

GENDER JUSTICE AND UNIFORM CIVIL CODE

India has a multiplicity of family laws. Over and above these various laws, customs also play some role in the area of marriage, divorce and other family matters. The law is communal insofar as each community or religious group has its own distinct law to govern domestic relations. It is also personal insofar as each person carries his own law wherever he goes in India¹. What law will apply to a person depends on the religion he follows. The law relating to marriage, divorce, maintenance, guardianship and succession governing the Hindus, Muslims and Christians etc., is different and varies from one religion to other. There are different laws like the Hindu Marriage Act; the Hindu Succession Act; the Hindu Minority and Guardianship Act; the Hindu Adoption and Maintenance Act governing the personal matters of Hindus. The Shariat Act, The Dissolution of Muslim Marriages Act and the Muslim Women (Protection of Rights on Divorce) Act etc., which are based on the tenets of Holy Quran govern the personal matters of Muslims. Similarly the Indian Christians are governed by the Indian Christian Marriage Act, the Indian Divorce Act and the Cochin Christian Succession Act etc. Parsis are governed by a different set of laws.

There is no Uniform Civil Code in India but a Uniform Criminal Code is equally applicable to all citizens irrespective of their religious affiliation. However, in the case of civil law particularly in the matter of personal laws there is no uniformity. The family law is partly statutory and partly non-statutory. Muslim law is by and large non-statutory and is divided into a number of schools and sub-schools. Similarly, the non-statutory portion of Hindu law is divided into several schools and sub-schools. The present day

¹ *Malakayya vs. Avati Bhommayya*, AIR 1971 AP 270.

family law is thus a maze. There is no uniformity in all-personal laws as they confer unequal rights depending on the religion and the gender. There is no *lex loci* in India in matters of marriage, succession and family relations. This is very confusing.

The Committee on the status of women in India, in its report entitled "Towards Equality" presented in 1974, evaluating the personal laws from the angle of the women, criticized the British policy towards these laws. According to the Committee, the policy had a crippling effect on women; the result of the policy was "to encourage the feeling of separateness and prevent the unity of the two communities"; the policy of non-intervention with family law resulted in stagnation with the result that "the two systems could neither absorb nor adjust to socio-economic changes. Social tensions inevitably arise in situations when law does not in fact answer the needs arising from major social change".²

With a view to achieve uniformity of law, its secularization and making it equitable and non-discriminatory, the Constitution of India contains Article 44 of the Directive Principles of State Policy which runs as follows: "The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India"³.

India has set before itself the ideal of a secular society and in that context achievement of a Uniform Civil Code becomes all the more desirable. It will create a national identity and will help in containing fissiparous tendencies in the country. The Uniform Civil Code will contain uniform provisions applicable to everyone and based on social justice and gender equality in family matters. Its provisions will be fair and equitable so that every member of the society may have a feeling of equality of social status from major social change.⁴

During the debate in the Constituent Assembly on Article 44, several Muslim members had expressed the fear that implementation of Article 44 would abrogate their personal laws. K.M.Munshi had then explained that there

² Report 102.

³ Jain, *Indian Constitutional Law*, 600.

was nothing sacrosanct about the personal laws as these laws covered merely secular activities like inheritance and succession. Religion must be divorced from personal law. He pointed out that India was an advancing society and it was necessary to unify and consolidate the Nation by every means. We must consolidate and unify our personal law so that “the way of life of the whole country may in course of time be unified and secular”.

Dr. Ambedkar, the Law Minister at the time, emphasized that India had already achieved uniformity of law over a vast area of human relationship and the only areas of civil law, which continued to have diverse laws, were the areas governing matters like marriage and succession. The other point argued was that such diversity violated the principle of Fundamental Rights that there should be no discrimination between citizens.⁵ Thus, the Founding Fathers were convinced that it was not necessary to have legal pluralism for a pluralistic society and that, as a multi-religious country, India’s salvation lay only in having a secular Uniform Civil Code.

These arguments remain as valid today as they were when placed before the Constituent Assembly. The absence of a Uniform Civil Code so far is as incongruity that cannot be justified with the emphasis that is placed on secularism, science and modernization. According to the Committee on the Status of Women in India⁶: “The continuance of various personal laws which accept discrimination between men and women violate the fundamental rights and the Preamble to the Constitution which promises to secure to all citizens “equality of status, and is against the spirit of natural integration”. The Committee recommended expeditious implementation of the Constitutional directive in Article 44 by adopting a Uniform Civil Code.

With the new Constitution having come into force, and Article 14 therein making discrimination invalid, certain aspects of the current family laws making differential provisions for various groups which place the followers of one system at the advantage over the followers of the other

⁴ Report of the Committee on the Status of Women, 132.

⁵ Constitutional Assembly Debates, VII, 540, 547-8.

system, have been challenged as discriminatory from time to time. The Courts have either avoided or by-passed evaluating the family laws on the touchstone of Article 14 or rejected these challenges.

In *Mary Roy vs. State of Kerala*⁷, the question argued before the Supreme Court was that certain provisions of the Travancore Christian Succession Act, 1916, were unconstitutional under Article 14. Under these provisions, on the death of an intestate, his widow was entitled to have only a life interest terminable at her death or remarriage, and his daughter could get only Rs 5000 or one-fourth of the value of the share of sons whichever was less. It was also argued that the Indian Succession Act, 1925, had superseded the Travancore Act. Under this Act, widow gets one-third share of the property of the intestate and sons and daughters share equally in the remainder. The Supreme Court avoided examining the question whether gender inequality in matters of succession and inheritance violated Article 14, but nevertheless, ruled that the Indian Succession Act had superseded the Travancore Act. *Mary Roy* has been characterized as a “momentous” decision in the direction of ensuring gender equality in the matter of succession⁸.

The opponents of the Code argued that the Constitution through Articles 26, 29 and 30, recognizes the existence of the “Collective members” besides “Individual members” as constituents of the composite Indian nation⁹. But this argument can be countered by saying that fundamental matters and religion are essential matters for the individual and not for a group or a community.

Because of the existence of conversation among certain sections of the Indian population, the Government’s deference to this sentiment because of political considerations, it becomes extremely difficult to have any progressive measure in the area of family law. For example, sometime back, the Government introduced in Parliament the Adoption of Children Bill, 1972, seeking to add a secular and uniform law of adoption to govern all adoptions

⁶ Report, 142.

⁷ AIR 1986 SC 1011.

⁸ Alice Jacob, “Equal Inheritance Rights to Indian Christian Women of Kerala”, (1986) 28 JILI 241.

irrespective of religion of the parties involved. It would have repealed the Hindu Adoption Act. For the Hindus, the proposed law would have secularized the law of adoption based on the legal fiction having a religious and sacramental basis. Even this permissive and optional law was opposed by the Muslim orthodox opinion and, ultimately, the Government succumbed to this pressure, and withdraws the Bill. The Bill imposed no obligation on any one to adopt and yet it was opposed. The enabling law would not have affected those conscientious persons who did not want to adopt considering adoption as being against their religion, but it would have helped many couples who pine to have children and also many orphans from minority groups who need care, protection and love of someone, but cannot get it at present under the law as it stands today.

6.1. PERSONAL LAWS AND GENDER DISCRIMINATION

On a clear analysis of personal laws, it becomes obvious that the women have been conferred an inferior status in most of the personal matters compared to the men. The following examples justify the statement.

Hindu Law: - Till the codification of Hindu law in 1955 and 1956 the Hindu Women did not enjoy equal rights along with the Hindu men. Before 1955 polygamy was prevalent among the Hindus.

The Hindu woman could not hold any property as its absolute owner except in the case of "*Stridhana*". She had only limited estate, which was passed on to the heirs of the last full male owner called reversioners on her death. In the matter of adoption a Hindu woman had no right to adopt a child on her own. She could not be the natural guardian of her children during the life of her husband. These examples are only illustrative in nature and not exhaustive.

Even though the Hindu law has been codified, certain discriminatory provisions still exist even today. For example a Hindu woman is not a coparcener in Hindu coparcenary except in a few States like Andhra Pradesh,

⁹ Tahir Mahmood, Personal Laws in Crisis, 91.

Maharashtra, Karnataka and Tamil Nadu. Consequently she is not entitled to claim a share in the coparcenary. Similarly, she has no right to partition of a dwelling house even though she is a legal heir. Thus it is obvious that the codification of personal law of Hindus has not succeeded completely in eradicating the gender inequality.

Muslim: - In the Pre-Islamic Arabia, the women enjoyed a secondary status in all respects when compared to men. The advent of Islam has contributed much for the amelioration of muslim women and alleviation of their problems. The Holy Quran gives equal rights to men and women and places women in a respectable position. However, there are certain aspects in Islam that render the position of Muslim women especially the wives insecure and inferior.

A muslim male is permitted conditionally to marry as many as four wives at a time. It is important to note that the polygamy among muslim men is only a permission but not a compulsion. The Shia muslim male can contract *Muta* marriages for an agreed period of time. There is no ceiling on the number of *muta* marriages that may be contracted by a Muslim male. In the matter of divorce the position of the muslim women is the most inferior and insecure compared to others. Particularly the method of divorcing the wife by the husband by pronouncing triple "*Talak*" is highly discriminatory. This is in spite of the clear message of Holy Quran, which discourages "*Talak-ul-Sunnat*" and "*Talak-ul-Biddat*" because the right of the husband to divorce his wife is unilateral and unfettered. Recently the Allahabad High Court has held that the practice of the triple *Talak* is unlawful and void. In the matter of succession, a muslim woman is discriminated against, despite the assertion of certain muslim scholars that the Islam in this regard is more progressive and liberal. The legal position is that when two sharers or residuaries of opposite sex but of the same degree inherit the property of the deceased, the muslim male gets twice the share of the female. For example, if brother and sister inherit the property as successors, the brother gets two shares whereas the sister gets only one share.

In the matter of maintenance also the divorced muslim wife is not required to be maintained beyond the 'Iddat' period. The Criminal Procedure Code, which imposes an obligation on a husband to maintain his wife including divorced wife until she maintains herself, is a secular law and is applicable to all. There is a controversy as to whether a muslim husband can be directed to maintain his divorced wife even beyond the Iddat period under the provisions of section 125 of the Code of Criminal Procedure. In the famous case of *Mohd. Ahmed Khan vs. Shah Bano Begum*¹⁰, the Supreme Court speaking through Chandrachud, the then Chief Justice held that section 125 of Code of Criminal Procedure is applicable also to the muslims and that even a muslim husband also is liable to maintain his divorced wife beyond the iddat period. Because of the controversy, the Parliament has passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to overrule the judgment in Shah Bano case. The effect of this Act is that a muslim husband is not liable to maintain his divorced wife beyond the 'iddat' period, unless both the spouses submit to the court at the appropriate time that they would like to be governed by Code of Criminal Procedure.

6.2. UNIFORM CIVIL CODE AND INDIAN CONSTITUTION

The Indian Constitution, in its Part IV, Article 44 directs the State to provide a Uniform Civil Code throughout the territory of India. However it is only a directive principle of State policy, therefore it cannot be enforced in a Court of law. It is the prerogative of the State to introduce Uniform Civil Code. The Constituent Assembly Debates clearly show that there was a wide spread opposition to the incorporation of Article 44 (Article 35 in the Draft Constitution) particularly from the Muslim members of the Assembly.¹¹ Naziruddin Ahmed, Mohd. Ismail Sahib, Pocker Sahib Bahadur and Hussain Sahib etc., made a scathing attack on the idea of having a Uniform Civil Code in India on the grounds that the right to follow personal law is part of the way

¹⁰ AIR 1985 SC 945

¹¹ See CAD BOOK No. 2 Vol III pp 538,552.

of life of those people who are following such laws, that it is part of their religion and part of their culture, that it would lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country and that in a country so diverse it is not possible to have uniformity of civil law. However, one of the most illustrious members of the Assembly, K.M.Munshi strongly felt that if the personal law of inheritance, succession etc is considered as a part of the religion, the equality of women can never be achieved.¹²

The Chairman of the Drafting Committee Dr B.R.Ambedkar stated that in our country there is practically a civil code, uniform in its content and applicable to the whole of the country. He cited many instances like Uniform Criminal Law, Transfer of Property and Negotiable Instruments Act, which are applicable to one and all. However he conceded that the only province, the civil law has not been able to invade so far is marriage and succession. He also dispelled the arguments of certain muslim members that the muslim law is immutable and uniform throughout India. He cited the example of the North-West Frontier Province, which was not subject to the Shariat law prior to 1935 and until then followed the Hindu law in the matter of Succession etc.¹³ Similarly in the North Malabar region of Kerala, the Marumakkutayan law applied to all, not only to Hindus but also to Muslims. Up till 1937, in the rest of India, the Hindu law of succession governed the various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent.

Some of the learned members however predicted that a stage would come when the Civil Code would be uniform and stated that power given to the State to make the Civil Code uniform is in advance of the time.¹⁴ Dr Ambedkar also opined that it is perfectly possible that the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the

¹² CAD Vol. III p.548.

¹³ Id at 550.

initial stage, the application of the Code may be purely voluntary.¹⁵ The foregoing discussion clearly establishes that the framers of the Constitution were aware of the gender injustice and sexual inequality of women and they incorporated Article 44 in the Constitution hoping that it would be introduced in future at the appropriate time. It is really unfortunate that even after 58 years of independence, the State did not find it necessary to make any efforts to honour this Constitutional commitment. It is the humble opinion of the Researcher that a Uniform or Common Civil Code is possible only when the Governments consider the gender justice as the ultimate goal.

6.3. UNIFORM CIVIL CODE AND JUDICIAL RESPONSE

The judiciary in India has taken note of the injustice done to the women in the matters of many personal laws. It has been voicing its concern through a few judgments, indicating the necessity to have uniformity in personal matters of all the citizens. In the case of *Mohd. Ahmed Khan vs. Shah Bano Begum*¹⁶ pertaining to the liability of a muslim husband to maintain his divorced wife beyond 'iddat' period, who is not able to maintain herself, the Supreme Court held that section 125 of Code of Criminal Procedure which imposes such obligation on all the husbands is secular in character and is applicable to all religions. In this case, the Supreme Court through Chandrachud, CJ regretted that Article 44 has remained a "dead letter" so far and chided the Government for not undertaking to enact the Uniform Civil Code as required by Article 44. The Court observed:

"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, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this

¹⁴ Per Mr Naziruddin Ahmad, CAD Vol. VIII p. 542 dt 23.11.1948.

¹⁵ CAD vol. VII p. 551.

issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country, and, unquestionably, it has the legislative competence to do so.”

The Supreme Court observed further:

“We understand the difficulties involved in bringing persons of different faith 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 is so probable. But piecemeal attempts of courts to bridge that 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 case.”

In *Ms. Jordan Deigndeh vs. S.S.Chopra*¹⁷, D.Chinnappa Reddy, J speaking for the court referred to the observations of Chandrachud,C.J. in *Shah Bano Begum’s* case and observed as under:

“.... The present case is yet another, which focuses ...on the immediate and compulsive needs for a Uniform Civil Code. The totally unsatisfactory state of affairs consequent on the lack of a Uniform Civil Code is exposed by the facts of the present case....”

In *Sarla Mudgal vs. Union of India*¹⁸, a two-judge bench of the Supreme Court led by Kuldip Singh, J., (R.M. Sahai, J., concurring) took the opportunity to make the state aware of the void in the area of personal laws arising out of conflict situation that could legitimately be resolved by the legislature through the enactment of a uniform civil code. In this case the Supreme Court held that conversion of a Hindu male to Islam only for the purpose of contracting bigamous marriages circumvents section 494 of the Indian Penal Code. The court has declared such marriages as bigamous and void. The Court after referring to various precedents on the point, categorically held that till uniform civil code is achieved for all the Indian Citizens, there would be an inducement

¹⁶ AIR 1985 SC 945.

¹⁷ AIR 1985 SC 935.

¹⁸ (1995) 3 SCC 635-53.

to a Hindu husband who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim. Here the court was pointing out the injustice done to the first wife, legally wedded.

The Bench noted the failure of successive Governments till date, to implement the constitutional mandate under Article 44 of the Constitution of India. It was suggested that the personal laws of the minorities should be rationalized to develop religious and cultural amity preferably by entrusting the responsibility to the Law Commission and Minorities Commission. The Bench further directed the Government of India to file an affidavit indicating the steps taken and efforts made to have a fresh look at Article 44 in August 1996. However this latter direction was treated as “obiter dicta” by the court subsequently.

In *Lily Thomas vs. Union of India and Others*¹⁹, another two-judge bench of the Supreme Court comprising of Saghir Ahmad and R.P. Sethi, JJ., though concurred with the view propounded by the two-judge bench in *Sarla Mudgal* on the facts of the case, and yet deviated from its stand on uniform civil code. For his deviating view, Saghir Ahmad, J., drew support by citing the observation of the Supreme Court in *Ahmedabad Women Action Group and Others vs. Union of India*²⁰, in which it was held that the question regarding the desirability of enacting a uniform civil code did not arise in that case. Likewise, Sethi, J., on the basis of his reading of *Sarla Mudgal* stated that the Supreme Court in that case “has not issued any directions for the codifications of the common civil code and the judges constituting different Benches had only expressed their different views in the light of facts and circumstances of those cases”. By implication, *Lily Thomas* seems to lay down that the issue of directing the State about the enactment of a uniform civil code did not arise directly as such, and, therefore, whatever was said and done in *Sarla Mudgal* was only obiter—something said just in passing.

¹⁹ (2000) 6 SCC 224; AIR 2000 SC 1650.

²⁰ (1997) 3 SCC 573.

A three-judge bench decision of the Supreme Court in *John Vallamattom and Anr. Vs. Union of India*²¹, was delivered on July 21, 2003. It hit the headlines of the national press, saying “Supreme Court calls for Uniform Civil Code”²². In *John Vallamattom*, in a petition under Article 32 of the Constitution, the Supreme Court was solely concerned with the Constitutionality of the provisions of section 118 of the Indian Succession Act 1925 which deals with bequest to religious or charitable purposes.

The Act of 1925 confers the right to dispose off property by will upon all persons irrespective of religion, race, caste, sex, etc. Section 59 of the Act clearly provides that every person of sound mind, and who is not a minor is entitled to dispose off his property by will. The execution of underprivileged wills is protected under section 63 which lays down that the will shall be signed by the testator and attested by two or more witnesses, each of whom should have seen the testator sign or affix his mark to the will. If the making of a will is caused by fraud or coercion or by such opportunity, which takes away the free agency of the testator, the same shall be void under section 51 of the Act.

However, despite this all round equality stance, section 118, falling in part VI of the Act of 1925 regulating testamentary succession, deals with bequest to religious or charitable purposes at variance. It provides:

No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the will of living persons.

These provisions, by virtue of section 58 of the Act of 1925, specifically exclude the testamentary succession to the property of any Mohammedan, Hindu, Buddhists, Sikh or Jain. The effect of the provision of section 118 read with section 58 is that it singularly applies only to Christians. This means that a

²¹ 2003 (5) SCALE 384.

²² See, *Hindustan Times*, July 23, 2003.

Christian; having a nephew or niece or any nearer relative²³ cannot bequeath his property for religious or charitable use unless: (a) the will is executed not less than twelve months before the death of testator; (b) it is deposited within six months from its execution in some place provided by law; and (c) it remains in such deposit till the death of the testator.

Most brazenly, these provisions discriminate against the members of the Christian community in India vis-à-vis non-Christians, inasmuch as unlike the Hindus, Muslims, Buddhists, Jains or Sikhs, or even Parsis, the Christians are practically prevented from bequeathing their property for religious or charitable purposes unless a fresh will is executed on the expiry of every 12 months, if the testator does not suffer from the misfortune of death within the said statutory period. The discriminatory treatment becomes pointed and sharp even more when it is realized that "charity and compassion are preached in every religion". If so, why should the Christians be treated differently from non-Christians? To make out discrimination gross or self-evident, Lakshmanan, J., cites the privileged positions of Muslims and Hindus:²⁴

There is no restriction on Mohammedan on bequeathing property for religious or charitable purposes. A Mohammedan can validly bequeath one-third of his net assets, when there are heirs. The only restriction as regards the legator is that he should not be a minor. As regards the legatee, it is stated that if the legatee causes the death of the legator, the Will becomes void and ineffective. Under Mohammedan Law, a Will can be lawfully made in favour of an individual, an institution, a non-Muslim, a minor and an insane. As regards the subject matter, any property can form the subject of a Will, and both corpus and usufructs can be bequeathed.

In the case of Hindus, the founding of a temple or a charitable institution is considered as an act of religious duty and has all the aspects of *Dharma*.

²³ As per the provisions of section 28, read with Schedule I of the Act of 1925, the term "nearer relative" includes father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister. It includes adopted son. However, it does not include any relation by marriage. Accordingly, wife of the testator is not included within the ambit of "nearer relative".

²⁴ See, *Supra* note 21 at 399 (paras 58 and 59).

Under section 118 of the Act of 1925, Christians are discriminated against not only vis-à-vis non-Christians, but also in relation to other fellow Christians. For example, the impugned provision discriminates against a Christian who has a nephew, niece or nearer relative vis-à-vis a Christian who has no such relative. Khare, CJI, feels surprised and says that it is difficult to appreciate as to why a testator would, although he is entitled to bequeath his property by way of charitable and religious disposition if he has a wife, but he would be precluded from doing so in the event he has a nephew or a niece. “It is really baffling”, Khare, CJI adds, “that no protection has been given to the near relatives [like wife] against death-bed gifts for non-religious or charitable purposes”. This means, in terms of protection-provision of section 118, the interest of testator’s wife is subordinated to his nephew or niece. Likewise, the stipulation in section 118 that a testator who lives beyond the statutory period of twelve months is not able to execute his wishes in relation to his property unless he makes a new will is patently “unreasonable and arbitrary”. There is no rationale behind limiting the survival of the testator for a period of twelve months, and a testator who does not survive beyond the same period, in declaring the will of the former as void and that of the latter as valid. Besides, “the period or duration of life of a testator has no relation with the purpose of will, there appears to be no reason behind fixing twelve months’ period”. Moreover, testators constitute “a homogeneous class and they cannot be divided arbitrarily on the basis of duration of their survival which is unrelated to the purpose of execution of a will”. The period of twelve months has no nexus to performing a philanthropic act.

Manifestly, thus, the restrictions imposed upon the members of the Christian community by section 118 of the Act of 1925 are found to be not reasonable in any conceivable sense.²⁵

On the very face of it, the Indian Succession Act of 1925 is a pre-Constitution statute. Its legitimacy or validity is, therefore, required to be tested

²⁵ Virendra Kumar, “Uniform Civil Code Revisited: A Juridical Analysis of *John Vallamattom*”, 45 JILI (2003) 315.

on the touchstone of our Constitution that we, the people of India, have given to ourselves. This is what is mandated under Article 13 of the Constitution. Clause (1) of Article 13 categorically states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of fundamental rights as provided in Part III, shall, to the extent of such inconsistency, be void.²⁶ Of course, keeping in view the prospective operation of Article 13(1), in the event the provision of section 118 of the Act of 1925 be held unconstitutional being in violation of fundamental rights, the same would be void only with effect from the commencement of the Constitution, and not from a date anterior to it. The provision of section 118 has been found discriminatory against the Christians, and therefore, violative of Article 14 of the Constitution. Accordingly, the Supreme Court as unconstitutional has finally struck down the said provision on July 21, 2003. Surely, this has provided the much needed relief to the Christian community in India by voiding the basis of discrimination—a step which was taken by the British Parliament more than forty years ago (to be exact, in 1960) by repealing the Statutes of Mortmain that also constituted the basis of section 118 of our Act of 1925.

In fact, at the very inauguration of our Constitution in 1950, we all were constitutionally assured that all laws in force at the commencement of the Constitution would be weeded out in so far as those were inconsistent with the provisions of the Constitution in general, and fundamental rights including the right to equality and non-discrimination in particular. It needs to emphasize that the State *suo proprio* was obliged to initiate steps in this direction as soon as possible. In fact, for bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, Article 372 envisages mainly two modes of doing this. One mode may be termed transitory in nature. Under clause (2) of Article 372, the President may by order make

²⁶ The expression, “laws in force”, as per clause 3(b) of Article 13 of the Constitution, includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed,

such adaptations 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 the effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law. This power was to be exercised by the President within three years from the commencement of the Constitution.²⁷ However, the power of the President to adapt laws was further extended by the Constitution (Seventh Amendment) Act, 1956 by specifically incorporating a new Article 372A so that the provisions of any law in force in India or in any part thereof, immediately before the commencement of the amending Act of 1956 may be brought in line with the provisions of the Constitution. The other mode envisaged under Article 372 (and also Article 372A) of the Constitution is the one that empowers “a competent Legislature or other competent authority” to do the exercise of adaptation and modification of the pre-Constitution law, that is “law in force” immediately before the commencement of the Constitution—the exercise which the President was empowered to undertake during the transitory period only.

It is in this backdrop, we must understand and appreciate the agony of the judicial mind, when Khare, CJI, lamentably says:

[I]t is a matter of regret 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.

Constitutionally, the Supreme Court’s call for a uniform civil code falls within the ambit of Article 141 of the Constitution, because the function of the apex court is not just to decide a *lis* between the parties before it but to go beyond that as an ultimate repository of the Constitution. It is a very special function at the level of the highest court of the land, needing constantly the

notwithstanding that any such law or any part thereof may not be then in operation wither at all or in particular areas.

²⁷ Initially this power was to be exercised within two years. This period was subsequently extended to three years by section 12 of the Constitution (First Amendment) Act, 1951.

fuller and fuller exploration and exploitation of constitutional values in accordance with the directives of the Constitution.

The framing of uniform civil code is often considered counter-productive, because it is likely to evoke religious susceptibilities. Traditionally, the personal laws regulating relationships in the realm of marriage-divorce, inheritance-succession, minority-guardianship, adoption-maintenance, etc. are closely tied up with religion and religious practices. This is how historically, especially during the British period, we happened to have separate personal laws for the Hindus, Buddhists, Jains, Sikhs, Muslims, Parsis, Christians and Jews. In fact, it was this prevailing scenario of multiple personal laws in India that prompted the founding fathers of our Constitution to conceive the idea of a common civil code under Article 44 of the Constitution.

The first critical step in the direction of moving towards a common civil code was taken in the enactment of Hindu Code Bill that eventually fructified in the form of four major enactments, namely Hindu Marriage Act of 1955, Hindu Succession Act of 1956, Hindu Adoptions and Maintenance Act of 1956, and Hindu Minority and Guardianship Act of 1956. These Acts are the amended and codified version of the hitherto prevailing personal laws amongst the traditional Hindus in any of its forms or developments, including a *Virashaiva*, a *Lingayat* or a follower of the *Brahmo*, *Prarthana* or *Arya Samaj*. The term 'Hindu' also includes within its ambit any person who is a Buddhist, Jain or Sikh by religion. Although these enactments as such intended to have nothing to do with religion or religious practices, and are supposed to be secular in character, and yet, as if by quirk of history, they came to be labeled as 'Hindu' codes, albeit using the term 'Hindu' in a wide sense. Nevertheless, the usage of the term 'Hindu', even if it is used in a wide sense, seems to be a misnomer. But, then, this was merely for a transitory period. In due course of time, these 'Hindu' enactments were expected to be replaced by an all-embracing uniform civil code as envisaged under Article 44 of the Constitution. This was to be accomplished by working on mainly on two fronts.

First, by reforming the 'Hindu' codes from within. In this respect, some steps have already been taken.²⁸

One argument against the enactment of a uniform civil code is repeatedly raised. It is often argued that notwithstanding Article 44 of the Constitution, the State is not obliged to enact the Code by overriding personal laws without the consent of the communities concerned. To support this stand, invariably a statement is abstracted from the speech made by Dr. B. R. Ambedkar in the Constituent Assembly on December 2, 1948. While discussing the provision of Article 44, Dr. Ambedkar said:

I should also like to point out that all that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. It is only giving a 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 found to be objectionable by the Muslims or by the Christians or by any other community in India.

A bare perusal of the abstracted statement in the light of the eventually adopted provisions of Article 44 of the Constitution simply implies that in the matters of social reforms the State, having gained the power to enact a uniform civil code, will not "immediately proceed to execute or enforce that power" in haste. It will pay due regard to religious sentiments of all the communities in India. However, by any rational construction, the abstracted statement does not debar the State to undertake the enactment of a uniform civil code for weeding out the highly unjust and discriminatory provisions, especially *vis-à-vis* women, even after a lapse of more than half a century since the inauguration of our Constitution.

Thus, it is clear that no gender justice could be rendered in its comprehensive sense, unless the women, irrespective of their religious

²⁸ See, for instance, the Amending Act/ Adaptation Orders effecting changes into the Hindu Marriage Act of 1955 by Hindu Marriage (Amendment) Act, 1956 (73 of 1956); Repealing and Amending Act, 1960 (58 of 1960); Hindu Marriage (Amendment) Act, 1964 (44 of 1964); Marriage Laws (Amendment) Act, 1976 (68 of 1976); Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978). Marriage Laws (Amendment) Act, 1999 (39 of 1999); and Marriage Laws (Amendment) Act, 2001 (49 of 2001).

affiliation have been conferred equal rights on par with men in personal matters, the Constitutional mandate of right to equality of status and opportunity can not be implemented. However adequate care should be taken to see that only the rights are made uniform and not the rituals which are inherent part of the culture and religion as otherwise it would violate the basic structure of the Constitution viz. secularism.

RESUME

The Uniform Civil Code is an issue politically more sensitive and debatable than an instrument to remove the gender discrimination. The feasibility and the probable issues in the Code are subject matter of controversies not only between the various religious communities but also intra-communities. The Committee on the status of women in India, in its report entitled "Towards Equality" presented in 1974, evaluating the personal laws from the angle of the women, criticized the British policy towards these laws. According to the Committee, the policy had a crippling effect on women; the result of the policy was "to encourage the feeling of separateness and prevent the unity of the two communities"; the policy of non-intervention with family law resulted in stagnation with the result that "the two systems could neither absorb nor adjust to socio-economic changes. Social tensions inevitably arise in situations when law does not in fact answer the needs arising from major social change". With a view to achieve uniformity of law, India has set before itself the ideal of a secular society and in that context achievement of a Uniform Civil Code becomes all the more desirable. But India being credited having a mosaic of various cultures, traditions, faith, practices and features, it would not be feasible to adopt an Uniform Civil Code because the followers of different tribes, cultures and practices would not like to forgoe their own identity and well establish and a long chain of practices in their domestic relations. Another option may be to educate the people and eradicate discriminatory or oppressive system of practice if any in their community or groups. Looking into the facts of different culture, tradition, practice, belief,

rituals and ceremonies prevalent and followed in India by various religious communities, sects, tribes as well as other people the Uniform Civil Code containing the uniform provision applicable and enforceable to the Indian citizens in the Indian society does not appeared to be a viable solution and perhaps not also possible to see like "Indian Uniform Civil Code". The law of succession too has variation on the lines of tradition, practice etc. All such tradition, practice and rules cannot be clubbed into to portrait Uniform succession law. It is, however, fairly possible to include and amend the laws for gender justice in succession matters in the respective laws without infringing the faith, practices and system of the different fractions of the society.