State to establish Uniform Civil Code."

HISTORY OF UNIFORM CIVIL CODE

Article 44 of the, "Directive Principles in India sets its implementation as duty of the State. Apart from being an important issue regarding secularism in India, it became one of the most controversial topics in contemporary politics during the Shah Bano case in 1985. The debate then focused on the Muslim Personal Law, which is partially based on the Sharia law and remains unreformed since 1937, permitting unilateral divorce and polygamy in the country. The Bano case made it a politicized public issue focused on identity politics by means of attacking specific religious minorities versus protecting its cultural identity.[ii] Goa has a common family law, thus being the only Indian state to have a uniform civil code." The Special Marriage Act, 1954 "permits any citizen to have a civil marriage outside the realm of any specific religious personal law. Personal laws were first framed during the British Raj, mainly for Hindu and Muslim citizens".[iii] The British feared opposition from community leaders and refrained from further interfering within this domestic sphere. The demand for a uniform civil

code was first put forward by women activists in the beginning of the twentieth century, with the objective of women's rights, equality and secularism.

Till Independence in 1947, "a few law reforms were passed to improve the condition of women, especially Hindu widows. In 1956, the Indian Parliament passed Hindu Code Bill amidst significant opposition. Though a demand for a uniform civil code was made by Prime Minister Jawaharlal Nehru, his supporters and women activists, they had to finally accept the compromise of it being added to the Directive Principles because of heavy opposition. The debate for a uniform civil code dates back to the colonial period in India.[iv] The Lex Loci Report of October 1840 emphasised the importance and necessity of uniformity in codification of Indian law, relating to crimes, evidences and contract but it recommended that personal laws of Hindus and Muslims should be kept outside such codification." "According to their understanding of religious divisions in India, the British separated this sphere which would be governed by religious scriptures and customs of the various communities (Hindus, Muslims, Christians and later Parsis)".[v]These "laws were applied by the local courts or panchayats when dealing with regular cases involving civil disputes between people of the same religion; the State would only intervene in exceptional cases. Thus, the British let the Indian public have the benefit of self-government in their own domestic matters with the Queen's 1859 Proclamation promising absolute non-interference in religious matters. The personal laws involved inheritance, succession, marriage and religious ceremonies. The public sphere was governed by the British and Anglo-Indian law in terms of crime, land relations, laws of contract and evidence; all this applied equally to every citizen irrespective of religion.[vi]"

CONSTITUTIONALLY ASSEMBLY DEBATES & UNIFORM CIVIL CODE

The "debate, over the Uniform Civil Code in the Constituents Assembly was among the most heated. In the Constituent Assembly, there was division on the issue of putting the Uniform Civil Code in the fundamental rights chapter. The matter was settled by a vote. By a majority of 5:4, the fundamental rights sub-committee headed by" Sardar Vallabhbhai Patel held that "the provision was outside the scope of fundamental rights and therefore the Uniform Civil

Code was made less important than freedom of religion." [vii]The positions in the assembly were divided into two camps.

On "one side, were members who wished to use the legal power and status of the Constitution to modify religious customs and advance secularisation and legal uniformity among all religious groups. KM Munshi, for example," "called for the restriction of religion to the private sphere and the promotion of unity and societal integration based on civic national identity. On the other end were those who believed that a constitution should reflect the spirit of the nation as it currently was and should not impose deep social and cultural changes"[viii]. Kazi Syed Karimuddin and Maulana Hasrat Mohani wanted protection for the personal laws of the minorities. Kazi Karimuddin, member of the Constituent Assembly that framed the Constitution, argued:

"The people outside and the members of the Constituent Assembly must realize that a Muslim regards the personal law as part of the religion and I really assure you that there is not a single Muslim in the country at least I have not seen one, who wants a change in the mandatory provision of religious rights and personal laws, and if there is anyone who wants a change in the mandatory principle, or religion as a matter of personal law, then he cannot be a Muslim. Therefore, if you really want to protect the minorities because this is a secular state it does not mean that people should have no religion, if this is the view of the minority Muslims or any other minority that they want to abide by personal law, those laws have to be protected."[ix]

Hasrat Mohani, freedom fighter and Urdu poet who coined the iconic "Inquilab Zindabad" slogan, was equally emphatic:

"I would like to say that any party, political or communal, has no right to interfere in the personal law of any group. More particularly I say this regarding Muslims. There are three fundamentals in their personal law, namely, religion, language, and culture which have not been ordained by human agency. Their personal law regarding divorce, marriage, and inheritance has been derived from the Quran and its interpretation is recorded therein. If there is any one, who thinks that he can interfere in the personal law of the Muslims, then I would say to him that the result will be very harmful. … Mussalmans will never submit to any interference in their personal law, and they will have to face an iron wall of Muslim determination to oppose them in every way"[x]

Naziruddin "Ahmad by means of caution, stressed the importance of obtaining the consent of the communities whose religious laws would be affected by the new code. Naziruddin Ahmad, a Constituent Assembly member representing West Bengal, took a sobering view when he warned against radical constitutional provisions:"

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

Ahmad supported uniformity in principle but argued against pervasive state interference in the internal affairs of religious communities, he stated.

"It is a question of stern reality which we must not refuse to face and I believe it will lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country." Emphasising pragmatism, Ahmad indicated the difficulty the State would face

"At this stage of our society in asking people to give up their conception of marriage, for example, which was associated with religious institutions in many communities". [xii]Naziruddin "Ahmad by means of caution, stressed the importance of obtaining the consent of the communities whose religious laws would be affected by the new code. Dr. Bhimrao Ambedkar was very clarificatory in his assertion:""

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

B.N. RAU COMMITTEE AND CODIFYING HINDU LAW

This "finally led to the setting up in 1941 of the B.N. Rau Committee; officially the Hindu Law Committee, whose task it was to examine the question of the necessity of common Hindu laws.

Rau was an Indian civil servant, jurist, diplomat and statesman known for his key role in drafting the Constitution of India as Adviser to Constituent Assembly.""

The B.N. Rau Committee recommended a "codified Hindu law, which would give equal rights to women in keeping with the modern trends of society. However, it must be mentioned that its focus was primarily on reforming the Hindu law in accordance with the scriptures. The committee reviewed the 1937 Act and recommended a civil code of marriage and succession for Hindus. After much study, it presented the government with two draft Bills on March 1942 regarding intestate succession and marriage. Unable to clinch the matter, the Rau Committee was revived and reconstituted once more in 1944; it finally sent its report to the Indian Parliament with a draft Bill in February 1947".[xiv]

The, " Rau Committee report dealt comprehensively with Intestate and Testamentary Succession including Maintenance, Marriage and Divorce, Minority and Guardianship and Adoption. As procedure demanded, the draft went before a select committee again, this time chaired by Ambedkar himself. When it finally came up for discussion in February 1951, India was already a free nation. Discussions continued, but were endless, the Hindu Code Bill lapsed and was re-submitted only in 1952."[xv]

The "provisions, had to be broken up into separate parts, apparently to nudge through the radical changes in smaller steps, rather than as a whole scale transformation. The Hindu Marriage Bill was passed in May 1955, and the Hindu Succession Act in June 1956. Later, the Hindu Minority and Guardianship Bill was passed in August 1956 and the final component, the Adoptions and Maintenance Bill in December 1956."

CONSTITUTION & ISSUE OF UNIFORM CIVIL CODE

Part III of the constitution that is, "Article 12 to Article 35 provides for fundamental rights, which are enforceable by the High Courts of the various states and the Supreme Court of India. Part IV of the constitution provides for socio-economic rights styled as Directive Principles of state policy and are not enforceable by any court of law. However, Article 37 clarifies that such directive principles are nevertheless fundamental in the governance of the country and it shall be the duty of the state apply these principles in making laws." Under Part IV of the

Constitution, "Article 44, states that the state shall endeavour to enact a Uniform Civil Code for citizens throughout the country. On the other hand, under Part III of the Constitution, Article 25 provides Freedom of conscience and free profession, practice and propagation of religion".[xvi] The tussle "is mainly between these two articles. The Supreme Court since two decades has started a trend (which is now considered to be a well settled law) that the Directive Principles and Fundamental Rights ought to be harmoniously constituted, and whenever possible fundamental Rights should be adjusted in their ambit so as to give effect to the trend can manifestly be evinced in ABK Singh v. Union of India[xvii], followed by Woman Rao v. Union of India[xviii] and Griha Kalyan Kendra Worker's Union v. Union of India[xix]. It is the state, which is charged with the duty of securing a UCC for the citizens of the country and unquestionably, it has the legislative competence to do so."

CHALLENGE WITH RESPECT TO ARTICLE 25

The "major challenge in the implementation of the Uniform Civil Code is Article 25 of the Indian Constitution. The minorities of the country oppose the implementation of the Uniform Civil Code by taking the defence of Article 25."

Article 25 "provides for the Freedom of Religion, which is a Fundamental Right in the Constitution. Under this Article, a person is free to practice and propagate his choice of religion. The religious practices prevalent in the personal laws of communities are continued to be practised. These communities contend that the right to freedom of religion in Article 25 enables them to manage personal laws according to their community's laws." The introduction of "Uniform Civil Code is challenged as a violation of the fundamental rights under Article 25. Article 44 is only a Directive Principle of State Policy which is not enforceable in courts but Article 25 is a Fundamental Right which is enforceable in courts."[xx]

However, Article 25 "excludes secular activities from its purview. Secular activities are to be dealt with by the State and not the religion. This exception is considered to include personal laws by the supporters of the Uniform Civil Code. It is a key point to notice that matters like divorce, adoption, inheritance are matters of law and not of religion. These matters can be separated by religion for better applicability of constitutional provisions. Law and religion are better to be separated. This is a long going debate. But the need for a Uniform Civil Code

cannot be denied. However, it is imperative and advisable to look into the other side also. Uniform Civil Code is covered under the Directive Principles of State Policies while Freedom of Religion and Conscience are guaranteed under the chapter of Fundamental Rights. It is often argued that State cannot frame and implement a policy which takes away or abridges the Fundamental Rights of citizen. Those who argue against the Uniform Civil Code are of the opinion that matters like marriage, divorce, maintenance, succession and so on are religious affairs and the Constitution guarantees freedom of such activities and therefore a Uniform Civil Code will be a violation of it. The Supreme Court has observed that marriage, succession and like matters are of secular nature and cannot be brought within the guarantee enshrined under Art 25 and 26 of the constitution held that right to one's personal law is not a fundamental right."

PERSONAL LAWS & GENDER DISCRIMINATION

Fundamental "rights enshrined in part III of our constitution is heart of our constitution. Since it guaranteed Civil liberties such as equality before law and equal protection of laws, freedom of speech and expression, religious and cultural freedom, freedom to form assembly", practice "religion and finally the rights to constitutional remedies in the form of writs and also at the same time providing severe punishments in IPC or other special laws." It "imports the meaning that everyone is equal before the law that is right from king down to slave without any discrimination as to caste, creed, religion, race, sex and place of birth. Our country is seat of so many religions since it incorporated the feature of Secularism in 42nd amendment, 1976 and also given fundamental freedom as per Article 25 to 28 to profess, practice and propagate one's religion."[xxi] "Under this grab of cultural and religious freedom, many legislations such as Hindu Marriage Act, 1955, Hindu succession Act, 1956, Hindu Maintenance and adoption Act etc., were legislated with the insertion of a clause if custom permits." It means "through one side statutory law support appears to be given significance but the other side letting the society to continue their practices under customary law by adding a clause that if custom permits. It means any provision may be ignored if there is any corresponding customary principle in force."[xxii]

Certain "provisions in the said legislations appear to be quite gender discriminatory, confusing and conflicting. The provisions such" as "triple talaq under Muslim law, giving no right of adoption to Muslim communities, providing no family status and also no chance for claiming maintenance to second wife under Hindu marriage Act while allowing polygamy under Muslim law (all Indian nationals only) appear to be very conflicting and confusing. If we see Sec.5 (i), it speaks about the condition of valid marriage and declaring it as void under section 11 if the condition is broken".[xxiii] This is very much appreciable. "But again, contradicting provision under Section 16 of Hindu Marriage Act provides a cushion for conferring of legitimacy on the illegitimate children who are begotten out of void marriage. To what extent this provision is justifiable? It may be said that children should not be ignored for the mistakes committed by their parents. Then is it correct to ignore the rights of women of second marriage? Again, here also a discrimination between children and women. When law is recognizing the children of void marriages, is it not validating void marriage as a valid one by conferring legitimacy? It means what we are not accepting directly, accepting it indirectly. When both children and women are considered as vulnerable sector, why again there is difference?"

So, the "contention is that there must not a provision for conferring legitimacy on illegitimate children. Unless such rigid provision is inserted, the bigamous situation cannot be curbed. The, situations of bigamous and polygamous are very high among Hindus only as per some of the survey reports. But it is going uncontrolled, where the women victims are exposed without proper redress. Of course, there are number of cases left unexplored".[xxiv]

Article 14 "prohibits class legislation but reasonable classification is allowed but it paved the way for making personal laws as per one's whims and fancies under the grab of cultural freedoms given under Art.25-28. It draws a conflicting opinion that under one guaranteed freedom, we are allowed to frame and regulate our personal laws at the same time leading to conflicts to the other fundamental right guaranteed in Articles 14-15. Therefore, it is a high time to judge what is reasonable classification? The grip of religious culture and customs framing personal law in such a manner keeping the female gender to suppression and torture is clear cut violation of our fundamental right as guaranteed under Article 14. And again, keeping those laws beyond judicial review is abhorrent. The center's categorical approach that is personal laws must be in conformity with constitution is very appreciable since it will assist

Supreme court in determining the validity of certain practices like *triple talaq, polygamy because these practices directly hit the rights of women to their life and dignity*. Fundamental argument is whether constitutional protection extends even to those laws which are not in conformity with other fundamental rights given in the constitution."

CONCEPT OF SECULARISM & UNIFORM CIVIL CODE

At the outset, it is to be realised that India is a unique country, having geographic, religious, social and cultural diversity. "The Constitution of India makes repeated efforts to recognize and protect the diversity of social scenario and re-emphasizes unity in diversity. It recognises 'pluralism of religions and convictions. Unfortunately, however this ideal has been subject to recurrent attacks made by nationalists/ chauvinists and the religious fundamentalists belonging to all religions. Religion has been a dominating factor in the Indian society. On one hand, religion has contributed to spiritual upliftment of the masses, while on the other hand wrong interpretation of religious edicts has perpetuated many social evils4. The religion and custom based personal laws of different communities have been a major cause of this discrimination."

In order "to combat these social maladies, our Constitution framers adopted secularism as one of the constitutional goals, which became a separate Preambular goal later on.[xxv] Secularism isn't just a normal constitutional goal but a basic feature of the Constitution, an integral pillar to realize the grandiloquent vision of promoting fraternity amongst the entire citizenry of India. It is true that the Indian Constitution does not use the word secularism in any of its provisions, other than in the Preamble, but its material provisions are inspired by the concept of secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socioeconomic justice, it placed before the country as a whole, the ideal of a welfare state." And the concept of welfare is purely secular and not based on any considerations of religion. "The essential basis of the Indian Constitution is that all citizens are equal, and this basic equality (guaranteed by article 14) obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights".[xxvi]

As societies progress, "particularly through modernization and rationalization, religion loses its authority in all aspects of social life and governance. Secularization refers to the historical process in which religion loses social and cultural significance. As a result of secularization,

the role of religion in modern societies becomes restricted. In secularized societies, faith lacks cultural authority; religious organizations have little social power. There is a decline in levels of religiosity." The dream "of a secular India necessarily rests on the process of secularization, which has to go along simultaneously and continuously. Societal perception towards religious has to change; there has to be a differentiation in various aspects of social, economic, political and legal life, as each of them becomes more and more specialized. Secularization can also denote the transformation of a religious into a secular institution. Secularization can also manifest itself in another form where there is a transfer of activities from religious to secular institutions, such as a shift in provision of social services from temples, mosques and Churches to the government. Secularization also requires a change in mentalities of the people inhabiting a State."

Individuals should focus on "moderating their behaviour in response to more immediately applicable consequences rather than out of concern for post-mortem consequences, as is usually seen in societies which are preponderantly religious".[xxvii]

JUDICIAL STAND WITH RESPECT TO UNIFORM CIVIL CODE

The "history of Judicial behaviour tells that in initial stage it adopted a literal interpretation with regard to constitutionality of personal laws as well as implementation of the UCC. One of the earlier cases in which the question relating to personal laws was involved was the case of ***State of Bombay v. Narasu Appa Mali***.[xxviii] The Court though opined in favour of the UCC but it declined to struck down the discriminatory provision of personal laws. The limitation of the judiciary was explained by Justice Gajendragadkar, in following words:"

"Article 44 of the Constitution is, in my opinion very important. This Article says that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. In other words, this article by necessary implication recognizes the existence of different Codes applicable to the Hindus and Mohammedans in matters of personal law and permits their continuance unless the State succeeds in its endeavour to secure for all the citizens a Uniform Civil Code. The personal laws prevailing in the country owe their origin to scriptural texts. In several respects their provisions are mixed up with and based on considerations of religion and culture; so that the task of evolving a Uniform Civil Code applicable to the different

communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a Directive Principle that the endeavour must hereafter be to secure a Uniform Civil Code throughout the territory of India".[xxix]

He further observed, "It is impressed upon us that our Constitution sets up a secular State, that Article 44 contains a directive to the State to secure for the citizens a Uniform Civil Code throughout the territory of India, and still the State of Bombay by this legislation has discriminated between Hindus and Muslims only on the grounds of religion and has set up a separate code of social reform for Hindus different from that applicable to the Muslims. While deciding this case Chagla C.J., relied heavily on Davis u. Beason."

In this case "the constitutionality of an Idaho Statute of 1882, which outlawed bigamy was challenged. It was contended that the impugned Act infringed the religious freedom of the members of the Mormon Church and violated the First Amendment of the U.S. Constitution which provided that Congress shall not make any law respecting the establishment of religion or forbidding the free exercise thereof. The members of this church used to practice polygamy as a part of their religious creed. Mr. Justice Field, who delivered the opinion of the Supreme Court, however, rejected the contention and" observed: "However free the exercise of religion may be, it may be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

Justice Gajendragadkar opined that "the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provisions of the Constitution contained In Article 14. He observed that the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, XXV of 1946 has been challenged principally on two grounds. it is first contended that the personal laws applicable to the Hindus and Mohammedans in the Union of India are subject to the provisions contained in Part III of the Constitution of India and as such they would be void to the extent to which their provisions are inconsistent with the fundamental rights guaranteed by Part III. It is then argued that in so far as both these personal laws allow polygamy but not polyandry, they discriminate against women only on the ground of sex. If that is so, the provisions of the personal law permitting polygamy offend against the provisions contained in Article 15 (1) and as such are void to the extent under

Article 13 (1). In other words, after the commencement of the Constitution bigamous marriages amongst the Hindus as well as the Mohammedans became void and the Hindus and Mohammedans who entered into such bigamous marriages became liable to be punished under Section 494. Penal Code; and yet the impugned Act specifically provides for the punishment of the Hindus alone; that is how It discriminates against the Hindus solely on the ground of religion."

The "thorough examination of The State of Bombay v. Narasu Appa Mali's case reveals that the High Court favoured the introduction of the Uniform Civil Code and rightly held that the institution of polygamy was not based on necessity. If there was no son out of first marriage then instead of taking recourse to second marriage the proper course was adoption of a son. As for the contention regarding discrimination between Hindus and Muslims. The court very clearly observed that the classification was reasonable and did not violate Article 14" of the Constitution). "The court did not only uphold the validity of the legislation but emphasized that the said legislation must be enforced in its true spirit as an essential step to secure for the citizens a Uniform Civil Code throughout the territory of India."

In ***Shahulameedu vs. Subaida Beevi,*** Krishna Iyer.[xxx] J.. while upholding the rights of a "Muslim wife to cohabit with her husband who had taken a second wife yet held her entitled to claim maintenance under section 488 of the (Old) Criminal Procedure Code. He said that the view that the Muslim husband enjoyed an arbitrary unilateral power to inflict divorce did not accord with Islamic injunctions. He went on to plead for monogamy among the Muslims. He referred to the Muslim scholarly opinion to show that the Koran enjoined monogamy upon Muslims and departure therefrom was only as an exception. That is why a number of Muslim countries26 have prohibited polygamy. He further observed that keen perception of the new frontiers of Indian law hinted at in Article 44 of the Constitution was now necessary, on the part of Parliament and the Judicature."[xxxi]

In "1972 a very complicated issue was raised before the Kerala High Court in ***Makku Rawther's Children: Assan Rawther and Other vrs. Manahapara Charayi***[xxxii], regarding Muslim Personal law and Article 44 of the" Constitution. "The main issue which came up for discussion was regarding the hiba or gift under Mohammedan Law. Under the Muslim law gift can be made by an oral agreement between the parties and the same are exempted for the registration under the Indian Registration Act, 1908. In this case an oral gift was made and the

same was challenged on the ground that Section 129 of the transfer of Property which exclude the operation of Registration Act in case of hiba is violation of Articles 14, and 15 of the Constitution and, therefore, it may be declared void under Article 13 of the Constitution. Justice V.R. Krishna lyer after gathering the basics of different personal laws as prevalent in India and the philosophy behind the concept of gift and thereby making a law regarding registrations of gifts delivered a dynamic Judgement and observed."[xxxiii]

Whatever "might have been the content of the gift in Section 129 of Transfer of property Act when it was originally enacted, its meaning has to be gathered today in the Constitutional perspectives of Articles 14, 15, 25, and 44. The application of Muslim Personal Law to gifts does not preclude the application of other laws which do not run counter to the rules of Muslim Law. A Muslim gift may be valid even without a registered deed and maybe invalid even with the registered deed. The important thing is that the old laws must be tuned up to the new law of the Constitution and the spirit of the times."

The judgment clearly mentioned "that the provisions of the personal laws must run in accordance with the provisions of the Constitution. It is the function of the judiciary to construe the words in the personal laws with the passage of time which Is the need of the hour in the light of constitutional mandate. Thus, all kinds of gifts whether it belongs to Hindus or Muslims must comply with the section 17 (1), section 49 of the Registration Act and Section 123 of the Transfer of Property Act. The only exception to this general rule according to this judicial pronouncement is that non-secular gifts can be exempted from registration. In this way through this decision, the court emphasized that personal laws in respect of gifts must be read in the light of Article 44 of the Constitution."[xxxiv]

In ***Shaha Bano Case***[xxxv] in the course of its judgment Chief Justice Chandrachud also referred to and touched the issue relating to the UCC and observed:

"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. There is no evidence of any official activity for framing a Common Civil Code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws that have conflicting ideologies. No community is likely to bell the cat by making gratuitous

concessions on this issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another."

We "understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the Courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it so palpable. But piecemeal attempts of Courts to bridge the gap between personal laws cannot take the place of a Common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to casts?"

The Shah Bano judgment "attracted maximum controversy. The progressive and secular sections of the society welcomed the judgment but the fundamentalist section of the Muslim community openly opposed the judgment. The judgment was interpreted as putting Islam in danger. It was seen as an interference with the Shariat law i.e. personal law of the Muslim Community. It was alleged that the judgment would help to impose a UCC over the Muslim Community. The academic world was also divided. Though most of the academics supported the judgment few put strong dissents."

The critics of "the judgment argued that maintenance to divorce was forbidden by Quran, it would lead to contract and proximity (for receiving payment) and to adultery. That Muslim law was immutable and though marriage under it was a contract it was a 'sacred contract and therefore, unchangeable. The whole concept of the UCC was once again challenged and legislation to undo the effects of the judgement was demanded. Thus, the Supreme Court reaffirmed the decision of Shah Bano Begum and laid down solid foundation for the uniform civil code in spite of Muslim women (Protection of Rights on Divorce) Act. 1986. The judicial response to encourage the constitutional philosophy of uniform civil code has platys been quite praiseworthy. But unfortunately, the efforts on the part of the legislature show that nothing has so far been done by this august body to promote the philosophy of Article 44. The objective of uniform civil code can be achieved only if the three organs of the State endeavour to take initiative to put this philosophy into action."

In the "history of UCC, the Sarala Mudgal Case generated big controversy. After the Shah Bano judgment, this case is important because first time the Supreme Court ventured to ask the executive about the step which It bad taken to implement Article 44 of the Directive Principles of the State Policy. The Court's activism once again put the problem of UCC on the national agenda. Coming to Sarala Mudgal Case[xxxvi]"

In this case, "the Supreme Court analyzed the statutory provisions and case law relating to the UCC. The judgment was delivered by a division Bench Comprising-Kuldip Singh and RM. Sahal. Both the judges delivered separate but concurring opinions. Answering the questions, the Court held that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in term of the provisions of section 494 Indian Penal Code and the apostate husband would be guilty of the offense under section 494 Indian Penal Code."

The Supreme Court "highlighted the problem of polygamy and its misuse by non-Muslim males. In the light of the facts of this case, the Supreme Court once again quoted with approval the Shah Bano and Dlengdeh judgments and emphasized the need to have a UCC. The Court not only emphasized to have a UCC in India but also went one step ahead and the requested the Govt. of India through the Prime Minister to have a fresh look at Art. 44, of the Constitution and endeavour to secure for the citizen a UCC throughout the territory of India. Showing the judicial activism, the Supreme Court further directed the Govt. of India through Secretary, Ministry of Law and Justice to file an affidavit in the Court till August 1996 indicating therein the step taken and efforts made, by the Govt. of India, towards securing a UCC for the citizens of India."

In its concurring Judgement Justice Sahai made few valuable suggestions for achieving the UCC in India. "He also criticised the misuse of polygamy by Muslims as well as non-Muslim. In this connection he suggested the government may also consider feasibility of appointing a committee to enact a Conversion of Religion Act, immediately, to check the abuse of religion by any person. The law may provide that every citizen who changes his religion cannot many another wife unless he divorces his first wife. The provision should be made applicable to every person whether he is a Hindu or a Muslim or a Christian or a Sikh or a Jain or a Buddhist provision may be made for maintenance and succession etc." also to avoid clash of interest after death. This would go a long way to solve the problem and pave the way for a UCC.[xxxvii]

The constitutional "validity of The Muslim Women (Protection of Rights on Divorce) Act 1986 was challenged before the Supreme Court in Danial Latifi & Anr v. Union of India[xxxviii] by Daniel Latifi in 2001, who was the lawyer of Shah Bano in the Shah Bano case. The Supreme Court tried to maintain a balancing act, attempting to uphold Muslim women's rights without addressing the constitutionality of gender and religious discrimination in personal law. Court reiterated the validity of the Shah Bano judgment. The Muslim Personal Law Board, an intervenor, questioned the authority of the court to interpret religious texts."

The Court concluded that "the Act does not, in fact, preclude maintenance for divorced Muslim women, and that Muslim men must pay spousal support until such time as the divorced wife remarries. However, the Court held that if the Act accorded Muslim divorcees unequal rights to spousal support compared with the provisions of the secular law under section 125 of the Criminal Procedure Code, then the law would in fact, be unconstitutional. Further the Supreme Court construed the statutory provision in such a manner that it does not fall foul of articles 14 and 15 of the Constitution of India. The provision in question is Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which states that a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband". The Court held this "provision means that reasonable and fair provision and maintenance is not limited for the iddat period (as evidenced by the use of word 'within' and not 'for'). It extends for the entire life of the divorced wife until she remarries."

The most "controversial question which has been politically significant in the recent past in the background of a secular constitution and the concept of welfare state is that whether or not a divorced Muslim woman after divorce post iddat period is entitled to maintenance by her husband or not. The iddat period is generally considered to be three menstrual courses if she is subject to menstruation, three lunar months if she is not subject to menstruation or if she is pregnant at the time of her divorce the period between her divorce and the delivery of child or the termination of pregnancy, whichever is earlier. Generally, it is taken to be three months."

In the "case of John Vallamattom v. Union of India[xxxix] Case, the Priest from Kerala, John Vallamatton filed a writ petition in the year 1997 stating that Section 118 of the Indian Succession Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for the religious or charitable purpose by will. The bench comprising of Chief Justice of India V.V Khare, Justice S.B Sinha and Justice A.R.

Lakshmanan struck down the Section declaring it to be unconstitutional. Further, Khare stated that:"

"Article 44 provides that the State shall endeavour to secure for all citizens a Uniform Civil Code throughout the territory of India. It is a matter of great regrets that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A Common Civil Code will help the cause of national integration by removing the contradictions based on ideologies".

On 22 August 2017 the Supreme Court took a landmark decision in this case of Shayara Bano v. Union of India[xl]on the constitutional validity of "Talaq-e-Biddat" popularly known as "Triple Talaq" which is one of the three male initiated divorces in the Muslim community, the other two being "Talaq ahasan" and "Talaq hasan". As the name, "suggests in this form of divorce, where a Muslim man can instantly divorce his wife after repeating the word talaq in one sitting, without any state intervention. Here the means of communication could be in any form i.e written, oral, or even electronic, which further enhances a woman's vulnerability in this arbitrary and unilateral divorce. This controversial custom given that it is an intersection between gender identity and community has unsurprisingly left Muslim women prone to abuse and in a morbid state, especially given the socio-economic aspect where most of the women are financially dependent on their spouse and the added fear of this whimsical divorce leaves many cases of marital abuse unreported."

Thus "because of the pressing need to address the above issue the Supreme Court in this case declared that, this custom unconstitutional by a majority of 3:2 ratio. This ultimately will have a ripple effect on various aspects of Constitutional Law, especially in the context of Fundamental Rights and its relation with the personal laws of the country, while also having an impact on the social aspect of gender justice which unfortunately the judgement does not discuss in detail as it mainly as it focuses mainly on the validity of Triple Talaq in context" to marriage as an institution. "The majority decision restored the trust that the common people possess for the institution of Judiciary. The judgment proved that the democratic notions such as equality, liberty etc. would not bend down against any philosophy even if it is a religion. The courts finally brought justice to those women who have been a victim of *Triple Talaq.* Men after enjoying and extracting pleasure out of women used to abandon them easily by the virtue of *Triple Talaq."*

Now, "after the pronouncement of the judgment the situation has changed and made such incidents impossible. No husband can now abandon his wife by ending marital tie on his whims and fancies. The court ensured that the ideas of equality especially gender equality is not a mere theoretical ideology."

SECULARISM & CONTENTION OF UNIFORM CIVIL CODE

Pandit Jawahar Lal Nehru, "being an agnostic, was however adamant and pursued the enactment of Hindu Code Bill relentlessly. Questions were raised as to why only Hindus should be subjected to such controls leaving all other religious communities to continue with their parochial laws. However, despite resistance from all quarters, Hindu Code was enacted in the form of Hindu Marriage Act, Hindu Succession Act and Hindu Adoption and Maintenance Act. Special Marriages Act too was enacted which makes provisions irrespective of any religion. Perhaps that was the appropriate time for a uniform civil law to have been enacted and that would have gone down well with the country." It was necessary because there "has not been uniformity even within Muslim personal law, with one for Shias and another for Sunnis. Enacting a law for one religious' community to the exclusion of other communities was itself a discriminatory move. Historic blunders are difficult to correct and same is applicable in this case also."[xli]

Now Law Commission has suggested that "emphasis should be laid on reforms in personal laws. It suggests that diversities in personal law may continue and reformative steps could be introduced gradually. It suggests achieving the task step by step. Any hasty action would enable fanatics to hijack the real issue to inflame passion and declare it as an onslaught on religion. It made no concrete suggestions to achieve the priorities like equal protection of law for women and gender justice."[xlii]

We have the "example of Shah Bano case when entire Muslim community stood as one to oppose Supreme Court judgment on grant of maintenance to Shah Bano under Section 125 of Cr.P.C. So far as Constitutional provisions are concerned, it is necessary to refer to Article 44 of the Constitution which says the State shall endeavour to provide for its citizens a uniform civil code (UCC) throughout the territory of India. This article is however not justiciable as it is merely a directive. Article 15 of the Constitution lays down that the state shall not

discriminate against any citizen on grounds only of race, religion, caste, sex, and place of birth. Article 25 of the Constitution lays down" "that all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality and health. Article 26 says that all denominations can manage their own affairs in matters of religion. With such freedom of religion being guaranteed by the Constitution and enforceable as fundamental rights, Article 44 is a mere directive or guideline declaring the philosophy and objective of the Constitution. Now the question arises whether matters relating to personal laws are a matter of religion."

Religion "is not concerned with personal law although it is practiced within religious communities. Looking at the tenets of any religion and basics of personal law of any religious community, religion has its ingredients rooted in spirituality, mode of worship, conducting prayers and rituals relating to religious practices." "But personal law has nothing to do with such objects as its domain includes marriage, divorce, adoption, succession and inheritance. But political parties, with their agenda, have resisted a uniform civil code on the ground of interference in religious affairs."[xliii]Critics "of a Uniform Civil Code argue that it is not possible in view of Articles 15, 25 and 26 of the Constitution. An analytical study of these articles with interpretations pronounced thereon by Supreme Court from time to time, would make it clear that these are not in confrontation with the objective of Article 44. Religion and personal law are different avenues. That is why the Supreme Court suggested that a uniform civil code must be framed to bring equality and put curbs on discrimination in matters of dispensation of justice. Some political parties oppose a uniform civil code on the ground that it is against democracy." This argument has no legs to stand on because in that case uniformity in criminal laws would have also been against democracy. "On the contrary, uniform civil code will enable men and women to be aware of their right to equality and about the sweeping changes in the realm of their affairs with regard to marriage, succession and inheritance."

At this juncture "when major reforms have been introduced in almost all the theocratic countries with liberal outlook, there is no reason why a major part of our population should remain deprived of the reforms."[xliv]

The "Portuguese Civil Code of 1867 which continues to be implemented after India annexed Goa in 1961, applies to all Goans, irrespective of their religious or ethnic community. Surprisingly, there is no problem in Goa. It is only when a common code for India is talked

about that all problems crop up. To ensure that religious communities do not remain deprived of the fruits of a liberal outlook, equal treatment of laws in matters of personal life, it is for them to come forward and ask to be governed by the same law. In any case, uniform civil code cannot be imposed as it requires broad consensus. Unfortunately, in our country, everything is seen from a political perspective and that may not help in evolving a national consensus. Law Commission is perhaps right when it suggests going slowly".[xlv]

The Preamble "of the Constitution states that India is a Secular Democratic Republic. This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A religion is only concerned with relation of man with God. It means that religion should be not interfering with the mundane life of an individual. The process of secularization is intimately connected with the goal of uniform civil code like a cause and effect. In S.R. Bommai v. Union of India[xlvi]", as per Justice Jeevan Reddy, it was held that "religion is the matter of individual faith and cannot be mixed with secular activities can be regulated by the State by enacting a law. In India, there exist a concept of positive secularism as distinguished from doctrine of secularism accepted by America and some European States i.e., there is a wall of separation between religion and State. In India, positive secularism separates spiritualism with individual faith. The reason is that America and the European countries went through the stages of renaissance, reformation and enlightenment and thus, they can enact a law stating that State shall not interfere with religion. On the contrary, India has not gone through these stages and thus, the responsibility lies on the State to interfere in the matters of religion so as to remove the impediments in the governance of the State."[xlvii]

The word secular is not "precise and has different shades in different contexts. It is opposed to religion in the sense that the secular State cannot be a religious State. In this context, some feel that a secular State is an anti-religious State. The State, which has no religion of its own, does not necessarily mean an anti-religious State. It may be a State respecting all religions. Though the term, secular was added to the preamble by way of 42nd Constitutional Amendment, secular spirit permeated every fibre of the Constitution from its very inception."[xlviii]

This "very secular spirit formed the foundation of fundamental right to equality before law; discrimination on grounds of religion, race, caste, sex, place of birth or any of them ; prohibition of discrimination on above said grounds or any other in respect of any employment or office under State ; or suffrage ; and freedom of conscience and free profession, practice and

propagation of religion . Article 27 is another consequence of secularism. It states that no person shall be compelled to pay any taxes, whose proceeds are used for the promotion of any relation. This makes clear that State is barred from patronizing or supporting any religion. Subject to public order, morality and health, every religious denomination or any section thereof shall have a right:"

a) "to establish and maintain institutions for religious and charitable purposes;"

b) "to manage its own affairs in matters of religion;"

c) "to own and acquire movable and immovable property; and"

d) "to administer such property in accordance with law."

Articles 25 and 26, "guarantees right to freedom of religion. Article 25 guarantees to every person the freedom of conscience and the right to profess practice and propagate religion. But this right is subject to public order, morality and health and to the other provisions of Part III of the Constitution. Article 25 also empowers the State to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice and also to provide for social welfare and reforms. The protection of Articles 25 and 26 is not limited to matters of doctrine of belief."

It extends to acts "done in pursuance of religion and, therefore, contains a guarantee for ritual and observations, ceremonies and modes of worship, which are the integral parts of religion." Uniform Civil Code is not opposed to secularism and will not violate Article 25 and 26. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. No religion permits deliberate distortion. The UCC will interfere only in matters of inheritance, right to property, maintenance and succession, there will be a common law".[xlix]

CONCLUSION

For the first time, "it was the Constituent Assembly in which the idea of UCC was legally mooted in India. Initially, efforts were made to put it in the Fundamental Right chapter but Sub-Committee on Fundamental Rights by the majority decided to put it in Directive Principles

chapter. In the Constituent Assembly, the Muslim members opposed the idea of a UCC and several amendments were proposed by Sri Mohammed Ismail Sahib, Sri Naziruddin Ahmed, Sri Mahoob Ali Baig Sahib Bahadur, Sri B. Rocker Sahib Bahadur and Sri Hussain Immam. On the other hand, Sri K.M. Munshi, Sri K.M. Alladi Krishna Swami Ayyar and Dr. Ambedkar supported the idea of UCC. However, Dr. Ambedkar assured the Muslim members that to make a beginning the future parliament might adopt the UCC purely on a voluntary basis. In the end of the debate, the proposed provision was adopted as Article 44 in the Constitution. There are several provisions in the Indian Constitution directly or indirectly related to the UCC. Broadly the UCC has been discussed with relation to Fundamental Rights, the Directive Principles; and The Fundamental Duties. One of the important problems for enacting the UCC has been related with the conflict between the power of the State to enact a UCC and the Fundamental Right of the people to exercise their right to freedom of religion including right to be governed by their religion's personal laws. Here the provisions of the Constitution of India are ambiguous and the conduct of the State to reform the religious personal laws has been inconsistent."

The positive "political interference is the need of the hour to meet the demands of the communities suffering from the dictates of the male dominated culture. The new ways and means are to be found out to liberate the majority of the minorities from this crisis of its own identification. For this the process of continuous dialogues and debates must be made routine life of those who rule the country. If the unity, integrity and fraternity as goal of our constitution is to be achieved the rulers must adopt this process irrespective of political ideologies. The sprite of the constitution should be realised in positive way if nation's building process is to be continued. The minorities in our country should make it a point that right now they would not permit the political bosses to treat them as mere floating votes. This attitude will not make the constitutionalism rather it would wreck it. The misinformation which breeds hatred among different communities must be done away by the positive campaign of mutual trust building."

It is high time that the "Law Commission must undertake a comparative study of the different personal laws of different communities in India. A scientific, classification must be made of the similarities and dissimilarities in the various personal laws. In the first stage there should be a uniform civil code on those subjects on which there is very little controversy. With regard to issues on which wide dis-agreements exist we must seek the help of the principles of natural justice in framing the Uniform Civil Code."

The criminal law provisions, "which are secular in nature, should be effectively enforced to arrest the dangerous anti-national trends in minority demands. Inter-religion, Inter-caste, Inter-citizen intercourse should be encouraged and developed for the healthy growth of consensus on the realisation of the constitutional mandate. To be successful, a UCC needs to reflect India's diversity as well as its commitment to equality. UCC should incorporate progressive features of all religions and should not just be a majoritarian imposition. It can be an eclectic mixture of progressive provisions in different personal laws. Further, one must also realize that a UCC need not entirely obliterate all personal laws. Ways have to be explored in which their innocuous provisions may still be retained for those who wish to adhere to them. Some suggest that there should be a UCC but one should be free to opt out of it. Certain other ways could be thought of too. Such matters should not be rushed with. Sociological investigation and research are needed before reaching any reliable solution."

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