

## PERSONAL LAWS: NEED FOR A UNIFORM LEGISLATION\*

### Introduction

Law is the formal codification of customs that have achieved such acceptance as become the enforced norm. The process of acceptance is accelerated by the existence of legislative bodies, which seek to impose laws. Law codification involves the legislation and regulation of statutes, as well as the resolution of disputes<sup>1</sup>. In the civil law system codification is also an attempt to structure the law according to fundamental ethical principles to create a sense of order and simplicity that all members of society can comprehend, not merely university trained jurists. Stating the law in simple, precise terms, understandable to the lay person without a specialized legal education, is the only way they can reasonably obey it or be fairly sanctioned for not obeying it. This overlaps with the idea of a formal social legal code as understood in ethics. Keeping in view the existence of civil codes in the majority of the countries in the world, there is a real need of one such code in respect to the matters relating to marriage, divorce maintenance, success etc. for all the citizens in a democratic country like India where population includes people belonging to diverse faiths, religions, and castes.

India has a complex system of personal laws governing inter-personal relationships. Each community has its own law governing marriage and divorce, maintenance, custody and guardianship of children, inheritance and succession, adoption and the like. These personal laws go with an individual across the states of India where they are part of the law of the land, and the individual is entitled to have that individual's own personal law in the local territory<sup>2</sup>. These diverse personal laws exist in India despite the constitutional directive to the legislature to enact a uniform civil code applicable to all religious groups that should uniformly govern their family relationships. In fact, the absence of uniformity in laws governing these vital inter-personal relationships has resulted in the denial of constitutionally mandated equality of all citizens before the law and equal protection of laws as also the allied mandate of non-discrimination on the ground of sex in the crucial area of family laws. Most family laws being old and religious in origin, contain discriminatory provisions against women.

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1. [http:// www. Knowledgerush .com/kr/encyclopedia/Dispute Resolution/](http://www.Knowledgerush.com/kr/encyclopedia/Dispute%20Resolution/)accessed on 20.6.2009
2. J Duncan, M. Derrett, "*Religion, Law and the State in the India*" New York: the Free Press, (1968) P. 439.

There are professed by its different communities. Hindu law governs all Hindus, as also Buddhists, Jains and Sikhs. Muslim law applies to Muslims, Christian law governs Christians, and Parse law applies to the Parsis. Jews have their own personal law. There is an overarching secular civil law that the parties may opt for, the Special Marriage Act of 1954 under which persons professing any faith or differing faiths can marry. If they are married under the Special Marriage Act, the determination of their heirs and the right to inheritance or succession is then governed by the Indian Succession Act of 1925 which applies to all who marry under the Special Marriage Act except Hindus. Furthermore, Hindu as well as Muslim law has within it, several schools which may prescribe, for example, differing sets of legal heirs. These religious laws are derived originally from religious texts and their interpretations by scholars or courts, interspersed with customary law which, may differ in different parts of the country. These laws have also been modified by legislation from time to time. Now, with the exception of the Muslims and the Jews, matrimonial law for almost all the other communities in India is statutory. The statutes, however, often make only piecemeal changes in the original religious laws, thus retaining vestiges of an older discriminatory system<sup>3</sup>. These personal laws go with an individual across the states of India where they are the part of the laws of the land and the individual is entitled to have the individual's own personal law applied and not the law which would be applied in the local territory<sup>4</sup>. Thus, the religion and personal laws in India are more or less closely intertwined. The idea of a Common Civil Code, therefore, strikes at the heart of custom and orthodoxy of the various religious communities. The need for a comprehensive legislation is to effect an integration of India by bringing all communities into a common platform, which is at present governed by personal laws that do not form the essence of any religion. There should be a Uniform Civil Code irrespective of all religions as far as social ethics are concerned.

The framers of the Constitution clearly indicated the meaning of the word personal law in Entry 5 of list III of the 7<sup>th</sup> Schedule of the Constitution, which says:

“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 their

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3. Sujata Manohar, “Inter-Personal Laws In India, an article given on site accessed on 24.9.2007 (in [diacode.nic.in/coiweb/fullact1.asp?Tfnm=00+56](http://diacode.nic.in/coiweb/fullact1.asp?Tfnm=00+56))
  4. Ruma Pal, “Religious Minorities and the Law” in J Duncan M Derrett, “*Religion, Law and the State in India*,” New York: The Free Press, (1968) P. 24.

personal law”.

The matters specified in Entry 5 of list III of the Constitution were the matters which were governed by personal law under the Government of India Act 1935. Thus, the matters enumerated in this item are subject to legislation by the state, which include the personal laws. Article 246(2) clearly provides that parliament or the state legislature have power to make laws with respect to any of the matter enumerated in list III of the Seventh Schedule. Moreover, in a secular state personal laws relating to such matters as marriage, succession and inheritance could not depend upon religion but must rest on the law of the land. A Uniform Civil Code is accordingly necessary for achieving the unity and solidarity of the nation which was envisaged by the very Preamble to the Constitution of India.<sup>5</sup>

### **Historical Background:**

In the early Hindu history, the laws the people followed could be called laws of nature being based on custom, ascertained by experience as being the best for the community in the long run. At that stage religion was the governing force and consequently the priest class or the Brahmins enjoyed supremacy and expounded the religion and law. This is how the code of Manu came into being. Muslim period marks the beginning of a new era in the legal history of India. The old Hindu Kingdom began to disintegrate gradually. An atmosphere of great neutral distrust was created amongst the contending states, which prevented their political unity against the common enemy.<sup>6</sup> With the establishment of Muslim rule in India, Muslim law also became the law enforceable through the machinery of state.<sup>7</sup> However, Hindu law was also allowed to be reserved for the Hindu and the Mohammedan rulers did not interfere with the system in any appreciable way so far as its civil aspect was concerned. Thus, the Muslims followed their Muslim law and the Hindus were allowed to stick to their own system of law with respect to civil law only. But in case of criminal law – tribunals made no distinction between the Hindus and the Muslims or their systems of law.<sup>8</sup> Hence, the Hindus enjoyed under the

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5. K.M. Munshi, VIII C.A.D. 547-48, See in Basu DD. “*Uniform Civil Code for India*”, Prentice Hall of India Pvt. Ltd., New Delhi, 1996, P3.
  6. Deshta Kiran, “*Uniform Civil Code - In Retrospect and Prospect*” Deep and Deep Publications. New Delhi. (1999), P12
  7. M, Rama Jois, “*Legal and Constitutional History of India*”, Universal Law Publishing Co. Pvt. Ltd. (1990), Vol.II, P. 4.
  8. U.C.Sarkar, “*Epochs in Hindu Legal History*”, Visheshvarananda Vedic Reasearch Institute Hoshiarpur (1958) PP.200-201.

Mussulman government, a complete indulgence with regard to the rites and ceremonies of their religion as well as with respect to various privileges and immunities – in matters of property and all other temporal concern. The Mussulmans law only gave the rule of decision in case where both parties were Hindus and the point was referred to the judgment of the pundits or Hindu lawyers.<sup>9</sup>

Later on during the British regime, by regulation of 1781, the personal laws of Hindus and Muslims were made applicable in matters of inheritance, marriage etc. Lord Warren Hastings was of opinion that it would be a great evil to impose on Indian people a foreign legal system. But the British rulers began with policy of non-interference and generally allowed the then existent system of law to prevail; but gradually they began to assert themselves being of course, backed by a strong fraction of the public opinion. Later they enacted few laws which governed family relationships irrespective of the religion of the parties, i.e. The Caste Disabilities Removal Act 1850; The Special Marriage Act 1872; India Majority Act 1875; The Indian Succession Act 1925; The Child Marriage Restraint Act 1929; Muslim Personal Law (Shariat) Application Act, 1937 etc., but they did not show any pursuit to encourage the environment of uniformity of laws in India.

The founding fathers of the Constitution also had in their mind the diverse civil laws applicable to Indians in the matter of inheritance, adoption, succession, divorce etc. that were largely based on personal or religious laws of various communities. The Hindus had series of different laws based on different schools of thought; Muslims were subject to Shariat, which depend on, whether the individual was Shia or Sunni, whereas their own personal laws governed the Christians. Due to the prevalence of multicultural personal laws there was great difficulty in administration of justice. For this reason, the idea of common civil code was put forward which provided for common laws for all Indians irrespective of their religion and region. But during the debate on the said clause the members for and against the Uniform Civil Code expressed different views. While participating in the debate Dr. B.R. Ambedkar pointed out that we have uniform code on all matters namely contract, transfer of property, partnership, civil procedure, crime except of those of marriage, adoption and succession. The object of incorporating Article 44 in the Constitution is to govern all relationships of life by uniform system of law for the reason that human relationship and human requirements do not differ by the mere fact that different persons belong to different religions. The true objective of its endorsement in our nation charter is to use it as a weapon of national integration.

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9. Grady, quoted in U.C. Sarkar's, *Epochs in Hindu Legal History*, (1958), P.23.

Thus, while recognizing the need of ethnic and religious groups to affirm their distinctive religious identities, the Constitution does not treat personal laws as religion though they may have been derived from it. Article 44 of the Constitution mandates the state to adopt a Uniform Civil Code throughout the territory of India. The underlying assumption of Article 44 is that “a Uniform Civil Code would create a sense of “Indianness” and strengthens national unity. It is one principle that has been described as “fundamental in the governance of the country” but being a directive principle it is not directly enforceable by any court. By making it Article 44 of the Constitution, the Constituent Assembly guaranteed that a Uniform Civil Code can only be brought about by the Parliament.

As a first step towards this goal Parliament codified various laws relating to Hindus i.e. the Hindu Marriage Act 1955; the Hindu Adoption and Maintenance Act, 1956; the Hindu Minority and Guardianship Act, 1956; the Hindu Succession Act 1956, which have replaced the traditional Hindu laws based on different schools of thought and scriptural laws into one unified code. Few other legislations<sup>10</sup> have also been framed some of the provision of which are against the personal laws, but they are still applicable to citizens and are continuing to operate and can be amended. The Hon’ble Supreme Court has observed that “the legislation, not religion, being the authority under which personal laws were permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing the Uniform Civil Code. In this view of the matter, no community can oppose the introduction of Uniform Civil Code for all the citizens in the territory of India.”<sup>11</sup>

### **Need For A Comprehensive Legislation:**

Even the most homogenous societies have to look for ideas to deal with the differences between and amongst the people. The quest for uniformity begins when it becomes no longer desirable to keep the diverse personal laws of the various communities, which are unjust and discriminatory especially to women when it relates to the matters relating to the marriage, divorce, children, guardianship, adoption, succession and the ownership of the property. The only concern is to create justice amongst all people of all persuasions. In all this, law plays a critical role in giving objective expression to such religious personal laws, stating them in explicit terms and rendering them enforceable. Therefore, the only possible solution is to codify all personal laws and merge

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10. The Dowry Prohibition Act, 1961; The Criminal Procedure Code, 1973; Code of Civil Procedure, 1908.

11. *Sarla Mudgil v. Union of India*, AIR 1995 SC 1531

them under a Uniform Civil Code. A small step in this direction is to provide a secular law of marriage, divorce, guardianship, succession and so forth that could be adopted for by adherents of any or every faith. Further, there is also need to reform all or any of the personal laws by enacting legislation to the effect.

The goal of 'personal law' reform was more neutrally described in Article 44<sup>12</sup> of the Constitution in terms of achieving a 'Uniform Civil Code'. It envisages administering the same set of civil laws to govern different religions and regions. It grows out of a nineteenth century dream to codify all laws in the manner of the later Justinian of Roman Law or of the Napoleonic code. But codification may simply be consolidatory rather than reformative. A reformative Uniform Civil Code of personal law does not just require all personal laws to be stated in the form of a statute, but seek radically to transform – not just rewrite them. It is for the various communities to devise appropriate reforms for their adherents under non-contention conditions. When they are persuaded to do so, they will no doubt be aware that they are free to draw inspiration from their own inventive and rich traditions as well as those of others. While laws may be derived from religion, they do not form part of it and the need for a Uniform Civil Code cannot be overstated. It would neither impinge on the freedom of an individual's conscience, nor on the expression of it. Thus, Uniform Civil Code is seen as both desirable in itself and as contributing factor to unity among the society's diverse communities and also protect the fundamental social rights of both the individuals and communities.<sup>13</sup>

Thus, it is the imperative duty of each and every part of the governance to work towards one common code. A single law for all the citizens will provide social justice to the all sections of the society. Even the preamble<sup>14</sup> to the Constitution also clearly provides for social justice (political, economical and social), which we can achieve only when we have one common law for all citizens. The idea behind incorporating this provision in the Constitution is to

12. The state shall endeavour to secure for the citizens a Uniform Civil Code through out the territory of the India.

13. *Supra* note 2, P.6.

14. The Preamble declares: "WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:  
JUSTICE, social, economic and political;  
LIBERTY, of thought, expression, belief, faith and worship;  
EQUALITY of status and of opportunity; and to promote among them all:  
FRATERNITY, assuring the dignity of the individual and the unity and integrity of the Nation.

make it homogenous society and to save it from disintegrating forces like religion, caste etc. Thus, the Uniform Civil Code on the one hand, will help to keep the country intact and also help to establish the rule of law on the other which is very essential in a diverse country like India. In this way the provision is binding on the whole country and there is no justification to adopt indifferent attitude towards achieving this noble goal of Uniform Civil Code as envisaged by the Constitution makers. But the personal laws of different religious communities continue to operate irrespective of the fact that the Preamble to the Constitution of India describes the modern nation state of India as a "Sovereign, Socialistic, Secular, Democratic, Republic". That when a Hindu, a Muslim and a Christian, all are citizens of the same country, governed by different personal laws is an anachronism indeed in modern India and diametrically opposed to the fundamental principle of secularism.

Furthermore, when more than 80 percent of the citizens have already brought under the codified personal law, there is no justification whatsoever to keep in abeyance any more, the introduction of Uniform Civil Code for all citizens in the territory of India. However, no further steps were taken for enacting a civil code for all Indians. This reluctance on the part of the Government to pass a civil code is based on the apprehension that the party may lose the support of the Muslims at the time of election. Hence, so long the ruling party continued to entertain this apprehension, there is little likelihood of implementing the directive principles. Every time the question of Uniform Civil Code was raised the Government of India opposed to it on the ground that to achieve it would be to hurt sentiments of Muslims. But such a stand of the government has been laid bare by various judgments delivered by the Supreme Court of India. The time has come to think of group interest and refuse to bow to the pressure of religion oriented personal laws.

Politics apart, the case for a Uniform Civil Code – which will cover the entire gamut of laws governing rights relating to property, marriage, divorce, maintenance, adoption and inheritance – has been most argued on behalf of women. There is universal agreement that personal laws, regardless of the community, are skewed against women. A Universal Civil Code will most affect these issues relating to the marriage, divorce, maintenance, succession and so forth. In almost all recent cases where the need for a Uniform Civil Code has been emphasised women were at the receiving end of torture in the garb of religious immunity. Apart from the famous Shah Bano<sup>15</sup> and Sarla Mudgal's<sup>16</sup> case, there have been several other pleas by wives whose husbands

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15. AIR 1985 SC 945

16. (1995), 3 SCC 635.

converted to Islam only in order to get married again without divorcing the first wife. Furthermore, one should not forget that nationhood is symbolised by one Constitution, a single citizenship, one flag and a common law applicable to all citizens and India's obligations under international law also require a common civil code in respect to the personal matters of the various religious communities. India having ratified the International Convention on Civil and Political Rights, 1966 and the International Convention on Elimination of All Forms of Discrimination against Women, 1979 is bound to enforce the relevant provisions and ensure gender equality under national laws<sup>17</sup>. Another legal expert Satyabrata Rai Chowdhuri also observed that: "Since differential treatment for any religious group is violative of the UN Covenant on Civil and Political Rights and the Declaration on the Right to Development adopted by the World Conference on Human Rights, it is hoped that Parliament will frame a common civil code without further delay, divesting religion from social relations and personal law<sup>18</sup>".

Moreover the Uniform Civil Code exists in the state of Goa called Family law applicable on all communities, which was framed and enforced by the Portuguese colonial rulers through various legislations in the 19<sup>th</sup> and 20<sup>th</sup> centuries. After the liberation of Goa in 1961, the Indian State scrapped all the colonial laws and extended the Central laws to the territory but made the exception of retaining the family laws because all the communities in Goa wanted it. The philosophy behind the Portuguese Civil Code was to strengthen the family as the backbone of society by inculcating a spirit of tolerance between husband and wife and providing for inbuilt safeguard against injustice by one spouse against another. The most significant provision in this law is the pre-nuptial deed regarding the disposal of immovable and movable property in the event of divorce or death. During matrimony both parents have a common right over the estate but on dissolution, the property has to be divided equally, son and daughters have the equal right on the property. As the procedure involves compulsory registration of marriage, this effectively checks child and bigamous marriages.

Recently, The Times of India leading daily newspaper of India also conducted a poll for their program titled 'Lead India' to know the opinion of people on this sensitive issue of framing Uniform Civil Code in India. Later on 24<sup>th</sup> December, 2007 in a show telecasted on channel 'Star One' it showed

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17. Jyoti Rattan, "Uniform Civil Code in India: A Binding Obligation under International and Domestic Law", *Journal of the Indian Law Institute*, Vol.46:4, p.577.

18. Satyabrata Rai Chowdhuri, "A Common Civil Code: It is a Constitutional Obligation" *The Tribune* 30 July 2003 p.10

that a vast majority 75 percent answered in favour of enactment of Uniform Civil Code whereas 19 percent said 'no' and 6 percent did not reply<sup>19</sup>. So this report further supports the view that enactment of a comprehensive legislation is a necessity to build integrity and solidarity in a democratic country like India.

### **Judicial Outlook:**

The Judiciary have shown its concern over contradictions in the personal laws of various communities and emphasized the need to enact a uniform civil code for all the citizens of India. In the highlighted case of *Mohd Ahmed Khan v. Shah Bano Begum*<sup>20</sup> the Supreme Court has drawn the attention of the parliament with full realization of the difficulties involved in bringing persons of different faith and persuasion on a common platform. In this case the court held that a common civil code will help the cause of national integration by removing disparate loyalties to law which has conflicting ideologies. While awarding maintenance to a divorced Muslims woman under Section 125 of the Criminal Procedure Code, 1973 held that this section is truly secular in character because the liability imposed by Section 125 to maintain close relatives who are indigent is formed upon the individual's obligation to the society to prevent vagrancy and destitution. This is the moral edict of the law and morality cannot be clubbed with religion. But lot of objections and protest was raised against this decision of Hon'ble Supreme Court by fundamentalists. Major opposition came from a section of the Muslim community. It was criticized on erroneous ground that Supreme Court had no power to interpret Quarnic texts and that the ruling interfered with their personal law which was claimed to be immutable. They objected even the slightest reform or change in their personal law in the name of the religion or in the name of immutability of the law as ordained by the Allah or Prophet. Therefore, the Government had to frame, Muslim Women (Protection of Rights on Divorce) Act 1986, which deprived Muslim, divorced women of the benefit of a secular law given in famous Shah Bano's case. This law does not give any benefit to divorced Muslim women, but on the contrary is unconstitutional as it discriminates the divorced women on the ground of religion, and dignity of women, equality and equal opportunity for all as given in the Preamble of the Constitution is also not saved.

Then in *Sarla Mudgal v. Union of India*,<sup>21</sup> the Division Bench of Supreme Court comprising Kuldeep Singh and Mr. R.M Sahai JJ, shown their

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19. Telecasted on dated 24th December, 2007

20. AIR 1985 SC 945

21. AIR 1995 SC 1531

concern over contradictions in the personal laws of various communities and observed that Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Article 25 of the Constitution guarantees religious freedom where as Article 44 seeks to divest religion from social relation and personal law. The matters of secular character such as marriage, adoption, succession etc. can not be brought with in the guarantee enshrined under Articles 25, 26, and 27 of the Constitution of India. Thus it is a decisive step towards national consolidation. Justice Kuldip Singh while expressing unhappiness over inaction towards enactment of Uniform Civil Code observed that it appears that even years thereafter, the rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The governments, which have come and gone have so far failed to make any effort towards unified personal law for all Indians. The court called upon the union Government through the secretary to the Ministry of Law and Justice to file an affidavit by August 1995 indicating the steps and efforts made by the Government towards achieving Uniform Civil Code for all Indians in the matter of personal law. The court reminded the Government of its bounden duty to implement Uniform Civil Code for both protection of oppressed and promotion of national integration and national unity". However, the then Prime Minister Sh. Narsimha Rao later assured a group of concerned Muslim leaders that he does not propose to take any action on the court's directive unless the minority wants it.

Keeping in view the Supreme Court's decision in Sarla Mudgal's case a public opinion<sup>22</sup> was conducted on this issue among 2330 men and women of voting age group in the nine metropolitan cities namely Delhi, Bombay, Calcutta, Madras, Bangalore, Ahemadabad, Lucknow, Hyderabad and Cochin. The opinion poll results showed that an overwhelming majority (84%) of the respondents wants Uniform Civil Code for all citizens irrespective of their religion, where as 73 percent welcomed the Supreme Courts decision invalidating the second marriage of Hindu husband's converting to Islam. A sizable 64% do not agree with the prime minister that a uniform code should be introduced only if and when the minorities are ready for it. Moreover 61% of the respondents favoured a unified law even if it means a loss of the Hindu undivided family privilege for Hindus which is a tax saving device under the tax laws. There are, however, certain city wise variations. In two cities Hyderabad and Bangalore more people disapprove of the Supreme Court's ruling against the second marriage of Hindu husband in contrast to the other seven cities, and Hyderabad is also the only city where the majority (57%)

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22. Times of India, June 23, 1995

feels that the Prime Minister is right in saying that a Uniform Civil Code should be introduced only if minorities agree. The reasons are too obvious to be stated as the Muslims are in sizeable numbers in these states.

After the bold decision in *Sarla Mudgal's* case a review petition was filed by various persons i.e. Members of Muslim personal Law Board and Jamat Ulema Hind and a writ petition was also filed by woman's organization 'kalyani.' The writ petition and review petition were disposed of in *Lily Thomas and Others v. Union of India*<sup>23</sup> Here again the question involved was whether a Hindu who is already married and having wife living gets converted into Islam and marries again commits bigamy or not under Section 494 of the Indian Penal Code, 1860. The court clearly held that till the time of marriage of a Hindu is dissolved under the Act none of the spouses can contract second marriage. Further, the Supreme Court has emphasized that in order to curb the tendency on the part of Hindu males to resort to conversion to Islam whenever they want to have second wife, the legislature must enact Uniform Civil Code as directed under Article 44 of the Constitution.

In another land mark judgment in *Danial Latif v. Union of India*<sup>24</sup> a five judge Constitution bench of the Supreme Court upheld the Constitutional validity of the Muslim women (Protection of Rights on Divorce) Act, 1986 and held that a Muslim divorced woman has right to maintenance even after *iddat* period under the Act of 1986. The court said that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife, which clearly extends beyond the *iddat* period in terms of Section 3(1) (a) of the Act. Also a divorce woman who has not remarried and who is not able to maintain herself after *iddat* period can proceed as provided under Section 4 of the Act against her relations who are liable to maintain her in proportion to the properties which they may inherit on her death according to Muslim law from such divorced woman including her children and parents. If the relatives are found unable to pay her maintenance the Magistrate may direct the state wakf board established under the Wakf Act, 1913 to pay such Maintenance.

Again in 2003, the Supreme Court of India in its latest judgment in *John Vallamottom v. Union of India*<sup>25</sup>, which hit the headlines in the national press where in the court has emphasized the need to enact Uniform Civil Code as, envisaged under Article 44 of the Constitution. This evoked a public debate in the country. In the instant case the Constitutionality of the Section 118 of

23. AIR 2000 SC 1650.

24. AIR 2001 SC 3262

25. AIR 2003 SC 2903

Indian Succession Act 1925 was in question. It was contended that the said section was discriminatory to the Christian community because it prevented a Christian from bequeathing his property for religious and charitable purpose. While delivering the judgment Justice V.N. Khare, the Chief Justice of India has made reference to Uniform Civil Code and two Judges who heard the case also seem to have agreed with the learned Chief Justice. The Chief Justice confirms and fortifies this approach by abstracting a statement from Justice Benjamin Cardozo that the "Old Order may change yielding place to new" and as Albert Camus said that stability and change are the two sides of the same law coin. Bearing this dynamism in mind the chief Justice Khare evaluated the provision of Section 118 of The Indian Succession Act 1925 and declared it discriminatory to the Christian Community<sup>26</sup>.

Thus, judiciary has played a very dynamic role by stressing upon the need for the enactment of Uniform Civil Code under Article 44, which is part of Directive Principles of State Policy of the Constitution of India. The judiciary has gone to the extent of holding that the time has now come for a complete reform of personal laws and make a uniform law applicable to all people irrespective of their sex, religion and caste. Now it is the obligation of the state to endeavor to secure a Uniform Civil Code so that national unity and stability is maintained and the personal laws are reformed in the light of changing values of modern society. The Uniform Civil Code is required not only to ensure uniformity of law between communities but uniformities of laws within communities ensuring equality between rights of men and women.<sup>27</sup> In fact, the absence of uniformity in laws governing these vital inter-personal relationships has resulted in the denial of constitutionally mandated equality of all citizens before the law and equal protection of laws.

### **Problems in the Enactment of a Comprehensive Law:**

The question of adopting a Uniform Civil Code is a legal question because it is a mandate addressed to the state by Article 44 of the Constitution, which is the highest law of the land.<sup>28</sup> It is difficult to bring persons of different faiths and persuasion at a common platform. But a beginning has to be made if the Constitution is to have any meaning. Laws may be derived from religion, but

26. Varinder Kumar, "Uniform Civil Code Revisited: A judicial Analysis of John Vallamattom" *JILI* 2003 Vol.4 5, P315.

27. F. Agnel, "Hindu Men Monogamy and UCC XXX (50). *Economic and Political Weekly* 32 (1995); B. Karat, "Uniformity v. Equality" *Frontline* 17 November 1995.

28. D.D., Basu "*Uniform Civil Code for India*" Prentice Hall of India Pvt. Ltd. New Delhi (1996)

they do not form part of it and the need of the Uniform Civil Code cannot be overstated. It would neither impinge on the freedom of an individual's conscience, nor on the expression of it.<sup>29</sup> Article 25 of the Constitution itself does not speak of the personal law of any religious denomination and a citizen cannot claim a fundamental right to follow the personal law of the group or the community to which he belongs or he professes to belong. Article 25 contains a clause giving power to the state to regulate and restrict economic, financial, political and other secular activity that may be associated with religious practice. The freedom of religion, therefore, does not include social and economic practices, and in certain matters relating to civil laws that do not form part of the essence of religion but are secular practices or usages connected with religion, the legislature would be competent to make a uniform law relating to such activities and thereby implement Article 44 of the Constitution of India.<sup>30</sup> Further more, the object of incorporating Article 44 in the Constitution is to govern all relationship of life by uniform system of law for the reason that human relationships and human requirements do not differ by the mere fact that different group of persons belongs to different relations. The success of a democratic process lies in harmonizing these group interests leading ultimately to common good.<sup>31</sup> The anxiety of the minorities about their personal law does not relate to the laws themselves but rather to their privileged position as minorities in a country<sup>32</sup>. Political conflict in India over personal law appears more prevalent over the issue of Uniform Civil Code. Successive governments have acquiesced in this argument either for political gains; fear of political loss, or from a misunderstanding of the word "religion tolerance". They have not sufficiently realized that differences in the law create a feeling of disparity and inevitably resentment. Given this "inertia of timidity" the task of unification has been indefinitely postponed. The Bhartiya Janta party (BJP), principal party in the coalition in 2000 has been a supporter of a Uniform Civil Code over the past many years. During the 1996 and 1998 national election campaigns, the BJP, according to some observers, even made the enactment of a Uniform

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29. Gereld James Larson, "*Religion and personal law in Secular India.*" Social Sciences Press, Delhi (2001), PP 32-33.

30. Basu's "*Commentary on the Constitution*" (7th ed.), Vol. (E) S.C.Sarkar and Sons, Calcutta (1981) P.139.

31. Mohammad Imam, "*Minorities and the Law*", N. M. Tripathi Pvt. Ltd., Bombay (1972), P 386

32. Ruma Pal, "Religious Minorities and the Law" in J Duncan M Derrett, "*Religion, Law and the State in India*", New York: The Free Press, (1968) P. 274.

Civil Code a tenet in its platform<sup>33</sup>. After coming to power in the spring of 1998, however, the BJP has not initiated any formal legislative proposal to alter the existing personal law structure<sup>34</sup>.

Keeping in view the legislative silence till today it is clear that the piecemeal attempts by the Courts<sup>35</sup> in number of cases, however, to bridge the gap between personal laws can not take the place of a Uniform Civil Code. Justice for all is a far more satisfactory way of dispensing justice than in justice from case to case. A common civil code can be evolved in stages. The task is arduous and calls for statesmanship of the type we had shown earlier. The Constitutional goals cannot be forgotten, much less forsaken.<sup>36</sup> But as the issue of enactment of Uniform Civil Code is very sensitive, therefore it has to be preceded by an evolutionary process of reform, codification and simplification of existing personal laws. There is a need to bring a change in the outlook of masses to accept the conditions favorable to a process of uniform personal laws.

The biggest obstacle in implementing the Uniform Civil Code apart from obtaining a consensus is the drafting of a common civil code. Should it be a blend of all the personal laws or should it be a new law adhering to the Constitutional mandate? Many contend that if a Uniform Civil Code were adopted, the new laws would reflect the concerns of the majority Hindu population<sup>37</sup>. The major opposition to the framing of the Uniform Civil Code is coming from the second largest community in India viz. the Muslims. They object even the slightest reform or change in their personal law in the name of religion or in the name of culture or in the name of immutability of the law as ordained by Allah and prophet<sup>38</sup>. Even the Supreme Court's decision in a

33. Saba Nagbi Bhaunik, "Surviving Friends". *India Today* (Internet edition) January 19, 1998.

34. Article, "Temple Art. 370 not on campaign agenda: PM," *Times of India* (Internet edition), August 24, 1999. (In this Article BJP party leader K.N. Govindacharya admits that the BJP has not come out with its own manifesto with regard to a Uniform Civil Code.)

35. Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945; Sarla Mudgil v. Union of India AIR 1995 SC 1551; John Vallathoosil v. Union of India AIR 2003 SC 2902, Ahmedabad Women Action Group v. Union of India (1997) 3 SCC 573; Lily Thomas and Others v. Union of India AIR 2000 SC 1650

36. P.P. Rao, "Uniform Civil Code is a necessity", *The Tribune* August 6, 2003.

37. Raj kumari Agarwala, "Uniform Civil Code: A Formula not a Solution" in Tahir Mahmood ed., "*Family Law and Social Change*," M.N. Tripathi, Bombay (1975)

38. Bhagwati Prasad Singhal on "Uniform Civil Code - Framing is Imperative", published in AIR 1998 Journal Section 166

highlighted case of Shah Bano Begum whereby the court tried to interpret the Shari' at was not acceptable to the Fundamentalist Muslims. Rather it was taken as a deliberate move to subvert Muslim personal law in favour of the primarily Hindu based Indian Code of Criminal Procedure<sup>39</sup>. The other minority community, the Christians also fear that their status and autonomy as a minority community may be in jeopardy without separate personal law and their constitutionally recognised status might eventually fade and that they may lose their identity as well as their ability to practice their religion freely. Many Parsi's also argue that without separate personal law system the result would be a Uniform Civil Code that would inevitably reflect mainly Hindu interests<sup>40</sup>.

The fear that under the guise of Uniform Civil Code, the Hindu Code will be imposed on all is misconception. A uniform law code does not necessarily mean a law of one community (Hindu) but inclusion of personal laws of different religious communities based on the principle of equality of sexes and the liberty for the individuals of all the communities. The Uniform Civil Code should strike a balance between protection of Fundamental Rights and religious dogmas of individuals. It should be a code without any bias with regard to religions or political considerations. While drafting, the Uniform Civil Code the need is to draw a balance i.e. to safeguard civil rights and the identity of the minorities, while refusing to pander to religions fundamentalism of any colour. Under the uniform laws a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi, but it means basic essentials or principles of marriage, divorce, maintenance succession etc. will be common for all irrespective of their religions e.g. principle of monogamy should be imposed on all or age at marriage is to be fixed for all. Let us dismantle at the same time, special privileges for Hindus under the Hindu Undivided Family provisions as also any special laws governing the personal affairs of Christians, Parsis, Jains, Buddhists, and Sikhs as well as other groups like the Nairs of Kerala who follow the principles of matrilineal descent. Do away not only with Muslim Personal Law but also other laws on the statute books that grant legal sanctity to unique practices of the diverse communities of India.

Coming to the working of the Uniform Civil Code, some legal experts feel that a suitable atmosphere must be created so that all sections of society get ready to accept the uniform laws in respect to the matters relating to marriage, divorce maintenance, succession etc. Some think that there is a

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39. Saleem AKhtar, "*Shah Bano Judgment in Islamic Perspective*" Kitab Bhavan, New Delhi (1994), PP 246-261.

40. Flavia Agnes, "*Law and Gender*", Oxford University, New Delhi (1995) PP. 141-163

possibility of the Uniform Civil Code being abused or rejected but this should not eschew the Parliament from enacting the Uniform Civil Code because the social welfare and benefits resulting from the implementation of Uniform Civil Code are far greater. When the Hindu Code Bill, was introduced in 1948, there was lot of protest from Hindus on the ground that the Code was contrary to the Dharamshastra, which incorporates classical Hindu jurisprudence. But the then law Minister Dr Ambedkar had said that for India's unity the country needs a codified law, and later on four Acts were passed<sup>41</sup>. In a similar fashion the Uniform Civil Code can be implemented which will cover all the religious communities and also any person who comes to India. Further, there is also controversy regarding the ideal time for enactment of Uniform Civil Code, it can be contended that India has moved much further from ideal than when the Constitution was written fifty eight years ago. It is high time that India has a uniform law dealing with marriage, divorce, succession, maintenance and so forth. Rather it is the need of the hour that sentiments and emotions have to be cooled and tempered by sincere efforts to change the mindset of the masses to accept the uniform civil code.

So time has now come to frame a uniform law in respect to the personal matters, which are applicable to all irrespective of their religion, sex or caste. A Common Civil Code must imply that ALL citizens are covered under same set of civil laws. As an Indian I wholeheartedly support the idea of a common civil code. It is a fair and equitable Directive Principle of State Policy under Article 44<sup>42</sup> of the Constitution of India. However, it is essential to understand this matter in its entirety, away from the hysterical jubilation and frantic wailing of communalists on both sides. One people one law why not? Nationhood is symbolized by one Constitution, a single citizenship, one flag and a common law applicable to all citizens.

### **Conclusion:**

India is a land of religions. Hindu, Buddhists, Jains, Christians, Muslims, Parsee and Sikhs form the nation. They co-exist as separate and distinct identities. Each community has its own personal laws. it appears to be absolutely essential in the interest of the unification of the country for building up one single nation with one single set of personal laws in the country. Thus, a comprehensive legislation in the form of Uniform Civil Code is must for the

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41. The Hindu Marriage Act 1955; The Hindu Succession Act 1956; the Hindu Minority and Guardianship Act 1956; The Hindu Adoption and Maintenance Act, 1956.

42. The state shall endeavour to secure for the citizens of a Uniform Civil Code throughout the territory of India.

unity of a nation like India, which is applicable to every body living within the territory of Indian union irrespective of caste, creed or religious persuasions. It is disappointing that various governments in power failed to fulfill their promise of implementing one such code. Although judiciary has shown their concern for the enactment of one such code but our governments are not bothered to enact and implement one such code. A uniform law will focus on rights, leaving the rituals embodied in personal law intact to preserve the identity of ethnic and religious groups within the bounds of Constitutional propriety. It will provide facilitate harmonisation of social relationships across the country in keeping with the changing contours of emerging societal realities. If the Centre is unwilling to move forward, there is no reason why some progressive States should not take the lead as they have done in the past as in case of legislating Right of Information Acts for the states. A national Uniform Civil Code could follow. The state of Goa has shown the way and there is absolutely no reason for delay. Now the active efforts i.e. political courage, vision and commitment to equality is required on the part of the government because the stability of a society depends to a large extent on the preservation and maintenance of just and equitable relationships among individuals not only in the professional and public life, but also within the four corners of home. Therefore, to summarize it can be said that a secular India needs a uniform civil code for the protection and promotion of national unity and solidarity for its citizens. It is time to make a concerted attempt. An indigenous law, applicable to all communities coexisting democratically, is needed in the country. Accommodating personal laws of all religions under such a code may be an uphill task and may require time, but the legislature will ultimately have to perform this onerous duty of compiling the code. In fact, codification of one uniform law is the ultimate solution to bring equality for all in respect of their personal laws.