CHAPTER VIII

SUMMATION AND SUGGESTIONS

In the present India sickness of our personal laws has been almost every Tom, Dick and Harry's cup of tea. From the early days of independence ailments of this branch of the country's legal system have been talked about by all and sundry. This problem child of the Indian statute-book has received the fullest attention of the legislators, judges, lawyers and legal academicians-who may be regarded as the doctors and physicians of law. At the same time it has also suffered at the hands of unlicensed quacks, charlatans and mountebanks who, having little knowledge of the real issues involved, have been freely talking of its diseases and suggesting measures for their treatment. Their hurly burly has confused even many of the rightful physicians and misled them to wrong conceptions and prejudices. This has resulted into misdiagnosis of the problems, wrong prescriptions for their solution and overdoses detrimental to our socio-moral values.[628]

Commencing from the constitution-making process, the issue of personal laws in the country has been a major site of strife.[629] In the Constituent Assembly, furious debates took place about whether independent India should continue with the practice of religion specific personal laws for different religious groups devised by the colonial masters or whether this system should be done away with and replaced by a Uniform Civil Code.[630]Caught in a deadlock, the constitutional architects devised a pragmatic strategy. They accepted the practice of governing different religious groups in accordance with their personal laws

It has already been stated that the term 'Personal Law' means the law that governs a person's family matters. Though, the meaning of the term personal law sheds some light on its nature and scope, but it does not help to understand its subject-matter. The Constitution of India, though, does not define the term personal law, but Entry 5 of List III of the VII Schedule throws much light on its subject-matter.[631] Apart from these subject-matters of personal law which are expressly provided, the residuary clause of the Entry makes it necessary to enter

[628]Tahir Mahmood, *Personal Laws in Crisis* 95 (Metropolitan, New Delhi, 1986).
[629]*See*, Subrata Mitra& Alexander Fischer, "Sacred Laws and the Secular State: An Analytical Narrative of the Controversy over Personal Laws in India" 1(3) *IR* (2002).
[630]*See*, Constituent Assembly Debates, Vol. VII, November 28, 1948 speech by LOKANATH MISRA 175; Constituent Assembly Debates, Vol. VII, December 1, 1948 speech by C. Subramaniam 87; Constituent Assembly Debates, Vol. XI, November 21, 1949 speech by Jaspat Roy Kapoor 194.
[631]Entry V says that: "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 personal law."

into the pre-constitutional position of personal laws to ascertain their subject-matter, if any, apart from those specified in the Entry 5 of List III of the VII Schedule.

8.1.Status of Personal Law in India: what is

Insofar as the question of constitutionality of laws is concerned, the Constitution of India prescribes certain requirements which must be met by laws in order to be constitutionally valid. [632] For laws that pre-date the constitution, such as personal laws the relevant constitutional provision is Article 13(1) which provides that all the pre-constitution laws should not violate the fundamental rights under Part III of the Constitution; else such laws will be treated as void.[633]Another provision under the same Article, i.e. Article 13(3)(a) elucidates what is meant by the term 'law'.[634]These two provisions are to be read in light of Article 372.[635]

Reading the above provisions harmoniously, it becomes clear that any law to be constitutionally valid must not infringe upon the fundamental rights guaranteed by the Constitution of India. Irrespective of such provisions however, the courts have been very cautious while adjudicating the constitutionality of the personal laws. The courts so far have adopted a very contradictory approach starting from Narasu Appa Mali's case where the Hon'ble High Court had held that "the personal laws are not 'laws' under Article 13(3)(a) of the Indian Constitution". Although, the Narasu judgment was delivered by one of the High Courts in the country prior to the enactment of post-independence Hindu personal law reforms, its reasoning had a huge impact on the personal law jurisprudence in the High Courts as well as the Supreme Court in the post-reform era.

An early depiction of this is visible in the judgment of the Madras High Court in *Dwaraka Bai* v. *Prof. Nainan Mathews*,[636] in this case, the petitioner challenged Section 10 of the Indian Divorce Act, 1869 which allowed a husband to obtain divorce only on the ground of

[632]The Constitution of India, art. 13.
[633] Article 13(1):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.
[634] Article 13(3((a): 'law' comprises any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."
[635]Article 372(1): All the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. Further, according to Explanation 1 of Article 372, the expression 'laws in force' means:"...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."
[636] AIR 1953 Mad 792.

adultery, while the wife had to prove cruelty or desertion in addition to adultery. The court while upholding the said provision held that such discrimination was justified as it considered the differing consequences which the act of adultery could have when done by a man and woman.[637] On similar lines, in *Harvinder Kaur* v. *Harmender Singh Choudhury*,[638] the Delhi High Court upheld Section 9 of the Hindu Marriage Act, 1955. In doing so, the Court observed that: "Introduction of constitutional law in the home is most inappropriate and will prove to be a ruthless destroyer of the marriage institution and all that it stands for." The court further observed that if Articles 14 and 21 were applied to matrimonial homes then the institution of marriage will collapse."[639]

Another instance when the hegemony of Narasu reasoning comes out starkly in the Supreme Court in respect of personal laws is in the case of *Shri Krishna Singh* v. *Mathura Ahir*. In this case the Apex Court held that, Personal Laws are immune from being subjected to Part III of the Constitution. Going through the above cases, one can clearly see that the courts have avoided dealing with the issue concerning constitutionality of personal laws. The court may have adopted such an approach as they might have apprehended that if personal laws were tested on the touchstone of fundamental rights, it may have led to some conflict.

Although, the Narasu reasoning played a major role in fashioning the personal law jurisprudence in the country, but as every idea is subject to change, adaptation, reformulation, and abrogation, it gradually started to lose its stronghold and the approach of Indian courts in matters pertaining to personal laws also shifted. Consequently, the courts adopted a more activist stance and began to test personal laws on the touchstone of Fundamental Rights. This approach enabled the courts to either strike down any particular statutory provision in any law or to reinterpret them harmoniously with Part III of the Indian Constitution.[640]

An early depiction of this approach is visible in the judgment of Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah.*[641] In this case, the petitioner challenged the constitutionality of Section 9 of the Hindu Marriage Act, 1955 dealing with restitution of

[637] *Id.* at 35.
[638] AIR 1984 Del 66.
[639] Ibid at 34.
[640] Agnes, *Supra* note 10 at 909.
[641] AIR 1983 AP 356.

conjugal rights for reason that it infringes Articles 14, 19, and 21.[642] The Court struck down the relevant provision, finding it to be violative of Article 21 and observed that:

"…the remedy of restitution of conjugal rights constitutes the starkest form of governmental invasion of personal identity and individual's zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being."[643]
However, later, the Supreme Court in *Saroj Rani* v. *Sudarshan Kumar Chadha*[644] expressly overruled the view taken by the Andhra Pradesh High Court.

On similar notes, in *Ammini EJ v. Union of India*,[645] the Kerala High Court quashed the words 'incestuous' and 'adultery coupled with' from Section 10 of the Indian Divorce Act, 1869 on the grounds of being arbitrary and violative of Articles 14, 15, and 21 of the Constitution.[646] Following this verdict, several other High Courts held this provision to be discriminatory. Resonating with these verdicts, the Indian Parliament amended the said Act in 2001 bringing it in consonance with personal laws of other religious groups.[647] In C. *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*,[648] the Apex Court held that the right of a Hindu woman to execute a will in relation to the property possessed by her under Section 14 of the Hindu Succession Act, 1956 is protected under Articles 14, 15, and 21 of the Constitution.[649] Similarly, in *John Vallamattom v. Union of India*,[650] the Apex Court struck down Section 18 of the Indian Succession Act, 1925 as being violative of Article 14.[651]

Another important judicial pronouncement depicting Supreme Court's liberal, rights-based and activist approach is *Daniel Latifi v. Union of India*.[652]In this case, inapplicability of

[642]*Id*. at 17.
[643] *Id.* at 29.
[644] (1984) 4 SCC 90.
[645] AIR 1995 Ker 252; *See also Mary Sonia Zacharia v. Union of India*, 1995(1) KLT 644 (FB).
[646] AIR 1995 Ker 252, p. 40, 41, 47.
[647]*See* Werner Menski, "The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda" 3 *GLJ* (2008).
[648] *(*1996) 8 SCC 525.
[649]*Id.* at 15, 27, 29.
[650] (2003) 6 SCC 611.
[651] *Id.* at 66, 70.
[652] (2001) 7 SCC 740.

Section 125 of the Criminal Procedure Code to Muslim women was challenged.[653] It was brought to the attention of the Court that at the same time, under Section 3(1)(a) of the 1986 Act, a divorcing Muslim husband had become liable to potentially much higher maintenance payments to his ex-wife than under Section 125 of the Criminal Procedure Code.[654] The constitution bench of the SC while upholding the Act made following important conclusions for the benefit of divorced Muslim women:

"(1). A Muslim husband is liable to fair and reasonable provision for the future of the divorced wife including her maintenance and should be made within the iddat period. (2). Such Liability of Muslim husband is not confined to the iddat period."[655] These cases, among others,[656] point towards the shift in the attitude of Indian courts when dealing with issues concerning personal laws. Indian courts, which in the beginning were not inclined towards interpreting personal laws in light of the Fundamental Rights guaranteed by the Constitution, have gradually adopted a more liberal as well as rights-based stance. And in the recent *Shayara Bano* v. *Union of India*[657], the Supreme Court of India pronounced a verdict which set aside the practice of instant triple talaq or talaq-e-biddat as unconstitutional. The above-discussed approaches provide an insight into the trajectory of courts' engagement with personal laws.

8.2. Status of Personal Law in India: What is expected to be

Article 44 is not only an evidence of the fact that all the Personal Laws are differently recognized; but it is also a clear proof that the same should not be perpetuated. Article 44 illustrates that the personal laws are of 'provisional nature'. Therefore, Mr. Masani, a member of the Sub-Committee, suggested a common civil code to all citizens while discussing draft Article XI.[658] But the suggestion was overruled by majority,[659] saying that

[653] In this case the petitioners challenged the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986, under which Sec 125 of Cr.P.C does not apply to Muslim women.
[654] *See*, The Muslim Women (Protection of Rights on Divorce) Act, 1986, §3; *See, also* Menski, *Supra* note 59, 219.
[655] Daniel Latifi v. Union of India, (2001) 7 SCC 740.
[656]The activist approach of the Indian courts is visible in several other cases, *See* generally *Mrs. Pragati Varghese* v. *Cyril George Verghese*, AIR 1997 Bom 349; *Debra Clare Seymour* v. *Pradeep Arnold Seymour*,(2002) 98 DLT 34; *Shamim Ara* v. *State of Uttar Pradesh*, (2002) 7 SCC 518.
[657]*Shayara Bano* v. *Union of India*, (2017) 9 SCC 1.
[658]Draft Article XI: *Right to Freedom of Family Relations*: (1) Every Person has the right to be free from interference in his family relations. (2) No marriage valid according to the law of the Union or a State, shall be dissolved unless permitted by the law of the Union or the law of the State concerned and in accordance with the forms and under the conditions of the State concerned. *See*, B. Shiva Rao, *Id.*, Vol. 2, at 78.
[659]The Minority consisted of Mr. Masani, Rajkumari Amrita Kaur, Mrs. Hansa Mehta and Dr.Ambedkar. B. Shiva Rao, *Id*.at 128.

this was out of the scope of fundamental rights.[660]When the Draft Constitution was moved for consideration and approval in the Constituent Assembly, draft Article 35 providing for a uniform civil code was opposed by four Muslim members on the ground that it would interfere with the way of life and the religion of the people. This argument was countered by Shri K. M. Munshi, Shri Alladi Krishna Swami Ayyar and Dr. B. R. Ambedkar: who pointed out that personal law was never in the purview of religion and as such there was no question of any danger to the religion. Ultimately, the present Article 44 was adopted on November 1949, without any amendment.[661]

The short historical account, as stated above, makes it clear that the present 'distinct and separate status' of personal laws 'based on religion' is not expected to be continued perpetually.[662]This fact of separation of religion from personal laws is also clarified in the Constituent Assembly by K.M. Munshi, member of the Draft Committee. He says that there has to be a separation of religion from personal law and religion must be limited to spheres which justifiably relate to religion." This is a paradigm shift from the 'British policy of duality' and 'plurality of personal laws' to the 'Indian policy of unification' of personal laws.

National policy of unification of personal laws in the form of a common civil code is expressly envisaged in Article 44. Apart from Article 44, there are many other policy indicators which go on similar line of unification of personal laws and consolidation of India into nationhood which was, and in fact is, the chief objective of the Uniform Civil Code. Article 51-A, for example, prescribes the duty of every citizen of India to abide by the Constitution and respect its ideals.[663]The Preamble, which opens the minds of the makers of the Constitution, evidently makes it clear spells out the spirit of the Constitution.[664] These indicators direct the legislature and the executive in what manner they are to exercise the legislative and the executive power they have.

What has been discussed in the foregoing paragraphs reveals that, though the status of personal laws, at present, is separately recognized and maintained, but the same is not

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[660]Nonetheless the provision for a uniform civil code was incorporated in the directive principles of state policy *See*, B. Shiva Rao Ibid, Vol. 2, at 128.

[661]*See,* Meghe, Dinkar R., *Uniform Civil Code and Hindu Personal Law 5* (Pathik Prakashan, Nagpur, 1973).

[662] In the Constituent Assembly Debates it was laid down categorically that the object of Article 44 is to bring a uniform personal law for the purpose of national integration. It advances on the conjecture that there is no necessary relationship between religion and personal law in a civilized society. See Sarala Mudgal, supranote 73.

[663]Article 51-A : 'to uphold and protect unity and integrity of India; and to promote harmony and the spirit of common brotherhood amongst all the peoples of India transcending religious diversities.'

[664] The Preamble of the Constitution says that, "The people of India have resolved to constitute 'secular' India; and have secured for themselves, amongst other things, the fraternity assuring the dignity of the individual and the unity and integrity of the nation."

expected to be perpetuated. In a joint note of dissent, women members in the Constituent Assembly i.e., Mrs. Hansa Mehta and Rajkumari Amrit Kaur had categorically said that the uniform civil code should be granted within few years from now.[665]Thus, Uniform Civil Code is not only due, but it is overdue.

8.3.Government's Lip Services vis-à-vis Judiciary's Lament

Article 37 although is just a guidelines and not justiciable but they are very much important in the governance of the country. It is a 'moral duty' of the State to apply these principles in making laws. Dr. Ambedkar in the Constituent Assembly stated that "the legislature and the executive should not merely pay lip services to these principles but they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country."[666]

A period of more than six decades has elapsed since India got independence. Unfortunately, the government is merely paying lip services to the principle of uniform civil code. "The command of Article 44 is yet to be realized."[667] Being dissatisfied with this attitude of the Government, the Supreme Court many times expressed regret. The Supreme Court in *John Vallamatton*[668]regretted that Article 44 has still now not seen the light of the day.[669]In *Ms. Jorden Diengdeh v. S.S. Chopra*[670] the Supreme Court suggested that it is time for the law makers to intervene in the matters dealing with matrimonial issues and to enact a uniform law for the same.[671]Chandrachud, C.J., in *Shah Bano Begum*[672] *had* observed Article 44 still has not seen the light of the day and had expressed regret for its non-implementation.[673]Learned

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[665]Mrs. Hansa Mehta and Rajkumari Amrit Kaur had stated that, "We are of the view that a uniform civil code should be guaranteed to the Indian people within a period of 5 or 10 years…."

[666]Cited in, Basu, *Supra*note 58 Vol. 3, at p. 4026.

[667]See, *S.R. Bommai* v. *Union of India*, AIR 1994 SC 1918, at p 2066.

[668]*John Vallamatton* v. *Union of India*, AIR 2003 SC 2903 at p. 2913.

[669]The learned judge observed that, "It is a matter of regret that Article 44 of the Constitution have not been given effect to. Parliament is still to step in for framing a common civil code in the country." It reminded that, "A common civil code will help the cause of national integration by removing the contradictions based on ideologies." Ibid.

[670]AIR 1985 SC 935 pp. 940 – 41.

[671]The learned court had suggested that "the time has come for the intervention of the legislature in these (judicial separation, divorce and nullity of marriage) matters to provide for a uniform code of marriage, divorce and to provide by law for a way out of the unhappy situations…" Ibid.

[672]*Mohd. Ahmed Khan* v. *Shah Bano Begum*, AIR 1989 SC 945.

[673]Chandrachud, C.J., had observed Article 44 still has not seen the light of the day and had expressed regret for its non-implementation. on behalf of the five judge Bench of the Supreme Court that, "Article 44 of our Constitution has remained a dead letter . There is no evidence of any official activity for framing a common civil code for the country. 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 issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in

Justice Kuldip Singh, in *Sarala Mudgal*[674] expressed his agony: "One wonders how long it will take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India."[675]

8.4.Problems with Uniform Civil Code

Adoption of uniform civil code is viewed as an answer to the controversy surrounding personal laws. As stated above the judiciary time and again has in many cases urged the government to implement uniform civil code whenever they were confronted to decide on matters pertaining to personal laws. Adoption of uniform civil code is viewed important for achieving equal status to all the citizens and for promoting national integration. One of the most important reasons, because of which civil rights groups are backing the Uniform Civil Code, is to ascertain equal rights to women.

Uniform Civil Code is always harped on around the movement around the rights of women. It is lauded as the ultimate solution to do away with many of the discriminations between the genders that have seeped through religious edicts and social structure. Even in the Constituent Assembly Debates the discrimination against women and much needed social reforms for elevation of their status in the society was the moot point in favour of Article 35.

The members against a common civil code ignominiously dodged the question of elevation of the status of women and focused only on the cultural disparity and dominance of the majority. No one tried to question the practical working of a common civil code and how would it be beneficial in the drive for rights of women in our country. Ironically, none of the women members participated in the debate on Article 35 and the proposed future prospect of securing a uniform civil code. K.M. Munshi appealed to the House that absence of uniform personal law would amount to all discriminatory practices being covered under the purview of religious freedom and hence rendering impossible for legislative reforms to correct them as they would be struck down on the premise of religion.

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the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because; it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case." *Id.* at para 32.

[674] *Sarla Mudgal* v. *Union of India*, 1995 3 SCC 635.

[675] *Id.* at para 32, 1538.

8.5.National Integrity and "Women's Rights"

The argument that presents national integrity as the rationale for a Uniform Civil Code along with its conflation with "women's rights" is unacceptable because of its implicit homogenizing thrust. To begin with, it is wrong to assume that while Hindus have willingly accepted reform, "other" communities continue to cling to diverse and retrogressive anti-women laws and threaten the integrity of the nation-state. It is misleading to claim that Hindu Personal Law was reformed: it was merely codified. Laws intended to overhaul marriage and inheritance were dropped from consideration in parliament in response to pressure from conservatives in the Congress party on the eve of the first general election, held in 1951. B.R. Ambedkar, who drafted the original Hindu code bill, even resigned as law minister in protest. Eventually, in 1955-1956, Prime Minister Nehru did moved forward in this endeavour by enacting four pieces of legislation with regard to Hindus.[676]What these laws achieved was the codification of the vast and heterogeneous practices of all communities that were neither Muslim, Parsi, nor Christian, bringing them into conformity with what were assumed to be "Hindu" norms, but what were, in fact, North Indian, upper-caste practices. Other practices that did not match these norms were explicitly dismissed during the debates in parliament as being "un-Indian."[677]These mid-1950s laws were by no means an unqualified advance for women's rights. On the contrary, codification put an end to the diversity of Hindu laws practiced in different regions, in the process destroying existing and often more liberal customary provisions. Conversely, there are features of Muslim Personal Law that are more advantageous for women than Hindu Personal Law; the Muslim marriage-as-contract protects women better in cases of divorce than the Hindu marriage as sacrament; the Muslim law of inheritance protects women's rights better than Hindu law; and the mehr (bride-price) is the exclusive property of the wife. Also, Muslim men who marry more than once are legally bound to fulfil responsibilities toward all their wives, whereas Hindu men who contract polygamous relationships (illegal since the 1955 Hindu Marriage Act) escape this responsibility in their second or third marriages. In practice, the BJP position that a Uniform Civil Code will take into account "positive features" of all personal laws is actually untenable. Another problem with the national integrity argument is that this imagined national integrity is constructed through the marginalization and exclusion of a multiplicity of

[676] The four legislations were; Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoption and Maintenance Act.
[677]Nivedita Menon, "A Uniform Civil Code in India: The State of the Debate in 2014 Feminist Studies" 480-486 40 Special Issue: Food and Ecology (2014).

other interests and identities, and therefore it is not a value that feminists can espouse. At the same time, feminists cannot accept unqualified claims of minority religious communities to their unreformed personal laws in the name of cultural identity. For one thing, the cultural identity contained within personal laws that is claimed today as "natural" and prior to all other identities is no more primordial than the nation. Here, it is important to keep in mind the genesis of personal laws: the British colonial government, in consultation with self-styled community leaders, simplified vastly heterogeneous family and property arrangements within the ambit of four major religions: Hindu, Muslim, Christian, and Parsi. The resultant personal laws of each of these religions that are being defended today in the name of tradition and religious freedom are, thus, colonial constructions of the late nineteenth and early twentieth centuries. Feminists reject the notion of a religious community exerting rights over women through their personal laws because the gender discriminatory provisions of the personal laws are based on the same logic of exclusions that characterize the coming-into-being of the Indian nation itself.

8.6.Suggestions

First of all, the ambiguity surrounding the "status" of Personal Laws in India needs to be removed. Whether the personal laws it is at par with the concept of 'Law' or 'Law in force' or Customs having the "force of Law" under Article 13 of the Constitution. Unless the status of Personal Laws is clarified and expressly made at par with the status of any other secular Laws the ideology of securing equality of law and equal protection of law between men and women will continue to be an illusion leading to gross failure of social justice.

Moreover, even though the status of personal laws remains ambiguous, Time and again the apex court have relied upon Narasu Appa Mali's case and as stated in most of the cases in the preceding chapters have maintained a reluctant approach in testing the personal laws in the touchstone of fundamental rights. However, in some cases Judiciary has recognised as 'law' and has reviewed personal laws and tested it within the touch stone of constitutionality. However, an express clarification is needed to ensure progressive equality in the domain of personal laws. Time and again the courts have been relying upon Narasu's ruling whenever the dispute concerning personal laws have been brought up in the forefront. The first step in order to remove the ambiguity with regard to the status of personal laws can be achieved by overruling Narasu Appa Mali's judgment.

Even though a constitutional directive, the enactment of Uniform Civil Code is fraught with problems. For one thing, little clarity exists as to the contours of Uniform Civil Code; whether it would be limited to issues of inheritance, marriage and divorce, etc, or cover other aspects as well. Second, the legal diversities existing in the country are so massive (in some places the law changes every two hundred kilometres) that any attempt to enact Uniform Civil Code will generate widespread resentment and strife. Third, the existing laws are founded on at least four clearly distinct jurisprudential philosophies. Enactment of Uniform Civil Code cannot be based on any arbitrary selection of one jurisprudence over another (there is no basis for presuming, for example, that one jurisprudence is superior to another, or that Anglican jurisprudence should be the basis for all personal laws - Hindu, Muslim and tribal). It will involve reconciliation of the different jurisprudences, a basis for which still remains to be worked out. Finally, personal laws of some communities, particularly tribal communities of North-east India such as the Nagas, Mizos, etc, enjoy constitutional or political sanction. Enactment of Uniform Civil Code would entail constitutional amendments which would not be easy.[678]

Against this growing tension between certain provisions of the personal laws of the different communities and the constitutional laws the argument of the antagonists of Uniform Civil Code that within democratic framework communities ought to have the right to adhere to their personal laws cannot be pushed too far. While the principle that the democratic framework should allow space for existence of personal laws is unexceptionable, it cannot by the standards of that very democratic logic be allowed to degenerate into a licence for the different communities to deny sections of their members rights to which they are entitled as citizens. In other words, the democratic principle that communities should enjoy space for practising their personal laws has to be subordinated to the internal restriction that the external protection to the personal laws would not be used to dominate the weaker groups within the communities. For, unless consensus exists on such internal restriction, the very idea of autonomous space for communities to follow their personal laws would stand in jeopardy. Any member within the community who feels aggrieved or oppressed would be free to approach the court that his or her fundamental right is being infringed and the cannot be allowed merely because the community is assured an autonomous space in respect of practising its personal law. We would then return to square one and the state would have little

[678]Imtiaz Ahmad, Personal Laws: Promoting Reform from Within, *EPW* Vol. 30, No. 452851-2852. (Nov. 11, 1995).

option except to foist an imperfectly articulated Uniform Civil Code. Enlightened public opinion has recently begun to veer round the view that in the face of enormous difficulties implicit in the enactment of Uniform Civil Code the appropriate course would be for the communities themselves to undertake to rationalise through entirely internal initiative those aspects of their personal laws which stand in conflict with the constitutional laws or fail to pass the test of equity, justice and good conscience, a doctrine of Roman law followed in India. This course is recommended as it vests the right to rationalise or even to reform their personal laws within the different communities and upholds the principle imperative to a democratic polity that culturally distinct communities possess a degree of autonomy to exist alongside a majority nation.[679]

The fundamental question in the pursuit of this course of action would be how the-internal initiative within the different communities should be activated to translate itself into concrete action. Since the orientation to look towards the state for initiating any kind of public action is strong in our country, one course would be for the state to create an institutional framework within which such internal initiative might take effect. For instance, the state could set up consultative machinery within the different communities to bring about consensus around the rationalisation of the different questionable provisions. Such a course would be wholly counter-productive if not downright self-defeating. It would contradict the principle of autonomous space for cultural communities which rest precisely on the argument that in a polyethnic society the state stands in danger of becoming the carrier of the values of the dominant community. It would also contradict the principle of separation of the sacred and the secular upon which the idea of a secular state is founded. Therefore, quite irrespective of the nobility of intentions, a secular state cannot take upon itself to promote reform within the different communities and were it to do so its intentions would remain eternally suspect.

Under these circumstances, both the initiative for rationalisation and reform as well as the creation of appropriate institutional structures for building consensus over such rationalisation or reform has to come from within the different communities. Since the different cultural communities in India are at varying stages of social development, it is to be expected that the possibility for emergence of such initiative and for a consensus to he eventually evolved would be varied. Even so, a beginning has to be made somewhere and this beginning has to be made by concerned sections in the different communities. These concerned sections would first have to create an institutional structure for rationalisation

[679] Ibid.

and/or reform and then go about dialoguing with the different segments of their community to work out a consensus.

There can be no uniform prescription for the process the concerned opinion in the different communities should follow. Allowance for variation in this respect has to be made depending on the advancement level of the communities. For example, with regard to the Muslims it appears that two alternative possibilities exist. One course can be for concerned Muslims to begin lobbying for codification of Muslim personal law. The other course can be to work for piecemeal reform and take up on a priority basis those provisions where the contradiction between the constitutional law and the personal law is severe or the law as understood and applied at present is clearly in dissonance with the principles of equity, justice and good conscience. Undoubtedly codification can go a long way toward removing the existing contradictions between the constitutional and personal laws as well as making them consonant with the principles of equity, justice and social conscience. However, there are two catches in this. First, codification led from the top often ends up creating unforeseen difficulties which are subsequently difficult to rectify. Second, codification can only follow emergence of an agreed upon draft code of Muslim personal law. Such an agreed upon code will present the same difficulties as those implicit in the rationalisation and/or reform of specific provisions. Indeed, there is every possibility that the difficulties may be greater as the process of codification of their law may be seen by the community as a wholesale change of Muslim personal law against which a strong sentiment already exists. Therefore, since social reform is a piecemeal process, the appropriate course would be to make a small beginning and work towards an eventual codification of the entire corpus of Muslim personal law. Concerned Muslims or any group of them of whatever persuasion or bent of mind - progressive, conservative, fundamentalist or modernist - should first begin by identifying those specific areas where tensions between the constitutional and Muslim personal law are already evident. On the basis of general impressions, it is possible to suggest that the areas relate to inheritance, marriage and divorce, but saying this alone would not do. One would be required to take a harder and more detailed look at the whole corpus of Muslim personal law to pin down very narrowly and pointedly the specific provisions which need rationalising.

Once identification of the specific provisions that need rationalising has been made, the second step would consist of finding out the Koranic position on them. Since Muslims argue that their personal law is divinely ordained (which contention for the time being need not be contested), it would help matters greatly if it can be shown to what extent the specific

provisions as understood and applied in India are actually at variance with the Koranically ordained position. Such scrutiny would actually strengthen the legitimacy for rationalisation and/or reform.

After these preliminary exercises have been gone through, a campaign specifically addressed within the community should be mounted to enlist popular support for rationalisation and/or reform in the desired direction. This campaign should have two thrusts. On the one hand, it should attempt to approach the sections which are directly affected by the existing provisions in order to convince them about the necessity of rationalisation and/or reform from their viewpoint and to enlist their support in favour of such initiative. On the other hand, it should try to create a framework for dialogue and debate between the protagonists and antagonists of contemplated rationalisation.