

# UNIFORM CIVIL CODE, PERSONAL LAWS AND ITS NEED IN INDIA : A REVIEW

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## INTRODUCTION

Uniform Civil Code was a much debated issue in the Parliament of India in 1948, after India became independent. On one hand eminent personalities like Dr. B.R. Ambedkar, supported by eminent nationalists like Gopal Swamy Iyenger, Anantasayam Iyengar, KM Munshiji and others favoured the implementation of the Uniform Civil Code; it was strongly opposed by Muslim fundamentalists like Pocker Sahib and members from other religions. Earlier, the Congress Party (which was in rule at that time) had given an assurance that it would allow Muslims to practice Islamic personal Law and thus the framers of the Indian Constitution the architects of the Constitution, discovered a compromise by including the enactment of a Uniform Civil Code under the Directive Principles of State Policy in Article – 44 of the Constitution, i.e. it will be binding on the State to adopt the Uniform Civil Code system rather it will only act as persuasive legal provision

Prime Minister Jawaharlal Nehru in the year 1955 thought of codifying personal laws but was faced with opposition from the orthodox elements. But Nehru was convinced about it and brought in the Hindu Code Bill in 1955. When the debate was raging on the Hindu Code Bill in Parliament in May 1955, a question was raised by many members of the Parliament, that is why only codify Hindu rituals and customs and not those of Muslims? The response from Nehru and his law minister was that Muslims were not ready for reforms. One of the member Kripalani had said, "It is not the (Hindu) Mahasabhites who alone are communal; it is the government also that is communal, whatever it may say. It is passing a communal measure. I charge you with communalism because you are bringing forward a law about monogamy only for Hindu community. Take it from me that the Muslim community is prepared to have it but you are not brave enough to do it. If you want to have (provision of divorce) for Hindu community, have it; but have it for the Catholic community also."

## Legislative History of Personal Law in India

Personal laws have traditionally been regarded to be beyond the purview of legislature because they are very much identified with religion or religious beliefs. The very nature of personal laws is such that the legislature intentionally hesitates in interfering or parting with them. However, in different periods legislative enactments have been made in this area also. Some of these tend to modify and some endeavour to restore the personal laws.

This chapter presents the legislative history of personal laws in India. For the sake of convenience, the discussion has been meticulously arranged into three heads, namely-Hindu Law and the Legislature, Muslim

Law and the Legislature and Christian and Parsi Laws and the Legislature. But before that a brief general discussion appears to be necessary.

In the early nineteenth century, the legal system of India was comparatively full of chaos and confusion. Infact, different laws were applied by village, district and provincial courts. While in many matters of civil law, Hindus and Muslims were governed by their own laws, non-Hindus and non-Muslims were governed by another set up laws.<sup>1</sup>

Uniform civil Code of India is a term referring to the concept of an overarching Civil Law Code in India. 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.

The common areas covered by a civil code include laws related to acquisitions and administration of property, marriage, divorce and adoption. The Muslim criminal law which was applied to Muslims and, to a very great extent to Hindus and other natives also, had become obsolete.<sup>2</sup>

Although the British Parliament felt the need of suitable reform in Indian law, but the process of codification seems to have been accelerated due to two major factors, viz., the influence of Bentham's idea of codification of law and the passing of the Charter Act of 1833. As a result of the work of different Law Commissions a number of legislations were enacted which affected the personal laws of two major communities viz., the Hindus and the Muslims. Some of these important legislations were : the Caste Removal Disabilities Act 1850, the Indian Penal Code 1860; the Criminal Procedure Code 1861, 1882 and 1888; The Civil Procedure Code 1859 and 1882; the Indian Contract Act 1872; the Transfer of Property Act 1882; the Indian Evidence Act 1872; the Indian Succession Act, 1865; the Child Marriage Restraint, Act 1828, etc.

The purpose of these legislative steps was to bring about uniformity and certainty, which is evident from Lord Macaulay's following words:

“We must know that respect must be paid to the feeling generated by differences of religion, of nation and caste. And much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But whether we assimilate those systems or not, let us ascertain them, let us digest them. We propose no rash innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principles is simply this – uniformity where you can have it-diversity where you must have-but in all cases certainty.”<sup>3</sup>

This love of certainty and uniformity, which led to codification, had its impact on those spheres of law also which were, hitherto, governed by the respective personal law exclusively. The succeeding pages will give a brief account of this fact.

<sup>1</sup> U.C. Sarkar, Epoch in Hindu Legal History, pp. 348-50 (Hoshiarpur: Visheshvaranand Vedic Research Institute 1958).

<sup>2</sup> U.C. Sarkar, Epoch in Hindu Legal History, pp. 348 (Hoshiarpur: Visheshvaranand Vedic Research Institute 1958).

<sup>3</sup> XIX Hansard's Debates, 3rd Series, pp. 531-533.

India follows a Common Law system which was hereditary from the colonial era. Even in the present day various legislations which were initially introduced by the British are still in effect, only modified in their forms. Fearing opposition from the community leaders The British refrained from further interfering within this domestic sphere, which left India with a multiplicity of the personal laws. For instance the Christians Marriage Act 1872, Jews have their uncodified customary marriage law, The Parsi Marriage and Divorce Act, 1936. Hindus and Muslims have their own separate personal laws. Hindu law has by and large been secularized and modernized by statutory enactments. On the other hand Muslim law is still primarily unmodified and traditional its content and approach. The contemporary family law is therefore a maze. There are no *lex loci* in India in matrimonial matters, matters of succession and family-relations. With a view to achieve uniformity of law, its secularization and making it equitable and non-discriminatory, the Constitution contains Art.44 of the Directive Principles of State Policy that runs as follows; "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India"

Uniform Civil Code is a term which has its roots from the concept of Civil Law Code<sup>1</sup>. A Uniform Civil Code connotes the idea of same set of civil rules for the citizens irrespective of their religion, caste, etc. Civil law governs the matters pertaining to marriage, adoption, inheritance, succession and so on. The objective underlying a uniform civil code is to boost the concept of national integration by elimination contradictions based on religious ideologies. All communities in the country would then stand on a standard platform on civil matters like marriage and divorce, and would not be governed by diverse personal laws.

### **1. Why India needs a uniform civil code**

Constitutional law should override religious law in a secular republic

The brave fight put up by Muslim women against the practice of triple talaq has once again brought into focus the lack of a uniform civil code in India. The Narendra Modi government has now asked the Law Commission to examine the issue. This is hopefully the first step towards the implementation of something that has been delayed for far too long.

### **2. India needs a uniform civil code for two principal reasons.**

First, a secular republic needs a common law for all citizens rather than differentiated rules based on religious practices. This was a key issue debated during the writing of the Constitution, with passionate arguments on both sides. The Indian Constitution was eventually stuck with a compromise solution, a directive principle that says: "The state shall endeavour to secure for citizens a uniform civil code throughout the territory of India."

Several members of the Constituent Assembly disagreed vehemently with the compromise. Among them were the trio of Minoo Masani, Hansa Mehta and Rajkumari Amrit Kaur. As Kaur argued: "One of the

<sup>1</sup> A civil code is a systematic collection of laws designed to comprehensively deal with the core areas of private law such as for dealing with business and negligence lawsuits and practices

factors that have kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life.”

Later, in the first decade after independence, the opposition from Hindu conservatives to the Hindu Code Bill was eventually overcome. Nothing similar was tried when it came to Muslim conservatives. The political leadership of the day mistakenly decided to not take on conservative Muslim opinion just after the trauma of partition.

There is a second reason why a uniform civil code is needed: gender justice. The rights of women are usually limited under religious law, be it Hindu or Muslim. The practice of triple talaq is a classic example. It is important to note that B.R. Ambedkar fought hard for the passage of the Hindu Code Bill because he saw it as an opportunity to empower women. The great Muslim social reformer Hamid Dalwai also made the rights of women a central part of his campaign for a uniform civil code. It is unfortunate that the demand for a uniform civil code has been framed in the context of communal politics. Too many well-meaning people see it as majoritarianism under the garb of social reform. They should understand why even the courts have often said in their judgments that the government should move towards a uniform civil code. The judgment in the Shah Bano case is well known, but the courts have made the same point in several other major judgments. The move towards a common civil code cannot be a hasty one. There is the obvious political challenge on assuaging the fears of the Muslim community. The government will have to work hard to build trust, but more importantly, make common cause with social reformers rather than religious conservatives, as has been the wont of previous governments.

One strategic option is to follow the path taken after the fiery debates over the reform of Hindu civil law in the 1950s. Rather than an omnibus approach, the Modi government could bring separate aspects such as marriage, adoption, succession and maintenance into a uniform civil code in stages.

The civil law in Goa—derived from the Portuguese Civil Procedure Code of 1939—could be a useful starting point for a national debate. The coastal state continued with its practice of treating all communities alike even after its entry into the Indian Union. The government would also do well to complement the overdue move towards a uniform civil code with a comprehensive review of several other laws in the context of gender justice. That too is important in our times. The underlying principle should be that constitutional law will override religious law in a secular republic. Many practices governed by religious tradition are at odds with the fundamental rights guaranteed in the Indian Constitution. Even those who argued in the Constituent Assembly for continuing with different civil codes were not arguing on matters of principle, but of political expediency. They hoped that India would move to a common civil code within a decade or so.

It is now 69 years since the Constitution came into force. It is high time there was a decisive step towards a common civil code. If not now, then when?

### **3.Reasons why India needs a uniform civil code**

The proponents of a uniform civil code have been campaigning for it even before the independence of India. India has always been a place of many colors and spices and before independence in 1947 it would have been

hard to point out what constituted India. Fighting the British rule and winning our independence also helped in creating this nation we call India. It was known even at that time that to further unite India and make it a truly secular nation we would need a uniform civil code. But even after 66 years of independence we haven't been able to do this.

The reasons for why this has not been done are complex and a different topic on its own but it all boils down to political will. Politicians have always found it beneficial to play vote bank politics and try to appease different castes and groups instead of attempting to integrate our nation. Instead of focusing on the negative let's focus on the positive and talk about the reasons why we do need a uniform civil code.

### **3.1. It Promotes Real Secularism**

What we have right now in India is selective secularism which means that in some areas we are secular and in others we aren't. A uniform civil code means that all citizens of India have to follow the same laws whether they are Hindus or Muslims or Christians or Sikhs. This sounds fair and secular to me. A uniform civil code doesn't mean it will limit the freedom of people to follow their religion, it just means that every person will be treated the same. That's real secularism.

### **3.2. All Indians should be Treated Same**

Right now we have personal laws based on particular religions, which means that while Muslims can marry multiple times in India, a Hindu or a Christian will be prosecuted for doing the same. This doesn't seem like equality to me. All the laws related to marriage, inheritance, family, land etc. should be equal for all Indians. This is the only way to ensure that all Indians are treated same.

### **3.3. It will give more Rights to the Women**

A uniform civil code will also help in improving the condition of women in India. Our society is extremely patriarchal and misogynistic and by allowing old religious rules to continue to govern the family life we are condemning all Indian women to subjugation and mistreatment. A uniform civil code will help in changing these age old traditions that have no place in today's society where we do understand that women should be treated fairly and given equal rights.

### **3.4. Every Modern Nation has it**

A uniform civil code is the sign of modern progressive nation. It is a sign that the nation has moved away from caste and religious politics. While our economic growth has been the highest in the world our social growth has not happened at all. In fact it might be right to say that socially and culturally we have degraded to a point where we are neither modern nor traditional. A uniform civil code will help the society move forward and take India towards its goal of becoming a developed nation.

### **3.5. Personal Laws Are a Loop Hole**

The various personal laws are basically a loop hole to be exploited by those who have the power. Our panchayats continue to give judgments that are against our constitution and we don't do anything about it. Human rights are violated through honor killings and female foeticide through out our country. By allowing

personal laws we have constituted an alternate judicial system that still operates on thousands of years old values. A uniform civil code would change that.

### **3.6. It will help in reducing Vote Bank Politics**

A uniform civil code will also help in reducing vote bank politics that most political parties indulge in during every election. If all religions are covered under the same laws, the politicians will have less to offer to certain minorities in exchange of their vote. Not having a uniform civil code is detrimental to true democracy and that has to change.

### **Personal Laws and the Constitution of India**

The Constitution of India is the Supreme Law of the Land. It is not a document which sets out the framework 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 paper 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.'

#### **1. Personal Laws and the Indian Constituent Assembly**

Right after independence the question of the position of personal laws got entangled into the whirlpool of national politics. On the floor of the Constituent Assembly, for about two years, the issue suffered convulsions caused by the utterances of progressive legislators, dissenting voices of their so-called conservative brethren, apprehensions echoed by the spokesmen of the minorities, and bricks and bouquets thrown from outside by laymen and law-men.<sup>1</sup>

The Constituent Assembly had its first meeting in December, 1946. Speaking on the report on minority rights in August 1947, Pocker Saheb insisted that as far as Muslims were concerned election to the central and provincial legislatures should be held on the basis of separate electorates. Spelling out his reasons for the demand he said:

“The legislature is intended to make laws for the whole country and for all communities, and it is necessary that in that legislature the needs of all communities should be ventilated. I would submit that as matters stand at present in this country, it will be very difficult for members of particulars communities, say the non-Muslims, to realize the actual needs and requirements of the Muslims community. ... They will find it practically impossible to know exactly what the needs are. There may be legislation concerning wakfs,

<sup>1</sup> Tahir Mahmood, *Personal Laws in Crisis*, p. 3 (1st Ed. New Delhi, 1986).

marriage, divorce, and so many other things of social importance.... Therefore I demand a principle to the effect that the best man in the particular community should represent the view of that community.”<sup>1</sup>

This proposal regarding separate electorates for Muslims, however, met stiff opposition and thus any such possibility was ruled out by the Constituent Assembly. Among those who vehemently opposed it were, Govind Ballabh Pant and Sardar Patel. The latter opined:

“But in this unfortunate country if separate electorate is going to be persisted in even after the division of the country, woe betides the country; it is not worth living in.”<sup>2</sup>

As far as the issue of personal laws is concerned, it evoked considerable conflict of opinion amongst the members of the Assembly. It is interesting to note that “whilst all the Muslim speakers favored continuation of the British policy of neutrality, the Hindu speakers emphasized that the guarantee of religious freedom by draft article 19 did not exclude the jurisdiction of the state in matters of personal law”.<sup>3</sup> The Muslim speakers argued that neither of the draft articles 19 and 35, empowered the state to legislate on personal laws.<sup>4</sup> They stated that the secular state of India should not be endowed with the legislative powers of encroach upon the beliefs and practices of any religious community. Hindu speakers expressed contrary opinion.

While presenting the draft-Constitution to the Constituent Assembly for discussion in November, 1948, Dr. Ambedkar observed:

“The Draft Constitution has sought to forge means and methods whereby India will have a Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country”<sup>5</sup>

Further, he pointed that the means adopted by the draft Constitution was “uniformity in fundamental laws, civil and criminal”.<sup>6</sup> Accordingly, article 35 of the draft Constitution provided that “The State shall endeavor to secure for citizens a uniform civil code throughout the territory of India.”

Article 35 of the draft Constitution generated heated discussion in the Constituent Assembly when it debated the provision with Vice – President H.C. Mukherjee in the chair. Among those who sought amendments to articles 35 so as to exclude personal laws from the purview of the civil code were Mohammad Ismail, Naziruddin Ahmed, Mahoob Ali Beg, Pocker Saheb and Hussian Imam. On the other hand S.C. Majumdar, K.M. Munshi, Alladi Krishnaswamy Ayyara and Dr. Ambedkar opposed the desired amendments and insisted on the adoption of article 35<sup>7</sup> by the assembly without any exemption of personal laws from the purview of the further civil code.

<sup>1</sup> V Constituent Assembly Debates, p. 213 (1947).

<sup>2</sup> V Constituent Assembly Debates, p. 225 (1947).

<sup>3</sup> D.K. Srivastava, *Religious Freedom in India*, p. 240 (New Delhi, 1982).

<sup>4</sup> M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 543, (1949).

<sup>5</sup> M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 111, (1949).

<sup>6</sup> M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 111, (1949).

<sup>7</sup> The present article 44.

## 2. 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 in force 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 any such adaptation or modification shall not be questioned in any court of law.

(3) 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 from 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, notwithstanding 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.<sup>1</sup> 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*,<sup>2</sup> 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,<sup>3</sup> Hyderabad,<sup>4</sup> Calcutta,<sup>5</sup> Madhya Pradesh,<sup>6</sup> and Bombay<sup>7</sup> 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 recognized. If we do not apply it to personal law, those laws are left without any constitutional recognition.<sup>8</sup>

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

<sup>1</sup> Tahir Mahood, *Muslim Personal Law, Role of the State in the Subcontinent*, p. 97 (1977).

<sup>2</sup> AIR 1941 FC 16

<sup>3</sup> *Panch Gujar Kaur v. Amar Singh*, AIR 1954 Raj. 100.

<sup>4</sup> *Motibai v. Chanayya*, AIR 1954 Hyd. 161.

<sup>5</sup> *Naresh Bose v. S.N. Deb*, AIR 1956 Cal. 222.

<sup>6</sup> *Rao Mote Singh v. Chandrebali*, AIR 1956 M.P. 212.

<sup>7</sup> *Atmaram v. State*, AIR 1965 Bom. 9.

<sup>8</sup> Tahir Mahood, *Muslim Personal Law, Role of the State in the Subcontinent*, p. 97 (1977).

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 from 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 to other personal law.<sup>1</sup>
- (b) Transfer of property other than agricultural land; registration of deeds and documents.<sup>2</sup>
- (c) Charities and charitable institutions, charitable and religious endowments and religious institutions.<sup>3</sup>

List II (specifying the subjects on which state legislatures can make law) includes burial and burial grounds,<sup>4</sup> “rights in or over land”<sup>5</sup> (covering succession to agricultural lands) and administration of justice and organization of courts at the district level.<sup>6</sup> In List – I reference to Muslim law is “pilgrimage to places outside India”<sup>7</sup> 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. 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 led 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

<sup>1</sup> Entry 5. List – III Schedule VII of the Constitution of India.

<sup>2</sup> Entry 6. List – III Schedule VII of the Constitution of India.

<sup>3</sup> Entry 28. List – III Schedule VII of the Constitution of India.

<sup>4</sup> Entry 10. List – III Schedule VII of the Constitution of India,

<sup>5</sup> Entry 18. List – III Schedule VII of the Constitution of India.

<sup>6</sup> Entry 5. List – III Schedule VII of the Constitution of India,

<sup>7</sup> Entry 20. List – III Schedule VII of the Constitution of India.

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 Hindus, 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 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.

#### 4. Personal Laws and Article 13

Article 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 culminated into prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth<sup>1</sup> 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 question is whether it is permissible under the Constitution that the Muslims, Hindus, 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”<sup>2</sup> 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”<sup>3</sup> Personal law 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

<sup>1</sup> Articles 14&15.

<sup>2</sup> Clause 3(a).

<sup>3</sup> Clause 3(b).

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*<sup>1</sup> (a case under the Bombay Prevention of Hindu 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 Hindus 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 Hindu religious institutions of a public character of all classes and sections of Hindus. Now, if Hindu 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 article 17 and article 25(2) for certain aspects of Hindu 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 repeal 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 article 13 (1)”<sup>2</sup>

<sup>1</sup> AIR 1952 Bom. 84

<sup>2</sup> AIR 1952 Bom. 89, para 13.

Justice Gajendradkar agreed with all arguments of Chief Justice 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”<sup>1</sup> He added that the Muslim and Hindu 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).<sup>2</sup>

Similar opinion was in later years expressed by the High Courts of Madras,<sup>3</sup> Punjab<sup>4</sup>, Karnataka<sup>5</sup>, Madhya Pradesh<sup>6</sup> and Manipur.<sup>7</sup> Until this day, the court has said that either the continued application of separate personal laws is, or the exclusive 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<sup>8</sup>. 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*,<sup>9</sup> has been dissented from by the eminent scholars like D.D. Basu,<sup>10</sup> H.M. Seervai<sup>11</sup> and Mohammad Ghause<sup>12</sup>, 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*<sup>13</sup>, the Supreme Court has categorically ruled that: “Part III of the Constitution does not touch upon the personal laws.”<sup>14</sup>This judgment has been vehemently criticized by Justice A.M. Bhattacharjee in his M.N. Bose Lectures of 1981<sup>15</sup>. 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.

## 5. Personal Laws and Article 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

<sup>1</sup> AIR 1952 Bom. 90, para 13.

<sup>2</sup> AIR 1952 Bom. 91, para 13.

<sup>3</sup> *Srinivas Iyer v. Saraswathi Ammal*, AIR 1952 Mad. 1993.

<sup>4</sup> *Gurdial Kaur v. Mangal Singh*, AIR 1968 P & H 396.

<sup>5</sup> *Suda v. Sankappa Rai*, AIR 1963 Mys. 245.

<sup>6</sup> *Abdullah v. Chandni*, AIR 1956 Bhopal 71.

<sup>7</sup> *H.B. Singh v. Bhani*, AIR 1959 Manipur 20.

<sup>8</sup> *Moti Das v. S.P. Hahi*, AIR 1959 SC 962.

<sup>9</sup> *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84.

<sup>10</sup> *Commentary on the Constitution of India*, Vol. I, p. 155 (1965).

<sup>11</sup> *Constitutional Law of India*, pp. 254-255 (1968).

<sup>12</sup> ‘Personal Law and the Constitution of India’ in T. Mahmood (ed.) *Islamic Law Modern India*, pp. 57-58 (1972).

<sup>13</sup> AIR 1980 SC 707

<sup>14</sup> *Krishan Singh v. Mathura Ahir*, AIR 1980 SC 712.

<sup>15</sup> A.M. Bhattacharjee, *Hindu Law and Constitution* (1983).

and 15. It is alleged and all classical personal laws particularly those applicable to Hindus 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*,<sup>1</sup> 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*,<sup>2</sup> the Karnataka High Court held that the legitimate illegitimate distinction in the matter of children's maintenance rights under the conventional Hindu 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.<sup>3</sup>

It is interesting to note that recently, the Supreme Court of India in *Ahmedabad Women Action Group v. Union of India*,<sup>4</sup> dismissed three writ petitions which challenged the constitutionality 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*.<sup>5</sup> 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.

## 6. Personal Laws and Religious – Cultural Freedom

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 own” 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.

<sup>1</sup> AIR 1977 Pat. 171.

<sup>2</sup> AIR 1960 Mys, 182

<sup>3</sup> 1971 Cur. L.J. 660.

<sup>4</sup> (1997) 3 SCC 573.

<sup>5</sup> 1994 Supp. (1) SCC 713.

## CONCLUSIONS

Before concluding my study by presenting practical and viable suggestion for the solution of various problems highlighted earlier. It is interesting to observe that during the sixty seven years of our Constitution, Article 44 relating to Uniform Civil Code attracted very little attention from the legislators, lawyers, judges and legal academics. In fact, it remained a pious wish of the framers of the Constitution which was occasionally echoed in various form. In a nation grappling with stupendous problems (perhaps unheard of in any other parts of the world), combating with fissiparous forces threatening its very existence, Article 44 was thought of as a panacea to all problems, an ideal that could put an end to the great communal divide which was becoming more strident with the passage of time. However, during the last two decades, Article 44 has stirred up a flurry of activities in a various fields leading to political agitations, judicial decisions, legislative debates and academic outpourings all highlighting this provision with participants taking sides of the issue. The family life of Indians is, rightly or wrongly, guided by their respective religious and customary beliefs Religions more or less survive only through the ceremonies and social customs enforced upon its members if they are negated, soon enough religions will lose their eminence in social sphere. This uniform civil code has social, political, and religious aspect. The UCC would 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 and political considerations. The section of the nation against the implementation of UCC contends that in ideal times, in an ideal State, a UCC would be an ideal safeguard of citizens' rights. But India has moved much further from ideal than when the Constitution was written. But to conclude, I would like to say that citizens belonging to different religions and denominations follow different property and matrimonial laws which is not only affront to the nation's unity, but also makes one wonder whether we are sovereign secular republic or loose confederation of feudal states, where people live at the whims and fancies of mullahs, bishops and pundits. I strongly support the crusade for the implementation of the UCC and homogenizing the personal laws. I support it, not because of any bias, but because it is the need of the hour. It is the high time that India had a uniform law dealing with marriage, divorce, succession, inheritance, and maintenance.

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