UNIFORM CIVIL CODE: PROBLEMS AND PROSPECTS

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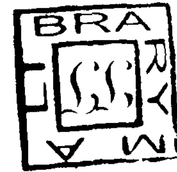

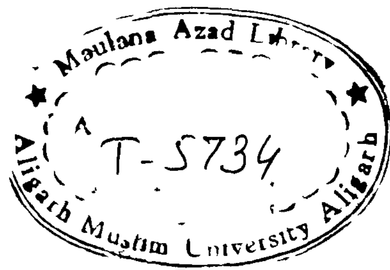

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Certificate

This is to certify that **Mr. Mohd. Shakeel Ahmad**, Senior Lecturer, Department of Law has completed the present research work entitled ***"Uniform Civil Code : Problems and Prospects"*** under my supervision. His research work is an original contribution towards the academic excellence. He has fulfilled all the requirements needed for submission of this research work. I further certify that the instant research work has not been earlier submitted elsewhere for the award of **Ph.D.** degree. I deem it a work of high quality and excellence for the award of Ph.D. degree.

I wish him all success in life.

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Wakafa Billah-e-Shaheeda

(*Surah Al-Fath*, *verse* 28)

"ALL SUFICIENT IS ALLAH AS A WITNESS"

Dedicated to

My Mother

Mrs. Sajida Khatoon

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Chapter - 1

Introduction

Chapter - 1

Introduction

Statement of the Problem

To India goes the distinction of being a home for all the major religions of the world. It is for this reason that it is often described as 'Land of Religious Toleration'. Its historic past dating back over 4000 years gives ample testimony to this claim. Many of the ancient Indian sacred texts and works on polity are outstanding documents on religious toleration. Indeed, most of the ancient Indian rulers followed a unique policy of Medieval Period was for more enlightened that Muslim rule elsewhere. A noteworthy effect of their rule was the emergence of a new synthesis of Hindu and Muslim doctrines. With the establishment of British rule, India came in contact with secular ideas and thoughts of the west. Attempts were made to harmonise western doctrines and concepts with those of India. The liberal and democratic movement of the west strenthened Indian secular trends. Religious freedom clauses of many western countries also considerably influenced Indian thinking. The Indian Constitution passed in 1950 guaranteed to every person subject to necessary limitations the right to profess, practise and propagate religion. It must, however, be stressed here that although the theme that underlines the constitutional provisions, takes into account the

western ideas, it is essentially Indian, being the product of her history and tradition.[1]

The Constitution of India guarantees freedom of conscience, Freedom to profess, practise and propagate religion, however is subjected to certain limitations imposed by the constitution. The judiciary has made further effort to curtail by laying down principle that the constitution protects only the essential aspects of religious freedom. India, being a secular country, allows the existence of various religion and does not promote any particular religion. The question of inviability of personal laws was discussed by the Constituent Assembly twice, first when the fundamental rights in Part III relating to personal laws, was incorporated in the Constitution and secondly, at the time when Article 44 contained in Part IV of the Constitution to secure Uniform Civil Code was debated. The Muslim members of the Constituent Assembly vehemently opposed the move but the Constituent Assembly with equal vehemence refused to accept the contention that Muslim Personal Law is immutable and inseperable law in Islamic religion.

Dr. Ambedkar refused to accept the immutability of the personal laws and held that state could change personal laws as a measure of social welfare and reform. To ensure the religious, linguistic, cultural and educational identity the Constitution of

India contains special provisions for the protection of Indian minorities. These freedoms assure that Muslims who are the largest minority in India do enjoy these accordingly and there shall be no intervention or discriminates on in the name of prohibition, reformation, abrogation or change in their personal laws which is religious and cultural symbols of the Muslim Indians. The scope of religious freedom is not left unlimited as it does not immunise these religious laws from legislation which run counter to public order, morality, social welfare and social interest.

It is stated that for social welfare reason, the state has the authority to enact a law under Article 25(II) and to formulate 'Uniform Civil Code' under Article 44 throughout the territory of India. It is to be remembered that when Article 44 was being put forth for debate in the Constituent Assembly the Chairman of the Drafting Committee Dr. B.R. Ambedkar :

"The Muslims unnecessarily read too much in Article 44."

He further declared that :

> "No government can exercise the legislative power in such a manner as to provoke Muslim community to rise in rebellion, to think, it would be a mad government if it did so."[2]

The Supreme Court judgement of April, 1985 in Shah Bano[3] case was widely, almost universally regarded in the country as a

landmark judgement and an earth shaking event. Unfortunately the controversy that followed the judgement resulted in more heat than light, and displayed ignorance, prejudice and fanaticism rather than a rational arguement. The Supreme Court judgement in Shah Bano case and the subsequent debate over it have divided Hindus and Muslims of the country so sharply as no other issue ever did since independence. An overwhelming majority of the Muslims of India protested against the decision of Supreme Court of India and convinced the government that the judgement was wrong hence it should be correctd by the legislation. Apart from this, the Supreme Court had in 1979[4] and 1980[5] ruled that the amount paid by the way of '*Mehr*', which customed required the husband to settle on the wife at the time of marriage, was no substitute for maintenance. But it is worth noting that the Supreme Court judgement in these two cases did not settle much controversy amongst the Muslims in India. The reason seems to be that in *Bai Tahira* and *Fazlun Bi* cases the Supreme Court had only passed the judgement relating to the maintenance of Muslim divorcee but in Shah Bano case in addition to the maintenance of the Muslim divorcee the Court also directed the government of India to look into the desirability of enacting a Uniform Civil Code throughout the territory of India. When in 1949 Article 44 of the constitution was enacted directing that "The state shall

endeavour to secure for citizens a Uniform Civil Code throughout the territory of India", we had already Uniform Codes of laws covering almost every aspect of legal relationship excepting only those matters in which we were governed by the various personal laws. The laws of Contract, the Transfer of Property, the sale of Goods, the Partnership, the Companies and Negotiable Instruments, Civil Procedure, Arbitration and Limitation, and a host of other statutory laws were Uniform Code applying to all throughout the country. As Ambedkar observed during the debates in the Constitutent Assembly[6] on the draft of Article 35 (subsequently enacted as Article 44), the only province which was not covered by any Uniform Civil Code was marriage and succession and it was the intention of those who enacted Article 44 as part of the constitution to bring about that change. Infact, Article 44 could have only the different personal laws in view, the rest of the field having mostly, if not wholly been covered by Uniform Civil Codes. the article, therefore, appears to be a demonstration of the conviction on the part of its framers that the existence of the different religion oriented personal laws of ours were not in tune with the egalitarian philosophy of our new National Charter and required to be replaced by a set of general and territorial laws contained in a Uniform Civil Code.

Mr. Justice Gajendra Gadkar, former Chief Justice of India has observed[7] that in any event the non-implementation of the

provision contained in Article 44 amounts to a great failure of democracy and the sooner we take suitable actions in that behalf, the better and that "In the process of evolving a new Secular Social order a Common Civil Code is a must".

Justice Hedge, a former judge of the Supreme Court has also observed[8] that "Religion oriented personal laws were a concept of medieval times alien to modern societies which are secular as well as cosmopolitan" and that "so long as our laws are religion oriented we can hardly build up a homogenous nation.

A unanimous five judge Bench of the Supreme Court has also regretted in *Shah Bano Begum*[9] that "Article 44 of our constitution has remained a dead letter" and that" a begining has to be made if the constitution has to be any meaning". In yet a latter decision in *Jordan Diengdeh,*[10] a two Judge Bench of the Supreme Court has reitrated that "the time has come for the intervention of the legislature in there matters to provide for a uniform code of marriage and divorce and to provide by law for a way but of the unhappy situations in which the couples like the present have found themselves." The Court directed that a copy of this order may be forwarded to the Ministry of Law and Justice for early action as they deem fit to take.

In a latter decision in *Sarla Mudgal*[11] Justice Kuldeep Singh observed :

> " One words have long will it 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. The traditional Hindu Law-Personal Law of Hindu-governing inheritence, succesion and marriage was given a go- by as back as 1955-56 by codifying the same. There is no justification whatever in delaying in definitely the introduction of a Uniform personal law in the Country."

He further clarified that :

> "Article 44 is based that there is no neccesary connection between religion and personal Law in a civilised society. Article 25 guarantees religion freedom where as Article 44 seeks to divest religion from social relation and personal law, marriage, succession and like matter of a secular character can not be brought within the guarantee enshrined under Articles 25,26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all the sacremental origin, in the same manner as in the case of the Muslims or the Christians."

After criticising the successive governments for not implementing the contitutional mandate under Article 44 of the

constitution of India he directed the Government of India through Secretary Ministry of Law and Justice to file an affidavit of a responsible officer in this court by August 1996 indicating therein the steps taken and efforts made by the Government of India towards securing a "Uniform Civil Code" for the citizens of India.

It is however, true that five members[12] of the Constituent Assembly, all of whom were Muslims strongly expressed[13] themselves against this article and moved without success amendments to this Article to secure exclusion of all Personal Laws from its operation and one member unhesitatingly branded this article as "tyrannous provision"[14] and "tyrannous measure"[15]. A modern legal scholar has also very strongly doubted[16] any correlationship between Uniform Civil Code and national solidarity and has gone to the length of holding that "a logical probability appears to be that code in question will cause *dissatisfaction* and *disintegration* than serve as a common umbrella to promote homogenity and national solidarity.[17] The learned scholar has relied, among other on Fyzee[18] and has also quoted with approval a progressive Muslim lady law-person who has been quiet categorical in declaring that it is

> "naive to imagine that such a code would cut down the number of communal riots or lead to integration; *it would serve no purpose except to divide us.*"[19]

Family relations in India are governed by religious personal Laws. Personal laws are often referred to as Civil laws but in India they are more correctly termed religious personal laws and distinguished from other civil laws. The four major religious communities : Hindu, Muslim, Christian and Parsi, each have their Personal Laws. They are governed by their respective religious laws in matters of marriage, divorce, succession, adoption, guardianship and maintenance. In the laws of all these communities, women have less right than men in corresponding situations that in itself is not surprising since religion in every part of the world discriminate against women. Religious personal laws are reputedly on religious rules and doctrines.[19a]

It is sometimes alleged that the personal laws are discriminatory in nature and the Muslim Personal Law is more discriminatory against women which will be cleared by way of following illsutrations.

1. The Muslims are polygamous, but the Hindus, Christians and Parsis are monogamous.

2. The Muslims are allowed extra-judicial divorce, but the Hindu, Christians and Parsis can effect divorce only through court.

3. A wife married under the Muslim Law can be divorced by the husband at whim or pleasure, but a wife married under the

Hindu, Christian or the Parsi law can be divorced only on certain grounds specified on those laws and only through court.

4. Under the Muslim Law, a husband's apostasy from Islam results in automatic dissolution of a muslim marriage though a wife's apostasy does not.

   Under the Hindu law, apostasy from Hinduism by either of the spouses does not effect a Hindu marriage, though it confers on the non-apostate spouse a right to sue for divorce.

   Under the Parsi law also, any spouse ceasing to be a Parsi Zoroastrian would only entitled his or her spouse to sue for dissolution, but would not otherwise effect a Parsi marriage.

   Under the Christian law, a change of religion has no effect on a Christian marriage except where the apostate husband has married again, in which case the wife would be entitled to sue for divorce.

5. Under the Muslim law, a divorced wife is not entitled to any maintenance, from the husband, except during the period of *Iddat*. But the other personal law allows a divorced wife post divorce permanent alimony.

6. Under the Muslim Law, a daughter inherits half the share of the son; but under the Hindu law a daughter shares equally with the son. (It may, however, be noted that under the Indian Succession Act governing the Parsis and also others who are not Hindus, Muslims, Buddhists, Sikhs or Jains, the position is the same as under Muslim Law).

7. Under the Muslim law a person cannot dispose off more than one-third of its properties by will; but the other Personal laws do not impose any such limitations.

8. Muslim law confers on a person the right to pre-empt any property in respect of which he is a co-sharer, or a participator in appendages or immunities or an adjoining donour. But the other personal laws do not confer any such right.

Now, if all these discriminations follow from the different personal laws and the personal laws apply to a person only on the ground of his belonging to or professing a particular religion, then these discriminations are also operating on the ground of religion only and Article 15 forbidding discrimination on the ground of *religion alone* would strike down all these provisions and unconstitutional and *ultra vires*.[20]

However, the Constitution of India adopted by the state subsequent to independence from Britain guarantees equality

(including sex-equality) to everyone (Article 14 & 15). The state is expressly prohibited from discriminating on the grounds of sex. The Constitution delcares void all laws which are inconsistent with its provisions regarding Fundamental Rights (Article 13). Yet religious personal laws that discriminate against women are still being applied almost four decades after the adoption of the Constitution. The Constitution and religious personal laws, while seemingly in conflict with each other, have coexisted for nearly fifty years.

The state has not adopted a consistent policy with regard to the reform of religious personal laws. Hindu Personal law has been extensively reformed in order to give equal legal rights to Hindu women. The Personal laws of other (minority) communities have been left virtually untouched, ostensibly because the leaders of these communities claim that their religious laws are inviolable and also because there is said to be no demand for change from within their communities. The present situation is that the women of minority communities continue to have unequal legal rights and even though women of the majority community has yet to gain complete formal equality in all aspects of family law.

The debate about religious personal laws has until now concentrated on their religious nature and on the capacity of the secular state to change them. This is partly because the state has

neither rejected nor totally expected the claims about the inviolable nature of religious personal laws. That the Constitution is ambigous about the nature of religious personal laws is indicated by the fact that the arguements in favour their reform as well as those against any reform are both based on the provisions of the Constitution. The state claims the right to reform these laws in order to bring them into conformity with the Constitution by giving women equality. The opposition to reform is based on the Constitutional right to freedom of conscience guaranteed as a Fundamental Right by Articles 25-28, which is claimed to encompass the right to be governed by religious personal laws. The Constitution does not resolve the difficult questions as to whether the religious nature of these laws prevents a secular state from interfering with them or whether the personal nature of these laws as distinct from territorial laws makes them immune to state control. Such ambiguity in the Constutiton permits contradictory claims and permits the claims to act discrepantly with respect to essentially similar claims of different communities.[21]

It is intended to approach the question from a purely legal point of view, shorn of religious sentimentalism and political abracadabra. The question that is intended to be raised in this academic venture is the problem of the Uniform Civil Code and whether we should have a Uniform Civil Code relating to or

replacing the different personal laws operating throughout India. Whether it will be beneficial for national solidarity or it will be injurious for that. Does Muslim personal law allows reform in it and if such a reform is allowed what should be the mechanism for such a reform? Moreover to what extent the reform can be done and what would be the model of the proposed Uniform Code for marriage and succession and matters.

Scope of the Study

The basic aim of this academic venture is to highlight the seriousness of the problem of gender discrimination based on religion based personal laws. It is also intended to search out the real intentions of the framers of the Constitution. Whether they wanted an immediate enactment of an All India Civil Code or whether it was a slow step by step approach. The objective of the present study is to find out the correct relationship between the Part III and Part IV of the Constitution of India i.e. Fundamental Rights and Directive Principles. The aim of the work is also to see the state action regarding the reform of Hindu Personal Law. The present is intended demonstrate study the state policy towards the reform of personal laws since 1947. The role of judiciary regarding the controversy of Uniform Civil Code and personal laws is also discussed keeping in view the prevailing situation in the country. An indepth study of the subject is need of the day; so that suitable measures have been suggested for

incorporation in the Constitution of India for solving the problem of Uniform Civil Code.

Objectives of Present Study

The present study was undertaken keeping in view the following broad objects :

1. To find out the historical perspectives of personal laws in India.
2. To enquire into the causes of heated debate in the Constituent Assembly between Muslim and Non-Muslim member over the issue of Uniform Civil Code.
3. To enquire into the causes of opposition from the minorities especially the Muslims.
4. To analyse the emerging pattern of the Indian judiciary regarding Uniform Civil Code and Muslim Personal Law.
5. To evaluate the existing legal position of personal laws in India.
6. To analyse the system of reform in Muslim Personal Law.
7. To critically evaluate the desirability of having a Uniform Civil Code for all the communities in India.
8. To draw conclusions and put forward suggestions in order to solve this problem.

Chapter I of this study is devoted to the statement of problem and its importance in India. In recent years not a month passes without a newspaper carrying statements of political

leaders, social workers, women organizations and religious leaders regarding implementation of Uniform Civil Code or it's opposition. The problem has become very serious due to the mixing of politics in this socio-legal issue.

The proper understanding of the subject cannot be done without looking ino the history of presonal laws. Three different legal systems having their origin in Hinduism and Islam and British Christian system have influenced Indian society. Basic principles of Hindu law were drawn from *Vedas* and *Puranas*. Epics like *Ramayana, Mahabharata* and *Bhagwat Gita* were moral fountain head. Manu is accepted as first law giver and *Manu Smiriti* is regarded as first law book. In ancient India, the king usually did not interfere in personal laws of people. Local customs and traditions were part of legal systems. During Muslim rule, Muslims were governed by their religion based personal laws. Whereas Hindus were left to produce their customs, traditions and religion based laws in family matters. During British rule, the colonial masters did not interfere in the personal laws of Hindus and Muslims. During the last years of their rule Britishers attempted to codify various personal laws.

Chapter II provides an insight into the above mentioned issues. The chapter is sub-divided into three parts namely, personal laws in ancient India, personal laws in Muslim India (medieval period) and personal laws in British India.

Chapter III peeps into the legislative history of personal laws and Uniform Civil Code. Existence of numerous personal laws in India are known phenomenon, hence, its relevance and utility was bound to be discussed in the Constituent Assembly. On the basis of debates on personal laws in Constituent Assembly, the weak points of the framers of the constitution have been highlighted. For two years, the Constituent Assembly witnessed debates in favour of and against Uniform Civil Code. In fact the issue of Uniform Civil Code divided the House on communal lines. This chapter critically examines the view point of the protogonists and opponents of Uniform Civil Code.

Chapter IV discusses different dimensions of Uniform Civil Code. The misconceptions about Uniform Civil Code have been highlighted. Uniform Civil Code is victim of certain misconceptions and it is an irony that the interpretation as well as implementation of Article 44 of our Constitution is not being taken into account in its right perspective. There are pre-judicial attempts on the part of Legislature and court both to examine the whole issue from the 'majoritarian' approach. Such attempts defeat the very purpose of Article 44. There is erroneous quest for Common Civil Code simply because Article 44 does not direct the Legislature to enact a Civil Code.

It contains a principle basically for uniformity in Civil laws. All these issues have been dealt in this chapter.

Chapter V is intended to examine and evaluate various cases decided by High Court and the Supreme Court of India. Important court cases have been discussed in this chapter which attracted the attention of affected groups. In these cases either the constitutionality of personal laws has been challenged or the courts have expressed suo-motto opinion in favour of enactment of a Uniform Civil Code. Attempts have been made to make impartial analysis of the judgement delivered and their affects on the masses. For this purpose five important, well known and celebrated cases have been selected. These cases are :

* State of Bombay v. Narasu Appa Mali (AIR 1952 Bom. 84);
* Mohd Ahmad Khan v. Shah Bano (AIR 1985 SC 945);
* Ms. Morden Diengdeh v. S.S. Chopra (AIR 1985 sC 935);
* Sarla Mudgal v. Union of India [(1995) 3 SCC 635] and
* Ahemdabad Women Action Group v. Union of India [(1997) 3 SCC 573].

Chapter VI focusses on the relationship between Fundamental Rights and Directive Principles of State policy. This chapter is intended to be an analytical note on Fundamental Rights and Directive Principles. It takes into account the legislative history well categorised into three periods on the basis of Supreme Court's decision on Directive Principles. In the first period *Madras v. Champakam Dorai Rajan* (1951), *Hanif*

Qureshi (1959), in *Re Kerala Education Bill, 1957*; in the second period *Chandra Bhavan's case* and in the third period *Minerva Mills* and post Minerva Mills cases have been thoroughly and critically analysed. The myth that the Directive Principles of State Policy can override the Fundamental Rights has been demolished.

Discrimination against women in India is prevalent in every sphere of life and most women experience some form of disadvantage. As such wide spread existence of discrimination does not land itself to analysis as a simple or unified phenomenon, it is not possible to study all aspects of discrimination against women. Chaper VII is intended to discuss the history of Hindu law reforms in its totality. In this chapter an attempt has been made to traces the legislative history of the Hindu law reform proposals with the main aim of identifying the gains made in women's legal rights at the initiative of the state, as well as pointing out the areas in which legal equality has not yet been granted. A detailed analysis of the process of Hindu law reform reveals the reasons that were put forward to justify the denial of equal rights to women. Statements made by state functionaries about the basis of their authority to reform religious personal laws will give some idea of the perceptions of political leaders about the relationship between the state and religion. They also provide an insight into their conception of law as a technology for social transformation.

Chapter VIII is an attempt to trace the legislative history of the religious personal laws of minorities namely Muslims, Christian and Parsis. Under the religious personal laws of minorities women had fewer rights than men, except in the case of Parsi law. There was also a considerable amount of diversity in the laws governing Christians to Muslims. The chapter is sub-divided into 5 parts. Legislative activity with regard to Islamic law, the enactment of the Dissolution of Muslim Marriage Act, 1939, the Special Marriage Act, 1954, Hindu Law Reforms Act, The Criminal Procedure Code, 1973, Reforms in Christian Personal Laws and Reforms of Parsi Personal Laws. In this chapter it has been shown that the state is trying to achieve equality of men and women but its attitude differs for Hindu and minorities due to several reasons.

Chapter IX deals with the reform of Muslim Personal Law. Whether personal laws should remain status quo or change be initiated from reformative angles? Reformation in Muslim personal law is a controversial issue, diving the community for and against such a process. To address the issue meaningfully, several aspects as the permission to make any change and the manner for that shift including the identified areas must be considered. This chapter discusses the possibility of any change in Islamic law, mechanism for change and the areas where the reform is most required.

Chapter X is devoted to the role of the Government towards achieving the mandate of Article 44 of the Indian Constitution. Its attitude towards the Hindu Personal Law and Muslim Personal Law has been analysed. Role of politicians has also been analysed. The attitude of the press, the intellectuals - both Hindus and Muslims, *Ulema* and the role of minority organisations has also been incorporated in this chapter.

On the basis the discussions and findings in the preceding chapters, inferences and conclusions have been drawn which find place in chapter XI of the present study. Several suggestions have been made in this chapter to solve the ticklish problem of Uniform Civil code and personal laws in India.

Research Methodology

In the processing of this work the doctrinal method of research was adopted. The work does not involve any field study as lot of relevant material is available in the printed form. For the purpose of this study extensive survey of textual materials, articles, newspapers and writeups formed the basis of preliminary study which was then expanded to cover a deeper survey of the literature. Ancient texts, Constituent Assembly Debates, Parliamentary Debates, Legislative Assembly Debates, relevant statutes and landmark decisions have been scanned and analysed in a systematic manner. The present work is thus based on the above referred material and is an original contribution to the problem studied.

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Chapter - 2

Historical Background of Personal Law

Chapter - 2

Historical Background of Personal Laws

Indian society is governed by Hindu, Muslim and British legal systems. The researcher has tried to analyse the evolution of these systems and has discussed the influence of the Britishers. More importantly codification of laws and enactment of some other laws as Kazi Act, 1881 throws light on the initiatives of colonial masters with regard to development of laws. It has been proved that as far as personal laws are concenred, Britishers left them untouched but decisions of the courts influenced them.

Present Indian society is the inheriter of three different and distinct legal systems – Hindu, Muslim and British.[1] The personal laws of Hindus and Muslims find their source and authority in their religious ancient texts. Since ancient time religion regulated almost every aspect of human life both public and personal. Religion was the guiding force behind all laws including personal matters as well as crime, evidence, procedure, contract, trade and commerce. The area of applicability of laws has been reduced, and is only confined to such aspects of life as marriage, dissolution of marriage, maintenance, minority, guardianship, adoption, succession and inheritence. These personal laws were considered immutable and beyond the legislative jurisdiction. From a historical perspective, many areas of Hindu law and Muslim laws have remained unaffected by centuries of political

vicissitudes and socio-economic upheavals. Doubts have been expressed as to whether or not personal laws are protected under the religious freedom guaranteed by the Indian constitution.[2] In this chapter an attempt has been made to examine the historical background of the application of the personal laws in India and their immunity from the perview of state legislations. This chapter deals with the constitutional, legislative and judicial attitudes of the problem. The chapter is sub divided to cover three distinct periods of Indian history namely, Ancient, Medieval and British India.

A. Personal Laws in Ancient India

The basic principles of Hindu law are found in the '*Vedas*' or revealed texts, which are reputed to have been divinely inspired. Tradition has it that God Brahma, the creator, and the first member of Hindu Trinity himself uttered the *Vedic* texts. They were regarded as infallible and as supreme to the early Hindus as were decay locks to the later Christians.

One can also discover in ancient India sacred works like the *Puranas*, the two great epics. The *Ramayana* and the *Mahabharata* and the *Bhagvata Gita*, the moral foundation upon which was built the Hindu law which has been in continuous application to this day.[3] The *Vedas*, which are also called *Shruti*, what is heard is also revealed text. Like any other revealed texts, the *Vedas* contains many titles of positive law. They believed that

the *Rishis* or sages of immemorial antiquity heard it and transmitted it for next generation. There is another class of scripture known as the *Smriti* which means tradition or 'what is remembered'. *Smritis* are different from Shrutis as they are not a direct perception of the divine precepts but are an indirect perception founded on memory. These two sources are considered as fundamental source of Hindu Law.

In ancient society the Hindu sages were the leaders of the community and they were revered both for their holiness and their profound learning. The rules laid down by them formed the basis on which the society was organised. In addition to their religious duties they also served as a code of ethics and morality but also governed social matters, and matters relating to politics and government. But in the early writings of these sages no distinction was made between civil laws and religious and social laws. It is only the later treatises that dealt them separately. That is why it seems that in early societies law and religion were inter-twined and were often indistinguishable from each other. Sir H.S. Maine stated that :

> "There is no system of recorded law from China to Peru, which when it first emerges into notice, is not seen to be entangled with religious ritual and observances.'[4] Freud claims that religion, morality and a social sense – the chief elements of what is

highest in man – were original one and the same.[5] In *Yajnavalkya Smriti* the subject is dealt with under three headings : *Acharya, Vyavahara* and *Prayaschita*. The second one is devoted to civil law and the first and the last of these relate to rules of religious observances and expiation.

'*Manu Smriti*' may also be put in the same category. *Manu* is regarded as the first law giver or exponent of the law. The code of Manu is divided into twelve chapters, eight of which state rules on various subjects of law both civil and criminal. Other chapters deal with religious sacraments and prescribe moral rules. In the third category fall other treatises like, *Narad Smirti* and *Brihaspati Smriti* etc. which in their entirety are devoted to the discussion of civil law and which are posterior to the Manu Smriti.[6]

Within this scheme of ancient Indian law, the king did not have significant authority to interfere with the personal laws of the people. Infact, the law did not derive its sanction from any temporal power; the sanction was self contained. Both the king and his subjects were equally subject to the rule of law formulated and enunciated by the sages. He executed, but seldom, if ever, formulated law.[7] 'Law was the king, of the king.' The king could not set the law aside.[8] Indeed, the king was required to take a vow at his coronation that he would scrupulously respect the established laws and customs.[9]

It is, however, submitted that it would be an over simplification to contend that the Hindus regarded the law as an integral part of their religion. Indeed, religion has its vital role to play in controlling and guiding the behavior of the people, yet local customs and approved usages had also acquired the force of law.[10]

B. Personal Laws in Medieval India

It is sometimes said that during the Muslim rule in India while ‘‘Muslim Scriptural’’ law was applied to the Muslim by the Qazis, there was "No similar assurance so far litigation concerning Hindus was concerned." It is also claimed that application of Hindu religious law to Hindus began in 1772 when Warren Hastings "made regulations for the administration of justice for the native population without discrimination between Hindus and Mahomedans.’’[11] But this is not the correct and authentic historical fact and this has been proved by most of the legal historians of India.

Muslim jurisprudence furnishes us with an example of complete union of law and religion. In 'Islam', says James Bryce, ‘Law is religion and religion is law’ being both content in the divine revelation. Similarly, J. Schacht streeses that ‘Islamic thought is the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.’[13]

The word Islam is derived from the Arabic root "SLM" which means, among other things, peace, purity, submission and obedience. In the religious sense the word Islam means submission to the will of God and obedience to his law. The connection between the original and religious meanings of word is strong and obvious. Only through submission to the WILL OF GOD and by obedience to HIS LAW, one can achieve true peace and enjoy lasting purity.[14] *Qur'an* consists of very words of God revealed to the Prophet Mohammad. The *Qur'an* is in the form of addresses which were revealed by God on different occasions starting from the time when the Prophet (SAW) made his first call to the people to submit to the religion of God, and continuing till the Prophet (SAW) completed his task in the form of a society fully organised, well integrated and patterned with all the basic institutions.[15]

Tradition has it that the Koran, was a transcript of a tablet preserved in the Heaven, upon which is written all that has happened and all that will happen. Islamic law from the very beginning had a well defined line of demarcation between

(i) Public law (*Huqullah*) and

(ii) Private law (*Huququl Ebad*).

Under this classification criminal law and public administration were placed in first category while marriage, family relations, successions, etc., were regarded as private law.

Whenever in history the Muslims found themselves in the ruling position in places having the mixed population, they applied the Islamic public law to all their subjects, but the Islamic private law was always applied, if at all, to all Muslims only. In matters falling in the domain of private law all Non-Muslims were left free, always and everywhere, to follow their own religious laws and customs and there was no compulsion on non-Muslims. From the very beginning this rule was adhered to as a matter of state policy (*Siyasa Shariyah*).

In actual practice, Muslim rulers did not exactly enforce in many places, the Islamic private law even for the Muslims – leave alone non-muslims. This explains the continued prevalance of numerous local customs in the Muslim dominated lands like Morocco and Indonesia. Probably that is the reason that in India the British found many Muslim communities (convert from Hinduism) continuing with their indigenous customs and usages and decided not to make any change in this respect.[17]

In India the Muslim rulers applied only some aspects of Islamic public law – e.g. Criminal law which they indeed found not drastically different from this country's own classical law. But, they surely never interfered with the religious laws and customs of the Non-Muslims relating to marriage, family and succession, etc. – despite the fact that they were extremely different from Islamic laws. They did not prohibit even practices relating to *Sati* and *Dev*

Dasi customs, despite their conflict with Islamic public law. How could they be expected to interfere with the other harmless institutions of Hindu religious law and customs? Eminent Arab travellers to Medieval period, have affirmed the undisturbed prevalence of Buddhist and Hindu religious laws under the Muslim rule.[18] Hence, during Muslim rule all Non-Muslims were governed in matters of their personal laws by their own traditional and customary laws. 'Hindus', writes Grady,

> "...enjoyed under the Mussalman government, a complete indulgence with regard to the rites and ceremonies of their religion as well with respect to various privileges and immunities in matters of properties – and in all other temporal concerns the Mussalman law gave the rule of decision excepting where both parties were Hindus, in which case the point was referred to the judgement of the Pundits or Hindu lawyers.[19]

Similarly U.C. Sarkar states that the Islamic civil court did not govern the Hindus in matters of inheritance, marriage and other analogous matters.[20] Islamic law applied to Non-Muslims only where they were directly or indirectly involved with Muslims. Thus, disputes between Hindus and Muslims sometimes taken before a Muslim Kadi (or *Kazi*, religious judge under the *Shariah*). Another appropriate illustration is to be found in

criminal law where Islamic principles applied to Muslims and Non-Muslims alike.[21] In the words of Tahir Mahmood :

> "The Muslim rulers of India enforced the public law of Islam as the law of the land. But in the areas of private law they applied Islamic law only to the Muslims. The law of Islam as a personal law thus emerged in India as one of the various personal laws, along with those of the Hindus, Buddhist, Jains, Sikhs... which were fully protected by the Muslim rulers."[22] Hindu religious law and customs were indeed placed by the Muslim rulers of India at par with the Muslim Personal Law.

It is an indisputable historical fact that Hindu law infact reached the heights of scholarly development during the Muslim rule in the country. "Before what is commonly called Muslim rule in the country, all law was derived from what is now known as Hindu religion and its injunctions and precepts as found in the *Srutis* and *Smritis* including the Holy *Vedas*, *Dharmashastras*, and *Dharmasutras*. Legal treatise like the *Manusmirti*, *Yagyavalkya Smriti* and Kautilya's *Arthashastra*, were legal codes of their respective times based on *Vedic* and Dharmic foundations. The law given by these ancient Indian codes is now called Hindu law. Development of this law did not stop after the advent of Islam in India. Muslim rulers of the country did not interfere with

it and left the process wholly free from state intervention. Vijyaneswhara's *Mitakshara* (11th century) and Jimutavahan's *Dayabhaga* (12th century) both were produced after the advent of Islam and were accepted and acted upon as veritable codes of Hindu law - (the latter in eastern India and the former in the rest of the country) - during the reign of the succeeding Muslim rulers. Devanna's *Smriti Chandrika*, the *Dravida* code of Hindu law , was also produced in South India towards the end of 12th century A.D. In North India Vachaspati Mishra's *Vivada Chintamani* and Mitramishra's *Viramitrodaya* appeared in the 15th and 17th centuries respectively the latter during the Mughal rule. At the peak of Mughal authority in the country Western India witnessed emergence of Nikhanata's *Vyavharmayukha* (17th century). All these work were legal codes of their ages based on Hindu religious sources however taking into account the exigencies of the time. These work eventually gave birth to the four sub schools of *Mitakshara* - (Madras, Mithila, Banaras, Bombay) schools. This massive development of Hindu law during the so called 'Muslim rule' in India confirm the historical fact of an absolute non-interference by the state at that time in the juristic evolution of indegenous law."[23] To confirm this attitude of exemption of personal law from the perview of state is reflected in the writings of Prof. M.P. Jain a well known legal historian of our time when he says about Mughal judicial systems in following words :

"Not much litigations came before the Kazis because

of the existence of village panchayats, and also because civil causes among the Hindus were decided by their own elders or Brahmins. The practice of the Mughal government seems to have been to leave the Hindus free to decide their cases as best as they could.[24]

Thus it is crystal clear that the Muslim ruler never interfered in the personal laws of Non-Muslims.

C. Personal Laws in British India

The criminal law was the only law during the Muslim rule, which was largely common to Hindus and Muslims with the exception of the application of oaths and ordeals. The Muslim rule came to an end with the disintegration of Mughal Empire. Towards its end the Empire has already weakened to such an extent that the Governors of different provinces had virtually usurped the whole power and became independent functionaries. It is at this juncture that the Britishers came to India as innocent traders, as they were, ultimately turned out to be the mercenaries and became the forerunners of British rule in India.[25]

The emergence of the British empire in India stands out as unique event in the history of the world. Unlike many other empires, the huge edifice of this empire was created by merely a company which was organized in England for furthering the British commercial interests in overseas countries.

During the British Raj in India as a matter of colonial policy, it was politically expedient for the British not to interfere with existing personal law in so far as they related to family and inheritence rights alone. Because the main object of the East India Company, namely trade, commerce and exploitation on the natural resources of the country, their primary motive was with law relating to trade and commerce.

When the British established their hegemony over India (1757), they more or less continued the Muslim pattern of judicial administration. But in the course of time, as they consolidated their position, they completely changed the criminal law and introduced their own system to deal with various matters of civil law.[26] Legislative immunity was granted to certain specified areas of Hindu and Muslim laws which, they considered, were deeply interwoven with religion. During this period the Britishers in India followed the policy of non-interference with the religious susceptibilities of their subjects. They thought that anything could not be wiser than to assure by legislative Act, the Hindus and Muslims of India that the private laws, which they reversely hold sacred and a violation of which they would have thought the most grievous oppression, would not be superseded by a new system of which they must have considered as imposed on them a spirit of vigour and intolerance.[27] Their attitudes towards Hindu and Muslim laws also appear to reflect the original Christian doctrine of two distinct spheres of life, the temporal and the spiritual; the

first being under the control of the state and the second under the control of the Church.

The earliest trace of the acceptance of this policy is found in the Charter of George II, granted in 1753. The Charter of 1753 was principally of the Europeans, and the Hindus and Muslims having their own special customs were left free to dispose off their cases themselves lest difficulty may arise by their custom being broken. The Charter Act of 1753 expressly exempted the Indians from the jurisdictions of Mayor's court and directed that such suits and disputes should be determined by the Indians themselves, unless both parties submitted themselves to the jurisdiction of the court. Warren Hastings throughout his tenure of his office adhered very tenaciously for the policy of applying the personal laws to the Hindus and Muslims. Hastings Rule reserving '*the laws of Koran*' to the Muslims and the laws of '*Shastra*' to the Hindus was rephrased in the Cornwalis Code of 1793. Thus the rule 'to each religious community to its own personal law' was, thus, firmly established in the country when the British came here in the 17th century. Most certainly it was not a gift from Warren Hastings, who arrived here over 150 years later as Governor of the Calcutta Presidency under the Rule of the Overseas usurpers from the Britain. When in his Judicial Plan of 1772, Warrent Hastings provided for the application of 'law of the Koran' with respect to the Mohammadans and those of the '*Shastra*' with regard to the Gentoos (Sec. 23). He was simply

guaranteeing continuation in force of the legal position regarding Hindu, Muslim laws well established in the country since the begining of the Muslim rule. By no dint of imagination he can be said to have introduced any new rule. What he did was to guarantee that the legacy of the Muslim rule under which Hindu law was to apply the Hindus and Muslim law to the Muslims would not be changed. And this guarantee, notably, the British governor gave only to serve the political interest of his masters – not by way of gift to the natives.[28]

The British policy towards Hindu and Muslim laws during the period of their dominion over India may be discussed under the following heads, viz. :

(i) Legislation indicating their neutrality towards Hindu law and Muslim law;

(ii) Legislation aimed at maintaining law, and order, good government, and introducing social reform and applying them to all communities alike;

(iii) Legislation on matters falling within the purview of Hindu law and Muslim law, and

(iv) Interference with Hindu law and Muslim law through judicial interpretation.[29]

As discussed above the British rule from its inception followed a policy of non-interference in the religious matters of

the Hindus and Muslims. The Charter Act of 1753 exempted the Indians from the jurisdiction of the Mayor's courts and directed that all disputes should be determined by the Indian themselves, unless both parties submitted themselves to the jurisdiction of the court. In 1772 Warren Hastings exempted the Muslims and Hindus and it was directed that the matters relating to Muslims and Hindus will be determined according to *Koran* and *Shastra*. The rule, requiring the application of Hindu laws to Hindus and the Muslim laws to Muslims was later extended to His Majesty's Court of Judicature, i.e. The Supreme Court of Judicature at Calcutta, Madras and Bombay, when these were established in 1773.[30] To the list laid down by Warren Hastings, succession was added in 1781 by the Act of Settlement. In 1793 Lord Carnwallis rephrased the Warren Hasting's rule of 1774. In this way Hasting's policy of preserving Hindu and Muslim law was generally supported by the British. Similar provision was also enacted by an Act of 1797 and by the Government of India Act, 1915. The 1797 provision was passed for the guidance of courts in Madras and Bombay and 1915 provisions for the guidance of the High Courts at Calcutta, Madras and Bombay.

Although the British did not directly interfere in the personal laws of Hindus and Muslims, their judicial mechanism, however, considerably influence the growth of these laws. The plan of 1772 place the administration of justice in the hands of English judges. Although this change was inoffensive, but it tended to mould

traditional concepts. The English judges used to consult Pandits and Maulvis in matters relating to personal laws of Hindus and Muslims, but nonetheless he was a foreigner with a foreign background. He could only make his judgement conform to what he thought was the law; his principal task was to search out a legal solution. Needless to say, the role of judges in the pre-British system was primarily to put an end to dispute brought before them, but when the administration of justice fell into the hands of British, the doctrine of precedent or *stare decisis* was introduced.

Thus, the law which hitherto had potentially existed in scriptural work and treatises now came to be fixed in the case law of these new courts. Before the advent of the British judicial system, the Hindu law was developed by commentaries and digests written by Hindu jurist. It is they who interpreted the scriptural law. But with the growth of case law this source began to dry up.[31]

In Muslim law certain misleading decisions were given by the English judges. The classic example of this is the judgement of the Privy Council in *Abul Fatah Vs Rassomoydhar Chaudhry*[32] which was contrary to the principles of Islamic law relating to family waqfs. Thus decision led to enactment of the Mussalman Waqfs Validing Act in 1913 with a view to restoring the status quo.

Another way to introduce English notions in Hindu and Muslim, personal laws by using the so called formula of "justice,

equity and good conscience". This maxim has enjoyed a continued existence and has been repeatedly laid down in a number of laws passed by the British. Infact, in the course of time justice, equity and good conscience came to mean English law as far as applicable to the Indian situation.

D. Codification of Laws in British India

During the British rule in India, except towards its close, no attempt was made to codify the personal laws.[33] As had been noted above, the British felt hesitant to interfere with the customs and religious-cum-legal principles applicable to the Hindus and Muslims. The first Law Commission had, however expressed a desire to prepare their code for the personal laws but, thereafter, it became an accepted tenet of British policy not to interfere with these systems, to leave them severely alone and to modify them only to the extent there was demand for the same backed by a strong public opinion.[34] The Second Law Commission gave vent to this policy and the same was repeated by the fourth Law Commission.[35]

In persuance of section 353 of the Charter Act of 1833,[36] the first Law Commission was appointed in 1834 and Lord Macaulay was appointed as its Chairman. The first task set before the commission, under the instructions from the Government of India, was to prepare a draft penal code for India. The commission

prepared the required draft and submitted it to the Government on October 14, 1837, before Macaulay's departure from India.

Meanwhile the Britishers had penetrated into *Muffassils* and the absence of *lex loci* posed many problems there. There was no *lex loci* or territorial law for persons other than Hindus and Muslims in the *Muffassils*. While within the presidency towns, a *lex loci* prevailed in the absence of personal or other special law. In different reports submitted by the commission from 1866 to 1869, many legislative enactments were made, such as the native Converts Marriage Dissolution Act, 1866, Indian Divorce Act, 1869. Other legislations that came into existance in the era of third Law Commission were the Hindu Wills Act, 1870; Special Marriage Act, 1872; The Indian Evidence Act 1872; The Christian Marriage Act 1872, which has now been amended by the Child Marriage Restraint (Amendment) Act, of 1978. A study of the legislative activities of the period of 1862 to 1872 points out that on the one hand the Third Law Commission was busy in making its contribution to the codification of the Indian law, on the other hand, Sir H.S Maine[37] and Sir James F. Stephen, both respectively as the law members of the Government played a vital role in the shaping of the codification of the laws in various spheres. Some of the more legislations this time were the Married Women's Property Act 1874; The Indian Majority Act 1875, The Bengal Mahammedan Marriages and Divorces Registration Act 1876. The

First legislative measure relating to any subtantive provision of Muslim Personal Law was enacted in British India was Avadh Laws Act of 1876.[38] This was an Act of regional covering ten districts of Uttar Pradesh which constituted the erstwhile Oudh state.[39]

On the suggestion of Sir Syed Ahmad Khan, the government thought it expediant to make a law empowering itself to appoint Kazis in any area if demanded by a sizeable number of local Muslims.[40] Hence the Kazis Act 1881 was enacted. Other important legislation which need to be mentioned in this context are the Transfer of Property Act 1882; The Guardians and Wards Act 1890; The Bengal Protection of Mohammadan's Pilgrim Act 1896.

Although, the new statutes applied alike to all people irrespective of their religious affiliations, the effect of some of the provisions was to limit the Hindu and Muslim laws in their own spheres of application and to introduce in English common law.[41]

The Caste Removal Disabilities Act ... abrogated the Hindu and Muslim laws of property in regard to apostates. Many laws were passed introducing reforms in the old Hindu law. In most cases, the innovating Acts had the support of Hindu community, but conservative and orthodox Hindus weaved these innovations as encroaching upon their religious practices. The Hindu Widow Remarriage Act 1856, permitted a Hindu widow to remarry.

Legislation enabling a widow's remarrige was contrary to Shastric prohibition. Although in ancient India widow remarriages were permitted in special cases and were commonly resorted to amongst certain classes in certain areas, they came to be opposed by the majority of Hindus on religious grounds.[42] The Hindu Wills Act of 1870 for the first time conferred a power of testamantory disposition on Hindus; which were previously unknown to Hindu law.[43] The Indian Majority Act 1875 fixed 18 as the age of majority the Act applied to Hindus in all matters except marriage, divorce and adoption. Many other Acts such as the Hindu Inheritance (Removal of Disabilities) Act 1928; The Hindu Law of Inheritance (Amendment) Act 1929; Child Marriage Act of 1929; Hindu Women's Right to Property 1937 etc. were enacted.

In the field of Muslim law very little legislative activity is found. Most statutes were enacted to restore the orthodox Muslim doctrines. The four central statutes were passed during the British India. The *Mussalman Waqf* Validating Act, 1913; The Muslim Personal Law (*Shariat*) Application Act of 1937; The Insurance Act of 1938 and The Dissolution of Muslim Marriage Act 1939.

The *Mussalman Waqf* Validating Act of 1913 was passed to undo the effect of the judgement given by Privy Council in Abul Fata Case.[44] The Muslim Personal Law (*Shariat*) Application Act, 1937 was passed to fulfill the desire of Muslim community to replace customary laws which was causing hardship to Muslim women, till that time, governed by Hindu Customary law. The

Insurance Act of 1938 was passed in order to solve certain difficulties regarding the assignment of insurance policies in regard to Muslims. The Dissolution of Muslim Marriage Act, 1939 gave Muslim women certain rights to get their marriages dissolved by the court.

In the light of the above discussion, it is submitted that there were several factors which were responsible for the shift of British policy of neutrality towards Hindu and Muslim law, i.e. their desire to remove anarchronistic practices from religion, improve the lot of women, achieve uniformity and certainty in the law, overwhelming support by religious leaders for their legislative innovations and later participation of Indian in law making process.

Further it is clear that the origin of personal laws lies with different religions. In ancient India there was not much distinction between personal law and public law. Religion played a very important role in regulating the affairs of the people. During Muslim rule in India which lasted about 700 years the state did not interfere in the personal laws of the other communities i.e. Hindu, Christians. The Muslim personal law enjoyed complete immunity during this period. During the 150 years of British domination the position was almost similar to that of Medieval period and the personal laws of Muslims and Hindus were to a large extent immune from state legislation. Whatever changes were introduced in Hindu law they were introduced to rectify some

apparent injustice to certain sections of Hindu society. Whether they be untouchables, widows or minor children. Similarly, the Acts which were passed exclusively for Muslims were enacted mostly on the demands of the Muslim community either to rectify misinterpreted judgement or to restore the correct Islamic position in place of customary law applicable in many Muslim communities who had converted from Hinduism. More or less the Britishers were hesitant to introduce their ideas in the personal laws of Hindus and Muslims. They thought that interference with the existing system of law might be resented by the Indians as an interference in their religion based laws. The Britishers were very careful not to injure the religious susceptibilities of the Indians. However, when they consolidated their position in India they gradually introduced their system nevertheless left the personal laws of Hindus and Muslims to perpetuate.

Summary

Three different legal systems having their origin in Hindu's and Muslim's religion and British system have influenced today's Indian society. Basic principles of Hindu law were drawn from *vedas* and *Puranas*. Epics like *Ramayana*, *Mahabharata* and *Bhagwat Gita* were moral fountainhead. Manu is accepted as first law giver and *Manu Smiriti* as first law book. In ancient India the king usually did not interfere in personal laws of people. Local customs and traditions were part of legal system.

During Muslim rule, Muslims were governed by their own laws whereas Hindus were left to practice their customs, traditions and laws. Although Muslims were usually bound by Qur'an and Islamic law, in practice Muslim rulers did not strictly enforce Islamic law.

During the British rule, the colonial masters did not interfere into the personal laws of citizen i.e. Hindus and Muslims. In the beginning, their basic aim was to trade from India and exploit its natural resources. They continued judicial system enforced by Muslim rulers. After consolidating their rule, they gradually changed criminal law and injected their own system in civil laws.

An attempt was made codify the personal laws by Britishers during their last years. Although, First Law Commission was appointed in 1834 but some legislative enactments could be made around 1860s such as Marriage Dissolution Act, 1866 and Indian Divorce Act 1869. For Muslims, on the suggestion of Sir Syed Ahmad Khan, Britishers enacted Kazis Act 1881 for appointing Kazis. Several others laws were also enforced.

The whole history of personal laws proves that they were influenced by change of time to some extents and Britishers introduced their system gradually but left personal laws untouched.

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Chapter - 3

Uniform Civil Code and The Constitution of India

Chapter - 3

Uniform Civil Code and the Constitution of India

Personal laws attracted the attention of the Constituent Assembly and heated debates in favour of Uniform Civil Code and against it took place. The Uniform Civil Code was debated under Article 35. Muslim members strongly opposed it whereas most of the Hindu members supported it. B.R. Ambedkar opined in favour of interference in personal laws. This researcher has taken into account whole controversy in the light of the Constitution of India and drawn conclusions impartially.

A. Constituent Assembly Debates and Uniform Civil Code

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

The Constituent Assembly Debates in the constitution making process revealed that the constitution makers debated the

concept, relevance and utility of the Uniform Civil Code. The Muslim members of the Constituent Assembly opposed the move with all possible intensity at their command. In this background, the arguments for and a quest for the objective evaluation of the Uniform Civil Code, will not be out of place in India which is known for its religious, cultural and lingual diversities. The Constituent Assembly had its first meeting in December 1946. However just after the freedom of India from the grip of British imperialist, the place and shape of personal laws in the future legal order in the country got much entangled into the whirlpool of national politics. Framers of the constitution envisage to establish a Sovereign, Democratic, Republic - ideas based on the ideas of justice, liberty, equality and fraternity. Later on, in 1976, words 'secularism' and 'socialism' were added to the Preamble. Fundamental rights especially regarding the right of freedom to religion was designed in our Constitution before its commencement in 1950. Since then, in the Constituent Assembly as well as on every platform, a great deal of discussion on personal laws has taken place repeatedly. Even prior to the commencement of the Constitution much was debated in the Constituent Assembly for and against the personal laws.[2]

i) The attitude of the antagonists

The Constituent Assembly debated the Uniform Civil Code under Article 35. Mohammad Ismail from Madras moved the

following proviso for addition to Article 33 which provided that 'any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law'. He advocated that the right to adhere to ones own personal laws was one of the fundamental rights. He asserted that personal laws were a part of the way of life of the people. In his evaluation, personal laws were the part and parcel of religion and culture. Any interference with the personal laws, in his view would tantamount to interference with the very way of life of those who had been observing such laws from generation to generation. He elucidated that India was emerging as a secular state and it must not do anything which hinder the religious and cultural ethoes of the people. To strenghten his argument, he cited precedents of Yugoslavia, the Kingdom of Serbs, Croats and Slovenes which were obliged under treaty obligations to guarantee to Muslims being in minority in the matter of family laws and personal status :

> "The Serbs, Croats and Slovene States agree to grant to Mussalmans in the matter of family law and personal status, provisions suitable for regulating these matters in accordance with Mussalman usage."[3]

To enrich his arguments, he named similar protective clauses of other European constitutions which dealt with the minorities. However, he pointed out that such clauses were narrow in scope as they dealt with any group, section or community of the people

and not confined to minorities only. His proposed amendments read :

> "That any group, section or community of the people shall not be obliged to give up its personal law in case it has such a law."

His proposed amendments sought to secure the rights of people in respect of their existing personal laws. He contended that in favour of the Uniform Civil Code was counter productive and the discontentment and faithfulness would be the natural result. By following their own persnal laws, people of different caste and communities would not be in conflict with each other.[4] The argument of Mohd. Ismail was objected by H.C. Majumdar, another member of the Constituent Assembly, who contended that the proposed amendment was in direct negation of Article 35. His objection was sustained by the Vice-President and Mohd. Ismail could not succeed. Another member of the Constituent Assembly Nazir Ahmad moved a proviso to article 35 which read :

> "Provided that the personal law of any community which has been guaranteed by the statutes shall not be changed except with the previous approval of the community ascertained in such a manner as Union legislature may determine by law."

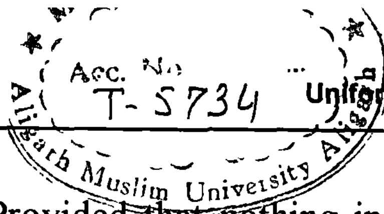
He further remarked that the Uniform Civil Code would create inconvenience not only to Muslims but to all religious

communities who had religion oriented laws. He further pointed out that the very concept of Uniform Civil Code clashed with the religious and cultural freedom guaranted to every citizen. He was also apprehensive that under Article 35 the state may violate the religious freedom of the citizens.

Surveying the legal developments in the Indian subcontinent, he pinpointed certain provisions of the Civil Procedure Code, 1908 which had already interfered with the Muslim Personal Law. However, the British administration, as he pointed out, during its 175 years rule, did not interfere with the institution of marriage, dower, divorce, maintenance, guardianship, paternity and acknowlegement, administration of estate, wills, gifts, waqf and inheritence. Whatever laws were enacted in the area of Muslim Personal Law during the British administration of justice were mostly on the initiative of Muslim community.[5] He put a note of caution in these words :

> "What the British in 175 years failed to do or was afraid to do. What the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do at all once... I submit Sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy."

Another member, Mahboob Ali Beg sahib Bahadur moved the following proviso to Article 35 :


Acc. No. T-5734 Aligarh Muslim University

> "Provided that nothing in this article shall affect the personal law of the citizen."[6]

Mahboob Ali Beg emphasized that the civil code spoken of in Article 35 did not include family law and inheritence but since some people have doubts about it should be made clear by a proviso to assure that the civil code would cover transfer of property, contract, etc., but not matters regulated by personal laws. He also claimed that secularism did not negative diversity in Personal laws.[7] M.A. Ayyanger, member of the Constituent Assembly intervened and remarked on it as a matter of contract. Ayyanger tried to put his argument forcefully and asserted that the matrimonial contract was enjoined by the Holy *Qur'an* and the Traditions of the Prophet (SAW). He stated that the Indian concept of secularism tolerated the existence of all religions with equal honour and dignity. He emphasised that in secular state like India, different communities must have the freedom to practice their own religion and culture, and they should be allowed to observe their own personal law. B. Pocker Sahib another Muslim member of the constituent Assembly while supporting the motion proposed the following provisio to Article 35.

> "Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law."

He laid emphasis on the following points :

(a) One of the 'secrets of the success' of the British rulers and the basis of their judicial administration was retention of personal laws;

(b) If the civil code was intended to supersede the provisions of the various civil code laws guaranting application of personal laws to cases of family law and inheritence, etc., Article 35 should be termed as 'tyrroneous provision'; and

(c) No community favoured uniformity of civil laws.

Organisations - both of Hindus and Muslims, questioned the competence of the Constituent Assembly to interfere with religious laws. Article 35 was thus, antagonistic to religious freedom.[8] Hussain Imam, too expressed similar views and pointed out :

> "India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything. In the north, we have got extreme heat. In Assam we have got more rain than anywhere in else in the world...."
>
> In Rajputana desert we have no rain. In a country so diverse, Is it possible to have uniformity of civil laws? ... We have ourselves provided for -
>
> Concurrent jurisdiction to the provinces as well as to the centre in matters of succession, marriage,

> divorce and other things. How is it possible to have uniformit when there are 11 or 12 legislative bodies ... to legislate on subject according to requirements of their own people?'[9]

He further argued and appealed :

> "The apprehension felt by the members of minority community is very real. Secular state does not mean that it is anti-religious but non-religious and as such there is a word of difference between irreligious and non religious. I, therefore, suggest that it would be a good policy for the member of the Drafting Committee to come forward to such safeguards in this proviso as will meet the apprehension genuienly felt and which people are feeling and I have every hope that ingenuity of Dr. Ambedkar will be able to find a solution to this."[10]

The above account of the opinions expressed by Muslim members shows two different opinions. While Naziruddin Ahmad and Hussain Imam visualized the possibility of having uniform family law sometime in future the other speakers ruled out the possibility of having a Uniform Civil Code for all time to come. Thus, members of the minority strongly argued for exclusion of personal laws from the ambit of the Uniform Civil Code.

Nevertheless, despite their convincing arguments and deep resentment, they could not succeed. They only got some assurance from Dr. B.R. Ambedkar.

(ii) The attitude of protagonists

Many members of the Hindu community expressed their opinions contrary to the views of Muslim members. K.M. Munshi expressed the following views.

(A) Even in the absence of Article 35 it would be lawful for Parliament to enact a uniform civil code, since the article guaranteeing religious freedom gave to the state power to regulate secular activities associated with religion.

(B) In some Muslims countries, for example, Turkey and Egypt personal laws of religious minorities were not protected;

(C) Certain communities amongst Muslims, for example, Khojas and Memons did not want to follow the *Shariat*, but they were made to so under the *Shariat* Act, 1937;

(D) European countries had uniform laws applied even to minorities;

(E) Religion should be divorced from personal law; The Hindu Code Bill did not conform in its provisions to the precepts of Manu and *Yajnavalkya*;

(F) Personal laws discriminated between person and person on the basis of sex which was not permitted by the Constitution;

(G) People should outgrow the notion given by the British that personal law was part of religion.[11]

Conclusively, he beseeched to divorce religion from personal laws.

> "We want to divorce religion from personal laws from what may be called social relations or from the rights of the parties as regards inheritence or succession. What have these things got to do with religion, we really fail to understand."

He advised Muslim brethren in these words.

> "I want my Muslim friends to realise this that the sooner we forget this isolationist outlook on life, it will be better for the country. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible into a strong and consolidated nation."

A.K. Iyer, a member of the Constituent Assembly, supported K.M. Munshi and urged the assembly to pass the article dealing with the Uniform Civil Code. He explained the scope of Uniform Civil Code :

> 'A Civil Code ... runs into every department of civil relations to the law of contract, to the law of

property, to the law of succession, to the law of marriage and similar matter.'[12]

The Assembly passed the article accordingly, brushing aside the proposal of the Muslim members for the exclusion of personal laws from the ambit of Uniform Civil Code. In the words of *Prof.* Tahir Mahmood :

> "I want to point out that Mohd. Ismail, Hussain Imam, Mahboob Ali Beg and Naziruddin Ahmad had the same status in the Constituent Assembly as Hans Mehta, H.C. Majumdar, K.M. Munsi and A.K. Iyer whose opinion prevailed is a different matter."[13]

Dr. B.R. Ambedkar although did not accept the amendments and defended the right of the state to interfere in the personal laws of different communities. He defended laws of different communities. He defended the arguments of Hindu members of the Constituent Assembly. But the same time he also gave some assurances to the Muslim members and he explained that the proposal was creating only a 'power' not an 'obligation', and closed the debate with these memorable words :

> 'Sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignity in the exercise of power must reconcile itself to the sentiments of different communities, No government can exercise its power in such a manner as to provoke

the Muslim communit to rise in rebellion. I think it would be a mad government if it did so. But that is a matter which relates to exercise of power and not the power itself.'[14]

Besides, the above observation Dr. Ambedkar persuaded the Muslim members "Not to read too much into Article 44". He affirmed even if the Uniform Civil Code was implemented it would be applicable to those who would consent to be governed by it.[15]

B. Personal Laws and the Constitution of India

The Constitution of India empowers the Legislature to legislate with respect to family relations governed by the personal laws by a Common Civil Code. With the enactment of the Hindu Code to replace significants segments of the customary Law of the Hindu Law, the demand for a Common Civil Code on the one hand and for the reform of the Muslim Personal Law on the other, has gained momentum. Enactment of a Common Code is recommended for a wide variety of reasons, which include averting communal riot and acceleration of the process of National Integration. While replacement of Muslim Law by a Common Civil Code has provoked intense opposition from a section of Muslims. Not all the advocates of the reforms are for replacement of Muslim family law, nor all their opponents, in India are scholars of Muslim Law. They do not conduct the debate on sound and sober lines. Consequently, the real issues are lost in a

whirlpool of non issues. We have already seen in the preceeding section how the debate took in relation to Uniform Civil Code. How after heated discussion the Article 35 of the draft constitution (Now Article 44) was incorporated in the Indian Constitution. Dr. Ambedkar the Chairman of the drafting Committee while supporting the inclusion of the provisio of Uniform Civil Code assured the members that they should not read too much into Article 44". he also assured the Muslim members that even if the Uniform Civil Code was implemented it would be applicable only to those who would consent to be governed by it.

The Constitution of India guarantees the religious and cultural freedom to every citizen of India Article 25 (1) states :

> "All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion."

Article 26 states :

> "every religious denomination or any section thereof shall have the right : (a) To establish and maintain institutions for religious and charitable purposes; (b) To manage its own affairs in matters of religion";

Article 29 (1) states :

> "Any sections of the citizens ... having a distinct lagnuage, script or culture of it sown shall have the right to conserve the same".

Religion is the matter of faith and conscience. The culture and civilization incorporate the religious ethoes. Muslim Personal Law being the very core of Islamic religious faith amalgamates in itself 'belief', 'practice', Propagation'. The ambit of religious and cultural freedom enshrined in Part III of the Constitution as the fundamental rights covers the Muslims Personal Law.

Under Article 372, the Constitution of India ensures the application of "all the law in force in the territory of India immediately before" its commencement. The Muslim Personal Law (*Shariat*) Application Act, 1937 is 'the law in force before the comencement of the Constitution of India.[17]

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue inforce therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, The President may by such order make such adaptation and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date

as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of Law.

(3) Nothing in clause (2) shall be deemed :

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.

The expression "law in force" in this Article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding. That it or parts of it may not be then in operation either at all or in particular areas.

The very letter and spirit of Article 372 of the Constitution reveal that the Muslim Personal Law (Shariat) Application Act, 1937 which ensures and governs the application of Muslim Personal law is the 'law in force' as it is enacted by the competent legislture. Since its application, the Act has have been 'altered or

repealed or amended by the competent legislture or other competent authority' till date, so that it is the 'law in force' or 'living law' according to Article 372 of the Constitution.[18]

The phrase "all the law inforce" in this article includes statutory, customary and, it seems, also personal laws.[19] The language of Article 372(1) is analogous to section 292 of the Government of India Act, 1935, which also recognised the continued application of "all law inforce" then. The Federal Court in *United Provinces v. Atiqa*,[20] had held that the phrase included also non-statutory laws including personal laws. Even after the commencement of the Constitution the High Courts of *Rajasthan*,[21] *Hyderabad*,[22] *Calcutta*,[23] *Madhya Pradesh*[24] and *Bombay*[25] have confirmed the applicability of Article 372 to personal laws. This article, in any case, is the only provision of the Constitution under which personal laws can be claimed to have been recognized. If we do not apply it to personal laws, those laws are left without any Constitutional recognition.[26]

As regard the Constitutional postulate of continuity and change in the matter of pre-1950 laws, at the time of the commencement of the Constitution a variety of Personal laws both codified and uncodified was applied to various religions and ethnic communities. By virtue of Article 372 of the Constitution all these laws, of every variety, got a statutory lease. It was not, however, a perpetual lease. The period of lease for all such laws extended till "further action", if any, by a "competent

authority". As specified in Article 372(1), this "further action' could be taken in the form of alteration, repeal, amendment, or adaptation. The principal "competent authority" that could take any such 'action' would, of course, be Parliament or a state Legislature. An executive authority, however, could also exercise the power of delegated legislation.[27]

The question of the power of adaptation and modification of the existing laws, conferred by Article 373 (2) on the President of the Republic, could be exercised by him also in respect of an uncodified law or custom has not been free from difficulty. However, since that power was not exercised by the President within the stipulated period of three years from the commencement of the Constitution, this question is now more or less redundant.[28]

It should be remembered that all the three lists in schedule VII of the Constitution of India also include subjects relating to personal laws. They are as follows :

(i) Marriage and divorce; infants and minors; adoption; wills, integracy 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.[29]

(ii) Transfer of property other than agricultural land; registration of deeds and documents.[30]

(iii) Charities and charitable institutions, charitable and religious endowments and religious institutions.[31]

List II (specifying the subjects on which state legisltures can make law) includes burial and burial grounds,[32] rights in or over land[33] (covering succession to agricultural lands) and administration of justice and organization of courts at the district level.[34]

In List I (mentioning subjects for parliamentary legislation) the only entry relevant to Muslim law is "Pilgrimage to places outside India.[35] Under this provision Parliament can make laws regulating *Haj* and *Ziyarat*.

Thus, nearly the entire gamut of subjects which traditionally falls within the ambit of personal law, has been placed at the disposal of either the state Legislature or the Parliament.[36]

Summary

In post-independent India the status of personal laws got politicised. For two years, the Constituent Assembly witnessed heated debates in favour of and agaisnt Uniform Civil Code. In fact the Uniform Civil Code divided the house on communal lines. Muslim members opposed it while Hindu members strongly supported the move.

The debates were carried on under Article 35 Mohammad Ismail of Madras moved an amendment exempting any group or

community from being covered by such legislation. He cited precedents of Serbs, Croat etc. where Muslims were assured to have their own personal laws. Some members like H.C. Majumdar contested the amendments on the ground that it negates Article 35. Objections were sustained and Mohd. Ismail's amendments were over-ruled. Some other members also moved for amendments but they failed despite strong pleas aand arguments. Some of the Hindu members opined just opposite to Muslim members. K.M. Munshi, A.K. Iyer and even Dr. B.R. Ambedkar were most vocal in this regard. Dr. Ambedkar coldly suggested to Muslim members, "not to read too much into Article 44" and declared that Uniform Civil Code will be applicable only with their consent.

No doubt Constitution of India empowers Parliament to enact Uniform Civil Code. After enactment of Hindu Code the demand for reforms in Muslim Personal Laws and Uniform Civil Code gained momentum. Constitutionally all laws including personal laws can be changed or amended. In reality personal laws are placed within the purview of Parliament and legislature.

So far as the question of recognition of personal laws is concerned, the Constitution does acknowledge the existence and continuation of such laws under Entry 5 List III of Seventh Schedule, together with Article 372.

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Chapter - 4

Uniform Civil Code : Misconception and Reality

Chapter - 4

Uniform Civil Code : Misconceptions and Reality

Uniform Civil Code is often debated for political purposes. Whereas the reality is that masses find such debates difficult to understand. One point stands out clearly on which everyone can agree; the problem is serious one and it needs careful examination. There are direct claims and indirect comments without understanding whole issue. To dispel the ignorance manifested wittingly or unwittingly, researcher is taking up the issue from a point of view of an academician and hopes to pinpoint myths and realities revolving around Uniform Civil Code.

Article 44 of the Indian Constitution states that :-

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

One of the most common misconceptions about the Uniform Civil Code is that the Hindus have surrendered their personal laws for the sake of uniformity throughout the country. Another important misconception is that the four Hindu enactments made in 1955-56 have rectified all the evils of Hindu's laws associated with, *inter alia*, the gender justice. The third popular fallacy about the Uniform Civil Code is that Muslims are the only stumbling

block in the implementation of the directive contained in Article 44 of the Indian Constitution. The fourth popular misconception is that the Muslim law is against the gender justice. Hence Muslim women are the most inferior women in India with respect to their legal rights as opposed to others. The fifth popular misconception is that the Uniform Civil Code, if implemented, would strenghtened the national unity. The sixth fallacy is that the personal laws are a gift by the Britishers and extended by the Constitution of India to the minorities especially Muslims in India. The seventh misconception about the Uniform Civil Code and personal laws is that, in all the states, all the religious communities have surrendered their laws for the sake of uniformity and national unity.

But the reality is otherwise. It is not so that only the Muslims are opposed to the change in their religion based personal laws. If we go through the history of the Hindu Code Bill, we would find that there was a very stiff resistence by the Hindu religious scholars, constitutional academicians, political leaders and the upper caste Hindus. Even the first Hindu Code Bill was allowed to lapse. It was due to the inhuman and degrading state of Hindu women in their ancient laws that the then government headed by Pt. Jawaharlal Nehru, brushing aside all opposition, got the Bill passed in Parliament despite a threatened veto by President of India Dr. Rajendra Prasad. Due to the threat posed by Dr.

Rajendra Prasad and the stiff opposition by the upper caste Hindu especially Brahmin certain anti women and anti secular laws, were incorporated in four Hindu Acts.[1]

It will be desirable to discuss some of the important fallacies in detail.

A. Dimensions of personal laws.

B. Erroneous approach for Uniformity

C. Misconception about Muslim Personal Laws

D. What does Article 44 demand?

A. Dimensions of Personal Laws

(i) Diversities based on region and territory

It is a great myth that different sections of Indian citizens are governed by different personal laws due to the fact that they follow different religion which have laws of their own. In fact neither all followers of any religion are governed by uniform law throughout India, nor is any personal laws uniformly applicable to all followers of a religion from which it is derived. The law differs from region to region and territory to territory and often differently applies in different circumstances.

The scope for countrywide uniformity as envisaged in Article 44 is restricted by the Constitution itself as enactment of personal laws, including its family laws has been placed in list III (concurrent lsit) of the Constitution.[2] Accordingly, parliament and

state legislature both can make, and have made, laws in these areas.[3] Parliamentary legislation on family law matters is moreover often supplemented with additional provision by the state legislatures.[4]

The other dimension of diversity in Family Laws may be noted as below :

I. Jammu and Kashmir state has, under the special provisions of the Constitutions applicable to that state, its own set of family laws – both statutory and non statutory.

   Their application is regulated by the Sri Pratap Consolidation of Laws Acts of 1977 (B).

II. When Pondichery was annexed to India in 1954, Local inhabitants (Hindu, Muslims, Christian and others) were given a choice to be governed by the old French Civil Code (Applicable in region under the French Colonial Rule[6]).

III. In 1962 when Goa, Daman and Diu became part of India, the Portuguese Civil Code 1867 and its supplementary laws – including the archaic Hindu usages decrees of 1880 were written in force in the entire region. The position remains unchanged after the creation of the state of Goa.[7]

IV. In Nagaland and Mizoram the local customary law was protected by a special provision incorporated in the Constitution in 1962,[8] through an amendment. The purpose

of this amendment was to protect the identity of the local tribes. In these and many other regions the Hindus, Muslims and Christians are governed by personal laws which are significantly different from those which govern their co-religionists citizens in the other parts of India.

(ii) Diversities based on specified group of persons

There are various categories of persons whom personal law enactments regard as the exception to the general Indian citizen by which they are exempt from the purview of the executive action through statutory law. This phenomenon is found almost all over the country where certain categories of persons, in matters of their personal law, are exempt from the purview of statutory law. This leads the complicated diversities in the field of personal laws.

Under the Indian Succession Act, 1925, the government of every state is authorised to issue a gazette notification in order to exempt from the application of that Act, any particular race or tribe, in the state on the ground of 'impossibility' or 'inexpediency' of the applying the same.[10] This authorisaiton has in the past, been exercised in the favour of the Christians of Coorg, certain Christian Races in Assam[12] and the several Christian Tribe in Bihar and Orissa.[13]

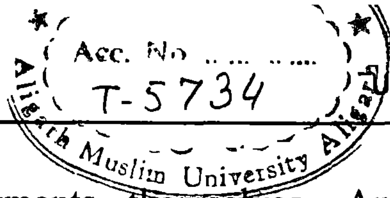
After independence the age old tradition of protecting tribal and secterian laws was allowed to continue by the Indian

Constitution the two privileged classes under the Constitution were created viz., the "Scheduled Caste" and "Scheduled Tribe". Out of these two privileged classes special exemptions have been given to the Scheduled Tribes, though no such special exemption has been given to any of the scheduled caste under any of the personal law statute. Thus, all the four Hindu-law enactments of 1955-56 are wholly inapplicable to each of the Scheduled tribes.[14] Inapplicability of some of these Acts to certain tribes in Assam, Bihar and Orissa has been judicially confirmed.[15]

As such these Acts cover almost the entire gamut of family law and succession, the tribal customs in these areas stand fully protected. And due to the concentration of particular tribes in particular regions of India, this statutory perpetuation of their customs, that are at great variance with the general law and pratice, adds a new chapter to territorial diversities in the personal laws of India.[16]

(iii) Diversities based on customs usages

Going through the four Hindu-Law enactment of 1955-56 one finds an interesting and relevant aspect of diversity which is based on the customary law of Hindus, Buddhists, Jains and Sikhs. Specific provisions relating to the customs of Hindus, Buddhists, Jains and Sikhs, running counter to general statutory provisions, enjoy full legal protection under the provisions of the concerned



enactments themselves. Among the customs and customary institutions that remained so protected are :

(i) those violating statutory rules relating to '*sapinda*' relationship and prohibited degrees in marriage;[17]

(ii) Customary marriage – rites replacing '*Saptapadi*';[18]

(iii) Customary divorce;[19]

(iv) Custom of adopting major and married children.[20]

The customs under each of the abovementioned heads maybe in vogue among the Hindus in any "local area, tribe, community, group or family".[21] No court has perhaps ever frowned on this wide-based protection of diversified custom despite the fact that the term "law" in Article 13 of the Constitution is specifically extended to custom and usage having the "force of law".

Not only the Hindu law retains custom as an exception of the general rule but the customs in derogation of the general law are protected under other laws as well. For example, the law relating to civil marriage did not contain any statutory provision relating to the 'prohibited degrees' was not subjected to the face of contrary customs. But after 9 years the law was amended to protect customs and usages contrary to the rules of 'prohibited degrees' in marriage.[22] Under the amended law customs find a greater role to prevail and be recognized, as in this case it would be sufficient if it governs with in"atleast one of the parties" to

marriage[23] (unlike under the Hindu Marriage Act which would conceive supremacy of the custom in this regard only if it governs both parties to marriage.[24]

The Muslim Personal Law (*Shariat*) Application Act, 1937 also contains provisions relating to custom and usage applied to wills and legacies and adoption. These provisions are contrary to the Islamic law yet this discriminatory provision was incorporated into the Act due to purely political reasons. Interestingly such a provision has been repealed in Pakistan by the Pakistan Muslim Personal Law (*Shariat*) Application Act, 1962. The net result of the exception to the general law is that in predominantly Muslim Union territory of Lakshadweep and in Malabar region of Kerala, there remains a dyarch in respect of law applicable to the Muslims.

The diversity in the realm in personal laws in our country is very wide. This diversity is based not on religious but other grounds. Having their roots in the distant past the interterritorial and custom based diversity in the sphere of personal law could not be burried in the debries of freedom movement.

B. Uniformity : An Erroneous Approach

Article 44 appears in Part IV of the Constitution which provide "Directive Principles of State Policy". The most important Article which governs this part is Article 37 which contains the following three points :

(1) The principles contained in part IV shall not be enforceable by any court.

(2) This principle will be nevertheless, fundamental in the governance of the country; and

(3) It shall be the duty of the state to apply to these principles in making laws.

Article 44 clearly, does not ask the legislature to enact a civil code; It contains a principle which the state should apply in making civil laws. The principle of Article 44, basically, is 'uniformity in civil laws'. The state is expected to apply these principles – whenever wherever and as far as, possible – making laws relating to civil transactions.

In the constitutional expression "Uniform Civil Code" the prefix, "Uniform" – not found in any of existing codes (IPC, CPC, CrPC), and the absence of a capital 'C' in the words "Civil" and "code" very were establish that this expression does not pointout to a single comprehensive law; it only prescribe a principle of policy : that in reforming old and enacting New Civil Laws the principle of Uniformity should be observed as far as possible[25].

What appears strange is that the interpretation or implementation of Article 44 on line that application of the same law for all the members of a particular community throughout the length and breadth of India is not talked about at all. Nobody

demand that all Hindus should be governed by one and the same law in all circumstances in all the parts of country. Nobody is interested in the abolition of the Hindu customary law which is still in the force. Until today the target of law men and laymen who have taken interest in Article 44 has been the personal law of the religious-cum-cultural monirities, especially the Muslim Personal law which the protogonists of uniformity want to be abolished by one stroke of legislation.[26]

Ordinarily, the principle of Uniformity to be applied in making civil laws, is fundamental in the governance of the country; but if – for any valid and cogent reason – the state can not apply the principle of uniformity by while making civil laws, no court in the country can in any way have the principle enforced. The constitution leaves it, entirely and exclusively to the wisdom of the state when, how, in what way, and to what extent it can and should apply the principle of uniformity in making civil laws.[27]

Attempts have been made both by the legislature and court to apply Hindu law to non-Hindus in the place of their own laws; and this is often done under the pretext of effecting uniformity in family law. For example – the blanket restriction on marrying a cousin (drawn from the Hindu Laws) under Special Marriage Act of 1954.[28]

Another instance of this legislative trend was found in a local law enacted in 1950 by the West Bengal government, protecting continued enforcement of the classical (*Dayabhaga*) Hindu law to the Muslims in the former state of Cooch-Bihar now merged in West Bengal.[29] This was done to counter effect a law enacted by Parliament during the same year, under which the Muslim Personal Law (*Shariat*) Application Act of 1937 would have become applicable in Cooch-Bihar – in 1950 itself.[30]. For 30 years extension of the *Shariat* Act, 1937 to that territory was kept stalled and the move had the blessing of the Calcutta High Court.

It is submitted that it is highly improper to impose the law or usage of a particular community over another under the pretext of seeking 'Uniformity' in civil laws. By no dint of imagination can the constitutional doctrine of the uniformity in civil law means imposition or forced domination of one particular legal culture or a total suppression of another.

C. The Great Fallacy about Muslim Personal Law

It is a popular belief that the Muslims alone have a personal law and that this personal law is the stumble of block in implementing the directive of Article 44 of Indian Constitution. Muslims are blamed that due to their personal law the directive of Article 44 is not being realised as the do not want to forgo their personal law in favour of a Uniform Civil Code. This is a fallicious notion : There are a varieties of personal laws which are

applicable to different communities both Muslims and non-Muslims in India. They are as follows :-

I. Hindu Personal Laws largely codified but partly the codified (Also applicable *mutatis mutandis*, to Budhists, Jains and Sikhs);

II. Customary Law of Hindus, Budhists, Jains and Sikhs wherever protected by legislation or case law;

III. Tribal law of Hindus and others;

IV. Christian Personal Law - reformed and codified.

V. Parsi Personal Law - reformed and codified;

VI. Jewish Personal Law - wholly unreformed and uncodified and;

VII. Muslim Personal Law partly reformed but uncodified.[32]

Another issue which has been forcefully advocated by justice Kuldeep Singh in *Sarla Mudgal Case*[33] was " Have the Hindus, Budhists, Jains and Sikhs (constituting more than the 80% of the citizen in India) been brought under "one unified code".

The answer to this question is in negtative. The fact is that the Hindus, Buddhists, Jains and Sikhs are still not governed by a uniform law.

(I) The four Hindu law enactments of 1955-56 do not cover the entire gamut of Hindus Personal Law. Certain important

aspects of Hindu Law are still qualified i.e., the law relating to co-parcenary, joint family and partition of property. In these matters the classical Hindu law is still applied. Hindu law, broadly speaking, has two schools (1) *Mitakshara*, (2) *Dayabhaga*. Even today thousands of cases relating to propertis are being decided by the court in accordance with principle of the above mentioned schools.

(II) The four Hindu law enactment of 1955-56 have uniform application through out the territory of the India. But, in Goa, Daman Diu, there still is in force old Hindus usages decrees of 19th century. In Pondichery most of Hindus have opted to be governed by the French Civil Code. Similarly Jammu and Kashmir has its own Hindu law enactment, State of Uttar Pradesh and Tamil Nadu have amendments to Hindu Code. Andhra Pradesh and Kerala have enacted special Hindu Law statutes supplementing the central laws.

III. In south Indian states – Andhra Pradesh, Karnataka, Kerala and Tamil Nadu, the Hindu matriarchal families are governed not by the Hindu code, but by a variety of customary laws.

IV. Local custom and usage prevailing in North-eastern states – Nagaland, Mizoram, Meghalaya, Arunachal Pradesh and Sikkim are fully protected under Article 371A of the Indian Constitution or by virtue of legislative provision and judicial decisions.

V. Various tribes are free to follow their own customs which differ from tribe to tribe and place to place under Section 2-3 of the four Hindu enactments. The entire tribal population following the Hindu, Buddhist, Jain and Sikh religion is fully exempt from the four Hindu law enactments.

VI. The Hindu Law Enactment allows all the Hindus, Buddhists, Jains and Sikhs to follow their respective customs and usages in the following matters :-

(i). Prohibited degrees in marriage and *sapinda* relations[35] (Hindu Marriage Act, 1955, sec. 5);

(ii). Marraige-rites and ceremonies[36] (sec. 7);

(iii). Right to obtain divorce without proper judicial proceedings[37] (sec. 291);

(iv). Adoption of adult and married persons (Hindu Adoption and Maintenance Act,[38] 1956, sec. 10);

(v). *Mitakshara* Coparcenary Property (Hindu Succession Act,[39] 1956, sec. 6);

(vi). Joint family properties governed by *Marumakkattayam*, *nambudri* and *Abyasandantana* customs[40] (sec. 7);

(vii). Properties held by *Sthanamandans*[41]; and

(viii). Specified impartible estates[42] (sec. 5(ii))[34].

All the four Hindu law enactment of 1955-56 clarify that "custom and usages" for this purpose include those prevalent, "In any local area tribe community, group or family.'[43] The scope for customary practices is, thus, extremely wide.

These may and often do, differ – among the Hindus, Buddhists, Jains, Sikhs from area to area, tribe to tribe, community to community, group to group and family to family.

Whither uniformity? The Four Hindu Enactment of 1955-56, surely do not bring "more than 80% of citizens" following the Hindus, Budhists, Jains or Sikhs religious under the banner of one uniform law.

It does'nt mean that no uniformity has been effected by these Acts. Many provisions of the Four Acts do uniformity apply to those who are governed by them but quite a few do not; and a very large number among those "more than 80% citizens" are not governed by those statutes at all. It is a fact that there remains considerable diversity in respect of conflicting traditional joint family rules, prevalence of local, law, exemptions to schedule tribes and statutory protection to all types of customs and usages.

So far as, the Muslim Personal Law is concerned, it could not have and did not, remain outside the ambit of the states' legislative power. Central legislature have occasionally exercised its power to make statutory provision regarding the scope of Muslim personal law[45] administration of *waqf*,[46] women to judicial

divorce[47], and post divorce rights;[48] registration of marital transactions and dowers.[50]

The protagonists of uniform civil code project the issue in such a manner that the minorities, especially the Muslims, feel that it is they who will have to sacrifice their personal law for the sake of Uniform Civil Code. This apprehension is due to the manner of compaign in which it is alleged that the only defect lies in the personal laws of Muslims. We have seen and we will see later that the other religious groups including the Hindus also have discriminating laws and laws which are unequal. So the campaign for a uniform civil code should be carried on in such a way that the minorities should not become apprehesive. Supposing that if the Muslims, Christians and the Parsis were to give up their personal laws abruptly, what could be the susbtitute for them? Obviously, the Special Marriage Act, 1954, the Guardians and Wards Act, 1886. How could, then, these minorities be expected to adopt the said laws when the majority community has not done ...? If the idea is to impose on Muslims, Christians and Parsis, the Hindu Law Enactments of 1955-56 in the name of Uniform Civil Code, for obvious and legally tenable reasons they can not be expected to digested.[51] This is the main reason why the Muslims, Christians and Parsis link their rspective personal law with their religious identity. They are apprehensive that if a Uniform Civil Code is ever enacted that would mean the total abrogation of their religion based personl laws and the imposition of the terol laws.

They do not want to give up their personal laws for the sake of implementing the mandate of Article 44.

The state can not discard the personal laws of the minorities, which has by its own direct action gifted to the majority community a separate religon based personal law. Doing so will be wholly unconstitutional of course, the state can codify and reform the personal laws of minorities as it has done in the case of majorty but neither the personal laws of minorities can be altogether repealed while that of majority community remains intact – protected and fortified by statute nor can the personal laws of the majority despite its codified and reformed shape be a substituted for a uniform civil code so as to be imposed on the minorities[52].

So for as the question, what is the stumbling block to a uniform civil code is concerned the answer lies with the diverse variety of personal laws – Both codified and uncodified, reformed and unrefomed – applicable not only to minorities but to the majority communities also. Each of such personal laws is a stumbling law who what the constitution call " a uniform civil code through out the territory of India." The state is not at all interested in carrying out the directive principle of Article 44. Custodian of state authorities are continuously practising the policy of appeasement of the majority community through an effective step by step, protection of its religion, communal

customary, tribal and personal laws, and a blow for thwarting a uniform civil code is squarely put on the Muslims only. It is nothing short of fraud.

D. What Does Article 44 Demand?

It is necessary to know the meaning message, import and scope of each and every word of Article 44 to know the exact nature of this article. If we carefully and honestly analyse the provision of Article 44 then we would be able to draw a just and reasonable conclusion. The cautiousty selected wordings of Article 44 is very important. Article 44 in our constitution does not direct any law-making body to enact a uniform civil code straight away. It only says that the state shall endeavour to secure a uniform civil code for the citizen throughout the territory. If we pay deep attention to the wordings of the said article following questions arise.

(i) Is endeavouring to secure something the same as directly enacting a law?

(ii) What is the meaning and scope of a 'civil code'? What does the expression 'uniform' stand for?

(iii) 'Do uniform' and 'common' convey the same meaning and are they interchangeable words?

(iv) Is the Uniform Civil Code to be compulsorily applicable to all citizens of India?

Now we will discuss the meaning of the words endeavour to secure uniformity in civil law and extend of their applicability. Article 44, clearly, does not ask the legislature to enact a civil code, it contains a principle which state should apply in making civil laws. The demands of Article 44 – whatever they are – and the modalities for the implimentation both are to be determined in tune with the provisions of part III of Constitution guaranteeing Fundamental Rights – including right to equality before law and equal protection of laws,[54] citizen civil liberties, freedom of individual to profess and practice their respective religions,[55] freedom of religious communities to manage their own affairs[56] and right of sections of citizens to preserve their distinct culture.[57]

Legislative enactment of an all India Uniform Civil Code straight away is not envisaged by the Constitution even at the central or union level. Article 44 wants the government and the legislature to make possible endeavours which may in the long run secure uniformity in the making and application of civil laws. To demand that parliament should straight away enact a uniform civil code goes against the letter and the spirit of Article 44.[58] What should be the rule of interpretation and how the balance between part III and part IV of the constitution should be maintained has been very beautifully explained by the Supreme Court of India in *Minerva Mills case*[59]. It was observed by the Supreme Court :-

> "India represent a mosaic of humanity consisting of diverse religious, linguistic and caste groups. The

rationale behind the insistence on fundamental rights has not yet lost its relevance, alas or not. The Congress session of Karachi adopted in 1931 the Resolution on Fundamental Rights as well as on economic and social change.

The Sapru Report of 1945 said that the Fundamental Rights should serve as a "standing warning" to all concerned that :

> 'What the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civil rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary application of life. (p. 260).[60]

The Indian nation marched to freedom in this background. The Constituent Assembly resolved to enshrine the Fundamental Rights in the written text of the Constitution. The interlinked goals of personal liberty and economic freedom then came to be incorporated in two separate parts, nevertheless parts of an integral indivisible scheme which was carefully and thoughtfully nursed over half a century. The seeds sown in the 19th century saw their fruition in 1950 under the leadership of Jawaharlal Nehru and Dr. Ambedkar. To destroy the guarantees given by part III in order purportedly to achieve the goals of part IV is plainly to

subvert the Constitution by destroying its basic structure. Indian Constitution is founded on the bed-rock of the balance between part III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution."[61]

These are the settled position of the relationship between the part III and part IV of the Indian Constitution and the directive contained in Aticle 44 is not an exception.

As to the meaning and scope of civil code an imminent Expert of Hindu law. JDM Derrett observed :

> "Civil code throughout the world, suggests a great deal of private law, including contract and Tort.[62]

Professor Tahir Mehmood righly formulated this situation and observed that :

> "This is indeed true. There are numerous countries in the world which have no civil codes at all. In many other countries there is in force a civil code which contains all sorts of civil laws (as opposed to penal laws) except family and succession laws. In very few countries there is a civil code which covers also laws of families relations and succession. In most countries family and succession laws are contained in special statutes standing separate from the local civil codes if there any inforce. In view of these various models

> available outside India, how do we determine the meaning and the scope of the expression "Civil Code" as used in article 44 of the Constitution? shall be presume that in this provision the terms is just synonym for family code? Is it right to presume so?

The word 'code' is used in many different senses. It may mean a single comprehensive statute (e.g. The Indian Penal Code), but it may also refer to the body of several statute dealing with the same subject. It is in this later sense that the term Hindu Code – by which means the four Hindu law statute is enacted during 1955-56. What does, then, article 44 mean? Does it necessarily talk of a family code, which is single (like the Indian Penal Code), or does it leave room for a body of several statutes of family law and succession on the pattern the Hindu code 1955-56.[63]

As far as the word 'uniform' is concerned the standard dictionaries of the English language do not translate 'uniform' as 'common' and vice-versa.

In recent years we have been hearing a lot about the sophistry that the constitution speaks of a Uniform Civil Code but anti-Muslim block wants to introduce a common civil code.[64]

P.C. Chatterjee comments :

> "I have to confess that the distinction to 'uniform' and 'common' in this context is one that beats me.

> No examples are provided of a code which may be 'common' but not 'uniform' or *vice versa*. For instance, if a Code prescribes that some men may have four wives (Muslims) but others may have only one, would such a Code, be described as uniform? In ordinary language, one would be inclined to say that such a code is not uniform because it does not apply equally to all males. Could such a code be described as common? I would say again that it is not common and for the same reason. But supposing it is contended that a code is uniform it if prescribes a rule which applies to a particular limited class only and is not intended to assert anything more".[65]

Is it, then, not worth examining what are in fact the requirements of uniformity in respect of a civil code (to the more specific and accurate of a family code)? Does the Constitution talks of a strict and rigid uniformity of family law? Is such uniformity in fact possible. All these questions are indeed worth pondering in the interest of a smooth, peaceful and harmonious implementation of article 44 in a forseeable future. Uniformity, obviously can not be a purposeless goal. The modalities for translating the mandate of Article 44 into action should be decided with the reference to its objects and purposes. What does the law of interpretation provides in such a situation is very

beautifully summed up by a writer :

> "Generally a mandatory provision is to be construed strictly, while a directory provision is to be construed liberally. There is no reason to adopt a different line of reasoning in the construction and interpretation of the Constitution. In all such cases one must consider the real purpose of the provision, whether statutory or Constitutional."[66]

To conclude the discussion about the scope of the word uniform used in Article 44. The researcher is fully agreed with the observation of learned author Dr. Tahir Mahmood :

> "The word 'uniform' here (in article 44) has so far been thoughtlessly regarded as a synonym for the word 'common', and perhaps nobody has ever considered why the father of Constitution prefered the former to the latter expression. I think there is difference between 'common' and 'uniform' – the former meaning one and the same in all circumstances whatsoever and the latter meaning 'same in the similar circumstances'."[67]

To give the answer of the fourth question that whether the Uniform Civil Code should be applied compulsarily to the all the citizens of India. It is necessary that every uniform civil law, if and when enacted, must compulsarily apply to all Indians? In this

regard the observatios made by Dr. B.R. Ambedkar is worth mentioning which he made while concluding the debate on uniform civil code in the Consititute Assembly :

> "Nothing would prevent a future parliament from enacting a civil code and making it applicable only to these who voluntarily submit to its provisions."[68]

It can safely observed that in our country the personal laws applicable to different communities are 'veriform'. This diversity in personal in laws is not only based on religion or religious or group but it also due to the customs of the people. The myth that the Muslim Personal Law is the only of obstacle in the procurement of the Uniform Civil Code is totally baseless. In fact the personal laws of the majority community are more veriform than the personal laws of minorities' community. The meaning and scope of Article 44 is generally misunderstanding not only by the laymen but the by law men also.

Summary

Uniform Civil Code is the victim of certain misconceptions and realities and it is an irony that the interpretation as well as implementation of Article 44 of our Constitution is not being taken into account in its right perspective.

There are prejudicial attemtps on the part of legislature and court both to examine the whole issue from a 'majoritarian'

approach. Such attemtps defeat the very purpose of Article 44 for uniformity in personal laws.

India is a large country with diverse personal laws and customs. These diversities are by product of different customs, regions and territorial separation. Again there are specified groups who enjoy special treatment like tribal laws which were allowed to continue even by Constitution of India. Beside that Constitution itself created two privileged class viz., the "Scheduled Caste" and "Scheduled Tribe". We have a spectrum of personal laws and customs as diverse as nation's languages, cultures and geographical realities.

There is erroneous quest for Uniform Civil Code simply because Article 44 does not direct the legislature to enact a civil code. It contains a principle basically for "Uniformity" in civil laws.

Whenever Muslim Personal Law is debated it lacks intellectual impartiality. Media reportage, academic analysis and often politician's view points reflect the vested interests of those concerned. Often Muslim Personal Law is shown as defective and discriminatory.

The question is – what does Article 44 demand? It desires to provide nation's citizen uniformity in civil laws but applicable on those who voluntarily accept and submit to its provision. Thus, it wants only a shift from veriform to uniform.

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36. Section 5, Hindu Marriage Act, 1955.
37. *Id.*, Section 7
38. Section 10, Hindu Adoption and Maintenance Act, 1956.
39. Section 6, Hindu Succession Act, 1956.
40. *Id.*, Section 7
41. *Ibid*
42. *Id.*, Section 5(ii)

43. Section 3 in all the Acts.
44. *Supra note* 9 at 49.
45. *See* The Muslim Personal Law (*Shariat*) Application Act, 1937, Mapilla Succession Act 1918 (Tamil Nadu, Kerala).
46. *See* The Waqf Act 1954; U.P. Muslim Waqf Act 1960; The Waqf Act, 1995.
47. Dissolution of Muslim Marriages Act 1939; J&K Dissolution of Muslim Marrige Act 1942.
48. Muslim Women (Protection of Rights on Divorce) Act 1986.
49. Acts Applicable in Assam, Bihar, Bengal, Meghalaya and Orissa for detail see, Tahir Mehmood, *The Muslim Law of India*, p. 55 (1982).
50. J&K Muslim Dower Act, 1920.
51. Tahir Mehmood, "Constitutional Ideal of Uniform Civil Code – Is Muslim Personal Law a Stumbling Block?" *Religion & Law Review* (Vol. III, No. 2, 1993), p. 171.
52. *Id.* at 172.
53. *Id.* at 173.
54. *See* Article 14 of the Constitution of India.
55. *See* Article 25 of the Constitution of India.
56. Article 26 of the Constitution of India.
57. Article 29 of the Constitution of India.
58. *Supra note* 25 at 133.
59. Minerva Mills vs. Union of India, AIR, 1980, SC 1789.
60. *Ibid.*
61. *Ibid.*
62. *Supra note* 25 at 177.
63. *Ibid* at 127
64. P.C. Chatterjee, "Civil Code, Uniform or Common", *Seminar* (No. 441, May 1996), p. 54.

65. *Ibid.*
66. Bindra's Interpretation of Statutes, 7th ed., 1984, edited by Tahir Mehmood, p. 517.
67. *Supra note* 26 at 31.
68. Constituent Assembly Debates, Vol. 7, 1947, pp. 550-52.

Chapter - 5

Uniform Civil Code : Judicial Approach

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Uniform Civil Code : Judicial Approach

Part IV, of the Constitution of India contains eighteen Articles (including Articles added by amendments) which are bracketed under the title "Directive Principles of State Policy" for the good governance of the coutnry. None of such directives has evoked so much reactions as the constitutional requirement of a Uniform Civil Code for all citizens throughout the country. These are active obligations of the state. The state shall secure a social order in which social economic and political justice shall inform all the institutions of national life. The Directive Principles of State Policy detailed in Articles 37 to 51 of the Constitution possesses to characteristics. *Firstly,* they are not enforceable in any court and therefore if a directive is infringed, no remedy is available to the aggrieved party by judicial proceedings. *Secondly,* they are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. In this chatper, an endeavour has been made to discuss the constitutional obligation of the state to secure for citizens a Uniform Civil Code - throughout the territory of India and Judicial craftmanship of the High Courts and Supreme Court. The cases discussed in this chapter are those in which either the constitutionality of some personal-law was challenged or the

court, suo-moto, discussed the desirability of the enactment of a Uniform Civil Court. Since the time of its incorporation in the Constitution this has been a controversial topic and it continues to be so. *Article 44*, of the Indian Constitution runs as follows :

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

A. Narasuappa Mali case

The first case was *State of Bombay vs. Narasuappa Mali*[1], where the legislative provisions modifying the old Hindu law were challenged on the ground of being violative of Articles 14, 15 and 25 of the Constitution, the Bomaby High Court held that the Bombay Prevention of Hindu Bigamous Marriages Act, 1946[2] was intra vires to the Constitution. The Act had imposed severe penalties on a Hindu for contracting a bigamous marriage. The validity of this Act was attacked on the ground that it violated the freedom of religion guaranteed by Article 25 and permitted classification on religious grounds only, forbidden by Articles 14[3] and 15.

It was argued that "among the Hindus the institution of marriage is a sacrament and that marriage is a part of Hindu religion which is regulated by what is laid down by *Shastras*. It was also argued that a Hindu marries not only for his association with his mate but in order to perpetuate his family by the birth of

sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having a son when he is dead and to the spirits of his ancestors and that there is no heavenly region for a sonless man. The institution of polygamy was justified as a necessity of a Hindu obtaining a son for the sake of religious efficacy. Because son has a unique position in Hindu society no other religious system has given a such position to a son.

The above arguments were rejected by the court. Gajendra Gadkar J. was not prepared to concede that legislative interference with the provisions as to marriage constituted an infringement of Hindu religion or religious practice he was of the opinion that a sonless man can obtain a son not only by a second marriage but by adoption.

Chagla C.J., while upholding the validity of the Bombay Act, cited three reasons, *firstly*, what the state protected was religious faith and belief, but not all religious practices. *Secondly,* he claimed that polygamy was not integral part of Hindu religion. *Finally,* if the state of Bombay compels Hindus to became monogamist, and if it is a measure of social reform then the state is empowered to legislate with regard to social reform under Article 25(2) (b), notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propogate his relgion. Chief Justice Chagla relied heavily on *Davis vs. Beason*[4]. In this case constitutionality of an *Idhao* statute of 1882, which

out-lawed bigamy was challenged. It was contended that the impugned Act infrigned Church and violated the First Amendment[5] of the U.S. Constitution. In those days the members of that Church used to practice polygamy as a part of their religion. The Supreme Court rejected the contention and observed:

> "However free the exercise of religion may be it may be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation".

Regarding the discrimination made by the Act on religious grounds it was contended that only the Hindu community was choosen for the purpose of legislation while Muslims were allowed to practice polygamy. Gajendra Gadkar J. thought that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provision of constitution contained in Article 14.

Chagla C.J. also considered that :

> "Article 14 does not lay down any legislation that the state may embark upon must necessarily be of and all embracing character. The state may rightly decide to bring about social reform by stages, and the stages may be territorial or they may be community wise, and

that the discrimination made by the Act between the Hindus and the Muslims does not offend the equality provision of the Constitution.[6]

Chagla C.J., further observed that :

"there can be no doubt that the Muslims have been excluded from the operation of the Act in question. Even Section 494, Penal Code exempt them."

The court, thus submitting to the wisdom and supermacy of Legislature in a democracy kept its hand off from interfering with the prerogative of the Legislature.

The other point which emerges from this judgement is that the religious freedom guaranteed by Article 25 is the protection of religious faith and belief and not all religious practices. The third inference which can be drawn from the judgement is that the polygamy is not an integral part of Hindu religion.

These arguments of learned judge however, raise two questions, *first*, are the judges qualified to determine what is an integral part of a religion?, and *second*, does the Constitution protects only the essentials of a religion? The answer to both these question is, apparently, not in affirmative.[7]

The Madras High Court[8] was also grappled with the question of the validity of a Madras Law which has abolished polygamy among Hindus. The Act in question was the Madras Hindu -

(Bigamy and Divorce) Act, of 1949.[9] Challenge to the Act was made on substantially the same grounds on which the Bomaby Law was attacked, viz. The Act unconstitutionally interferred with the free practice of religion and permitted discrimination against Hindus. The arguments were not accepted by the court like the Bombay High Court the Madras High Court pointed out that the abolition of polygamy did not interfere with religion because if a man did not have a natural borned son, he could adopt one.[10] Further, relying on the passage in *Rynold v. U.S.*,[11] the court said that whilst – religious belief was protected by the Constitution religious practices were subject to state regulation.[12] The High Court observed :

> "the religious practice, therefore, may be controlled by legislation if the state think that the in interest of the social welfare and reform it is necessary to do."[13]

Thus, the court took the position that in a democracy it is the Legislature which is to lay down the policy of the state and to determine what legislation to put up on the statute book for the advancement of the welfare of the state. Moreover, the next inference which can be drawn is that the state way rightly decide to bring about social change by stages and these stages may be territorial or community wise.

Again in *Ram Prasad vs. State of U.P.* almost identical issue was raised before the Allahabad High Court, upholding the validity of the statutory provisions prohibiting bigamy among Hindus.[14]

B. Shah Bano Case

The next important case relating to Muslim Personal Law and Uniform Civil Code is *Mohd. Ahmad Khan vs. Shah Bano Begum.*[15]

The appellant, Mohd. Ahmad Khan, being an advocate by profession at Indore, M.P. married to respondent in 1932. In 1975 the appellant broke the matrimonial home by driving Shah Bano Begum out of matrimonial home. During this period the respondent gave birth to three sons and two daughters. In 1978 the respondent filed a suit under section 125 Cr.P.C. in the court of judicial magistrate Ist class, Indore, asking for the maintenance provision at the rate of Rs. 500/- per month. On November 6, 1978, the appellant divorced the respondent excercising the so called unilateral power of *talaaq* irrevocabily. In his defence the appellant advanced the argument that by virtue of *talaaq*, she seized to be his wife, he was no more under obligation to maintain her and he had already paid maintenance to her at the rate of Rs. 200/- per month for about two years. He deposited Rs. 3000/- in the court in lieu of dower during the period of iddat. In August 1979, the lower court directed the appellant to pay a sum of Rs. 25 per month by way of maintenance. The respondent went in appeal to the Madhya Pradesh High Court in 1980 for the enhancement of maintenance amount. The High Court enhanced the maintenance amount to Rs. 179.20 per month. Against this order the husband approached the highest judicial institution through special leave.

A Bench consisting of Mr. Justice Murtaza Fazle Ali and Mr. Justice A. Vardharajan were of the opinion that these two cases were not correctly decided, hence they referred this appeal to a larger Bench on Feb. 3, 1981 stating that :

> "As this case involves substantial questions of law of far reaching consequences, we feel that the decisions of this court in *Bai Tahira vs. Ali Hussain fissoly Chotia*[16] and *Fazlun Bi vs. K. Khader Vali*[17] require reconsideration because, in our opinion they are not only in direct contravention of the plain and the ambiguous language of section 127 (2) (b) of the Code of Criminal Procedure 1973... The decisions also appear to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by section 2 of Muslim Personal Law (Shariat) Application Act, 1937 – An Act which was not noticed by the aforesaid decision. We, therefore, direct that the matter may be placed before the honourable Chief Justice for being heard by a larger Bench consisting of more than three judges."

A Constitution Bench consisting of five judges (*Chandrachud, C.J., D.A. Desai, J.O., Chenappa Reddy, J.L.S., Venkat Ramiah, J. and Rangnath Mishra J.*) heard the case, Chief Justice Chandrachud wrote and delivered the judgement.

Technically, the case related to the maintenance of Muslim divorcee but the observations of the court regarding Muslim Personal Law and Uniform Civil Code created a controversy in the socio-legal and political arena. The question of maintenance of Muslim divorcee and the applicability of section 125 of Cr.P.C. was settled by the Supreme Court in Bai Tahira and Fuzlin Bi case.

In *Shah Bano* case apart from observations relating to the maintenance of Muslim divorcee the Supreme Court held that :

(i) There is no conflict between provisions of Section 125 of Criminal Procedure Code and Muslim Personal Law in the matter of maintenance of divorcee, however, in case of any conflict section 125 shall prevail over the Personal Law.

(ii) That a Muslim divorcee has a right to obtain maintenance till her remarriage or death under section 125 of the code and if she is unable to maintain herself, her ex-husband has a duty to provide for her maintenance till her remarriage or death.

(iii) That if a husband, even he be a Muslim, marries another women the wife has a right to refuse to live with him and yet obtain maintenance from him.

(iv) Moreover, the Supreme Court has strongly criticized the Government of India for its reluctance to enact Uniform Civil Code in view of the sensitivity of the Muslim community.

Regarding the implementation of Article 44 of the Constitution, the Court pointed out the apathy of the Legislature that it has not been sincere enough to bring the Uniform Civil Code into practice.[18] The court further remarked that the government's in action has rendered the directive contained in Article 44 of the Constitution of India meaningless and asked the government to take steps for enacting a Uniform Civil Code without any regard to the Muslim reaction. The Court felt that :

> "Inevitably, the role of the reformer has to be assumed by the court because, it is beyond the endurance of sensitive mind and to allow injustice to be suffered when it is so palpable. But piecemeal attempts of the Court 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."

In this case, the appellant and the interveners stressed that under Islamic Law a husband is duty bound to maintain the wife in case of divorce till the expiry of *Iddat* period only. In support of this assertion they relied on some very important text books (e.g. Mulla, Tyebji, Paras Diwan) on law, but the court did not find any merit in the referred textual materials. The court rejecting

the above argument held that in case the divorcee was unable to maintain herself, the period of *Iddat* must not come in the way and she in such case, was entitled to be maintained by ex-husband even after the expiry of *Iddat* period and would continue till she had remarried. The court cited the two *Qur'anic verses* in support of this view point :

"For divorced women
Maintenance (should be provided)
... on a removable scale
This is a duty
On the righteous."[19]
"Thus doth God
Makes clear his signs
To you : in order that
Ye may understand."[20]

Although the correctness of the translation was challenged by the appellant and the intervener, All India Muslim Personal Law Board, regarding the meaning of the word "*MATA*" used in verse 241 of Holy *Qur'an* but this point of dispute was not conceded and accepted by the court. The meaning of the word "*MATA*" meant 'provision' and not 'maintenance' was asserted by the appellant as well as not relied on the translation of appellant but relied on the translation of the verses 241 and 242 by Zafarullah Khan[21]. The translation of Zafarullah Khan is thus :

> "For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus, does Allah make his commandments clear to you that you may understand."

The translation of verses 240 to 242 in the 'meaning of the *Qur'an*'[22] was relied upon by the court.

> "Those of you, who shall die and leave wife behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their accord, you shall not be answerable for whatever they chose for themselves in a fair way; Allah is all powerful, all wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God fearing people."

Besides the above the court cited certain other translations of the Holy *Qur'an* by renowned scholars.

After anlaysing the above mentioned translations of the verses 241-242 the court held that the *Qur'an* imposes obligation on the husband to provide maintenance for the divorced wife beyond the *Iddat* period.

When the appellant and the intervener All India Muslim Personal Law Board cited the following statement made by Shri Ram Niwas Mirdha, the then Minsiter of State, Home Affairs on Dec. 18, 1973[23] in the Parliament which is as follows :

> "Dr. Vyas very learnedly made certain observations that a divorced wife under a Muslim Law deserves to be treated justly and she would get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of Muslims through the Criminal Procedure Code. If there is a demand for change in Muslim Personal Law, it would actually come from the Muslim community itself and we should wait for the Muslim public opinion on these matters to crystallise before we try to change this all, this is hardly, the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the ambit of clasue 125, but a limitation is being imposed by this amendment to clause 127, namely, that the maintenance order would sieze to operate after the amounts due to her under the personal law or paid to her ... so this I think, should satisfy honourable members that whatever advanced we have made is in the right direction and it should be welcomed."

The court ignored the legislative history of Section 125 and 127 of Criminal Procedure Code and held that :

> "The provision contained in Section 127 (3) (b) may have been introduced because of the misconception that dower is an amount payable on divorce. But that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce."

The judgement has been criticized on the following grounds :

(i) The *Qur'an* and *Shariat* have been wrongly interpreted and by relying on these the Supreme Court held that there is no conflict between the Personal law and Section 125 Cr.P.C. and ignored the authoritative texts and unanimity of *Ulema*. The Supreme Court has flouted the established principles of interpretations of Islamic Law by Muslim jurists and *Ulema* and an uninterrupted practise of the Muslims of the world for the last 1400 years.

(ii) That the Muslim Personal Law (*Shariat*) Application Act 1937, covers maintenance if the parties are Muslims. The Supreme Court by enunciating the prevalance of the secular laws of social significance over the provisions of the Shariat Act has opened a way for courts to interfere in the Muslim Personal Law.

(iii) The decision is a clear cut interference in Muslim Personal Law.

(iv) That the Supreme Court in this case not only ignored legislative history and clear intent of Legislature and violated the well established rules of harmonious construction for interpretation of statutes and for harmonising conflicts between different parts of the same law but set itself up as a "Super Legislature" or as a "Third Chamber of Legislature".

(v) That the Constitution authorises to interprete the Constitution, not the *Qur'an* and to test the laws, enacted by competent Legislature as regard their constitutionality. The Constitution bestows no authority on Supreme Court to reinterpret a religion or to perform it.

At the outset, in his judgement, Y.V. Chandrachud, C.J. speaking for the court, observed that :

> "It is alleged that the fatal point in Islam is degradation of women. To the Prophet (SAW) is ascribed the statement, hopefully wrongly that women was made from a crooked rib and if you bend it straight it will break; therefore treat your wife kindly."[24]

It showed the misconception of the learned judge about the status of women in Islam. However, the most objectionable part of the judgement is that in which the court unncessarily assumed the function to interpret the holy *Qur'an*. The Supreme Court in

this case forgetting its role of interpreter tried to give that potent impression to the reformer of law as Legislature ignoring the scheme of "seperation of power theory" on which ever constitution is designed. According to Prof. Tahir Mahmood :

> "The Shah Bano judgement has caused great resentments in many circles of Muslim community in India. Though we may not agree with the other opponents of the judgement on many points that they have raised, we do strongly feel that the assumption by the Supreme Court of function to interpret the Holy *Qur'an* was absolutely uncalled for. If Justice Chandrachud was convinced (which he obviously was) that in the wake of a conflict between the Cr.P.C. and the Islamic law the former should prevail. He should have simply so asserted. There was no need no justification, for him to assume the role of an interpreter of the *Qur'an*, for which extremely delicate and difficult task most certainly he was unqualified."[25]

The attempt of judiciary to interpret certain verses of *Qur'an* and admonition to state with regard the Uniform Civil Code definitely frustrates the well established principle of 'Judicial self restraint' and the concept of 'Judicial Activism' surely does not permit Indian independent judiciary to do like this.[26]

The concept of Uniform Civil Code has become very complex issue in Indian context. Unnecessarily and without any due relevance Supreme Court advocated for its preparation and application. Really, this aspect of Supreme Court's observation can be respectfully submitted as "Unwarranted" uncalled for. How can a Uniform Civil Code be enforced in India based on diversified languages, religion, laws (in rare areas only) and culture?[27] It may be pointed out that such sporadic observations are bound to create controversy and for which our government has to face and some times becomes bound to pay a heavy cost.[28]

The judgement as a whole caved thus be read like this :

> "Islam degrades women; *Qur'an* negates certain popular belief; therefore all Muslims must be subjected to a Uniform Civil Code by altogether scrapping their personal law."

One may legitimately ask was it in fact necessary to say all this to decide that the Cr.P.C. provision on divorced wife maintenance did not exclude Muslims from its scope?[29] Dr. Tahir Mahmood, an eminent scholar observed about this judgement :

> "The ideas expressed by the Supreme Court at the end of the judgement in respect of the legendary Uniform Civil Code were as uncalled for as the attempt to put a new glass on a *Qur'anic* verse. The enthusiastic support given by the court to an

> extremely controversial issue in respect of which the Muslims are – awfully sensitive, and that too in a judgement directly concerning the Islamic personal law, is in-explicable. This 'obiter' in the judgement could have been easily avoided without affecting in the least its '*ratio decidendi*'."[30]

The Shah Bano judgement did unintentionally provide inflammatory materials to Muslim bashers of whom, also there is no dirth in the country and thereby negated its own wisdom and rationale. In a recent book Prof. Tahir Mahmood wrote :

> "By mixing up the actual issue in the case with the controversial question of a Uniform Civil Code and by trying to justify its ruling on the strength of certain *Qur'anic* verses as understood by the court, the judgement (opening with an uncalled for reference to the ill founded western criticism of Islams alleged anti women stance) raised an unhealthy controversy which unfortunately assumed communal and political overtones. This unpleasant chapter of recent legal history of India could have been easily avoided by showing judicial self-restraint."[31]

C. Jorden Diengdeh Case

The third important case relating to the present discussion is Jorden Diengdeh vs. S.S. Chopra[32] which was delivered only a

fortnight later than the controversial Shah Bano case. The special leave petition in Jorden Diengdeh case, relating to Christian personal law, was decided by a division bench of the Supreme Court on 10th May, 1985. The judgement was delivered by Justice O. Chinappa Reddy who sat also on Shah Bano Bench. The judgement is on the same lines as Shah Bano case and it is suppliment to Chief Justice Chandrachud's view on Uniform Civil Code expressed in Shah Bano Case. The facts of the case are somewhat novel and peculiar. The wife, the petitioner claims to belong to the 'Khasi tribe' of Meghalaya who was born and brought up as a Presbytarian Christian at Shillong. She is now a member of the Indian Foreign Service. The husband is a Sikh. They were married under the Christian Marriage Act, 1872. The marriage was performed on October 14, 1975. A petition for declaration of nullity of marriage or judicial separation was filed in 1980 under Sections 19, 20 and 22 of the Indian Divorce Act, 1869. The prayer for declaration of nullity of marriage was rejected by a learned single judge. The wife filed petition for special leave to appeal against the judgement of High Court. She sought a declaration of nullity of marriage under the Indian Divorce Act, 1969, as the marriage was solemnised by Christian rites under the Christian Marriage Act, 1872. The ground on which the declaration was sought in the courts below and before the Supreme Court the ground was the impotence of the husband in that though the husband was capable of achieving erection and, penetration, he ejaculate pre-maturely before the wife has an

orgasm, leaving the wife totally unsatisfied and frustrated. The real problem before the court was that the marriage appeared to have broken down irretrievably. Finding that it was not possible for the court to give the desired relief under the Christian law, the learned judge talked of the urgent need to enact a 'Uniform Civil Code'. He reproduced the ground of divorce and nullity under various statutes (Indian Divorce Act, 1869; Parsi Marriage and Divorce Act, 1936; Dissolution of Muslim Marriages Act, 1939; Special Marriage Act, 1954; Hindu Marriage Act, 1955) and concluded :

> "It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is, far from being uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion and caste... We suggest that the time has come for the intervention of the Legislature in these matters to provide for a Uniform Code of marriage and Divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such actions as they may deem fit to take.[33]

The court did not give any relief to the victim and no one knows what finally happened to the poor tribal lady. The Delhi

High Court had, while refusing a decree of nullity allowed her a judicial seperation keeping her irretrievably broken marriage legally intact.

The *Jorden Diengdeh case* involved application and interpretation of the Christian Personal Law. Yet, the Supreme Court judgement in the case examined neither the present state of Christian Personal Law in the country nor the response of the Christian community to the issues of Personal law reforms and Uniform Civil Code. Nor did it talk of the Parsi community's feelings in this matter. Paraphrasing divorce and nullity provisions in the Christian and Parsi laws and the comparable sections of the statutes applicable to Hindus and Muslims, Justice O. Chinappa Reddy choose only to join the chorus of groans of the day to rebuke Muslims for their opposition to the Shah Bano ruling that in which the state had been asked to 'act' towards enacting a Uniform Civil Code even if the majority community was not prepared to give a 'lead' by offering repeal of its own personal law in favour of Uniform laws.[34]

The learned judge further held that under strict Hanafi law, there was no provision enabling a Muslim women to obtain a decree dissolving her marriage on the failure of her husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing 'unspeakable misery in innumerable Muslim women' that was responsible for the passing

of Dissolution of Muslim Marriages Act, 1939. He further observed :

> "If the Legislature could so alter the Hanifi law, we fail to understand the hallaballo about the recent judgement of this court in the case of *Mohammad Ahmad Khan Vs. Shah Bano Begum* interpreting the provisions of Section 125 of the Criminal Procedure Code of the Muslim law."[35]

The learned judge while quoting from the statement of *Objects and Reasons of the Dissolution of Muslim Marriages Act, 1939* did not say that these provisions were drawn from another school of Islamic Law itself, i.e. the Maliki School (which fact the statement of object and reasons does explain at length) which is permissible under Hanafi law. This appeal involved some very serious issues faced by the society other than the Uniform Civil Code but Chenappa Reddy J. did not make any reference to those issues, it shows the intention of the learned judge. He has unnecessarily created a serious doubts about the legitimacy of codified law workable in India since 1950. In the opinion of Prof. Tahir Mahmood :

> "Neither the issue of 'Uniform Civil Code' nor that of the response to Shah Bano judgement was in question in the case before the court. What does it mean? Can the court speak suo moto only about a

> 'Uniform Civil Code' and the Muslim law and never about any other factors even if they are much more relevant than 'Uniform Civil Code' and Muslim law in any case.[36]

If we scrutinize *Christian Marriage Act, 1872* we find that the Christian Marriage Act demands that every marriage between a Christian and non-Christian (besides all Christian - Christian marriages) must also take place under the provisions only. This is provided in section 4 of the said Act. When enacted, this provision reflected the high handedness of the then foreign rulers who regarded their own religion as superior to all others. But no body bothered because the Act clashed only with Muslim Law which allowed a Muslim Chrisitan marriage – Hindu law did not any interreligious marriage at all.

Since 1954 the legal position has been very different. The Special Marriage Act, 1954 now allows all sorts of inter religious marriages to take place freely. Can a non-Christian marry a Christian under this Act? Of course, yes. But, then, how about the demand of Section 4 of the Christian Marriage Act, still enforce demanding that a non-Christian's marriage to a Christian must also be solemnised by Christian rites only. The two Acts are apparently in conflict. People are not sure of the correct legal position and therefore want to play safe unmindful of the possible consequence in future – by complying with section 4 of the old

Act of 1872.[37] The Indian Divorce Act 1869 applies if either party to a marriage is a Christian (besides all cases where all parties are Christians). Can a non-Christian married to a Christian, whose marriage is governed by the Christian Marriage Act, 1872, seek or divorce under the Special Marriage Act 1954? Two High Courts have given conflicting rulings – *Rajasthan*[38] saying yes, *Allahabd*[39] No. The Act itself is not clear on the point, though the preamble – an Act to provide an special form of marriage in certain cases for the registration of, such and certain other marriages and for divorce – tilts in favour of the Rajasthan ruling. Was it not imperative case to examine all these aspects of the law? Could it not have upheld the already available *Rajasthan* ruling and give the desired relief to the poor tribal girl, paving the way for salvaging in future other women finding themselves in a similar mess.

In this case nothing of this sort was done, the only thing which was done to suggest the government to enact a Uniform Civil Code and to admonish the Muslims for their unfavourable reactions to the Shah Bano ruling.

What the *Jordan Dingdeh case*, and many other judicial case have brought to the limelight for a recodification of the Christian law in India. Last codified in 1865-1872 on the basis of the progress made till then in Britain, statutory Christian law is now rather outdated. It is the women who are the worst sufferers under the 19th century Christian-law statutes of 1866 to 1872. Not only

Christian women but also those non-Christian women who are married to Christian and are therefore, again governed by those laws. The plight of women governed by the 19th century statitutes of Christian law has been described by the *Kerela High Court* in following words :

> "Life of a Christian wife who is compelled to live against her will, though in name only, as the wife of the man who hates her, has cruelly treated her and deserted her, putting an end to marital relationship irreversible, will be a sub-human life without dignity and personal liberty ... which she is bound to lead till her death."[40]

Although Ammine E.J. got relief from a miserable life by the Kerala High Court but Jorden Dingdeh was not given any relief and she was left to suffer endlessly till a Uniform Civil Code is enacted.

D. Sarla Mudgal Case

The fourth important case relating to personal laws of Hindus and Muslims and Uniform Civil Code is *Sarla Mudgal v. Union of India*.[41] Once again a very controversial judgement was handed down by the Supreme Court of India which once again raised the qustion of the enactment of a Uniform Civil Code. The judgement became very controversial due to its uncalled for '*obiter dicta*'. The issue raised before the court were as follows :

(i) Article 44 is based on the concept that there is no necessary connection between religion and personal laws in a 'civilized society'.

(ii) Article 25 guarantees religious, freedom whereas article 44 seems to divest religion from social relations and personal law. Marriage, succession and like matters of secular character cannot be brought within the guarantees enshrined under Articles 25, 26 and 27.

(iii) Article 44 is decisive step towards national integration. Justice Kuldeep Singh observed that :

> "The personal laws of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have foresaken their sentiments in the cause of national unity and integration, some other communities would not though, the Constitution enjoins the establishment of a 'Common Civil Code' for the whole of India."

Justice Kuldeep Singh further observed that :

> "Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in the two nation or three nation theory and that in the Indian republic there was to be only one

orgasm, leaving the wife totally unsatisfied and frustrated. The real problem before the court was that the marriage appeared to have broken down irretrievably. Finding that it was not possible for the court to give the desired relief under the Christian law, the learned judge talked of the urgent need to enact a 'Uniform Civil Code'. He reproduced the ground of divorce and nullity under various statutes (Indian Divorce Act, 1869; Parsi Marriage and Divorce Act, 1936; Dissolution of Muslim Marriages Act, 1939; Special Marriage Act, 1954; Hindu Marriage Act, 1955) and concluded :

> "It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is, far from being uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion and caste... We suggest that the time has come for the intervention of the Legislature in these matters to provide for a Uniform Code of marriage and Divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such actions as they may deem fit to take.[33]

The court did not give any relief to the victim and no one knows what finally happened to the poor tribal lady. The Delhi

High Court had, while refusing a decree of nullity allowed her a judicial seperation keeping her irretrievably broken marriage legally intact.

The *Jorden Diengdeh case* involved application and interpretation of the Christian Personal Law. Yet, the Supreme Court judgement in the case examined neither the present state of Christian Personal Law in the country nor the response of the Christian community to the issues of Personal law reforms and Uniform Civil Code. Nor did it talk of the Parsi community's feelings in this matter. Paraphrasing divorce and nullity provisions in the Christian and Parsi laws and the comparable sections of the statutes applicable to Hindus and Muslims, Justice O. Chinappa Reddy choose only to join the chorus of groans of the day to rebuke Muslims for their opposition to the Shah Bano ruling that in which the state had been asked to 'act' towards enacting a Uniform Civil Code even if the majority community was not prepared to give a 'lead' by offering repeal of its own personal law in favour of Uniform laws.[34]

The learned judge further held that under strict Hanafi law, there was no provision enabling a Muslim women to obtain a decree dissolving her marriage on the failure of her husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing 'unspeakable misery in innumerable Muslim women' that was responsible for the passing

of Dissolution of Muslim Marriages Act, 1939. He further observed :

> "If the Legislature could so alter the Hanifi law, we fail to understand the hallaballo about the recent judgement of this court in the case of *Mohammad Ahmad Khan Vs. Shah Bano Begum* interpreting the provisions of Section 125 of the Criminal Procedure Code of the Muslim law."[35]

The learned judge while quoting from the statement of *Objects and Reasons of the Dissolution of Muslim Marriages Act, 1939* did not say that these provisions were drawn from another school of Islamic Law itself, i.e. the Maliki School (which fact the statement of object and reasons does explain at length) which is permissible under Hanafi law. This appeal involved some very serious issues faced by the society other than the Uniform Civil Code but Chenappa Reddy J. did not make any reference to those issues, it shows the intention of the learned judge. He has unnecessarily created a serious doubts about the legitimacy of codified law workable in India since 1950. In the opinion of Prof. Tahir Mahmood :

> "Neither the issue of 'Uniform Civil Code' nor that of the response to Shah Bano judgement was in question in the case before the court. What does it mean? Can the court speak suo moto only about a

> 'Uniform Civil Code' and the Muslim law and never about any other factors even if they are much more relevant than 'Uniform Civil Code' and Muslim law in any case.[36]

If we scrutinize *Christian Marriage Act, 1872* we find that the Christian Marriage Act demands that every marriage between a Christian and non-Christian (besides all Christian - Christian marriages) must also take place under the provisions only. This is provided in section 4 of the said Act. When enacted, this provision reflected the high handedness of the then foreign rulers who regarded their own religion as superior to all others. But no body bothered because the Act clashed only with Muslim Law which allowed a Muslim Chrisitan marriage – Hindu law did not any interreligious marriage at all.

Since 1954 the legal position has been very different. The Special Marriage Act, 1954 now allows all sorts of inter religious marriages to take place freely. Can a non-Christian marry a Christian under this Act? Of course, yes. But, then, how about the demand of Section 4 of the Christian Marriage Act, still enforce demanding that a non-Christian's marriage to a Christian must also be solemnised by Christian rites only. The two Acts are apparently in conflict. People are not sure of the correct legal position and therefore want to play safe unmindful of the possible consequence in future – by complying with section 4 of the old

Act of 1872.[37] The Indian Divorce Act 1869 applies if either party to a marriage is a Christian (besides all cases where all parties are Christians). Can a non-Christian married to a Christian, whose marriage is governed by the Christian Marriage Act, 1872, seek or divorce under the Special Marriage Act 1954? Two High Courts have given conflicting rulings – *Rajasthan*[38] saying yes, *Allahabd*[39] No. The Act itself is not clear on the point, though the preamble – an Act to provide an special form of marriage in certain cases for the registration of, such and certain other marriages and for divorce – tilts in favour of the Rajasthan ruling. Was it not imperative case to examine all these aspects of the law? Could it not have upheld the already available *Rajasthan* ruling and give the desired relief to the poor tribal girl, paving the way for salvaging in future other women finding themselves in a similar mess.

In this case nothing of this sort was done, the only thing which was done to suggest the government to enact a Uniform Civil Code and to admonish the Muslims for their unfavourable reactions to the Shah Bano ruling.

What the *Jordan Dingdeh case*, and many other judicial case have brought to the limelight for a recodification of the Christian law in India. Last codified in 1865-1872 on the basis of the progress made till then in Britain, statutory Christian law is now rather outdated. It is the women who are the worst sufferers under the 19th century Christian-law statutes of 1866 to 1872. Not only

> nation – Indian nation – and no community could claim to remain a separate entity on the basis of religion."

These observations of the learned judge requires a close scrutiny. If we go through the above observation than we come to the following conclusion.

(i) India was partitioned in 1947 by the protagonist of "two-nation theory".

(ii) Indian leaders did not believe in that theory.

(iii) In the Republic of India there was to be only "one nation – the Indian nation."

(iv) In the Indian republic "No community could claim to remain a separate entity on the basis of religion."

(v) Those who prefer to remain in India after partition "fully knew this".

Therefore, the government of India is directed to immediately enact a Uniform Civil Code by introducing a bill in the Parliament. The above observations or the '*obiter dicta*' of the judgement have ruined the sensible '*ratio decidendi*' of this case that is to hold the second marriage of a Hindu husband after his conversion to Islam (without getting his first marriage dissolved) as void marriage.

The observations of Justice Kuldeep Singh need close scrutiny. *Firstly*, we will take the observation that the Hindus

along with Sikhs, Buddhists and Jains have foresaken their sentimetns in the cause of national unity and integrity. The concrete issue before the court was that while the statutory Hindu law did not and the Muslim Personal law as enforced in India did allow bigamy, could a Hindu husband circumvent the restriction by anouncing a sham conversion to Islam?

Assertively ruling that the law could not allow him to do so, the court ascribed the problem to the plurality of the personal laws in the country and stressed the need for a uniform of the Islamic law on bigamy – more often by non-Muslims than by Muslims themselves – is, of course, is a growing menace. While it does call for urgent remedial measures, seeking those measures in the terribly complex issue of a Uniform Civil Code ignores the maxim 'Justice delayed is Justice denied'. In the opinion of the court the delay on the part of the government in enacting a Uniform Civil Code is attributable to "reasons too obvious to be stated." On the one hand the court said that the reasons are too obvious to be stated and on the other hand the court discussed those obvious reasons in full detail. It seems that the court also believes in certain popular misconceptions in respect of personal laws and the constitutional provisions relating to a Uniform Civil Code.

The courts ruling that majority has foresaken their personal laws for the sake of national unity is also not correct. If we go through the legislative history of four Hindu-Law-Statutes we find that these statutes were enacted not for the sake of national unity

but for ameliorating the conditions of Hindu women. The legislative history of the four Hindu statutes makes it clear that a Hindu Code Bill was inherited by independent India from the pre-consitution regime. After the introduction of Article 44 it was discussed in the Parliament for about four years. In 1954 it enacted a new general non-religious law of marriage and divorce – The Special Marriage Act 1954 – attaching to it also the secular law of succession contained in Chapter 2 of Part III of the Indian Succession Act, 1935. Instead of applying these secular laws compulsory to the majority community, within the next two years Parliament enacted two special laws – The Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956. Both retaining many religious based provisions. The already available secular laws of minority and guardianship –The Indian Majority Act 1875 and The Guarandians and Wards Act 1880 – were also not found fit enough for the majority community. Instead, a New. Hindu Minority and Guardianship Act was enacted in 1956. Special provisions relating to maintenance if wife and other relations were included in the Hindu Adoption and Maintenance Act 1956. The most important feature of the above mentioned Hindu law statutes was that it reserved certain family rights relating to adoption, guardianship and maintenance etc. for the Hindus only and if a person ceases to be a Hindu it would result in the loss of above mentioned certain special rights.

Secondly, all the four Hindu-law statutes were not enacted for the directive of Article 44. As the vast population of Hindu tribe was kept out of all the Hindu law enactments of 1955-56 and were left free to follow their age old customs and those who were brought within the fold of newly enacted laws again certain local and caste customs relating to the extra-judicial divorce and women's property rights were specifically protected. We can say that the new Hindu Personal Law of 1955-56 was, thus, neither uniform nor free from religion based and sex based discrimination as it made many 'exceptions' in the form of customs and castes. It may be noted that these four Hindu law statutes were clearly against the directive of Article 44.

Persisting in the anti-uniformity policy in respect of the Personal Law of the majority, in 1962 when Goa, Daman and Dieu were liberated the local Hindu usages decrees of 1880's of the portugese regimes were legally protected. Though wholy outdated and different from the Hindu law statutes of the main land, those decrees are still inforce in the State of Goa and the territories of Daman and Dieu, as exceptions of the Portugese Civil Code of 1867.[43]

In 1976 the Indian Succession Act till then compulsorily applicable to all those who voluntarily opted for the non-religious marriage law of the Special Marriage Act, was made wholy in applicable to the Hindus, Buddhists, Jains and Sikhs. Hence

fourth they would be governed by the religion based Hindu Succession Act even if they married – within those four communities – under the Special Marriage Act (while in the same situation members of the other communities would be still governed by the Indian Succession Act). Adopted on the recommendation of the law commission (which as per the court judgement should now be asked to draft a Uniform Civil Code) this measure had clearly put Article 44 in the reverse gear.[44]

Thus, the observation of Justice Kuldeep Singh that the Hindus, Sikhs, Buddhists and Jains, have foresaken their sentiments for the sake of 'national unity and integration' is not true rather the codified Hindu Law of 1955-56 was extended to these communities because these three communities never had any scripture – based personal laws of their own. Even before 1955-56 they were governed by Hindu law subject to some contrary usages of their own; and there is still ample room for the retention of those special usages under all the Hindu law enactments of 1955-56. As far as Muslims, Christians and Parsis are concerned they always had their own religion based Personal laws.

It may be observed that the Hindu law statutes do not at all satisfy the constitutional ideals of secularism, gender justice, legal equality and uniformity. They cannot be imposed on the other communities in the name of a Uniform Civil Code. A very important comment appeared in the *Sunday Observer*[45] by an imminent lawyer Indira Jaising :

"One of the largest beneficiaries of the absence of a Common Civil Code have been the Hindus. The shoe is really on their foot. The judgement (in Sarla Mudgal) exposes the hypocracy of the Hindu community rather than the so called backwardness of Muslim Personal Law ... Those who have misused it (The Law), The Hindus, are demanding a change as if it were a stick in their hands with which to beat the Muslims. No where in the BJP rheotric there an acknowledgement of the fact that it is the Hindus who have used the existing system to their advantage. Perhaps if there was such an acknowledgement, the other community would be more willing for a change."

The observation of the court that Article 44 is based on the concept that there is no necessary connection between religion and Personal laws in a civilized society also needs a close scrutiny. It is submitted that under Islam the concept of religion covers the whole life cycle and even the hereafter. Law and religion under Islam cannot be seperated. Islam enjoins its believer to follow *Shariah*. These are numerous provisions in *Qur'an* to this effect :

"These are the limits ordained by God : so do not transgress them. If they do transgress the limits

> ordained by god such persons wrong (themselves as well as others)".[46]

As far as marriage is concerned in the words of Justice Abdur Rahim :

> "The Mohammadans Jurists regard the institution of marriage as partaking both of the nature of *Ibadat* or devotional acts and *Muamlat* or dealings among men."

Seen from the religious angle, Muslim marriage is an '*Ibadat*' (devotional act). The Prophet (SAW) is reported to have said the marriage is essential for every physically fit Muslim who could afford it. Moreover the following traditions may also be considered :

> "He who marries completes half his religion; It now rests with him to complete the other half by leading a virtuous life in constant fear of God."

> "There is no mockery in Islam".

> "There are three persons whom the Almighty himself has undertaken to help – First, he who seeks to buy his freedom; second, he who marries with a view to secure his chastity; and Third, he who fights in the cause of God."

> "... whoever marries a woman in order that he may retain his eyes – God putteth a blessedness in her for him, and in him for her."

The Prophet (SAW) is reported by some of the writers to say that marriage is equal to '*Jehad*' (Holy War); it is sinful not to contract a marriage; it is a *sunnah*; and it is obligatory on those who are physically fit.[47] In view of the above it is not correct that Article 25 does not cover marriage.

The irrationality of Justice Kuldeep Singh's approach can be seen by this observation noted below :[48]

> "Article 44 is based on the concept that there is no necessary connection between religion and personal laws in a civilized society. Article 25 guarantees religious freedom where as Article 44 seeks to divest religion from social relations and personal laws. Marriages, succession and like matters of a secular character can not be brought within the guarantee enshrined under Articles 25, 26 and 29."

He further observed :

> "The legislation – not religion – being the authority under which Personal law was permitted to operate and is continuing to operate, the same can be superseded supplemented by introducing a Uniform Civil Code. In this view of the matter no community can oppose the introduction of human Civil Code for all the citizens in the territory of India."[49]

He held the government responsible for its failure in the following words :

> "The successive governments till date have been wholly remiss in their duty of implementing the constitutional mandate under article 44 of the Constitution of India."[50]

Besides other key concepts, secularism, religious and cultural freedom under Article 25 is not confined to freedom of conscience but its ambit covers the right to process, practice and propagate the religion by the citizens. Indeed, religion is a wide and pursuasive concept. It is not confined to 'faith' only because 'practise' and propagation are the part and parcel of the religion. 'Faith' represents the inner aspect of religions, while 'practise' and 'propagation' manifest the 'external aspect'.[51]

With great respect to the learned judges, it is submitted that under Islam the concept of religion covers the whole life-cycle and even the hereafter. Law and religion under Islam cannot be separated. Islam does not allow its believers to follow man made law or customs in matters of social life in contravention of *Shariat*. On each of these matter these are specific provision in the Holy *Qur'an* and Muslims have been enjoined to warned of severe retribution in cases of contravention.

After laying down the law an divorce the *Qur'an* goes on to say :

> "These are the units ordained by God : so do not transgress them. If they do transgress the limits ordained by God, such persons wrong (themselves as well as others)."[52]

Once Lord Bryce speaking on the nature of Muslim law observed :

> "In Islam law is religion and religion is law, because both have same sources and an equal authority being both contained in the Divine Revelation' ... A revelation which covers whole sphere of man's thoughts and actions."[53]

Justice Kuldeep Singh perhaps is totally ignorant about the history of Muslim Personal Law in India when he says :

> "Political history of India shows that during the Muslim regime, Justice was administered by the *Qazis* who would obviously apply the Muslim scriptural law to Muslims, but there was no similar assurance so far litigations concerning Hindus was concerned. The system, more or less, continued during the time of East India company, until 1772 when Warren Hastings made Regulations for the administration of civil justice for the native population, without discrimination between Hindus and Mohammadans. The 1772 Regulations followed by the Regulations of 1781 where under it was prescribed that either community was to be governed by its 'personal law' in matters relating to inheritance, marriage, religious usage and institutions."

A cursory perusal of the history of Muslim Personal Law in India reveals that the policy of non-interference in the Personal laws of other communities was established by Mohammad Bin Qasim, who conquered Sindh. The local population was, however, treated with utmost consideration as reflected in a letter written by powerful viceroy of Eastern Provinces of the *Umayyad* Empire Hajjaj to him :

> "They have been taken under our protection and we cannot in any way stretch out our hands upon their lives or property. Permission is given to them to worship their God. Nobody must be forbidden. They may live in their houses in whatever manner they like."[54]

The historians attach little importance to Arab rule in Sindh; yet its indirect effects are many and far reaching. For example, the political arrangements made by Mohammad-Ibn-Qasim with non-Muslims provided the basis for later Muslim policy in the sub-continent.[35]

This policy of non-interference in religious and family matters was later on followed by Muslim rulers of Delhi during Mughal regime the Islamic law was the law of the land. The judiciary enforced the civil and criminal laws, but the non-muslims enjoyed the full freedom in respect of their personal laws. The British government also allowed the Muslims and Hindus to follow their own personal laws.

Section 27 of the Regulation of 1772 Provides :

> "That in all suits regarding inheritance, succession, marriage and caste and other usages or instructions the laws of the *Koran* with respect to Mohammadans and those of *Shastras* with respect to *Gentoos* (Hindus) shall be invariably adhered to."

Justice Kuldeep Singh further observed that :

> "It has been judicially acclaimed in the United States of America that the practice of polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable by its followers. It can be superseded by the state just as it can prohibit human sacrifice or the practise of "*suttee*" in the interest of public order."[56]

In Islam too polygamy is an "exception" to the genral rule of monogamy. To quote Billy Graham :

> "Islam has permitted polygamy as a solution to social ills and has allowed a certain degree of latitude to human nature but only within strictly defined framework of law. Christian communities make a great show of monogamy, but actually they practise polygamy. No one is unaware of the part "mistresses" played in western society.[57] In this respect, Islam is fundamentally honest religion, and

> permits a Muslim to marry a second wife if he must, but strictly forbids all clandestine amatory association in order to safeguard the moral probity of the community.[58]

If polygamy is not permitted, the result will be sexual anarchy and moral deterioration. In fact, the western world has deteriorated morally. Some scholars advocate monogamy. But the unfortunate thing is that they do not think about the other side of the problem. The views of Annie Besant is quite germane in the circumstances :

> "There is pretended monogamy in the west, but there is really polygamy without responsibility. The 'mistress' is cut off when the man is weary of her and sinks gradually to the woman of the street for the first lover has no responsibility for the future and she is hundred times worse off than the sheltered wife and mother in the polygamous home. When we see the thousands of miserable women, who crowd the streets of western town during the night, we must surely feel that it does not be in western mouth to reproach Islam for its polygamy.[59]

Thus, if our learned judges take the precedent of America about morality, the Muslims cannot be obliged to do so because Islam cannot achieve anything indirectly which it prohibits

directly. America and other western countries pretend monogamy but they practise polygamy.

The observation of Justice Kuldeep Singh that Article 44 is a decisive step towards national integration seems somewhat untenable. Delievering the main judgement, he proceeded to hold :

> "Those who prefer to remain in India after partition fully knew that the Indian leaders did not believe in two nation or three nation theory."

This part of judgement is assailable. However, it is not a new assertion. This argument was put forward during the debate on Uniform Civil Code on the Draft Constitution where K.M. Munshi[60], M.R. Masani, Aladi Krishna Iyer[61] advocated about Uniform Civil Code. Justice R.N. Sahay although, concured with his companion Justice Kuldeep Singh but he was alive to the sensitivities, realities and magnitude of the problem. When he observed :

> "The pattern of debate, even today, is the same as was voiced forcefully by the members of the minority community in the Constituent Assembly. If, the non implementation of the provisions contained in Article 44 amounts to great failure of Indian democracy' represents one side of the picture, then the other side claims that, 'logical probability appears to be that the code would cause dissatisfaction and disintegration

than serve as a common umberella to promote homogenity and national solidarity.

Justice R.N. Sahay evaluates religious freedom and secularism in the following words :

> "Religious freedom, basic foundation of secularism, was guaranteed by Article 25 to 28 of the Constitution. Article 25 is very widely worded. It guarantees all persons, not only freedom of conscious but right to profess, practise and propagate religion."[62]

Justice R.N. Sahay also explains 'religion' :

> "What is religion? Any faith or belief. The court has expanded religious liberty in its various phases guaranteed by overt acts of the individual. Religion is more than mere matter of faith. The Constitution by guaranteeing freedom of conscience ensured in aspects of religious belief and external expression of it were protected by guaranteeing right to freely, practise and propagate religion.

Reading and reciting holy scriptures, for instance, *Ramayana* or *Qur'an* or *Bible* or *Guru Granth Sahib* is as much a part of religion as offering food to deity by a Hindu or bathing the idol or dressing him and going to temple, mosque, church or *Gurudwara*." However, Justice R.N. Sahay favours the

implementation of Uniform Civil Code when he observed that 'religious practises, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression. Therefore, unified code is imperative both for protection of the oppressed and for promotion of national unity and solidarity.[63]

But while advocating the desirability of a Uniform Civil Code he again gave a sensible root for the attainment of the objectives contained in Article 44 when he says that

> "the desirability of Uniform Code can hardly be doubted. But it can concretise only when climate is properly built up by elite of the society, statesman amongst leaders who instead of gaining personal milage rise above and awaken the masses to accept the change."[64]

He advised the government to entrust the responsibility to the law commission which may in consultation with minority commission examine the matter and bring about the comprehensive legislation in keeping with modern day concept of human rights for women.

Eminent jurist and an expert of constitutional law H.M. Seervai's opinion about the Sarla Mudgal case is as follows :

> "It is unfortunate that supporting or opposing a Uniform Civil Code should do so without reference to

> our Constitution and the law governing the two very large communities in our country – Hindus and Muslims. It becomes necesary to say this because of the amazing order passed (in Sarla Mudgal case). The Supreme Court cannot enforce the mandate of Article 44 consequently the aforesaid order is null and void."[65]

His concluding observation is also quite germane. Those who have studied Hindu law and Mohammadan law will realise that a common Civil Code for the Hindus and the Muslims alike is an impossibility. To speak of Hindu Law might suggest that there is one law applicable to all Hindus, but this is not so. Before 1955-56, Hindu law was divided in the first instance between two main schools, namely, the Mitakshara and Dayabhaga school ... There is no Common Civil Code governing marriage among Hindus ... Mohammadan law (also) does not uniformly apply to all Mohammadans. All Hindu law Acts provide in identical language that "nothing in those acts shall apply to members of scheduled tribes... A Common Civil Code is, therefore, a mirage.[66]

Partha S. Ghosh comments on Sarla Mudgal judgement in following words :

> "Here are some hard facts one, there was stiff resistance to the passage of Hindu code Bill of 1955. Two according to the Indian census report of 1961

> the percentage of Hindus having more than one wife was more than that of the Muslims. Three, almost all Hindus still solemnize their marriags through religious customs although there is a civil wayout through the Special Marriages Act of 1954. The point here is that Indians in general are religious people and minorities are more so as they are everywhere. To force them to succumb to majoratarian pressure is not only bad politics it is also bad ethics. Let the demand (for Uniform Civil Code) come from the communities themselves. The role of the state should be that of a catalyst not that of a dictator."[67]

As far as the order of the court, directing the Government of India to file an affidavit within a stipulated time, indicating therein the steps taken and the effort made, by the Government of India towards securing, a "Uniform Civil Code", is concerned, it is nothing but the violation of judicial restraint envisaged by the doctrine of "separation of powers" – which is an inherent characteristic of the Constitution of India.

Though, the principle of uniformity, to be applied in making civil laws is fundamental in the governance of the country but if – for any valid and important reason the state can not apply the principle of uniformity while making civil laws, no court in the country in any way have the principle enforced. The Constitution

leaves it, entirely and exlcusively to the wisdom of the state when, how, in what way, and to what extent, it can and should apply the principle of uniformity in making civil laws.

It is submitted that the solution to be problem of unlawful bigamy lies in suitably amending the Hindu Marriage Act, improving the now cumbersome and vexatious judicial process for divorce, and properly codifying the true principles of the Muslim Personal Law. Constitutionally tenable, these steps will surely bear fruit.

E. Ahmedabad Women Action Group Case[69]

After the judgement in Sarla Mudgal's case yet another verdict in the form of '*ratio decidendi*" came in 1997 and some significant issues about the Muslim Personal law were raised by the petitioners in this case. A petition was filed, as a public interest litigation, which the Supreme Court disposed off with other two petitions filed by Lok Sevak Sang and Young Women Christian Association, raising similar questions about laws applicable to Hindus and Christians, respectively. The petition, as regards the Muslim Personal Law urged upon the court :

(A) To declare Muslim Personal Law which allows polygamy as void as offending articles 14 and 15 of the Constitution.

(B) To declare Muslim Personal Law which enables a Muslim male to give unilateral *talaq* to his wife without her consent and without resort to judicial process of courts, as void, offendings articles 13, 14 and 15 of the Constitution;

(C) To declare that the mere fact that a Muslim husband takes more than one wife is an act of 'cruelty' within the meaning of clause VIII(f) of Section 2 of the Dissolution of Muslim Marriages Act 1939;

(D) To declare that the Muslim Women (Protection of Rights on Divorce) Act, as void as infringing Articls 14 and 15; and

(E) To declare the provisions of '*Sunni*' and '*Shia*' laws of inheritence which provide for lesser share for females as compared to the shares of males, void as discriminating against female only on the gound of sex.

The other two petitions prayed for similar relief regarding Sections 2(2), 5(ii) and (ii), 6 and explanation to Section 30 of the Hindu Succession Act, 1956; Section 2 of the Hindu Marriage Act, 1955; Sections 3(2), 6 and 9 of the Hindu Minority and Guardianship Act, 1956 read with Section 6 of the Guardians and Wards Act, 1890, Hindu spouses unfettered right to make testamentory disposition; Sections 10 and 34 of the Indian Divorce Act, 1869 and sections 43 to 46 of the Indian Succession Act.

The court did not dispose off any of the petition on merits because these issue involved state policies and, according to the court, they are best dealt by with the Legislature. The court, in this case, realizing the complexities involved in the issue raised before it and also knowing full its powers and limitations, refused

to oblige the petitioners by observing, at the outset that :

> "These writit petition do not deserve disposal on merits in as much as the arguments advanced by the senior advocate before us wholly involved issues of state policies with which the court will not ordinarily have any concern."[70]

The court supported its judgement in this case on the basis of its observations in earlier decisions, where the court had held that "*The remedy lies somewhere else and not by knocking at the doors of the court.*" The court quoted a number of significant judgements where similar isues came before it for adjudication. One such earlier petition was *Maharishi Avadesh vs. Union of India.*[71] In this case the Supreme Court of India dismissed a writ petition under article 32 of the Constitution. The relief prayed in this case were as follows :

(a) to issue a writ of *mandamous* to respondent to consider the question of enacting a common civil code for all citizens of India;

(b) to declare the Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15, and Articles 44, 38, 39 and 39A of the Constitution of India; and

(c) to direct the respondents not to enact *Shariat* Act, 1937 in respect of those adversely affecting the dignity and rights of Muslim women and against their protection.

The court dismissed the petition saying that *"These are all matters for Legislature. The court cannot legislate in these matters."*[72]

The court had, for the same reasons in *Reynold Rajmani Vs. Union of India,*[73] refused to add any new grounds of divorce, like divorce by mutual consent, to those already specified in the Indian Divorce Act. It was emphasized that the court *can give the fullest amplitude of meaning to the existing provisions, but cannot extent or enlarge legislative policy by adding a provision to the statute which was never enacted there.* The court further emphasized the previously established trends in different cases explaning the fact that *making law or amendment to a law is a slow process and the Legislature attempts to remedy where the need is felt more acute.* It would be inexpedient and incorrect to think that all laws have to be make uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stges.[74] In this case validity of Sections 15, 16, 17, 29 (5) and 144 of the A.P. Charitable Hindu Religious and Endowments Act, 1987 were challenged. One of the questions before the court was whether it is necessary that the Legislature should make law uniformly applicable to all religious or charitable or pubic institutions and endowments established and maintained by people professing all religions.

The court said :

"A uniform law, though is highly desirable, enactment

> thereof in one go perhaps may be counter productive to unity and integrity of the nation... Making law or amendment to a law is a slow process and the legislative attempts to remedy where the need is felt most acute. It would, therefore be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go."

In another case[75] cited by the court while upholding the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The Bombay High Court held that :

> "... in a democracy the Legislature is constituted by the chosen representative of the people. They are responsible for the welfare of the state and it is for them to lay down the policy that that the state should pursue. Therefore it is for them to determine what legislation to put on the statute book in order to advance the welfare of the state."

The court also held that,

> "Article 14 does not lay down that any legislation that the state may embark upon must necessarily be of an all embracing character." So far as the question of applicability of Part III of the Constitution to the personal laws, is concerned, both Chagla C.J., and Gajendragadkar, J., were of the opinion that "the personal laws do not fall within Article 13(1) at all."

The Supreme Court in *Krishna Singh Vs. Mathura*[76] opined that in process of applying the personal laws of the parties, the judges of the high court 'could not introduce their own concept of modernity'. In view of the Supreme Court, the Constitution maintained the position of Personal laws 'status quo'. In this case the Supreme Court, while considering the question whether a '*sudra*' could be ordaned to a religious order and become a '*sanyasi*' or '*yati*' and therefore installed as '*Mahant*' of the Garwa Ghat Math according to the tenets of the Sant Mat Sampradaya, Observed :

> "... Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties He (Judge) could not introduce his own concepts of modern times but should have enforced the law as derived from the recognised and authoritative sources of Hindu law, ...[77].

Thus, Part III of the Constitution does not touch upon the personal laws of the parties and in applying the Personal laws, a judge may not introduce his own concepts of modern times but enforce the law as derived from recognised authoritative sources of that law.

Moreover, regarding the observation of the Division Bench in *Sarla Mudgal Vs. Union of India*[78] that :

> "Marriage, succession and like matters of a secular

character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27".

The Supreme Court in the case clarified that in that case none of the decisions referred to above were placed before the Division Bench as they found no mention in the seperate judgements of Kuldeep Singh and R.N. Sahay, J.J. The question regarding the desirability of enacting a Uniform Civil Code did not directly arise in that case. The question in that case mainly related to embracing of Islam by a Hindu husband and his solemnization of a second marriage, etc. Regarding Uniform Civil Code, Sahay, J. in his seperate but concurring judgement, opined that while it was desirable to have a Uniform Civil Code the time was not yet ripe for that. Accordingly, the decision in *Sarla Mudgal* ultimately centered around the main questions and the observations on the desirability of enacting the Uniform Civil Code were only by way of '*Obitor dicta*'.

Thus, the most important and the most appreciable part of the judgement is that the Supreme Court held that the observations made by Justice Kuldeep Singh "were incidently made".[79]

Apart from these cases the court in Ahmadabad Women Action Group also referred to its opinions expressed in two more cases, *Madhu Kishwar Vs. State of Bihar*[80] and *Anil Mahsi Vs. Union of India*.[81] In *Mahdu Kishwar* the court gave depiction of

customary diversity existing among different people and religions of the country and held the view that enforcing of equality principle by judicial activism was difficult and arduous tasks. An activist court is not fully equipped to cope with the details and entricacies of legislative subject.

In *Anil Kumar Mahsi* case the court, in an illustrative way explained that the total uniformity between the spouses might not be probable and refused to declare section 10 of the Indian Divorce Act as violative of the Article 14 of the Constitution.

The court in this case did not look into the constitutionality of the Muslim Women (Protection of Rights on Divorce) Act, 1986 because that issue was already pending before the Constitution Bench. Thus, the court did not dispose off any of the issue involved in the case on merits. Instead declared them as involving state policies which fell within the ambit of the Legislature.

Justice Ahmadi in this case has rightly mentioned that the court should mentioned the 'self restraint' of the judiciary particulary in a matter relating to Personal laws which happens to be an extremely sensitive issue in India. The judgement of the apex court is a welcome decision and it should be appreciated because it shows the commitment of the judiciary to the doctrine of "Separation of Power" which is the backbone of any modern democratic state.

Summary

No single Article of 'Directive Principles of State Policy' has attracted such high pitched controvercy as 'Uniform Civil Code' under Article 44, which reads as, "the state shall endeavour to secure for citizens a Uniform Civil Code throughout the territory of India".

Some court cases have been discussed in this chapter which attracted attention of affected groups. In these cases either the constitutionality of personal laws has been challenged or the courts have taken *suo-moto* action in favour of enactment of Common Civil Code.

The first such case was *State of Bombay vs Narasuoppa Mali* in which modifications in Hindu law were challanged on the grounds that they violate Articles 14, 15 and 25 of the Constitution. Arguements were put forward that marriage among Hindus is a part of religion and having a son is regarded as spiritual benefit. Hence, polygamy was justified but these arguments were rejected by Gajendra Gadkar J. The court opined in favour of adoption of a son rather than for a second marriage. Chagla C.J. also upheld the validity of Bombay Act relying on *Davis vs. Beason* case. The court kept itself aloof and left the issue of Uniform Civil Code for Legislature.

Like Bombay Act, the Madras Hindu (Bigamy and Divorce) Act of 1949 was also challanged on the same grounds. The court

observed that while religious beliefs were protected by the Constitution, the religious practices can be regulated by state. In the case of *Ram Prasad vs. State of U.P.* also the Allahabad High Court upheld the statutory provisions prohibiting bigmay among Hindus.

Much controversial *Shah Bano case* was filed under section 125 CrPC in 1978 at Indore. The case went up to the Supreme Court. Chief Justice Chandrachud delivered the judgement on behalf of five judges Bench. The learned judge made certain observations for Muslim Personal Law and Uniform Civil Code. The court strongly criticized Government of India for its sheer inability in enacting Uniform Civil Code. Later All India Muslim Personal Law Board also intervened arguing that interpretation of *Shariah* and *Qur'an* by the Court is unwarranted. The judgement provided ammunition to Muslim bashers and communalised the atmosphere. Thus judicial self restraint is needed on such matters.

Another case for discussion is related to Christian Personal Law. Justice O. Chinappa Reddy delivered the judgement without considering Christian Personal Law or the wishes of Christian community.

In *Sarla Mudgal case* the personal laws of Hindus, Muslims and Uniform Civil Code were touched and the judgement favoured the enactment of Uniform Civil Code.

After the Sarla Mudgal case, another case, through Public Interest Litigation (PIL) raised some issues about the Muslim Personal Law. Issues covered were polygamy, unilateral *talaq*, Muslim Women (Protection of Rights on Divorce) Act 1986 and inheritance laws. This PIL was filed by Ahmedabad Action Group and disposed off by Supreme Court alongwith two other petitions filed by Lok Sevak Sang and young Women Christian Association. The court did not dispose off any of the case left them for legislature. In this case, the court tried to restore original constitutional position of Uniform Civil Code.

Thus it is clear from the discussions in this chapter, that whenever the constitutionality of any provision(s) of any personal law was challenged on the ground of being violative of fundamental rights, the court exercised self-restraint and left the matter for the wisdom of the legislature saying that it is a matter of state policies, with which the court is not ordinarily, concerned.

However, it is equally true that on many occasions the court unnecessarily stepped into the shoes of an activist, emphasizing the desirability of the enactment of a 'Uniform Civil Code'. This happened mostly when the issues involved in the cases did not at all require such incidental observations. Sometimes, even side-stepping the issues involved in the case, the court made un-called for remarks about 'Uniform Civil Code'.[82]

References

1. AIR 1952, Bom. 84
2. Act XXV (25) of 1946
3. Article 14 lays down, "The state shall not deny to any person equality before law and equal protection of laws within the territory of India."
4. (1889) 133 US 637.
5. The first amendment of the American Constitution says : Congress shall make no law respecting an establishment of religion or... prohibiting the free exercise thereof.
6. State of Bombay Vs. Narasuappa Mali AIR 1952 Bom., 84
7. Saleem Akhtar and Ahmad Naseem, *Personal Laws and Uniform Civil Code,* p. 62 (1998)
8. Sri Nivas Aiyer V. Saraswathi Ahmad, AIR 1952 Mad. 193.
9. Section 4 of the Act provided : "Notwithstanding any rule of law, custom or usage to the contrary any marriage solemnised after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnisation shall be void".
10. *See Supra note* 8
11. (1870) 98 U.S. 145, 166, 167.
12. D.K. Shrivastava, *Religious Freedom in India*, p. 255 (1982)
13. *Supra note* 8.
14. *Supra note* 7 at 62
15. AIR 1995 SC 945
16. Bai Tahira vs. Ali Hussain Fissalli Chothia, 1979 CrLJ 151.
17. Fazlun Bi vs. Khader Vali, AIR 1980 SC 1730.

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19. Quran II : 241 translated by Abdullah Yusuf Ali.
20. Quran II : 242 translated by Abdullah Yusuf Ali.
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27. Jorden Diengdeh vs. S.S. Chopra, AIR 1985 SC 935
28. *Supra note* 26 at 272
29. Tahir Mehmood, *Uniform Civil Code : Fictions and Facts*, p. 21 (1995)
30. *Id.* at 22.
31. Tahir Mehmood, *Statute - Law Relating to Muslims in India : A Study in Islamic and Constitutional Perspectives* (1995), also cited in *Uniform Civil Code : Fictions and Facts*, p. 23 (1995)
32. *Supra not* 27
33. *Id.* at 940-941.
34. *Supra note* 29 at 105
35. *Supra note* 15 at 940.
36. *Supra note* 18 at 28.

37. *Id.* at 29.
38. AIR 1959, Raj 133.
39. AIR 1974, All 278.
40. Ammini E.J. AIR 1995, Ker 252.
41. (1995) 3. S.C.C. 636.
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43. *Supra note* 29 at 15.
44. *Ibid.*
45. *The Sunday Observor*, New Delhi, June 18, 1995.
46. Syed Khalid Rashid, *Muslim Law,* p. 54 (1996).
47. *The Holy Quran* II : 229, Translated by Abdullah Yusuf Ali.
48. *Supra note* 25 at 345.
49. *Id.* at 345.
50. *Id.* at 346.
51. Mohammad Shabbir, "Muslim Personal Law, Uniform Civil Code and Judicial Activism : A Critique", *XII ALIG. L.J.* 1997, p. 65.
52. *The Holy Quran II* : 229 Translated by Abdullah Yusuf Ali
53. James Bryce, *Studies in History and Jurisprudence*, p. 237 (1901).
54. Ikram, *Muslim Civilization in India*, pp. 6-12 (1964).
55. *Id.* at 19-20
56. *Supra note* 25 at 345.
57. Shakeel Samdani, "Uniform Civil Code : A Critique of Sarla Mudgal vs. Union of India, XI ALIG LJ 1996, p. 187
58. Doi, Abdur Rahman, *Women in Sharia* (*Islamic Law*), p. 77, (1990).
59. See : Khursheed Ahmad, *The Position of Women in India*, p. 28.

60. K.M. Munshi said, "There is one important consideration which we have to bear in mind ... and I want my Muslim friends to realise this that the sooner we forget this isolationist outlook on life, it will be better for the country. Religion must be restricted to sphere-which legitimately appertain to religion and the rest of life must be regulated, unified and modified in such a manner that we may evolve as early as possible a strong consolidated nation. Our first problem and the most important problem is to ensure national unity in the country."
61. Alladi asserted that, "the replacement of the personal laws by a Uniform Civil Code was necessary to preserve the national unity and to remove dangers threatening national consolidation.
62. *Supra note* 25
63. *Ibid.*
64. *Ibid.*
65. Seervai H.M., *The Times of India*, July 5 1995.
66. *Ibid.*
67. *Hindustan Times* quoted by Saleem Akhtar and Ahmad Naseem, *Personal Laws and Uniform Civil Code*, p. 104 (1998).
68. *Supra note* 7 at 72
69. Ahmedabad Women Action Group Vs. Union of India (1997) 3SCC 573
70. *Id.* at 575
71. (1994 Supp (i)) SCC 713
72. *Id.* at 714
73. (1982 2 SCC 474)
74. Pannalal Bansilal Pitti Vs. State of A.P. (1996 2 SCC 498).
75. AIR 1952 Bombay 84
76. (1981 3 SCC 689)

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78. (1995 3 SCC 635)
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Chapter - 6

Fundamental Rights and Directive Principles of State Policy

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This chapter is intended to be an analytical note on Fundamental Rights and Directive Principles and their source. The researcher has taken into account the legislative history well categorised into three periods. In fact, it has been tried to demolish the myth that Directive Principles of State Policy can override Fundamental Rights.

The Directive Principles of State Policy contained in the Part IV of the Indian Contitution is borrowed from the Constitution of Ireland which had copied it from the Spanish Constitution. Part IV of the Indian Constitution sets out the aims and objectives to be taken up by the states in the governance of the country. The idea of a welfare state envisaged in our Constitution can only be achieved if the states endeavour to implement them with a high sense of moral duty. The key to the directive principle is found in Article 37 which runs :

> "The provisions contained in this part shall not be enforceable by any court, but the principle there in lay down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

> "Article 37 thus confers no enforceable rights on any person nor imposes no enforceable obligation on the 'state', as widely defined in Article 12. The word 'fundamental', in the governance of 'the country' is described in rhetorical language, hope, ideals and goals rather than the actual reality of government. The principal object in enacting the directive principles appears to have been to set standards of achievement before the legislature and executive, the local and other authorities, by which their success or failure could be judged. It was also hoped that those failing to implement the directives might, receive a rude awakening at the poles."[1]

In this chapter an attempt has been made to scrutinise supreme court's decisions on Directive Principles, which fall into three periods.

A. Champakam Dorai Rajan[2] to Chandra Bhawan case[3].

B. Chandra Bhawan case to Minerva Mills case.[4]

C. Post Minerva Mill's cases

A. First Period (Champakam Dorai Rajan to Chandra Bhavan)

Champakam Dorai Rajan case[5]

In this case a government order reserved certain seats for admission into a medical college on communal lines comprising

non-Brahmins, Backward Hindus, Brahmins, Harijans, Anglo Indian and Indian Christians and Muslims.

It was challenged on the ground that it was violative of Art. 29(2). The order was justified on the ground that it implemented the Directive Principle in Art. 46. Rejecting this contention, S.R. Das J. said :

> "The Directive Principles... which by Art. 47 are expressly made unenforceable by a court, can not override the provisions found in Part III which notwithstanding other provisions are expressly made enforceable by appropriate writs, orders and direction under Art. 32. The chapter on Fundamental Rights is sacrosanct and not liable to be abridged by any legislative and executive Acts or Order except to the extent provided in the appropriate Art. in Part III. The Directive Principles ... have to be conformed to and run as subsidiary to the chapter on Fundamental Rights".

Justice Das further held that if a law made in implementing Art. 47 could override Fundamental Rights, Art. 16(4), which conferred a power to reserve seats in public employment for any backward class of citizens would be redundant.

***Hanif Qureshi's case* (1959)**[6]

In this case, there was a direct conflict between the right to carry on butcher's business (Art. 19(1) (g) and Art. 48 Directive

Principles. In this case the prohibition of impugned Acts directly affected the business of the petitioners, who were butchers, because

> "The last part of the Directive Principles embodied in Art. 48 requires the State to take steps for prohibiting the slaughter of the specified animals and this Directive can be carried out by prohibiting the petitioners and other butchers (*Kasai's*) from slaughtering them[7]"

Justice S.R. Das said :

> "The Directive Principles can not override this categorical restrictions imposed on the legislative power of the state. A harmonious interpretation must be placed upon the Constitution, and so interpreted it means that the state should certainly implement the Directive Principles but must do so in such a way as not to take or abridge Fundamental Rights." Chief Justice Das further held "That the total ban on the slaughter of she - buffaloes, bulls and bullocks (cattle or buffalow) after they cease to be capable of yielding milk or of breeding or working as draught animals could not be supported as reasonable in the interest of general public."

Das C.J. held the aforesaid "total ban" ureasonable for the following reasons:

(a) the unfit and useless cattle kept alive were allowed to run wild and they were a danger to men and crops;

(b) Old and unfit cattle were left to fend for themselves in "concentration camps" and were left to a process of slow death which did the no good;

(c) the presence of a large number of old and useless cattle had an adverse effect on the breed of cattle;

(d) useless cattle consumed fodder which was much needed for fit cattle;

(e) to spend Rs. 19 per head in preserving useless cattle when the expenditure on national education was Rs. 5 per capita (as opposed to Rs. 104.6 and Rs. 223.7 per capita expanded in the United Kingdom and the United States respectively) was "illogical and extravagant bordering on the incongruous".[9]

(f) because of its cheapness, beef and buffalow meat were the principle source of much needed protein consumed by the poorer people of certain communities who would be deprived of essential protein by such prohibition;

(g) such prohibition would deprive to 2,00,000persons and their families of their livelihood.

The judgement also shows a contravention of the Directives in the earlier part of Art. 48 and of the directives in Arts. 41, 45 and 47.

Thus, reasons (a) to (d) show a contravention of that part of Art. 48 which speaks of the state organizing animal husbandry of modern and scientific lines and of preserving and improving the breed of cattle.

Reason (e) above shows the contravention of Art. 45, because money which can be spend on providing free and compulsory eduction was illogically and extravagantly spent on maintianing cattle. Reason (f) shows a violation of Art. 47 when it speaks of raising the level of nutrition and living standard of people, and reason (g) shows violation of Art. 47 and also of Art. 41 which speaks of the state making effective provision for securing the right to work. The prohibition would destroy the right to work of over 2,00,000 persons without providing them alternative work.

Thus the implementation of a part of Art. 48 violated other parts of the same Article, besides violating the directive principles in Arts. 41, 45 and 47.[10]

In ***In re Kerala Education Bill 1957*** Das C.J., held that the fundamental right conferred by Art. 30 had been expressely conferred on minority communities, and as long as the Constitution stood they could not be taken away. Directive Principles about free and compulsury education could not be implemented at the expenses of minorities; the state could implement the directive principles in Art. 45 by making good the

loss suffered by minorities educational institution as a result of not charging for. He further observed that the provisions of the Bill which required school belonging to minority community not to charge any fees in primary classes "would in a fact make it impossible for an educational institution established by a minority community being carried on."

The Supreme Court further observed that though the Directive Principle can not override the Fundamental Rights, nevertheless, in determining the scope and ambit of fundamental right the court may not entirely ignore the directive principle but should adopt "the principle of harmonious construction and should attempt to give effect to both as much as possible." It must be noted that there was a direct conflict between the right of minority communities and the Directive Principles in Art. 45, and no question of the reasonableness of restrictions arose in this case, as it arose in Hanif Qureshi's case.[12]

B. The Second Period (Chandra Bhavan to Minerva Mills)

In *Chandra Bhawan's case*[13] Hedge J. made the following observation :

> "... It is a fallacy to think that under our Constitution there are only rights and no duties. While rights conferred under Part III are fundamental, the directives given under part IV are fundamental in the governance of the country. We see no conflict on the

whole between the provisions contained in part III and part IV. They are complementry and supplementary to each other."

It was a strange observation because there was a no question of direct conflict between the directive principle in Art. 43 and fundmental right, under Art. 40 and Art. 19. Moreover none was argued before the court. These observations are, therefore, 'obiter' and they can not overrule the three[1] cases discussed above laid down the position of directive principles vis-a-vis fundamental rights. It may, however, be stated that the observation "we see no conflict on the whole between" the provisions contained in Part III and Part IV" tells us nothing as to what is to happen if a conflict does arise. **Secondly**, the dichotomy between part III, which confers rights, and part IV, which is said to impose duties, is untenable if "rights" and "duties" are used in their legal sense. A law "implementing the directive in Art. 43" which imposes a duty on employers to pay a minimum wage, confers a right on workmen to claim a minimum wage.

In the draft Constitution prepared by the Constitutional Advisor, Sir B.N. Rau,[15] Part III was entitled "Fundamental Rights including Directive Principles of State Policy". Chapter I was "General" and Art. 10 therein stated that "the principles of policy set forth in Chatper III of this part are intended for the guidance of the state. While the principles are not enforceable in

any court, they are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws''. Chapter II was entitled ''Fundamental Rights'' and containted Arts. 1 to 30. Chapter III was entitled ''Directive Principles of State Policy'' and these principles were set out in Arts. 31 to 41, Sir B.N. Rau had discussions in Dublin with President De Valera on the working of the directive principles in relation to fundamental rights under the Irish Constitution,[16] and, as a result of his discussion, Sir B.N. Rau suggested the following amendements in the draft Constitution :

At beginning of cl. 9(2) [now Art. 13(2)] insert the words ''Subject to the provisions of Cl. 10'' [which emphasised the fundamental nature of directive principles].[2] To clause 10 add the following :

> ''No law which may be made in the discharge of its duty under the first paragraph of this section, and no law which may have been made by the state in pursuance of principles of policy now set forth in Chapter III this part shall be void merely on the ground that it contravenes the provisions of (Cl.) 9, or is inconsistent with the provisions of Chapter III of this part.''[17]

He said that the object of these amendments was :

> ''... to make it clear that in a conflict between the rights conferred by Chapter II (Fundamental Rights)

> which are for the most part rights of the individual and the principles of policy set forth in Chapter III which are intended for the welfare of the state as a whole, the general welfare should prevail. Otherwise, it would be meaningless to say as clause 10 does say that these principles are fundamental and that it is the duty of the state to give effect to them in its laws."[18]

The minutes of the Drafting Committee show that these amendments were either not considered or not accepted.[19] In any event, the amendments were not made in the Constitution, as finally enacted. The relevant documents show that between those who wanted to make the directive principles justiciable and those who wanted to make them non-justiciable, the latter won the day.[20] Therefore, it is not surprising that the amendments suggested by Sir B.N. Rau to give primacy to directive principles over fundamental rights in case of conflict, were not adopted. It is necessary to add that because directive principle have received increasingly greater importance since the Constitution was enacted, it would be inaccurate re-writing of history to say that the framers of our Constitution gave primacy to directive principles over fundamental rights.[21]

Theoretically, a merely declaratory Bill of Rights was open to the framers of our Constitution, but the practical compulsion of our fight for independence made a judicially enforceable Bill of Rights inevitable. In our Constitution fundamental rights are strict

rules of law limiting legislative and executive power. This is emphasized first by Art. 13 (2) which expressly delcares that any law made in contravention of fundamental rights is protanto void and, **secondly**, by Arts. 32 and 226 which confer on the Supreme Court and the High Courts respectively the power to grant relief against the violation of fundamental rights by the issue of appropriate writs. As pointed out by Prof. de Smith, fundamental rights could have been made merely declaratory by putting them in the preamble, or including them in directive principles of state policy. We will revert to this contrast between fundamental rights and directive principles later.[22]

In the result, Part III of our Constitution was entitled "Fundamental Rights", and Part IV was entitled "Directive Principles of state Policy". This separation of fundamental rights and directive principles emphasizes the fact that they are in their nature and effect essentially different.[23]

An important aspect of directive principle of state policy is that even if Part IV had not be enacted, the objective of the Constitution set out in the Preamble would have to remain; so that justice, social, economic and political would have remained as an objective of the Constitution. The reference to justice, social, economic and political in Part IV is followed by detailed provisions which are believed to bring about social, political and economic justice. If the directive principle are to be applied in making laws they rightly assume the existence of legislative power.

In our own Constitution legislative powers are plenary except to the extent that they are fittered by fundamental rights and other Constitutional limitations. Therefore, even without directive principles. Parliament and State legislature can in the exercise of their legislative powers enact laws with respect to matters mentioned in the directive principles.

Minerva Mills case[24] is a very revolutionary judgement relating to the inter relation between Part III and Part IV of the Indian Constitution. The case was heard by a five judge Constitution Bench. The brief facts of the case are as follows :

The Minerva Mills, a limited company, owned a textile undertaking in Karnataka. The undertaking was nationalised and taken over by the Central government under the provision of the Sick Textile Undertaking (Nationalisation) Act., 1974. The petitioners challenged the Constitutional validity of the said Act. the petitioners further challenged the Consitutionality of the 39th (Amendment) which inserted the impugned Nationalisation Act as Entry 105 of the IX Schedule to the Constitution.

The moot question came before the Supreme Court was the Constitutional validity of Art. 31B. **Finally**, the petitioners challenged the Constitutional validity of Sections 4 and 55 of the Constititon (42 Amendment) Act, 1976. The Constitution Bench decided only the challenge to the said sections 4 and 55. Section 55 inserted the following sub-articles (4) and (5) in Art. 368 :

"(4) No Amendment of this Constitution (including the provisions of part III) made or purporting to have been made under this article (Whether before or after the commencement of section 55 of the Constitution (Forty-Second Amendment) Act, 1976] shall be called in question in any court onany ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article."

The majority judgements was delivered, by Chandrachude C.J. for himself and Gupta, Untwalia and Kailasam J.J., and Minority Judgement by Bhagwati J. In majority judgement the S.C. were held that Sections 4 and 55 of the Amending Act were void. Bhagwati J. partially agreed with majority opinion that the Section 55 was void, and Section 4 was valid. The attempt to confer a primacy upon the directives as against the fundamental rights has, however, been foiled in two respects :

(a) It has struck down the widening of Art. 31C to include any or all of the Directives in Part IV, on the ground that such total exclusive of judicial review would offend the 'basic structures' of the Contitution. In the result, Art. 31C is restored to its pre-1976 position, so that a law would be

protested by Art. 31C only if it has been made to implement the directive in Art. 39(b)-(c) and not any of the other Directives included in Part IV.

(b) That there is a fine balance in the original Constitution as between the Directives and the Fundamental Rights, which categories of provisions, instead of giving any general preference to the Directive Principles.

Further, Chandrachud C.J. referred to the history of India's struggle for independence, and to the Constituent Assembly Debates, to show how deeply our people valued their personal liberties which were regarded as indispensable, and as an integral part of our Constitution. He then traced the history of the demand for fundamental rights, and referred to the following observations of the 'Motilal Nehru' Committee :

> "It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances ... Another reason why great importance attaches to a declaration of rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion."[25]

After referring to the Sapru Report, 1945, Chandrachud C.J. observed :

> "To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure."[26]

He further observed :

> "The goals set out in part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the case of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.'[27]

In our Constitution there are additional grounds why the laws designed to secure social welfare on the lines of the directive principles in Part IV should not override fundamental rights. Part IV deals with only one of the several objectives of our Constitution as set out in the Preamble, namely, Justice, Social, Economic and Political.[28] But the Preamble sets out other objectives, which, if not more important than justice, social, economic and political are not less important; and it is reasonable to suppose that the framers of our Constitution could not have intended that laws designed to secure one objective should be allowed to destroy all or any of the other objectives.[29]

C. Third Period (Post Minerva Mills Cases)

The decision of the court is in accordance with the spirit of the Constitution. But in *Sanjeev Coke Mfg. Co. v. Bharat Cooking Coal Ltd.*[30] the Supreme Court expessed doubt on the validity of the decision in Minerva Mills case. A five judges Bench held that the question regarding the validty of Section 4 of the 42nd Amendment was not directly at issue in Minerva Mills case and therefore, determination of that question was uncalled for and 'obiter' and since the validity of Art. 31C, as originally introduced in the Constitution, had been upheld in Kesavanand Bharti's case, it should lead to the conclusion that Art. 31-C as amended by the 42nd Amendmend is also valid.

It is submitted that the court has only expressed doubt about the validity of Minerva Mills decision but has not expressly overruled it, and therefore the decision regarding invalidity of Section 4 and 42nd Amendment in Minerva Mills case remains valid until it is overruled. This decision has again created conclusion which has been finally settled in earlier decisions that there is no conflict between foundamental right and directive principles and both are supplementry to each other.[31]

We must now consider decided cases on the Articles in Part IV. However, we must bear in mind that those decisions are based on a view of a relation of fundamental rights by themselves and vis-a-vis directive principles of state policy which according to the present writer, is clearly wrong.[32]

The confusion created by the *Sanjeev Coke Mfg. Co. Case*[33] has been removed by decision of the Supreme Court in *State of Tamil Nadu V.L. Abu Kaur Baj*[34]. When the court held that although the directive principles are not enforceable yet the court should make an attempt at harmonising and reconciling the directive principles and the fundamental rights and any collision between the two should be avoided as far as possible. The reason why the founding fathers of our constitution did not advisely make there principles enforceable was, the court said, perhaps due to vital consideration of giving the Government sufficient latitude to implement these principles from time to time according to capacity, situations and circumstances that may arise.

In *Unni Krishnan. J.P.V. State of A.P.*[35] B.P. Jeevan Reddy J. stated the law thus-

> "It is thus well established by the decisions of this court that the provisions of Part III and IV are supplementary and complementary to each other and *that fundamental rights are but a means to achieve* the goal indicated in part IV. It is also held that the fundamental rights must be construed in the light of the directive principles".

In *Bandhua Mukti Morcha V. Union of India*[36], the Court has also held that though the directive principles are unenforceable by the courts and the courts cannot direct the legislature or

executive to enforce them, once a legislation in pursuance of them has been passed, the courts can order the state to enforce the law, particularly when non-enforcement of law leads to denial of a fundamental right.

It is now universally recognised that the difference between the fundamental rights and the directive principles lies in this that the fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the directive principles are aimed at securing social and economic freedoms by appropriate action. The fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be forced by resort to courts, so they are made justiciable. However, notwithstanding their great importance the directive principles cannot in their nature of things be enforced in a court of law. It is unimaginable that any court can compel legislature to make a laws then parliamentary democracy would soon be reduced to a oligarchy of judges. It is for this reason that the Constitution says that the directive principles shall not be enforceable by courts.'[37]

The Directives, however, differ from the fundamental rights contained in part III of the Constitution or the ordinary laws of the land, in the following respects.

D. Directive Compared with Fundamental Rights

(i) While the Fundamental Rights constitute limitations upon state action, the Directive principles are in the nature of

instrument of instructions to the Government of the day to do certain things and to achieve certain ends by their actions.

(ii) The Directives, however, require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive, neither the state nor an individual can violate any existing law or legal right under colour of following a Directive.

(iii) The Directives are not enforceable in the courts and do not create any justiciable rights in favour of the individuals.

From the stand point of the individual, the difference between the Fundamental Rights and the Directives is that between justiciable and non-justiciable rights- a classification which has been adopted by the framers of our constitution from the Constitution of Eire. Thus, though the Directive Principle under Art. 43 enjoins the state to secure a living wage to all workers, no worker can secure a living wage by means of an action in a Court, so long as it is not implemented by appropriate legislation. In other words, the courts are not competent to compel the Government to carry out any Directive, e.g., to provide for free compulsary education within the time limited by Art. 45 or to undertake legislation to implement any of the Directive Principles[38].

(iv) It may be observed that the declarations made in Part IV of the Constitution under the head 'Directive Principles of state

policy' are in many cases of a wider import than the declarations made in Part III as 'Fundamental Rights'. Hence the question of priority in case of conflict between the two classes of provisions may easily arise. But while the Fundamental Rights are enforceable by the Court (Arts 32.226(i)) and the court are bound to declare as void any law that is inconsistent with any of the 'Fundamental Rights', the Directives are not so enforceable by the court (Art.37), and the Court cannot declare as void any law which in other wise valid, on the ground that it contravenes any of the ;Directives'. Hence in case of any conflict between Parts III and IV of the constitution, the former should prevail in the Court.[39]

The analysis about the character and legal effect of Fundamental Rights and Diretive Principles of State Policy has clearly shown that the current fashionable view of their inter-relation is untenable. It is not necessary to repeat what had been stated earlier, but a brief summary of preposition may be enumerated. The following propositions emerge from the discussion :

(a) Our Constitution is the supreme or fundamental law because all laws and executive action contravening the Constitution are void. Consequently, fundamental rights are part of fundamental laws. Directive Principles, although provided in

the text of the Constitutions are not a part of the fundamental law, for they are not laws at all. No law executive action violating directive principle is void.[40]

(b) Directive Principles are moral precepts which have an educative value, depending on their efficacy, the moral character and sense of duty of persons to whom the directives are addressed.

(c) If fundamental rights had not been enacted, the result would have been disastrous, our liberal democracy could have been converted into a police state as happened during the operation of Emergency from 25 June 1975 to 21 March, 1977.

(d) If Directive Principle had not been enacted, nothing would have happened. For, government exist to work for the social, political and economic welfare of the governed, and legislative executive power enable them to do so. the welfare state has been created in many states whose constitution do not include directive principles, as experience from the example of England, U.S.A. and Canada.

(e) Proposition in (c) and (d) above show that the similarity of fundamental rights and directive principles being two wheels of chariot so that if one is snapped the other would loose its efficacy is misleading and has infact misled the judges.

(f) Fundamental Rights are not selfish individual rights but have a large social, political and economic content. Fundamental

rights carry with the duty not to use them to injure others or the states., or, to put it in move technical terms, fundamental impose the duty not to transgress the permissible limit, of the restriction put on those rights by law.

(g) Fundamental Rights have brought about a social, political and economic revolution by subjecting legislative and executive despotism to the discipline of fundamental rights in order to protect basic human rights and values. Secondly, the equality provisions of our constitution relating to 'untouchability' have brought about a social revolutions, for, untouchable were restored to human dignity and were put on the same level as "High Caste Hindus", to use a familiar expression for lack of better words. Further, discrimination in their favour was expressively permitted.

(h) Neither the enactment nor the existence of directive principles can bring about a social revolution, because their efficacy depends upon implementation by govenrment. These may belong to different parties, may be composed of cable mediocre or incapable person, of, persons who possess integrity and are incorruptible and persons who lack integrity and are corrupt. Further, from their very nature, all the directives were not intended to be implemented all at once and immediately. Several directives conflict with each other and there is also a conflict within individual Directives, and

Part IV contains no guidance as to how that conflict is to be resolved. Further, the emphasis of directive principle depends upon, financial and human resources and skills.

(i) It may be stated here, although it has not been set earlier, that the directives like "A Living Wage" or "The Right to Work" are incapable of fulfilment either immediately or in the forseable future. The right to work, which means the right to gainfull employment has not been available even in the most wealthy and advance democratic countries. For, there is a larger or smaller number of people employed in all of them. As to a "Living Wage", the Supreme Court has held that it is an ideal which can not be realised inforseeable future, infact living wage has been likened by the supreme court to the horizon which risist as we draw near. For what is a living wage at one time may sink to the level of fair wage at another time.

(j) Since Fundamental Rights and Directive Principles are the part of the same constitutions, although their legal status is different, and attempt must be made to harmonize laws made to implement directive principle with fundamental rights. In the case of an irreconciable conflict, fundamental right must prevail over the law implementing directive principles because such a law would be covered by Article 13 (2) and would be void.

Summary

The Directive Principles of State Policy of Indian Constitution have incorporated points from the Constitution of Ireland which is itself an end result of copying Spanish Constitution. Directive Principles are in the Constitution to guide the State in the governance of our nation as a "welfare State". Article 37 clearly tells that, "The provisions shall not be enforceable by any court but the principles should be the guiding force in making the laws."

The critical analysis clearly shows that attempts of propagating the views that Fundamental Rights and Directive Principles are inter-related are untenable. Directive Principles are moral guidance to State for enacting the laws. It is also proved that the soul of the Constitution is that Fundamental Rights are above Directive Principles and in case of any conflict between the two former should be accorded periority or the later.

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Chapter - 7

Hindu Law Reform : The Goal of Uniformity and Gender Justice

Chapter - 7

Hindu Law Reform : The Goal of Uniformity and Gender Justice

In this chapter attempt has been made to trace the legislative history of the Hindu law reforms proposals with the aim of identifying the reasons of those reforms with respect to women's legal rights and also scrutinising the areas where legal equality has not yet been achieved. For the purpose of studying the legislative process of Hindu law reform, it is necessary to critically analyse the official reports, expert's committee reports and Parliamentary Debates.[1] Many people were involved in this process who, strictly speaking, were not part of the government or the state but they were working in close cooperation with the government, they were part of the state. They were influential people who framed the reform proposals which form the basis for further debate and state action.

A detailed analysis of the process of Hindu law reforms reveals the reasons that were put forward to justify the denial of equal rights to women. If we go through the statements made by state functionaries about the basis of their authority then discover the perceptions of these political leaders about the relationship between the state and religion. The behaviour of the state shows that the state wanted to give women more legal rights, it was never

the intention to give complete legal equality to women. The state meant to improve the position of women as a component of its plan of modernisation, but it did not intent to upset or alter, in any substantial manner, the power structure of the family. The state assumed the authority to modify certain rules of Hindu law. The following vexed questions have been discussed in this chapter -

1. How consistently did the state persue its professed aims and what kind of opposition was generated to them?
2. How did the state respond to opposition?
3. What was the significance (implied or explicit) of the justifications of state action for the rights given to women?

A. Hindu Law Reforms

Under the Government of India Act, 1935 the Indians got an opportunity to have a representative Legislature. In 1937, G.V. Deshmukh, introduced a bill in the Federal Legislative Assembly on the Hindu women's right to property. When enacted, this bill purported to give the Hindu widow and widowed daughter's-in-law in the property of deceased male. However, daughter's were excluded from its purview and due to this certain difficulties arose. Even after the Act was amended with retrospective effect in 1938, there were still several separate bills introduced in the federal Legislative Assembly to amend the Act. Mostly private bills were rejected.

A Hindu Law Committee was appointed to suggest the modifications. The first Hindu Law Committee presented its

report in 1941. Although, it was asked to recommend changes in the Hindu women's Right to Property Act of 1937 and 1938, it presented a report with very different recommendation but not accepted. Because the Hindu Law Committee suggested that '*The better plan would be to leave the Acts to their operation for the present and enact a Comprehensive Law*'.[2] The first Hindu Law Committee prepared two bills, one dealing with succession and other with marriage. These were referred to separate joint committees. The joint committee on the succession bill suggested changes and recommended that the bill be recirculated while the joint committee on the marriage bill did not present a report.[3] Upon the recommendation of the joint committee on succession bill the Hindu Law Committee was reappointed by the Government of India by a resolution passed on 20.1.1944. The Committee, with the dissent presented a Hindu Code Bill along with its report in 1947. The Hindu Code Bill was divided into five parts, dealing with marriage and divorce, intestate succession, minority and guardianship, maintenance and adoption and the Mitakshara joint family.[4] In persuance of the report the Hindu Code Bill was introduced in the Federal Legislative Assembly on 11 April, 1947.

The partition of India on 15th August 1947 polarised the population on the basis of religious affiliations on both the sides. Even so, the political leaders of the newly independent state of

India decided to go ahead with the process of reform of Hindu law. The law ministry rearranged the Hindu Code Bill and this draft was referred by the government to a 'Select Committee' of the Constituent Assembly. The 'Select Committee' presented its report containing the revised Hindu Code Bill on 12 August 1948. This Hindu Code Bill was inconclusively debated by the Provincial Parliament and lapsed when that Parliament was dissolved in 1951. When the first elected Parliament assumed office in 1952 the government decided to split the Hindu Code Bill and introduce it as several separate bills. The Special Marriage Bill, The Hindu Marriage Bill, The Hindu Succession Bill, The Hindu Minority and Guardianship Bill and The Hindu Maintenance and Adoption Bill were all passed by 1956.[5]

It is interesting to note that the codification and reform of Hindu Law was not taken up in response to Public demand; rather the state had initiated the reforms in Hindu Personal Law, inspite of the opposition by the orthodox Hindu leaders assumed the responsibility for reform on its own initiative on different occasions the state justified its actions and explained the basis of its authority to reform Personal Laws in different ways.

B. Demand for Change

The demand of the reform of Hindu Law was made by a few social reformers and they started this work but without a systematic plan of action. These were certain members of the

Federal Legislative Assembly who were interested in changes to some aspects of Hindu Law and when gradually the control of the government passed into the Indian hands these Indian political leaders. Without bothering to the stiff opposition, carried their work of reforming Hindu Law to bring about social change with determination.

C. The First Hindu Law Committee

The first Hindu Law Committee which was appointed by the government enlarged its jurisdiction and went much beyond the terms of the reference. The first Hindu Law Committee based its opinion which permits the codification of Hindu Personal Law. In its report it relied on the authority of some of the scholars who had expressed their ideas in treatises and supported the move by writing to eminent people to elicit their views about codification. The questionnaire was distributed to judges, distinguished lawyers and citizens, members of the Central Legislature, High Court bar libraries, heads of religious institutions, women's associations, pandit's associations and others. Copies of questionnaire were published in the papers and some women associations had it translated into the vernacular.[6] The report of the first Hindu law Committee cited the favourable public opinion where it was available but it did not follow the policy that a proposal would not be recommended if the majority of public opinion was opposed to such a change. The government accepted its report and the bill prepared by the First Hindu Law Committee because

'the report had a favourable reception.[17] However, it was keen to dispel the objection that it was rushing with the reform of Hindu Law when political conditions were so extraordinarily disturbed. The law member of the Central Government, *Sultan Ahmad* refuted the charge that the government was hurrying the Assembly and said that the government was simply giving effect to the desire of some Hindu legislators, who had introduced various bills to reform certain areas of Hindu Law. Sultan Ahmad further claimed the support for codification from the fact that in the course of support for codification from the fact that in the course of discussing the motion to refer the succession bill to the joint committee, the majority of the representatives (of Hindus) had shown themselves to be in favour of reform. Twelve elected assembly members made speeches on Part I of the Hindu Code. Sultan Ahmad described eight in favour, three against and one sikh member as undecided about reforming and codifying Hindu Law.[8]

The law member also argued that a number of bills to amend the Hindu Women's Right to Property Act, 1937 and 1938, had made the rights of women so uncertain that it was important to enact part one of the Hindu Code Bill. The Hindu Law Committee was reconstituted by the government to complete the task of preparing Hindu Code Bill and a second Hindu Law Committee was constituted. A draft was prepared for the Hindu Code and this draft was prepared for the Hindu Code and this draft was sent

to few lawyers, of whom nine are reported to have sent their replies to Hindu Law Committee.[9]

The Committee, to gather the public opinion, toured the country. It was met with black flag protest demonstrations and the women constituted a substantial number of demonstrators. A substantial number of people who came before it to give evidence opposed the suggested changes. All these factors forced the committee to put forward a strong justification for continuing to advocate changes in Hindu Law. The Committee classified the public opinion into three categories. According to this classification, the first category comprised those people who where extremely orthodox hence opposed to the entire idea of reform and codification. The second category comprised of those people who were ultra-progressive and who wanted one uniform territorial law for the entire population. However, the bulk of the Hindu community occupied a middle position. Archana Parashar observed :

> "By this observation the committee probably meant that the bulk of Hindus were neither against nor in favour of reforms and, therefore, the committee could recommend that the Legislature proceed with the reforms. But the conclusion about the attitude of the bulk of Hindus was not based on concrete evidence, as the members of the second Hindu Law Committee

had no means of determining the opinions of most Hindus. With regard to the opinions tendered to the committee, it decided that the 'quality' of opinion which favoured codification decidedly outweighed that which was opposed to it. In a similar manner the opposition from women was dismissed with the observation that :

"(Those) women opposing seemed to us to be merely reflecting the views of their menfolk."

According to the Hindu Law Committee, the reason for introducing the changes was that the existing Hindu Law had assumed a harshness which its authors never intended and the real question to be considered was not how many or how few demanded change but whether the proposals themselves were in principle correct and worthy of acceptance. Thus, the second Hindu Law Committee was of the view that the Legislature had the right to decide what changes were needed in the law and when. Ambedkar, the first Law Minister of independent India, justified the Hindu Code Bill as necessary to save the Hindu system from decay and stagnation. He exorted his fellow Legislators that if they wanted to maintain the Hindu system, Hindu culture, Hindu society, they should not hesitate to repair where repair was necessary.[10] Obviously it was assumed that the state had the right or even the duty to determine that reforms were needed. The government rejected the objection that public opinion should also

be taken into consideration on the ground that the Parliament would not be able to function if it had to subject everytime to the *'Vote of the ignorant people outside who do not know the elementary facts of law making'*.[11] As far as the role of Congress party in reforming the Hindu Personal Law is concerned the Congress members, in the beginning had not played any decisive role in the debate on Hindu Law reform. The reason for not taking part in the debate that the Congress Party had boycotted the Legislative Assembly when the Hindu Law reform was being debated. The manifestos of the Congress party in the pre-independence period also did not make any specific reference to the reform of Hindu Law.

However, the Congress dominated Constituent Assembly made it very clear that Hindu Law reform was one of its top priority. Dr. Ambedkar and Pandit Nehru – Law Minister and the Prime Minister respectively, were strong proponents of Hindu Law reform at this stage. But the task of the government was made very difficult due to the division amongst the members of the Congress Party itself. At one stage Dr. Rajendra Prasad, the then President of India threatened to refuse to give presidential assent to the Hindu Code Bill. Eventually, the government decided to abondon the Hindu Code Bill for the time being, and as a consequence, Ambedkar resigned from the government.[12] Pandit Nehru declared the first general election to take the mandate for reforming Hindu Code Bill. He was of the view that after the

general election the newly elected government would be able to counter the objection that the Legislature did not have a public mandate for the enactment of Hindu Code Bill.

In the first elected Parliament the government introduced the component Bills of the Hindu Code individually and with many modifications. As the Constitution had been adopted by this stage, the government justified each bill as an effort to make Hindu Law conform to the provisions of the constitution.[13] The Special Marriage Bill had formerly been a part of the Hindu Marriage and Divorce bill but was dissociated from Hindu Law at this stage. The Law Minister explained that the underlying purpose of this bill was that religious differences should not prevent two people from marrying and unlike the Special Marriage Act, 1872, their marriage should not affect their religious beliefs.[14] This observation indicates clearly that the government had decided to update the Special Marriage Act, and was acting entirely on its own initiative.

The Hindu Marriage and Divorce bill was important in the government's view not only for its specific provisions but, even more importantly, because it represented an essential aspect of national development, namely social progress.[15] The other major reason for introducing this bill was to reiterate that society has changed completely and Hindu Law needed to be changed in order to continued to be relevant. It was also pointed out that the individual matters of faith and religion could not be allowed to

hold up social progress. It was also pointed out that the Hindu Law was scattered in many diverse judicial decisions and different schools of Hindu Law have made it very complicated. That's why the codification of Hindu Law was of utmost importance.

The Hindu Minority and Guardianship bill was introduced with the explanation that it was intended to preserve some special features of guardianship amongst Hindus.[16] And because, at one time or another, all branches of Hindu Law had to be codified. The Hindu adoption and maintenance bill was introduced as the remaining part of the Hindu Code Bill. The justification given was 'bringing the law into conformity with the Constitution'.

While introducing the Hindu Succession bill, the Law Minister said that by passing the Hindu Marriage Act, the House had not only accepted the principle and necessity of having one Uniform Code for the Hindus, but also the responsibility of passing other parts of the Code.[17] In addition to the arguments for the Hindu Marriage Bill, it was argued that this measure would give economic equality to women. The Law Minister stated that an examination of the opinion submitted to the state government revealed that except for the extreme orthodox view which is opposed to any reform being made ... *enlightened* opinion is in favour of the general principles underlying this bill.[18] He also noted that all women members of this House and all the *enlightened* women outside had supported the bill. The argument that Hindu Women, if consulted, would have opposed the measure

was forcefully countered by the state. The Law Minister answered that the matter of giving property right to women could not be decided by consulting women. He said that knowing the women as they are, it would amount to taking advantage of their illiteracy and of their economic dependence to use such an argument; by the same logic when '*sati* abolition' and 'widow remarriage laws' were to be enacted, if women had been asked their opinion about widow remarriage and *sati* they would not have favoured them, yet that would not mean that these laws were not needed.[19]

Thus the state took upon itself the responsibility of modifying those features of Hindu Law which, according to its view, needed to be changed. Public opinion was considered to be in favour of change, in view of the Congress victory in the general elections. It was widely believed that because the Congress won the first general elections it had acquired the mandate of the population for Hindu Law reform. However, the Congress election manifesto did not mention reform of Hindu Law as one of its point. Nehru was forced to address the issue when the opponents of reform fielded against him a *sanyasi* (a renunciate) who symbolically represented orthodox Hinduism.[20] The views of supposed beneficiaries of the reforms – women and untouchables were not considered important. The state had assumed the role of social reformer but patternalism in the performance of that role was also taken for granted. In this the state was continuing the tradition of pre-independence governments where the task of the state (and state

laws) was to 'improve' the life's circumstances of the population. However, the British administrators had, for a long time, professedly avoided reforming religious Personal Laws because state interference in religious matters was considered in appropriate and also because that might impede the natural development of indigeneous people.[21] Instead the nationalist government based its actions on the need to modernise the nation. The range of arguments used by the state to recommend and make reforms, on its own initiative and in the face of stiff opposition, clearly establishes the importance which the state attached to Hindu Law reform. Parallel to the state's effort to establish the need for reform were the arguments advanced to claim the authority to alter religious laws.[22]

D. Source of Authority for Change

The first Hindu Law Committee report was instrumental in giving the idea of codifying the entire Hindu Personal Law which would give women legal equality. In persuance of this that men and women should have equal human rights, the committee prepared two bills dealing with intestate succession and marriage. The decision to codify the entire Hindu Personal Law was in marked contrast from the policy followed by the Britishers in the last two centuries that state would least interfere in religious Personal laws of different communities. We find the changing attitude of the First Hindu Law Committee, the Second Hindu Law Committee report and the attitude of the government changing

from time to time. *For example*, the First Hindu Law Committee report introduced the idea of codification of the whole of Hindu Law, then demonstrated the capacity of the Legislature to do the job, and then went on explain the aims of codification. The Committee suggested that it would not improve a lot of women folk if isolated reforms are introduced in Hindu Law rather it would be feasible to enact a complete code replacing the existing Hindu Personal Law. The authority to do so was derived indirectly, by citing examples of ancient law givers and commentators. It was mentioned in the report that in the old age the task of codifying the law from time to time was performed by successive Law givers and Commentators. These authors implied the process of judicious selection and exposition of the texts in order to mould the orders of the law to the needs of the time, while appearing to make no changes.[23] The first Hindu Law Committee likened the Legislature to the ancient *smritikaras* and commentators and even went to the extent of suggesting that '*The Legislature must, like our law makers of old, deal with the subject as a whole, weaving each part in its proper relation to other parts, and bringing to discharge of this task comprehensive scholarship as well as zeal.*[24]

After justifying that the modern Legislature was the successors to the commentators the First Hindu Law Committee suggested modifications of the following topics and gave justification for the changes :

1. Under pre-reform Hindu Law provisions a widow was not entitled to own property as absolute owner except some specified kinds of property classified as *stridhana.* Her interest in the property left by her husband extended only to a right to enjoy the property without the right to alienate it, except in some specified cases. This was known as the widow's limited estate. The committee recommended the abolition of the limited estate of the Hindu widow on the ground that it was created by a decision of the Privy Council in *Kasinath Bisack vs. Hurrosundery Dosse.*[25] Although there were scholarly opinions both for and against the proposition that the '*smriti*' authorise the limited estate for Hindu women, the First Hindu Law Committee report supported the abolition of the doctrine on the basis that '*smriti*' did not unequivocally authorize such limitation.

2. The changes in the case of sacramental marriage was explained as an effort to '*restore the ancient law at its best*'. The recommendation of the committee to abolish polygamy was based on the explanation that it was not a prevalent practise and it was not suitable for modern day women. It was also expected from the committee to abolish *Sagotra*[26] *marriage* which worked harshly against women whose marriages were declared invalid under them but the committee did not recommend abolishing those rules but suggested the application of the *factum valet* rule, meaning that once a

marriage has been celebrated it would not be declared void for contravening the *sagotra* requirement.

The Legislative Assembly Debates reveal that the government justified its actions as in consonance with the '*smritis*'. Sultan Ahmad the law member claimed that the government was simply following the directions indicated by the traditional law givers. He argued that the traditional Hindu system may not have given extensive property right to women but at the same time most '*smritis*' did not intentionally slight women or deprive them of their right to succession. Renuka Ray a woman member of Legislative Assembly went further and claimed that in ancient times Hindu women were entitled to property rights and that they had lost these because of interpretations given to the rules by later jurists and under the British judicial system.[27]

From the above it is clear that the Hindu Law Committees' main argument was that they reflected the true rules of the *smritis*. The joint committees report modified some aspect of the Succession bill prepared by the first Hindu Law Committee. In its report the joint Committee addressed the matter of the alleged incapacity of women as a class capable of inheriting and the impropriety of granting women an absolute estate. The committee mentioned with approval the '*sutrakaras*' and '*smritikaras*' (The authors) who supported the right of women to hold property and their right to have a share in inheritence from the property of their husbands. Thus the joint committee established the legitimacy of

its proposals to make females co heirs on the basis that *Vedic* literature did not support the theory of total exclusion of women from property rights. *Similarly, with regard to the theory of limited ownership it examined the texts and relied on the authority of Golapchand Sarkar Shastri* to decide that the text had been misread by the courts and wrong conclusions reached. In doing so the joint committee unambiguously reiterated the supremacy of the *Vedic* texts and the task of the legislators was seen to restate the correct law as embodied in the *Vedic* text. It made no specific reference to the previous practise of the government to refrain from interferring with religious personal laws.

The whole exercise was vigorously opposed by orthodox Hindus on the following grounds.

1. They questioned the need and legitimacy of the codification itself.

2. Codification is necessary where the law is unsettled but since various schools of Hindu Law possess written as well as the fact that they have been explained by the highest judicial tribunals, there was no need to codify Hindu Law.

3. The third argument put forward by the opponents of the reform was that no other country had put the whole of the Personal law of any community in a court and it was not right to use legislation to effect fundamental changes in the structure of law.

4. In any case codification would make Hindu law a command of the sovereign and would this result in stopping its natural growth.

The second Hindu Law Committee tried to answer all the objections raised against the reformation of Hindu law and straight away based its authority on the provisions of Government of India Act, 1935. It established the authority to legislate upon matters mentioned in the Hindu Code Bill on the ground that matters like succession, marriage and divorce, infants and minors and adoptions were specifically included in the concurrent Legislative List. The next argument in defence of reforming Hindu Personal Law was that in the past the Hindu law of succession and marriage had already been modified by the central legislature and their validity had not been questioned by anyone so far. In claiming such sweeping authority for the legislature under the Government of India Act of 1935, the second Hindu Law Committee showed a marked change from the stand taken by the first Hindu Law Committee and by the joint committee but the second Hindu Law Committee also assesed that the draft code which it prepared reflected the spirit of ancient law much better than the law as now administered.[30]

We find no general discussion in the report of the 'select committee' of the Constituent Assembly about the basis of the authority of the Legislature but the justifications given for individual modifications provide us the information that the state's

interest was also the basis of the change were not even making an effort to find justification for a proposed change within the traditional Hindu system and that the basis of the rule was stated to be the interests of the state.

While introducing this report into the Constituent Assembly Ambedkar explained the main changes in corporated by the 'select committee'. Changes in Marriage law were put forward as enabling measures and an assurance was given that there was '*no violation of shastra and no violation of smriti at all*',[31] Monogamy for all Hindus was recommended on the grounds that under the *Dharamshastras* the Hindu husband did not always have an unfettered, unqualified right to polygamy. Authority of precedent was claimed as well as prior legislation in some states had already made the Hindu marriage a monogamous union. More importantly the modification in marriage law was justified on the ground that in the existing law, custom had been allowed to trample upon the text of *shastras* which were all in favour of the right sorts of marital relations.[32] This type of reasoning suggest that since the state was upholding the superiority of the true principles embodied in the *shastras*, its reform proposal would be directed towards making the law conform to those ideals.[33]

India gained independence on August 15, 1947 and the constitution was adopted on 26th November 1949 and enacted on 26th January 1950. The constituent Assembly was redesignated as Provisional Parliament. This provisional Parliament was dissolved

in 1951 and the first elected Parliament met in 1952. During this period the provisional Parliament could only discuss the applicability of Hindu Code bill and the relationship between the Constitution and religious law. It was again argued that the Constitution does not permit the discrimination between people on religious grounds. Hence, the government has no power to reform Hindu Personal law. One member said that enactment of such a law for only one community would amount to a secular state encouraging communalism.[34] The government defended its action through the Law Minister who stated that,

> "My ideals are drawn from the Constitution. We are bound to examine every social institution that exists in the country and see whether it satisfies the principles laid down in the Constitution."[35]

The government emphasized that the Constitution permitted it to treat different communities differently without attracting the charge of practising discrimination. He further explained that the reason that there was no reform of Muslim law or that of other religious communities was that these communities had not been consulted and it would be unfair to impose reforms on them without consultation.[36] The Law minister also declared that the state had power to interfere in the personal law of any community and he defended his statement on the basis of the Constitution of India.

Thus, the state made it very clear that the religious laws were not beyond the control of the Constitution and all religious Personal laws would eventually conform to the Constitution. The state on this basis claimed that the Constitution demanded that all laws be in conformity with its principles hence it was imperative to remove all the defects of Hindu Personal Law and make it inconformity with the Constitution.

Most of the reform proposals were explained as bringing Hindu Law into conformity with the Constitution. During the discussion on the Hindu marrige bill the Law minister observed :

> "Why is it necessary to go to the length of finding out what was stated in certain *smritis* 2000 years ago? The ancient law as it prevailed several centuries back is not in existence and in no case can it be resurrected."[37]

It does not mean that the state projected itself as acting against the scriptural Hindu law. State lost no opportunity to defend its actions as in conformity with the Hindu scriptural texts. Many proposals were either claimed to be supported by the ancient *smritis* or to embody the 'correct' version of the smritis rules. For example, the proposal where by the daughter was introduced as a simultaneous heir to the property of the Hindu intestate was explained as neither contravening contemporary law nor what was done in the past.[38] The government even exhorted

the modern day '*shastris*' to be true to their tradition and support the measures which were designed to '*restore to women the rights which they had once enjoyed under the then prevailing shastras*'[39].

While introducing the Hindu Marriage Bill in the Lok Sabha, it was mentioned that the real progress of the coutnry could not only be political or economic but the social progress was also important. The Constitution was aimed at achieving social and economic justice and this bill was designed to give social equality to Hindu women in one area. It was explained that since every aspect of the condition of Indian women could not be improved at once, a beginning was being made in the area of marriage (The criticism that without first ensuring economic rights granting better marriage and divorce right would not really change the position of women was rejected by the government was absurd.[40] In the Lok Sabha, the Hindu Succession Bill was also projected as a measure concerned with questions of social emancipation and progress. It was argued that a society cannot progress if half part of it is reduced to the position of bond slaves[41] and, although, reform of succession law may not achieve total economic emancipation it was of substantial consequence. Thus, the need for social progress provided the state with the authority to change the religious law which, in any case, was not accepted as the embodiment of religion.[42]

The progress of Hindu Law reform proposals through various stages shows a gradual change in the basis of authority which the state claimed in order to reform the law. The first Hindu Law Committee claimed to be working in this the Hindu religious system but by the time several Hindu Law Acts were passed, the state was unambigously asserting its right to decide which rule was to be modified and in what manner.

The difference in the position of the government of 1941 and the democratically elected national government of 1952 was that the later did not even bother to look to the religious text for specific support. Instead it sought to legitimise its actions primarily by reference to social progress criteria and, in the final analysis, the religious sanctity of any rule was not a bar to the authority of the state to modify it. This change in stand in turn indicated that the state had assumed the role of social reformer and it also indicated that it viewed legal reform as the appropriate technology for bringing about social change. In view of the fact that the state showed a strong persistence in reforming Hindu law it implied that law reform was the appropriate means, or at least one of the appropriate means, for achieving sex-equality and uniformity which were the two main professed aims of Hindu law reform were expected to result in, or even assist in, social transformation can be gathered from a close analysis of the substance of the reform proposals.[43]

E. Applicability of Reformed Hindu Law

One of the main goals of Hindu law reform was to introduce uniformity. This aim may primarily have been designed to lessen the complexities of the Hindu law but one of its obvious effect was to enlarge the area covered by the reformed law. To achieve the first objective the state also tried to achieve the second objective i.e. to enlarge the ambit of reformed Hindu Law. In the following section the applicability of the reformed Hindu law and the uniformity in the reformed Hindu Law shall be discussed one by one.

(i) Who is a Hindu?

The main task of the first Hindu Law Committee was to cover as broad an area as possible under the Hindu Code and it did not try to define the term 'Hindu' or specifying the categories of people which were to be governed by Hindu law. The bill on law marriage, in Section 8, mentioned the requisites for a civil marriage : that a civil marriage can be contracted under this Act by any person professing the Hindu, Buddhist, Sikh or Jain religion. In other words this was an attempt to say that the Buddhists, Sikhs and Jains are all 'Hindu'. The second Hindu Law Committee enlarged the definition of 'Hindu' and made it clear that the Hindu Code Bill will be applicable to all persons professing the Hindu religion in any of its forms or developments, including *Virasaivas* or *lingayats* and members of the *Brahmo*, the *Prasthana* and *Arya Samaj*. It was also to be applied on

persons professing the *Buddhists, Jain* or *Sikh* religion. Then the next move was to give the definition of Hindu a negative meaning rather than a positive meaning. The next sub section made it explicit that the Hindu Code Bill would cover any person who was not a Muslim, Christian, Parsi or Jew by religion. The illustration attached to the section made it clear that the Buddhists, Jains or Sikhs have merely deviated from the orthodox practises of Hindu religion but have not embraced the Muslim, Christian, Zorotrian or Jewish religion. This move was opposed by certain sections of the society, for example, *Virasaivas*' demand to be treated on the same footing as the Sikhs and Jains was accepted with the explanation that '*in view of strong sentiments felt by Virasaivas on this matter, it is desirable to meet their wishes to the largest extent possible.*'[44] The protest of the Buddhist that they did not wish to be governed by Hindu Law was not accepted. Similarly, the contentions of the Jains that there should be separate Code of Law was also rejected that the differences between the Hindus and the Jains were not fundamental in religion and they were the part of the Hindu religion.[45] From the above it is clear that the Hindu law reformers wanted to enlarged the definition of 'Hindu' and the aim of the second Hindu Law Committee was to cover as many people as possible under the Hindu Code Bill.

To further consolidate the definition of Hindu the word 'professed' was removed from the definition of the word 'Hindu' as suggested by the second Hindu Law Committee. *Dr. Ambedkar*

explained in the Constituent Assembly that the second Hindu Law Committee had defined a Hindu who 'professed' the Hindu religion, but that the 'Select Committee' had removed 'professed'. He further explained that this was done in order to prevent people from escaping the application of the Hindu Code Bill on the excuse that they did not 'profess' the Hindu religion. The intention of the state was that the Hindu Code Bill should cover every person who belongs to the Hindu faith but who may not necessarily be an active follower of the same.[46] In the *Lok Sabha*, during the debate on the Hindu Code Bill the government tried to dissociate the definition from its religion connotations and sought to explain that 'Hindu' denotes a particular religion. The Law Minister said that the word 'Hindu' did not denote any particular religion or any form of worship or any particular community. Therefore, it should be a mistake to equate Hinduism with religion, instead it should be called a culture – a synthesis of all the varied beliefs, customs and practises of different people.[47]

From the above it is clear that the state's intention was to enlarge the definition of the word 'Hindu' although, the government sometimes justified it on the basis of religion and sometimes on the basis of culture. The state on the one hand wanted to cover as many people as possible in the term 'Hindu' and on the other hand also wanted to be secular and this is evident from the final definition of the word 'Hindu'.

(ii) Uniformity

The next move of the state was to achieve a high degree of uniformity in Hindu Law. Sometimes the reform proposals were offered in order to replace the simultaneous existence of various schools of law with a single law. Sometimes the proposals replaced the provisions of one school by another school and sometimes introduced novel provisions which were untraceable in any existing school of Hindu Law. The next device to introduce uniformity was to curtail the scope of custom by statutory Hindu Law. The first Hindu Law Committee did not see the existence of various schools as an obstacle to codification. It only supported the codification of entire Hindu Personal Law. It recommended that before making fundamental changes it was necessary to survey the whole field and enact a code for the entirely. If however, that was not possible then atleast those branches which would be affected by the contemplated legislation should be codified.[48] They repeated the famous statement made by *Macaulay* that the aim of codification should be uniformity, where possible and divergence, where inevitable.[49]

When the Hindu Code Bill was debated in the provincial Parliament, objections were raised that only a handful of *Brahmins, kshatriyas* and *vaishyas* were governed by Manu's laws while the rest of the community was not; therefore, the repeal of all 'customs' would result in hardship to those who were governed by their own customs, furthermore, they constituted

almost eighty percent of the community.[50] It was also pointed out that it would be unwise to destroy the traditions of the greater majority of the community especially when the did not conflict with any law[51] and when the people governed by the customs had not demanded change.[52] These objections were rejected by the government on the following grounds.

1. Any one who press that custom should override this particular Code would have to prove that custom was more progressive than the provisions of the Code.[53]

2. The power to exempt any custom from the purview of Hindu Code Bill was possessed only by the Parliament and the Parliament has power to make exceptions in favour of customs.

3. To allow customs to continue to operate along with enacted laws would result in an erosion of the power of Parliament.[54]

4. The state law was more progressive in nature. A demand that Hindu Code bill be made optional was turned down on the ground that an optional Code would not be of much use to women as they would not be able to exercise this option provided in the legislation.[55] Yet the same government disallowed the application of the Malabar group of laws even though women under those laws had more rights than under the proposed Hindu Code Bill.[55] Significantly, the result of the decision in both cases was to give the 'uniform state

code procedure over other laws, although the first measure was justified as protecting the interest of the women while in the second the disadvantage to the women was completely ignored. Obviously the objective of better rights for women was persued less consistently than the obejctive of a Uniform Code.[57]

Upon the demand of certain states that the Hindu Code Bill should not be applied to them the Ambedkar emphasized that he would never agree to exempt any province from the operation of this law

> "Let there be no doubt about it at all that the Hindu Code shall be a Uniform Code throughout India. Either I will have this bill in that form or not have it at all."[58]

The legal journals carried articles both supporting and condemning the idea that a Uniform law would create a unified nation. Whether the Uniform Law applicable to all Hindus would divide the nation or would create a unified nation became an issue of heated debate in the press and legal journals. The opponents of the Hindu Code Bill were of the view that the unity of the country could only be forged by a Uniform Civil Code for the entire population and not by a code for Hindus only. Objections were also raised that Hindu Law reform should be the concern only of Hindus. Non Hindus should have no say in that matter and thus

the non-Hindu legislators should not participate in the reform process.

After the election the Hindu Code bill was more openly projected as a means to unify the nation but the proposals for achieving uniformity were less far reaching than at the previous stage. The government explained that the Hindu law reform was being brought forward with a certain specific ideology which included the 'the aim to bring together what are termed Hindus'[57]. It also said that the former foreign government could allow diverse schools of law to operate simultaneously as it was not interested in consolidating the society, but a national government could not ignore its legislative duties.[60]

Summary

Thus, it becomes obvious that under Hindu Law Reform bill the aim of Uniformity of law was consistently proclaimed but only partially achieved. Selective concern only for some customs or institutions was not explainable except as a compromise in the face of stiff opposition. For example, the Hindu adoption and maintenance bill, when originally introduced in the Lok Sabha, did not contain any exceptions. In the later stages the government made a compromise and allowed the continuance of customs which permitted adoptions over the specified age and even of married persons.[61] However, the government itself was not making concerted efforts to achieve uniformity. In many instances the

government retracted from the pre election Hindu Code Bill proposals and incorporated various exceptions to the rules with the result that many customs and institutions of traditional Hindu law continued in operation. But when the Joint Committee or the Rajya Sabha reduced the scope of these exceptions, the government supported the changed proposals and even managed to have them enacted. The foremost example of this was the initial exemption for joint family property governed by *Mitakshara* law from the perview of the Hindu Succession Bill. Understandibly the government was wary of generating the kind of opposition that had compelled it to abandon the Hindu Code bill in 1951. At the same time, however, it is difficult to accept that at the time of first introducing the bill the government was not sure of its capacity to carry through some of the reform measures but succeeded in actually enacting them into law after these proposals had been altered and made more radical by the Joint Committee or by the Rajya Sabha.[62]

References

1. The reasons for doing so is that a study of the legislative process involves more than just a study of parliamentary debates. Normally the government has the option to either introduce an official bill or appoint an expert committee to frame the bill. The bill when introduced into Parliament can either be debated or referred to parliamentary select or joint committees. After that the bill is debated and passed in the two houses, only than it is sent to the president for his assent.
2. First Hindu Law Committee report, 1941, p. 17.
3. Legislative Assembly Debates, ii, 1943, p. 1631; LAD, iii, 1944, p. 1908.
4. In Hindu Law two distinct types of joint families are the mitakshara joint family and the Dayabhaga joint family. Mitakshara joint family is based upon the mitakshara coparcenary which consists of a male Hindu and his three male decendants. The members of a coparcenary cannot be removed more than four degrees from the last holder of the property. All coparceners hold the property jointly and their interest fluctuates with deaths and births. The son takes an interest in the joint property at birth. On the death of a coparcener his share devolves on other coparceners by survivorship. No female can be a coparcener, although wives and unmarried daughters of coparceners can be members of the mitakshara joint family which is a broader body than the coparcenory. In the Dayabahaga school, the father holds the property in his individual capacity his sons acquire an interest in this property on his death. The sons take a defined share each but have a unity of possession and thus it is on his death that a coparcenary comes into existence. The interest in property devolves by succession and not by survivorship. Significantly females can be coparceners under Dayabahaga. (See Paras Diwan, pp. 248-56, 281-83 (1988)).

5. Archana Parashar, *Women and Family Law Reform in India*, p. 81 (1992).
6. First Hindu Law Committee Report 1941, p. 3; See also Legislative Assembly Debates, II, 1943, p. 1409.
7. *See* Sultan Ahmad, The Statement of Objects and Reasons attached to the bill relating to intestate succession. Legislative Assembly Debates, II, 1943, p. 1410.
8. Legislative Assembly Debates, II, 1943, pp. 1628-29.
9. Second Hindu Law Committee Report, 1947, p. 1.
10. Constituent Assembly Debates, 24.ii.49, p. 842.
11. Ambedkar, Parliamentary Debates, 6.ii.51, Col 2467.
12. Parliamentary Debates, 11.x.51, Cols 4733-34.
13. Parliamentary Debates, 18.ix.51, Cols. 2754-55, 2772; Parliamentary Debates, 20.ix.51, Col 293.
14. Lok Sabha Debates, 19.v.55, Cols 7804-08.
15. Nehru, Lok Sabha Debates, 19.v.55, Col 7955.
16. Pataskar, Lok Sabha Debates, 16.vii.56, Col 108.
17. Pataskar, Lok Sabha Debates, 5.v.55, Col 8022.
18. *Id.*, Col 8012.
19. Pataskar, Lok Sabha Debtaes, 2.ii.56, Cols 6972-73.
20. Everrett J.M., *Women and Social Change in India*, p. 187 (1979) quoted by Archana Parashar, *Women and Family Law Reform*, p. 88 (1992)
21. *See* H. Levy, *Indian Modernisation by Legislation : The Hindu Code Bill*, unpublished Ph.D. thesis, University of Chicago, p. 65 (1973) quoted by Archana Parashar, *Women and Family Law Reform*, p. 89 (1992)
22. *Supra note* 5 at 89
23. First Hindu Law Committee Report, 1941, p. 11.
24. *Id.* at 12.

25. 1826, IV, Indian Reports, p. 97, cf.

    In this case there was a difference of opinion amongst the *Pandits* about the correct legal position. The courts' Pandits were of the view that if the widow alienated property without legal necessity and without the consent of the reversionary heirs the alienation would be invalid. Four other Pandits held that in such a case the widow would incur moral blame but the alienation would be valid nevertheless.

26. All Hindus who trace their descent in the male line from the same ancient sage have the same gotra and are called sagotra.

27. Sultan Ahmad, Legislative Assembly Debates, II, 1943, pp. 1411-12; Renuka Ray, *Id.*, pp. 1422-23.

28. *Supra note* 5 at 93.

29. Second Hindu Law Committee Report, 1947, pp. 6-7.

30. *Supra note* 5 at 93.

31. Constituent Assembly Debates, 24.ii.49, p. 832.

32. *Id.* at 832-35.

33. *Supra note* 5 at 95-96.

34. Vidya Vachaspati, Parliamentary Debates, 5.v.51, Col. 2387.

35. Ambedkar, Parliamentary Debates, 20.ix.51, Col 2942.

36. Ambedkar, *Id.*, Col 2949 ff.

37. Pataskar, Lok Sabha Debates, 26.iv.55, Col 6485.

38. Lok Sabha Debates, 5.v.55, Col 8015; *See* also Pataskar, Lok Sabha Debates, 9.xii.54, Cols. 2350-51. Where he claimed that the house had competence to enact the law of minority and guardianship on the authority of Manu according to whom Hindu Law vested the guardianship of the minor in the soverign, the state.

39. Lok Sabha Debates, 25.vii.55, Col 8338.

40. Nehru, Lok Sabha Debates, 5.v.55, Col 7964.

41. Sadhan Gupta, Lok Sabha Debates, 5.v.55, Cols 8053-56.
42. *Supra note* 5 at 99.
43. *Id.* at 100-101.
44. Second Hindu Law Committee Report, 1947, p. 36.
45. *Id.* at 36.
46. Ambedkar, Parliamentary Debtates, 6.ii.51, Cols 2462-63.
47. Pataskar, Lok Sabha Debates, 5.v.55, Col 6959.
48. First Hindu Law Committee Report, 1941, p. 10.
49. *See* Stokes W., *The Anglo-Indian Codes*, p. 10 (1887)
50. *See*, C.D. Pande, Parliamentary Debates, 22.ix.51, Col 3018 cf.
51. T.N. Singh, *Id.*, Col 3127.
52. Ch. Ranbeer Singh, *Id.*, Col 3144.
53. Ambedkar, *Id.*, Col 2993.
54. Ambedkar, *Id.*, Col 3183 ff.
55. Ambedkar, *Id.*, Col 2948.
56. *See* the report of the Select Committee on Hindu Code, 1948, p. 1.
57. *Supra note* 5 at 107.
58. Ambedkar, Parliamentary Debates, 6.ii.51, Cols 2472-73.
59. Pataskar, Lok Sabha Debates, 4.v.55, Cols 7674.
60. Pataskar, Lok Sabha Debates, 26.iv.55, Cols 6481-84.
61. Lok Sabha Debates, 14.xii.56, Col 2989.
62. *Supra note* 5 at 111.

Chapter - 8

Reforms in Minority Personal Laws

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Reforms in Minority Personal Laws

In this chapter attempt is made to trace the legislative history of Personal Law in India as well as the legislative history of the religious personal laws of the Parsis and the Christians. Under the religious Personal laws of the minorities, women had fewer rights than men, except in the case of Parsi law, there was also a considerable amount of diversity in the laws governing Christians and Muslims; yet the state has not sought to reform these laws on the very same grounds that it claimed to reform Hindu Personal Law. State's actions illustrate how the reform of religious personal laws is bound by considerations of 'national integration' and the political stability of the state. The effect of non-reform of religious personal laws of any community on women is a secondary consideration in reaching a final decision about law reform. However in view of the constitutional guarantee of the sex equality and the state's proclaimed adherence to the principles of the Constitution, the state has to justify preserving legal rules that discriminate against women. It, therefore, relies on the argument that the minority communities need special consideration. The result of his consideration is that their personal laws are not reformed at the initiative of the state. The policy of the state appears that the state would reform them if the demand to do so

came from the relevant communities. Thus, the decision whether to reform religious personal laws is linked to the minority status of these communities rather than to considerations about the position of women. Moreover, in a democratic country like India the state is unlikely to be able to disregard the claims of the minority communities for special protection and this results in questionning the personal laws to ensure legal equality for women by the minorities, if the state tries to reform them. Due to the fact that these communities are unlikely to cease being minorities, women belonging to such communities face the prospect of continuing legal inequality perpetuated by religion and upheld by state. In the following pages it has been tried to trace the activities of the state with regard to the reform of minority religious personal laws. Since there has been very little legislative activity with regard to minority religious personal laws, I the researcher has relied on legislative debates where ever available, and supplement them with the debate carried on outside the Legislature to analyse the arguments about the nature of religious personal laws and the authority of the state to modify them. There has been only a little activity directed towards reform of the Christian and Parsi religious personal laws. This will be taken up at the end of the Muslim Personal Law section.

A. Legislative Activity with Regard to Muslim Personal Law

Muslims, like the Hindus, used the opportunities provided by the Government of India Act, 1935 to modify some aspects of

their religious personal laws. Before detailing their activity in the Federal Legislative Assembly, a brief account of the political activities of Muslim political leaders will be useful. At this stage the *Ulema*, i.e., the religious clerics, and the Muslim League were the two prominent groups articulating the interests of the Muslim community.[1] These two groups represented the one section *Ulema* who claimed responsibility for safeguarding the Islamic *Shariah* and giving the Muslim community religious and political guidance according to Islamic principles and commandments.[2] The Jamiat-ul-Ulema-i-Hind was of the view that the *Shariat* should be correctly understood and interpreted only by the *Ulema* who were its rightful custodians. They believed that the correct leadership for Muslims could only come from them. The Muslim League, on the other hand, was concerned with the political and economic demands of the Muslims bourgeois vis-a-vis its Hindu counterpart. It relied on the support from the middle class and rich land owners. After the elections under the Act of 1935, the initiative to change the Muslim Personal law was taken by the *Ulema*. One of the most important activities taken by the Jamiat-ul-Ulema-i-Hind was the introduction of the *Shariat* Application Bill into the Federal Assembly.[3]

The Muslim Personal Law (*Shariat*) Application Act, 1937 is by far the most important legislation in the closing years of the British rule in India. The Act almost abolished the legal authority of customs among the Muslims of British India. Unlike most of

India, the populations in Punjab, the North West Frontier Province and the Central Provinces were governed by these respective customary laws. The Muslim leaders and religious scholars became concerned with the fact that the Muslims in these areas were not following the rules of succession and inheritence enjoined by the *Shariat.* They were influenced by local customs and usages that allowed the Muslims to bequeath their entire property to their male heirs and thus avoid giving all the heirs their due shares as specified by Islamic law. Because they were influenced by local customs and usages.

In 1925 the Jamiat-ul-Ulema-i-Hind passed a resolution disapproving the practice of certain Muslims adhering to customs contrary to *Shariat.* A bill was prepared by the 'Jamiat' and was introduced in the Legislature of the North-West Frontier Province and later enacted as the North-West Frontier Province Muslim Personal Law (*Shariat*) Application Act, 1935. Later on it was desired by the Jamiat-ul-Ulema-i-Hind to get a law passed having a countrywide application over the whole Muslim population. A bill was prepared in consultation with the executive commitee of the Jamiat and introduced by H.M. Abdullah in the Federal Legislative Assembly in 1935. A motion was introduced by the Government of India's Home member, Sir Henry Craik to circulate the bill to elicit public opinion.[4] It was published alongwith the statement of objects and reasons, by the Government of India to gather public opinion.[5]

Objects and Reasons

The statement of Object and Reasons presented various causes for the introduction of the Bill, which run as follows :-

> "For several years past it has been the cherished desire of the Muslims of India that customary law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the plateform. The Jamiat-ul-Ulema-i-Hind, the greatest Muslim religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing the measure to this effect. Customary law is a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definitness which must be the characteristic of all laws. The status of Muslim women under the so called customary law is simply disgraceful. As the Muslim women organisation have condemend the customary law, as it adversely affects their rights, they demand that the Muslim personal law (*Shariat*) should be made applicable to them. The introduction of the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this, the present

measure, it enacted would have very salutory effect on society, because it would ensure certainty and definitness in the mutual rights and obligations of the public. Muslim Personal Law (*Shariat*) exists in the form of a veritable code and is too well known to admit of any doubt or entail any great labour in the shape of research which is the chief feature of customary law."

The position of Muslim women, in few cases, was seriously undermined by the then prevailing customs. Inheritence in particular continued to be ruled by customs, often excluding women, among numerous communities of Muslims. The *Shariat* Bill aimed at correcting such defect.[6] The bill was introduced as an aid to ensure certainty and definitness in mutual rights and obligation by the application of *Shariat*. The mover of the bill supported *it on the ground that it would secure uniformity of law among Muslims throughout British India.*[7]

In the Federal Assembly it was also mentioned that the Muslim women of Punjab condemned customary law as it adversely affected their rights and demanded the application of Muslim *Shariat* Law.[8]

Further reason for introducing the bill was that the Muslim Community was bound in conscience to follow its Personal Laws and so *'The existence of the legal state of things which allowed*

not only deep evasions but defiance of that law is a matter which is deeply resented by the community.'[9] The Federal Legislative Assembly sent the bill to a select committee and considered the Select Committee's Report and the bill in September 1937.[10] During the discussion in the Federal Assembly prior to sending the bill to the select committee, most of the speakers who favoured the enactment of the *Shariat* Bill mentioned the advantages to be gained by Muslim women. The point was made, however, that the opinion sent by the local governments to the federal legislature did not contain any opinion by women's organisations.[11] The Home member of the Government of India made it explicit that the *Shariat* Bill if enacted would not affect agricultural properties as the Federal legislature was not competent to make laws concerning such property. He also mentioned that it would be wise to consider carefully whether individuals should be given the option to decide whether they wanted to be governed by the *Shariat*.[12]

When the Federal Assembly considered the report of the Select Committee, supporters of the Bill repeatedly asserted that it was designed to do justice for women. It was also made clear that Muslim women had expressed their strong support for the measure.[13] Muhammad Ahmad Kazmi claimed that the Bill was necessary primarily because Muslim women were being denied their rights in matters of succession. He also accepted that the Bill was extremely limited in its scope as it did not apply to

agricultural land which constituted about 99.5% of all property available in India. According to him the idea behind seeking the sanction of the House was that in addition to giving some little relief to the females of the country, the *'representative House for the whole of India' should accept the principle that Muslim Personal law should be applied to Musim.*[14]

However, at this stage some members sought two important modifications to the Bill. An objection was raised against invalidating the existing laws which gave protection to the *Zamindars* (big land holders) and ensured that their property could not be divided. It was argued that since protection has been given to a certain class of people, i.e. the land holders, to ensure that their property was safeguarded against division, this right should not be taken away only from Muslim land holders. Mohammad Yamin Khan claimed that these laws have been made with the full concurrence and common consent of the *Musalmans* for protection of their interests.[15] In response, the government explained at it intended to modify the bill so that laws which it had passed on various aspects of usage and custom would remain valid. This action was described by the supporters of the Bill as denying justice to women and he cautioned that '*To take shelter under the laws which have been passed by the various legislatures in India where they (women) had no hand would not be a good thing.*[16]

Jinnah supported the Bill on the ground that it would enable women to own property and 'the economic position of women is the foundation of her being recognised as equal of men and share the life of men to the fullest extent.'[17] He proposed an amendment that individual Muslims should be given option to decide whether they wanted to be governed by *Shariat* or by customary law. In support of his argument he said that Cutchi Memons Act, 1920, gave a similar option to individuals, and more than half of that community had elected to be bound by the Act. The reason for the support of Jinnah was that he was not a traditionalist himself and also he was trying to protect the rights of rich landowners. Although this amendment was strongly opposed by the Jamiat but it was finally carried in a modified form. The final Bill which was enacted later on gave individuals an option to be governed either by the *Shariat* or by their customary law only with regard to adoption, wills and legacies.[18] Except these three matters Muslims were to be governed by Islamic *Shariat* Law in all other matters mentioned in Muslim Personal Law (*Shariat*) Application Act.[19]

The object of Section 2 is *firstly*, to abrogate custom and usage which may be contrary to the principles of Islamic law and, *secondly*, to grant certain exceptions. Fyzee says that the words 'intestate succession' clearly show that the power of testamentary succession enjoyed by certain communities is not taken away. These communities are *Khojas* and *Memons*. Thus, they may allow a custom which allows the disposition of even whole of

property by way of will, and which is clearly unIslamic. On the other hand, if a female receives property and by customary law the property is to revert to heirs of the last male owner, such custom being contrary to Islamic law, is abolished and she holds it in all respects as an heir under Muslim law.[20]

In conclusion, *the enactment of Shariat Act resulted in the express acceptance by the state legal system of the principle (with some exceptions) that Muslim ought, in personal matters, to be governed by the Shariat and not by custom. The state, in this way, contributed to enhancing the Islamization of the Muslim Community.* Islamization is here used to describe the increased tendency of the Muslim community to create a distinct identity separate from majority Hindu community.[21] In the words of Archana Parashar :

> "The political situation at the time was conducive to heightening the distinction between the Hindus and Muslim. The Governement of India Act, 1935 has accepted the principle of communal representation and the Muslim League was specifically representing Muslim's interest. However, a homogeneous Muslim popultion did not exist as the Muslim community and groups and the *Ulema* relied on the *Shariat*, or the orthodox Islamic principles, to forge a common identity. The customary practices of various Muslim

> groups, in addition to deviating from orthodox Islamic law, were invariably the pre-conversion customs retained by the Hindu convert to Islam. It was, therefore, to be expected that the *Ulema* considered it crucial that all custom be denied judicial recognition."[22]

Due to the difference of attitude between the Muslim League and Jamiat the government was able to retain certain custom which were clearly against the Islamic Law (*Shariat*). Muslim League which was representing the interest of wealthy land owners helped the govenrment to retain certain customs of Khojas and Memons against the wishes of the *Ulema* of the Jamiat.

Thus, uniformity in Islamic law was not achieved except in a very limited way, and the advantages gained by women were important more for their symbolic value. The enactment was important because it set the pattern for the Muslim leaders' subsequent legislative activities in post independence India. The government at this stage was neutral, in the sense that it allowed (within bound) individual communities to enhance or diminish the scope of their religious personal law.[23]

B. The Dissolution of Muslim Marriages Act, 1939

The Dissolution of Muslim Marriages Act, 1939 is another milestone in the Legislative history of Muslim Personal Law. The Dissolution of Muslim Marriages Act, 1939 may be said to be

another attempt by the *Ulema* to utilise the legislature to 'rectify' the prevailing situation in regard to the Muslim women to dissolve their marriages. Although, the *Qur'an* explicitly permits the dissolution of marriage by women in case of necessity, there are various school of thoughts about the conditions under which this permission can be used and there is no agreement about the procedure to be followed. Under *Hanafi* Law a women's marriage would stand dissolved on her apostatising from Islam. In India the majority of the Muslims follow the *Hanafi* law. In the absence of any other alternative for release from a difficult marriage, many Muslim women who wanted to get release from marriage got converted to another religion, hence getting their marriage dissolved. The judicial attitude in India was that this was a valid dissolution of marriage. The classical Hanafi law of divorce was causing hardships as it consisted no provision where by a Hanafi wife could seek divorce on such grounds as disappearance of the husband his long imprisonment, his neglect of matrimonial obligations etc. Finding no other way to get rid off undesired marital bounds, many Muslim women felt compelled by their circumstances to renounce their faith. This was causing great trouble to the *Ulema* that the Muslim women were apostatising from Islam. They decided to take action to rectify the sitution. The 'Jamiat' decided to have a law enacted empowering Muslim judges to dissolve a Muslim marriage on the application of a woman in those circumstances in which it was causing hardship

to them. Mohammad Ahmad Kazmi introduced a bill in the Federal Legislative Assembly in 1936.[24] The Bill was prepared by the leading *Ulema* of the Jamiat which was based on *Al-Hilat Al-Najizalil Halilat Al-Ajza* (a lawful devise) - A book written by Maulana Ashraf Ali Thanvi. This book was published in 1932 and the compiles of the book recommended that Muslim members of the Federal Legislature should introduce a bill based on the book. The compiler of the book belonged to the world famous *Deoband* School and during the preparation of the book he had gathered opinions from other religious scholars in India and Hejaz.[25]

The main feature of the bill was that for the purpose of dissolving the marriage at the instance of a Muslim women, it accepted that the principles of Maliki Law be applicable to all Muslims. In preparing the bill the principle of '*Takhayyur*' or eclectic choice was adopted which permits the replacement of the school of Islamic law with another in certain circumstances. The bill was sent to a 'Select Committee' and the Federal Legislative Assembly considered it in 1939.

The statements of Objects and Reasons[26] attached to the bill several reasons for introducing the bill. The main reason was said to be that the existing law had caused 'unspeakable misery to innumerable Muslim women in British India'. The statement of the Reasons and Objects of this Act indicates the circumstances in which the Act was passed :

> "There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently ill treating her on certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India, the Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provision of the Maliki, Shafei and Hanbali law. Acting on this principle the *Ulema* have issued the *fatwas* to the effect that in castes enumerated in clause 3, part A of this Bill, a married Muslim women can obtain a decree dissolving her marriage.
>
> As the courts are sure to hesitate to apply the Maliki Law to the case of a Muslim women, legislation recognising and enforcing the above mentioned principle is called for in order to relieve the suffering of countless Muslim Women."

In the Federal Assembly, the Bill was described as constituted of three parts. It gave grounds for dissolution of marriage, described the effect of apostasy on the marriage tie, and

provided for the authorized court personnel to dissolve a Muslim marriage. The Bill clearly enumerated the grounds on which the Muslim women could seek a divorce.[27]

During the debate in the Legislature it was repeatedly mentioned that legislation was necessary because the courts continued to follow precedents set by themselves on an incorrect understanding of Islam, despite the fact that the Muslim community had expressed its dissatisfaction over their view.

The mover of the Bill explained that there are three schools of apostacy. The only school that held that apostasy dissolved marriage was the Bokhara school. But the view also contemplated imprisonment or detention of a woman until she returned to Islam. The *Ulema* were of the opinion that to adopt the first part and leave out the other, as was being done by the British courts, was not proper. Furthermore, since the enactment of the Caste Disabilities Removal Act, 1850, the forfeiture of civil rights that could have been imposed on a woman at apostasy had been removed. In Kazmi's view now that inter-marriages between different communities were encouraged and freedom of religion was advocated, the Muslim community could not support the contrary position that apostasy by a woman should put an end to her relations with her husband.

Moreover, he argued that what had been prescribed as a punishment by Islam should not be allowed to be turned into a

right by the legislature or the courts.[28] Kazmi sought further support from the fact that the consequences of apostates in other religions were similar to those being prescribed in the present Bill, i.e., no community gave the apostate the right to automatically dissolve the marriage by her (or his) unilateral act. It was claimed that public opinion also supported the view that mere apostasy from Islam would not dissolve a Muslim woman's marriage. Syed Gulam Bhik Nairang disclosed that he had sent questionnaire to 89 *Ulema*, 65 of whom have replied. Except for one or two the rest were of the opinion that the true doctrine of Muslim law was that marriage was not dissolved on apostasy[29]. When the Bill was under discussion, prior to being sent to Select Committee, the government had pointed out that it should be made clear that the bill was not applicable to '*Shias*' whose law was different from that of the '*Sunnis*'. But later on the '*Shias*' were also included into the Act because the government did not raise any objection. As far as the clause that only a Muslim judge would have authority to dissolve a Muslim marriage was not accepted by the government.

The government had already made it clear that if the Muslims insisted for the inclusion of clause relating to the Muslim judges the government would oppose the Bill as a whole. The main reasons enumerated by the government was that if the clause is included in the Bill it would amount to casting aspersions on the judicial honesty of the judges. It was denied by the Muslim

members that they did not mean casting aspersions on the judges or they doubted the integrity of the judges but they said that under *Shariat* a non-Muslim judge could not be appointed for such purpose. But when the government showed no signs of accepting these claims the Muslim members acquised and explained that '*It is better to have a measure at the present stage as it is, rather than insist on a thing which does not appeal to the country at the present time.*[30] This was an important admission as it indicated that if there was no possibility of their demand being met, the Muslim religio-political leaders would make compromises and accept Legislative provisions that went against the *Shariat*.[31]

When the *Ulema* found that the final shape of the Act was not in consonance with *Shariat* they tried to stop the law coming into effect by sending a petition to the viceroy to withold his assent. But they could not succeed. The reason for not getting success was that the Muslim League did not support them in their effort to retain the provision that only Muslim judges should have the competence to dissolve Muslim marriges. The importance of this Act cannot be undermined in the sense that this Act, for the first time, gave the Muslim women of India the right, although limited, to ask for the judicial dissolution of the marriage. The Act also helped Muslim women from taking the extreme step of renouncing Islam to get their marriages dissolved. The role played by the *Ulema* in introducing the *Shariat* Bill and the Divorce Bill in the Federal Legislative Assembly illustrates clearly that when

political representation first became available to Indians under the Act of 1935, the Muslim religio-political leaders were willing to use the Legislative process to modify existing personal law practices. The *Ulema* efforts to have all Muslims govenred by the *Shariat* and to provide as limited right of divorce to women so that they do not apostatise from Islam are all ilustrations of the use of the political process to confirm the hold of religion on the lives of the people.[32]

In view of the above reasons, the Dissolution of the Muslim Marriage Act, 1939 was passed. It is applicable to all Muslims in India who may otherwise adhere to Hanafi, Shafii, Ithna Ashri or Ismaili law. The Act is enforced throughout India except in the state of Jammu and Kashmir, where a parallel enactment by the name of Jammu and Kashmir State Dissolution of Mulsim Marriages Act, 1942 is enforce. The words used by section 2 of the act as follows :

'Women married under Muslim Law' and not 'a Muslim women'. This protects women who have already abjured Islam in the hope of getting their marriage dissolved and are thus no longer Muslims; they also can get their marriage dissolved on any of the grounds given in the Act. The Act consolidates and clarifies the Muslim law relating to suits for dissolution of marriage by women.

It is applicable to all Muslims but the provisions of the Act have to be applied by taking recourse to ordinary process of the

civil courts of the country. An appeal against order of the sub ordinate court is competent under section 96 of the Code of Civil Procedure.[33]

C. The Special Marriage Act, 1954

After the partition of India the Muslim leaders who had identified with Indian nationalism joined the process of nation building, but the bulk of community, neither trusting nor trusted remained aloof and "it continued to cower, rejected, mistrusted and afraid.[34]' The greater proportion of those Muslims who remained in India were in the unenviable position of being identified with Pakistan while being citizens of India. They were, in the eyes of the majority community voted for the creation of Pakistan, hence not entitled to any special status in independent India. Due to this problem the Muslims started thinking about group solidarity and this group solidarity in turn raised suspicion about their bonafides and their loyalty to nation. In such changed circumstances in post partition independent India the religious identity of the Muslims became very important and a common religious Personal Law constituted an important component of that group solidarity and identity. It is against this background that the response of the national politician to the issue of reforming Muslim Personnal Law has to be understood. The state wanted to reform Hindu Law and give women legal equality and to make Hindu Law in conformity with the Constitution. It was also

expected from the state that Muslim Personal Law, i.e. *Shariat* which gave lesser rights to women than man in corresponding situation should also be modified on the lines of Hindu law. But it was very difficult for the state to integrate into one nation. Population bitterly divided along religious lines. The goverment was not in a position to introduce changes in Muslim Personal law as it might be interpreted as persecusion of minorities, especially the Muslims. The policy adopted by the state in the post partition India was to 'encourage' the minorities to integrate and become part of the Indian nation voluntarily and not by coercion. The statements and the speeches of the national leaders of that time bear testimony to the above assertion. At that time, any attempt to reform or replace Muslim Personal Law would have been counter productive thus, harming national unity and integrity. Although, the government always asserted that under the Indian Constitution it had every right to change religious Personal Laws but in practice it did nothing to alter or change the Muslim Personal Law as it did with Hindu personal Law.

In the following pages the government's activities and the statements of national leaders with regard to Muslim Personal law will demonstrate that the government gave utmost priority to integrate the minorities especially the Muslims into the national mainstream rather than to provide equality for women. The government attitude was that the *Shariat* is immutable and the government would interfere in the matter for change only when a demand is made by the community itself.

This vexed question of changes in Personal laws again came up for discussion during the debate on the Special Marriage Act, 1954. During the debate in the Lok Sabha Kazi Ahmad Hussain argued that Muslims were a large minority in the country and the views of their representative must be heard and accepted on any change that might be made to their Personal Law. He expressed the fear that the Bill would result in the curtailments of the rights of property and divorce which Muslim women then enjoyed.[35] Another objection that was raised during the debate was that, if enacted, this law would encourage to circumvent their religious laws and obligations.

Pandit Jawaharlal Nehru, the then, Prime Minister of India explained that :

(1) He did not wish to hurt any one's religious feelings but it appear to him that the extra ordinary reverance shown to what was called Personal Law seemed to be completely misplaced, whether it be a Hindu Personal Law, Muslim or any other,

(2) It was admitted that society has changed (which was undeniable) then it was not wise to bind with a certain social organisation which might have been good at one time but did not suit a later stage.[36]

Finally, the Government of India did not make any exceptions for the Muslims and the Act was passed. After passing of the Act

all Muslim orthodox parties severely criticised the passage of the Act and demanded that no Muslim should be allowed to marry under its provision. The main argument, in the words of Mohd. Ismail, was that –

> "Muslims hold religion as the most valuable thing in life and their whole life is governed by their religion and they cannot conceive of the possibilities of the abrogation of *Shariat* law on any account."[37]

The Muslim League passed another[38] resolution in March 1955 expressing grave concern over the enactment of Special Marriage Act and the government's refusal to exempt the Muslims from the perview of the Act. The Muslim league warned Muslims that this Act was only a beginning in the move to inroduce a Uniform Civil Code in the country. The resolution added that :

> "This meeting reiterates that the Personal (*Shariat*) Law of Muslims is a vital part of their religion and the substitution of it by any other law is a direct negation of the religious freedom guaranteed to them in the Constitution."[39]

Thus, not only were the Muslim leaders asserting that the Parliament could not interfere with the *Shariat* they were also asserting that Parliament should not do anything to 'encourage' Muslims to leave their religion. The implication of this argument, although not specifically articulated, was that the government was

expected to facilitate the control of religion over individuals. The state at this stage declined to accept the Special Marriage Act claims about the sanctity of all religions were ignored, helped to discount the Muslim members' claims but at the same time the state did not unequivocally declare its right to modify the religious Personal law of any community; instead it publicised the Special Marriage Act as a secular law which had nothing to do with the religious law of various communities.[40]

D. Hindu Law Reform Acts

At the time of the debate on Hindu Law reform bills in the Parliament and before that when the Hindu Code Bill was debated in the Constituent Assembly the government was repeatedly faced with the argument that a secular state should not legislate for only one religious community i.e. Hindu Community. Another argument vehemently put forward that if Hindu law was being reformed because it discriminated against women why not Islamic Law. Islamic law should also be reformed as it also discriminated against women. During the debate in the Constituent Assembly some members argued that if it is admitted that everyone has equal citizenship righs irrespective of their religion then the government should have introduced a bill that applied to every citizen and not to Hindus only.[41] After the adoption of the Constitution it was again pointed out by the opponents of the Hindu code Bill if monogamy was a desirable principle it should be made the rule

for every community including the Muslims. Similarly it was also argued that the benefits being bestowed on Hindu community should be extended to all the communities living in India.

One Muslim member Khwaja Inaitullah said that secularism did not mean that the same Personal laws should be framed for all communities. He suggested that Hindu law was being modified only because it had been undergoing changes but Muslim law had not chnge for the last 1350 years, nor was it likely to be changed in the days to come, since Muslims believed that their laws for marriage and division of property was made by God.[42]

The government's stands response was of a changing nature. The government claimed, after the first election that the government could not shirk the task of bringing in a law that would be applicable to everyone irrespective of religion. Later on the government also assured the Muslim community that it could not change or reform Islamic community at the moment because the Muslim community was not taken into confidence on the subject and it would be undesirable to initiate the process without consulting the people concerned.[43] If we go through the attitude of Dr. B.R. Ambedkar in the Constituent Assembly and later on as the Union Law Minister we find a change in his opinion. In the Constituent Assembly, Ambedkar had emphatically stated that being a secular state did not mean that the state had to draw back from regulating the lives of various communities governed by their

own special laws.[44] But when, after the enactment the Indian Constitution the government's emphasis on consulting with the Muslim community as a crucial factor the Union Law Minister changed his views and explained that a secular state did not apply that the sentiments of the people should not be taken into consideration. Dr. Ambedkar said :

"We are not here to flout the sentiments of the people."[45]

This answer of Ambedkar met with the response from Syama Nandan Sahaya that while the Law Minister had shown concerned for non-Hindus, he did not seem to have any regard for the feelings of Hindus.[46]

However, the government did not indicate whether it was going to initiate the process of consultation within a specified time. The significance of the government statements regarding the state's competence or authority to modify Muslim Personal Law, is that the community was to be given the option to decide when or if they would agree to have there religious Personal laws confirm to the Constitution.[47]

As we have already seen that during the debate on Hindu Code Bill and later the Hindu Law Reform Bills in the Constituent Assembly and the Parliament the opponents of the Bill had raised the point that a secular state should legislate for all religious communities and not only for the Hindu community which is the majority community.

On all such objections the answer of the government was that this was the first step for bringing uniformity and finally the government would try to enact a Uniform Civil code.[48] But we will see later that the government's stand underwent a major change when the Criminal Procedure Code was discussed in the Lok Sabha in 1973.[49] It reflects that either the government did not want to enact a Uniform Civil Code or it was not in a position to enact such a code due to several factors including the religious sentiments of the Muslim community and the political expediency both.

E. The Code of Criminal Procedure, 1973 (Controversy Relating to the Definition of 'Wife') Section 125(1) Explanation (b)

In 1973 the government introduced a new Criminal Procedure Code Bill in Parliament to replace the old Criminal Procedure Code of 1898 mainly to provide a uniform law of maintenance.[1] Under section 488 of the code of 1898 a wife could obtain maintenance from her husband in summary proceedings, but due to the meaning of the word 'wife' the proceedings were dropped when a husband divorced his wife. In this situation the divorced wife was not entitled to get any maintenance from her former husband. This state of affairs was very common in cases of Muslim wives. Whenever the magistrate ordered maintenance allowance in favour of wife the husband was at liberty to defeat the provision of law and the order of the court by pronouncing

divorce. That's why one of the matters dealt within the Criminal Procedure Code Bill was the maintenance of divorced wife. Thus when the Cr.P.C. bill was introduced in the Lok Sabha the government took cognizance of this difficulty faced by Muslim wives and provided an explanation to the section 125(1) that under the maintenance provision the word 'wife' would include within its meaning a divorced wife.

The definition of the 'wife' as given in Explanation (b) of Section 125 (1) of the Cr.P.C. is noteworthy for the purpose of the analysis.

> "Wife includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried."

The definition of the wife is objectionable to the scholars of Islamic jurisprudence as the same is foreign to Islamic concept of wife. The definition of the wife given in earlier code[50], thus, have been replaced by a new definition. On the basis of legal fiction, the two strangers being of opposite sex are treated to be husband and wife under section 125 of the Cr.P.C. for the purposes of maintenance even after divorce. When the bill was being debated in the Parliament it was objected to tooth and nail by Muslim members in the legislative house viz., Ibrahim Sulaiman Seth, G.M. Banatwala, C.H. Koya and others. They objected the explanatory clause defining the term 'wife' and they advanced

potent advocacy that Muslims must be exempted from the ambit of the definition of the wife.

Ibrahim Sulaiman Sait of the Muslim League objected to Section 125 of the Cr.P.C. Bill which was to replace Section 4, of the older Cr.P.C.[51] He claimed that the provision erodes the rule of Muslim Personal Law under which the term 'wife' does not include a divorced wife. Furthermore, under Islamic Law maintenance is payable to a divorced woman only for three months or three menstrual periods after the divorce (to determine whether or not she is pregnant to the husband or if she is pregnant at the time of divorce, then she is to be supported by the husband while the pregnancy lasts. The member said that since Muslims are governed by their personal law they have to follow it, and if the provision is not deleted from the Cr.P.C. then atleast Muslims should be exempted from its perview. In the opinion of Sait Muslim Personal Law includes specific procedures with regard to all matters concerning the life of a Muslim and these directives have been laid down by God himself in the *Qur'an*. Hence, he could not support the proposed explanation to the section, as it was opposed to Muslim Personal Law. This was a significant claim with respect to the relationship between Religious Personal Laws and the Constitution which almost went unchallenged in the Lok Sabha.[52]

Sait also reminded the Prime Minister and the Congress Parliamentary party which had given repeated assurances that

there would be no interference with Muslim Personal Law.[53] With Sait, another member of Muslim League, Mohd. Koya, tried unsuccessfully to introduce an amendment to the effect that the explanation to section 125 that 'Wife includes a divorced wife' be deleted. Koya asserted that he thought it was against common sense that he could be asked to maintain a divorced wife until she married again and it was not his duty to find her another husband.[54]

The Law Minister pointed out that the explanation in section 125, Cr.P.C. did not affect the civil status of the husband and wife in any manner and besides this made the following observation [55]

> "We have received a lot of representations which show that after divorce, women are generally in a very bad plight and it is a very difficult social and humanitarian problem...; I do not think that Muslim Personal Law comes into the problem."

He explained the reason for introducing the explanation to section 125, thus :

> "The Government had received information (the post-divorced circumstances of woman were economically stringent and therefore) after divorce women were in bad economic circumstances and on humanitarian grounds, they should have some help."

He explained that 'A helpless lady (alongwith some other categories of people) is given relief' no one could really say it was againt the Muslim Personal Law. Infact it was consistent with the humanitarian traditions of Muslim Personal law.[56] The government did not directly address the claim made by Sait that Muslim Personal Law had laid down directives for all matters and being divinely ordained these could not be altered. It had the opportunity to articulate its stand *vis-a-vis* its capacity to reform Muslim Personal Law, but it chose to treat the subject as not concerned with Personal law.

Rejecting all the pleas and amendments the section on maintenance was adopted by the Lok Sabha on 30th August, 1973. However, the Muslim religious and political leaders exerted sufficient pressure on the government to reconsider the Cr.P.C. Bill, Press media especially urdu was adopted as potent tool to oppose the proposed amendment of Section 488, Clause 3 of the then existing Cr.P.C. During that political situation, the resentment of Muslims was duly recognised. Meanwhile, various religious-political organisation sent letters to the then Prime Minister, Mrs. Gandhi protesting inclusion of the explanation to Section 125 in the Cr.P.C. Bill.[57] As a rare instance "In the legislative history of India, discussion on the draft of the (new) Criminal Procedure Code was reopened at the instance of the then Prime Minister Mrs. Indira Gandhi in Parliament at a very unusual stage."[58]

The Cr.P.C. bill was again taken up for discussion in the Lok Sabha on 11th Dec. 1973 and the decision of 30th August, 1973 was rescinded by the government. The effect of such recision was that the clause and all the amendments concering it were reopened for discussion.[59]

During the debate in the Lok Sabha Jyotirmoy Basu described the importance and significance of seciton 125 for Muslim women. In support of his contention he cited certain versus of the Holy *Qur'an* and claimed that the *Qur'an* provides maintenance to the divorced women on a reasonable scale. He also criticised the Privy Council decision in *Agha Mohamed Jafar vs. Koolsum Bibi.*[60]

The government finally succumbed to the pressure of the Muslim community and the law minister himself moved an amendment to section 127 and explained its purpose thus :

> "Under the customary or personal law of certain communities certain sums are due to a divorced women. Once such a sum was paid, the magistrate's order giving maintenance (under section 125) could be cancelled."[61]

The law minister was making a reference to Muslim Personal Law, under which the prospective husband promises to pay a specified sum to the wife at the time of the marriage. The sum is called dower or *Mehr* and the usual practise is that the sum is

paid to the wife at the time of divorce. Mr. Jyotirmoy Basu asserted that by this political move in the shape of the amendment the spirit of section 125 has been fully negatived. However, the amendment was accepted by the Lok Sabha.[62]

Thus, in the form of section 127 clause 3(b) exception was added during the debate. It is abundantly clear by the perusal of the legislative history that section 127 clause 3(b) was brought to safeguard to Muslims and their Personal laws. In the words of Tahir Mahmood :

> "In the wake of mounting opposition by the Muslims, Mrs. Gandhi (the then Prime Minister) rather created history by ordering reopening of discussion of the disputed position of the Bill at a very unusual stage. Finally, a saving clause (Section 127 clause iii(b) in effect protecting the Muslim Personal Law was inserted in that position.[63]"

He further observed :

> "The position as finally enacted laid down that though the courts could grant maintenance to a divorced wife, at the time of so doing, they should give due consideration as to whether she had already realised from the husband her post-divorce entitlement under the personal Law of the parties.[64] This was obviously meant to protect Muslim Personal

Law on the point as traditionally interpreted. The way in which the amendment as originally proposed, was modified, seemingly satisfied the orthodox Muslims.[65]

Archana Parashar comments on the whole exercise in the following words :

"The consequences of this decision were far more significant for women than for men as provisions of religious personal laws more often discriminate against women. The govenrment did not give any explanation for the decision to abandon its pursuit of a humanitarian goal, that is, to prevent undue hardship to divorced Muslim women. When the initial proposal for modifying the Cr.P.C. was made, it was recognised that Muslim women were in a particularly vulnerable position because of the case with which a Muslim man could divorce his wife. When the modified Sections 125-27 Cr.P.C. were accepted there was no change in the right of the Muslim husband to divorce his wife extrajudicially or of the right of the wife to receive dower or *Mehr* and the particular difficulty faced by Muslim women remained unchanged. The only outcome of the exercise was that the government was seen to subordinate the interest of women in the face of opposition from the male

religio-political leaders of the Muslim community. From now on the Muslim leaders seem to have *Carte blanche* with regard to matters claim to be governed by their personal law. Not only did they object to mandatory provisions but also to purely enabling provisions like those in the adoption bill."[66]

F. The Adoption Bill, 1972

The legislative history of Adoption bill dates back to 1956 when an attempt was made by Mrs. Jayshree Raiji to introduce the adoption of children bill into the Lok Sabha in 1956. But she could not persue the bill as she was persuaded to withdraw the bill when the Union Law Minister promised that the government would introduce a bill shortly. Acting on this promise, though after about 10 years, in 1965 the Indian Council For Social Welfare, in collaboration with the Indian Council of Child Welfare and other welfare organisations, prepared the Adoption of Children Bill. The Draft of the bill was sent to the Union Law Minister and members of Parliament. The following years Mrs. Tara R. Sathe introduced the adoption of Children Bill into the Upper House. But this bill could not be enacted as law. Again a new bill was introduced into the Rajya Sabha in 1972. The 1972 bill was referred to a joint committee in order to decide whether, among other things, it should apply to all sections of Indian society.[67]

The report of the joint committee recommended that the bill should be made applicable to all Indians except 'scheduled tribes'. The three Muslim members of the joint committee were not in agreement with the recommendation of the joint committee as they were of the view that Muslims should also be excluded from the perview of the proposed law. Due to the dissolution of Lok Sabha in 1977 no discussion or debate took place on the adoption bill. The Janata Government introduced a new adoption Bill but withdraw it from following opposition from the Muslim community. The term of the new Janata Government was very short and it could not complete its full five years term. Hence, no new bill could be introduced by the Janata Party government. The Congress government regained office in 1980 and reintroduced the adoption bill in the modified version which excluded Muslims from its perview. This exclusion of Muslims from the perview of adoption bill was condemned widely.[68] To ascertion the views of Muslims community and other minorities the bill was referred to the Minority Commission for its view. The adoption bill was designed to give every individual the right to adopt a child. A necessary condition for adopting a child was that the consent of other spouse was necessary, if the person adopting was married. The procedure for adoption was provided and the effects of adoption enumerated.[69]

The main reason for the opposition to the bill by the Muslim religious scholars and political leaders was on the ground that the

provisions of the proposed law conflicted with the tenets of Islam. There were three sepecific objections against the adoption bill :

(1) That under the adoption bill one of the legal consequences of the adoption was that the adopted child took the name of the adopting family. The Muslim leaders objected that the *Qur'an*[70] prohibits such a change of name and this prohibition is not a mere recommendation but is mandatory.

(2) The second legal consequence of adoption under the bill was that under it, the adopted child could not make specified matrimonial alliances. This amounted to declaring some relations as *haram* (Prohibited) but under Islamic principles Allah alone has the prerogative of declaring things and acts as *halaal* (Permitted) and *haram* (Prohibited). According to Muslim leaders by prohibiting relationships which *Allah* has permitted the Legislature was claiming authority which under Islamic law is possessed only by Almighty *Allah* which is not permitted under Islam.

(3) Since the adoption bill provided that the adopted child would become heir to the property of the adopting parents, this would naturally alter the shares of the heirs hence would amount to an interference with the scheme of succession provided by the *Shariat*. According to these Muslim religio-politial leaders would be totally against Islamic Law as the scheme of shares to the heirs has been expressly provided

for in the holy *Qur'an*[71]. They also cited an incident relating to the Prophet Mohammad (SAW). The Prophet Mohammad (SAW) had adopted his slave as his son and named him after himself. It was to annul this act that the later verses were said to be revealed. There is a tradition, reported by Saad-Bin-Abi-Waqas and recorded by Bukhari to the same effect.[72]

The above opposition of the adoption bill did not mean that the Muslim community was unanimous in its opposition to the bill. In 1978, when the government withdraw the bill, the Indian Council of Social Welfare organised a public meeting in Bombay which was attended, among others by Justice Chagla, former Chief Justice of Bombay High Court and later Minister for Education, Govt. of India. The meeting was presided over by Justice Hidayatullah, a retired Chief Justice of the Supreme Court. Justice Chagla said that the bill was of a purely optional nature and it was not forcing any Muslims to deny their faith. Asaf A. Fyzee, a prominent Muslim jurist said that the Muslim opposition failed to appreciate that the *Qur'an* had provided full direction on what should be done for orphans and the opposition to the adoption bill by the Muslims was in a sense denial of protection to the neediest children on purely obscurantist ground.

Some Muslim lawyers suggested that the government could modifiy the bill slightly and leave no ground for Muslim leaders to oppose it. The Chairman of the Minority Commission, Justice

Hamidullah Beg, Chief Justice of the Supreme Court, suggested that the government should not exlcude the Muslims from the perview of the adoption bill. Instead everyone should be given the option to declare that adoption is not contrary to their religious beliefs.[73] A common thread running through all these suggestions however, is that they give credence to the claims that the religious personal law cannot be modified and in effect they accept that religions have supremacy over the authority of the state and the Constitution.[74] The objection of the Muslim religio-political leaders rested primarily on the ground that Islamic law is immutable. *Allah* alone is the law giver and he has communicated these laws through the *Qur'an* and *Hadith*. It is, therefore, beyond any human agency's power to alter these laws and Parliament cannot assume the authority to do so. By agreeing to exempt the Muslim community from the perview of the Adoption Bill, the government gave tacit ascent to this ground. This stand of the government bears comparison to its conduct when enacting the Special Marriage Act, of 1954. Just like the Special Marriage Law, the Adoption Law was to be an enabling law, i.e., anyone who choose could take advantage of it. There was no compulsion for anyone who felt that it conflicted with their religion to exercise the legal rights given under the adoption bill. In 1954 the government had not accepted the claim made by some Muslim members that the Special Marriage Act would encourage Muslim to leave the fold of Islam, but in regard to Adoption bill the

government in effect took over the responsibility of ensuring that no Muslim had the opportunity to reject Islamic law. This was, as yet, the greatest concession made to the claims of the Muslims religio-political leaders regarding the operative sphere of religious personal laws and the competence of the state to modify them. An editorial entitled 'A crying shame'[75] described the reluctance of the government to provide a universal adoption law as a criminal abdication of responsibility.[76]

From the above, it is clear that the government made a departure from its past commitment when it reformed the Hindu Personal Law. The states conduct was not dependent upon the particular nature of Islamic and Hindu laws, because the state had initially made clear that it had the right to reform any religious personal law. But the state during the course of time changed its earlier position and said that the state would make reforms in Muslim Personal law i.e. *Shariat* only after taking into confidence the Muslim community. Later on even this position was given up and the attitude of the state established that the state would not make any civil laws that 'allowed Muslims to go outside the control of their religious law. In doing so, the state seems to have accepted the claim that the Shariat is immutable and parliament is not competent to modify it. The position of the government is, from the point of view of Muslim community, is in consonance with the Muslim Personal law, (*Shariat*) Application Act, 1937 which allows Muslims to be govenred by their Islamic law in

certain specified matters. But from the women's point of view the stand taken by the state is to perpetuate the legal inequality created by religion based personal laws. It is significant for women because by accepting the religio-political leaders as the spokesmen for the entire community, the state has virtually ensured that women continue to suffer legal inequality for the religio-political leaders are not even suggesting that some aspects of the *Shariat* may be in need of change. Mr. Hamidullah Beg opined :

> "The Constitution gives every individual his or her religious freedom. It does not give any group the right to thrust its views on even one individual. It is imperative that members of all minority groups even within the minority receive equal treatment with those of the majority."[77]

From the above discussion it is clear that the state's attitude towards the reform of minority Personal laws is to some extent consistent. The state after reforming the Hindu Religious Laws did not reform the minority personal laws. Sometimes the state declared that it cannot force the minority community to accept the reform in their personal laws and at another time declared that the voice or the demand in the change of Personal law should come from the community itself. It may be called as the government's realisation that any change in the minority personal laws would not be beneficial for the state. It may also be termed as political

expediency of the ruling party not to touch a very sensitive issue of the minority community. It may also be termed as the government thinks that the Shariat Act, 1937 and Article 372 of the Constitution of India does not permit it to change the minority personal laws.

G. The Muslim Women (Protection of Rights on Divorce) Act, 1986

In 1986 it was the aftermath of Shah Bano's case when the parliamentarians had to mend not only to renovate the maintenance provision but to pass a full fledged Act relating to the maintenance for Muslim divorcee in accordance with '*Shariat*'. When the *Shah Bano case* was decided by the apex judiciary, a great controversy in Muslim circle detonated and the Muslims depreciated and depricated to accept the judgement there off and further demonstrated that the time of reasoning adopted by judiciary was wholly unjustifiable and untenable and could not stand the test of logical and cogitative deduction as same is contrary to the Shariat. Hence, they joined and envigorated the hands of Muslim leadership and came under the banner of All India Muslim Personal Law Board, and started a countrywide demonstration and protestation and same germinated the consensus of the majority of the Muslims of India in favour of the move to demand statutory protection of their personal law relating to maintenance.[78]

The process of mobilising Muslim public opinion by referring to their religion based personal law and the immutability of the *Shariat* was again repeateted most forcefully in 1985, in response to the Supreme Court judgement in what became known as *Shah Bano's* case.[79] The Muslim Personal Law Board was an intervener in the Shah Bano Case.[80] The Muslim Personal Law Board strongly criticized the Supreme Court judgement as a gross interference with Muslim Personal Law and decided to organise the Muslim Community to stop this 'interference'. The Muslim Personal Law Board started a countrywide protest on the last Friday of *Ramadan*, a day on which Muslims gather in large numbers to offer prayer at the Mosque. The month of *Ramadan* is very important in Islamic caledner year and the last Friday of the *Ramadan* is the most important day of the month. By choosing the last friday of *Ramadan* the Muslim Personal Law Board started contiously the protest against this judgement. Muslims responded in great numbers and from then a wide spectrum of Muslim leaders took up the task of mobilising Muslim masses to protest against the Supreme Court judgement. Where ever the Muslim leaders went they were able to organise big rallies. In *Bombay*, for instance, more than 300,000 Muslims joined a protest march in November 1985.[81] In *Siwan*, Bihar more than 400,000 Muslims joined a conference convened by the Muslim Personal Law conference conveners.[82] The pattern was repeated all over the country. The demand for recession of the

judgement in Shah Bano's case (as well as the earlier cases) was primarily based on the reason advanced on all previous occasions namely that Muslim personal law is divine and hence not susceptible to modification by any human agency. Most Muslim leaders claimed that the decision that Section 125 of CrPC was applicable to Muslims amounted to a direct contravention of '*Shariat*'. They maintained that the husband's liability to pay maintenance came to an end with '*Iddat*', and some went to the extent of saying that it was actually a sin to give maintenance after this period.[83] The most important reason advanced by the agitationists was the interpretation of the *Qur'an* by the Supreme Court. They were of the opinion that by interpreting the holy *Qur'an* the Supreme Court was guilty of injuring the sentiments of the Muslims and by deciding to interpret the holy *Qur'an* it had taken the role of social reformer and violated the basic rules of *Shariat*. Some religio-political leaders claimed that the inaction and the ambigous stand of the government with regard to demands of Muslims had endangered the future of Islam in India.

The following two statements are representatives of the arguments used by Muslim leaders who sustained the movement to rescind the Supreme Court judgement. Maulana Abul Hasan Ali Nadvi, a member of Muslim Personal Law Board, thought that :

> "The problem of the protection of *Shariat* today is the most important problem for the Muslims of

> India... The Muslim feelings have been deeply hurt by the aggressive attack from all sides on the Muslim Personal Law. The government's wake and doubtful approach and the Supreme Court's judgement have made the future of Islam in this country dishonourable."[84]

Maulana Asad Madni issued a Threat that

> "Muslims cannot tolerate any interference in Shariat which is divined law. If they are compelled in this respect it can lead to undesirable consequences and the integrity of the country can be affected."[85]

(i) The Response of the Union Government

Mr. G.M. Banatwala, the General Secretary of the Indian Muslim League, introduced a private members bill in the Lok Sabha designed to overturn the Supreme Court decision in the two earlier cases of *Bai Tahira* and *Fazlun Bi*.[86] Mr. Banatwala's bill proposed the exemption of Muslims from the pronounced by the Supreme Court focussed the attention of the entire nation on this issue and on Banatwala's bill. The initial response of the Union Government was to oppose the bill introduced by Banatwala and its response was informed by the considered opinion of various advisors.[87] The legal advisors note, dated 25 May 1985, said that the Supreme Court had correctly interpreted the law. In the words of the Law Secretary :

"The decision of the court cannot be regarded as an encroachment on Muslim Personal Law, which is of civil nature whereas, Section 125 is a provision contained in the Criminal Procedure. In view of the foregoing, the bill to amend Sections 125 and 127 of the Cr.P.C. should be opposed. This view was supposed by the Union Law Minister Ashok Sen and the Minister of State for Law on June 2 and June 1, 1985. The Ministry of Home Affairs prepared a note, dated 24th July 1985 opposing the Banatwala bill even in the Lok Sabha, Arif Mohammad Khan, Minister of State for Home Affairs, argued forcefully against any move to exempt Muslim men from the perview of Section 125 Cr.P.C.[88]

When Muslim including Muslim Parliamentarians, Muslim leaders of different organisations and prominent *Ulema* of different schools of Islamic jurisprudence showed their resentments and mounted the pressure through all legitimate forums, the then Congress Government headed by Rajiv Gandhi Changed its response. The intensity of the agitation against the Supreme Court judgement compelled the government to reverse its initial stand. Mr. Z.R. Ansari another Union Minister argued forcefully against the Shah Bano judgement for three hours in the Lok Sabha. He said that the Shah Bano judgement was contrary to Islam.[89] Later on Mr. Ansari requested Banatwala withdraw his bill so that the govenrment could find a wayout which would be proper for all minorities.[90]

The Bill, entitled the Muslim Women (Protection of Rights on Divorce) Bill, was introduced into the Lok Sabha in February 1986.[91] The statement of objects and Reasons accompanying the bill explains that since the Supreme Court's decision in Shah Bano case has led to some controversy regarding the obligation of a Muslim husband to pay maintenance to his divorced wife,

> "opportunity has therefore been taken to specify the rights which a divorced Muslim women is entitled to at the time of divorce and to protect her interest".

Introduction of the 'Muslim Women (Protection of Rights and Divorce) Bill in the Parliament gave a shock to the 'Pseudo-Secularist hailers of the Shah Bano judgement for its so understood anti *Shariat* bias. Their ego was badly hurt and they came out to misrepresent the newly proposed law to the ignorant layman as a frightful national calamity. Passing of the Bill would in their opinion herald India's doomsday. Loud criticism was made without even caring to read its provisions and dispassionately understand the political will and legislative intention in the back ground.[92] The bill was described as a 'fraud' on the Constitution', 'a slap on the face of secularism' and an lawfully unwise step that would provoke the majority community to 'communal frenzy'. Its supporters were freely called, 'anti nationals, orthodox and lunatic'.[93]

The pendency of the bill before the parliament for about three months and in this duration same assumed the majority-minority conflict divorcing the realities of secular India as enshrined in the Constitution of India, but on communal basis. Intellectuals and public men of both the communities defended their contention barring few exceptions in both the communities. The spokemen of the Muslim community advocated that the bill is constitutionally justified and entitled to enjoy the protection guaranteed to the minorities in Part III of the Indian Constitution, while the spokemen of the majority community contended it as anti human more violating the principle of equality guaranteed under articles 14, 15 and 16 of the Constitution and found it discriminatory too.[94]

(ii) The Lok Sabha Debate on Muslim Women Bill

The govenrment did not take much notice of the opposition generated by this bill and on 6 May, 1986 the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed.[95] An account of the Lok Sabha debate enables us to ascertain the position of the government and the main issues that were discussed during the debate. When initiating the discussion, the Law Minister traced the stand of the government since independence on the matter of reform on Muslim Personal Law. He explained that it had been accepted from the start that Muslim Personal Law would not be altered without the community's

consent. He relied on a statement made by Ambedkar in the Constituent Assembly[96] to prove that, even at that stage it was acknowledged that the state may not impose uniform laws on minorities.[97]

The Law Minister explained that the Cr.P.C. provisions (Sections 125-127) had made specific mentions of the Muslim community's practise and had exempted Muslim men from paying maintenance to their divorced wife if they had paid the full amount payable on divorce. He emphasized that the provision of Cr.P.C. was made so that no Muslim persons should be offended. In his view, the Supreme Court in delivering the Shah Bano judgement had, among other things, forgotten that a Uniform Civil Code, even if enacted, may be optional in its application. This reference to the Uniform Civil Code as well as other parts of the judgement had created great apprehension in the minds of Muslims that their religious laws were being tampered with. The Law Minister said that the government could not possibly be blind to this anxiety among the 'largest' minority community in India.[98] Therefore, the government has correctly decided to accept the view held by Muslims about their personal law rather than that of those who thought secularism demanded that everybody must be 'tarred with the same brush'.[99] Accordingly the government came to the conclusion that since Muslims have a particular understanding of their personal law, the government is duty bound to pay attention to it. The Law Minister emphatically denied that the government

has succumbed to the forces of communalism or fundamentalism because they had merely listened to the 'just' demands of the community.[100]

From the above it is clear that the government defended its action for introducing the bill on the basis of safeguarding the 'wishes' of the minority community. The government felt its duty in safeguarding the protection given to the minorities in the Constitution of India. But the stand of the Law Minister is criticised by *Archana Parashar* in the following words :

> "In order to legitimise this stand, the Law Minister misrepresented the meaning of Ambedkar's statement, which was made during the debate on the constitutional article dealing with the Uniform Civil Code. What the Law Minister failed to point out was that the statement was made in response to the demand that Muslim Personal Law should be exempted from the purview of the Uniform Civil Code article. Ambedkar, at that time, had refuted the claim that Islamic law had not been modified by the legislature and had admitted only that the Uniform Civil Code may be initially optional. On another occasion Ambedkar had unequivocally stated that no community should expect that its personal law could remain outside the control of the Constitution.[101] Thus

Ambedkar had made the statement, quoted by *A.k. Sen*, to suggest only that 'in the initial stages' the Uniform Civil Code could be optional and I argue that A.K. sen misrepresented the actual meaning of the statement."

The Muslim women bill was vehemently opposed in the Lok Sabha. The main reason put forward by the opponents of the bill was that the bill contravened Articles 14, 15(1), 15(A) (e) and 44 of the Constitution. The main objection was that this bill denied Muslim women their constitutional right to equality. The bill was opposed mainly by Madhu Dandwate, Saifuddin Chaudhary, K.P. Unnikrishanan etc. K.P. Unnikrishnan charged the governemnt with surrendering to those 'dark forces' which insist on an expensive jurisdiction of religion and said that the medieval religion and social practises were opposed to the social region enshrined in the Constitution. He further said that the bill contravened the constitutional principles that religious freedom should be subject to public order by asserting that the constitution allows reasonable classification to be made and a law made only for the community is a perfectly valid classification.

The government further defended its action that the bill was to promote the interest of Muslim women and this bill was designed to safeguard their interest. Furthermore, the government tried to show that the bill was designed to give Muslim Women

than were available to them under the provisions of Cr.P.C. The law minister and many other member of parliament asserted in the parliament that the present bill puts no limit on the amount of maintenance that could be paid and the wife would have the option to claim maintenance from a number of people. But there was no explanation of why the government was singling out the women of one community to give them better rights than those enjoyed by the rest of the Indian women. If there was any defect or inadequacy in the provision of the Cr.P.C. dealing with the maintenance, the remedy was to reform the Cr.P.C. rather than to single out the women of one community for preferential treatment. It was also pointed out that the Waqf Boards, which are ultimately charged with providing help to indigent divorced Muslim women, are themselves financially mismanaged, and so giving them eventual responsibility to provide maintenance for Muslim women was merely a cosmetic measure.[102]

The debate in the Lok Sabha on the bill was supported by the members of various political parties including *Congress, Janata Party, Muslim League* etc. The bill was mainly supported on the ground that consideration of national integrity demanded that the bill be enacted. It was said in the Lok Sabha that due to the activities of the press the atmosphere in the country was emotionally charged and the communal background of the controversy made it to enact the bill in order to save the nation fro disintegration.[103] Another member of Parliament K.C. Pant

explained that :

> "There is need for unity and integration at this time, the need to bring communities together at a time when fundamentalism is growing all around us."

Begum Abida Ahmad, a Muslim women member of Parliament, argued that the bill maintained the self respect of women and even enhanced it, and she asked why any self respecting woman would beg maitnenance from someone who had divorced her and thrown her out of his house.[109] It was also asserted by many member of Parliament in the Lok Sabha that it can conduct its own affairs, have its own way of life, preserve its own cultural and religious identity and have the complete freedom to practise its own religion.[105] A considerable number of ruling party members were also of the view that 'if Muslims are satisfied then no one else may have a say in the matter'. Sheila Dixit took the view that if the vast majority of a community believed that their women already had enough protection there beliefs and sentiments had to be honoured.[106] Another member of Parliament Saifuddin Ahmad was of the view that such an attitude was bound to separate the Muslims from the mainstream of the community. But his stand was not shared by most Muslim members and many of them applauded the efforts of the government to secure national unity and integration. Syed Shahabuddin described the measure as :

"a symbol of the continuing struggle in our country between the forces of coexistence and national integration on the one side and the forces of assimilation and absorption on the other."[107]

Ibrahim Sulaiman Sait, a leading member of the Muslim league said that 'In this country which is multi-religious, multilingual and multi cultural, the idea of achieving national integration through a Common Civil Code is a .... delusion.'

From the above account it becomes evident that during consideration of the bill the main issue of debate the fact became obscured that the whole process of protest, communal polarisation and the eventual decision of the government to overrule the decision of the Supreme Court has been started by the issue of a divorced Muslim women's entitlement to maintenance. Instead of centring on the issue of disadvantage to women, or the relationship between the religious personal laws and the state, the debate became focussed on national integration.

Thus, Rajeev Gandhi, the Prime Minister of India satisfying the essence of the democratic norms, honouring the sentiments of the Muslim community, paying respect for the religious rights of the Indian minority and realising the truth within the framework of the Indian constitution that different personal laws of different communities, religious and cultures are entitled to coexist and continue, passed 'the Muslim Women (Protection of Rights on

Divorce) Act, 1986' with the view to satisfy the spirit of '*Shariah*' regarding the maintenance. The contents of the Act nullify the evil aspects of legislation and judicial pronouncements in the area of maintenance of Muslim divorcee which constitutes one of the segments of the Muslim Personal Laws in India.[108]

By enacting it government of India has, according to the Muslim view point, demonstrated its respect for the equality of all religions on Indian soil and its regards for the religious rights of the minorities guaranteed in part III obviously, felt otherwise.[109]

It is easy to understand why the government decided to accept the religio-political leaders as the sole spokesmen for the entire community. These leaders had demonstrated their capacity to mobilise large numbers of Muslim masses. Moreover, they had succeeded in articulating the idea that members of the Muslim community were feeling threatened and alienated from the rest of the society and the state because the community percieves that their religious personal law was in danger of being obliterated. The Supreme Court judgement was depicted as an effort by the state to supercede the principles of Islamic Personal Law with state law. The support given to the Shah Bano judgement by the intelligentia, mostly Hindus but some prominent Muslims, too, was portrayed as an effort by the majority to threaten the survival and sanctity of Islamic Law. The Muslim leaders argued that the sense of persecution suffered by the Muslim community was

threatening the integrity of the nation, and that Muslims would feel secure only when the government reversed the Supreme Court judgment. The Lok Sabha debate on the Muslim Women bill makes it clear that the government accepted this claim. The enactment of the Muslim Women (Protection of Rights on Divorce) Act was probably meant to reassure Muslims that their religious Personal law, (and through that their religion and culture) was not in danger of beign wiped out.[110]

(iii) Reforms in other minority religious Personal Laws

In the preceding pages we have seen that the state has been reluctant to make changes in the religious Personal laws of Muslims. The same is the case with other minority religious personal laws i.e. The Christians and the Parsi communities. As there has been virtually no discussion about the religious or secular nature of these laws, it cannot be said that the non-interference of the state is due to the immutable nature of these Personal laws. Rather, the reason for the state's non-interference in the Personal Laws of these communities is their '*minority status*'. Their minority status is an important factor in the state's decision to leave these Personal laws unreformed. The state's conduct with regard to the reform of Muslim Personal law has been repeated with regard to the Personal Laws of other minority communities. In the following pages the researcher will discuss the attempted reforms in Christian Personal Law and Parsi Personal Law.

H. Reforms in Christian Personal Law

Like other Personal Laws Christian Personal law also discriminates against women. Although Christians all over India have a uniform law of marriage and divorce extreme diversity exists with regard to their succession laws. Christian women, like women of other communities, have less rights than men in personal matters. Unlike other communities, Christian Personal Law consist mainly of state made law. The former British government was more confident about legislating for Christians than Muslims or Hindus and perhaps the reason for this was that they were also having the Christian faith. The promulgation of the Government of India Act, 1935, did not result in any legislative activity to reform Christian Personal Law. After independence the government although prepared two reports[111] but did not straight away reform Christian Personal Law. The government introduced the Christian Marriage and Matrimonial Causes Bill[12] in the Lok Sabha in 1962.[113] The Lok Sabha debate show no record of any discussion on this bill which lapsed in 1971 but it is generally believed that the Christian Bishops were opposed to the contemplated reforms and the government acceeded to their wishes. Since then no legislative activity or any effort by the state has been noticed to reform Christian Personal law.

In 1983 the Law Commission prepared another report on the grounds of divorce for Christians but the government has yet to

act upon its recommendations. There is no direct information available about the government's view on the matter of Christian Personal Law reform although the government has been made aware of the demand atleast by certain sections of the community, for changing their Personal Law. The Joint Women's Programme (a branch of the Banglore based Christian Institute for the Study of Religion and Society) sent a memorandum signed by nearly ten thousand people, to the Union Law Minister asking for the removal of laws discriminating against women.

Subsequently, the Joint Women Programme, along with a representative section of Christian women belonging to different women. Fellowships of the Chruches in Delhi, presented a memorandum to the Prime Minister of India in February 1986 (4.ii.86). The memorandum claimed to represent the opinions of very wide sections of Christian community since the changes it listed had been demanded during various meetings held by the joint women's programme.[114]

The Supreme Court delievered a land mark judgement in *Mary Roy's*[115] *case* in 1986 and declared that the Indian Succession Act, 1925 superseds the Travancore Christian Succession Act, 1916. The result of this decision is that Syrian Christian Women now share equally with their brother's in the property of their father. Under the Travencore Christian Succession Act the share of the daugther was only one quarter of

the share of the son subject to a maximum of Rs. five thousand.[116]

The Supreme Court further held that the Travancore Act became inopertive following the enforcement of the part B State Laws Act, 1951 and thus the succession to property left by intestate Christian males during the last thirty five years now open to dispute. In other words, the judgement had retrospective effect.

The Kerala Government filed a review petition, seeking the elimination of the retrospective effect of the judgment, but it was rejected. The reactions of the Christians was the same as the reaction of the Muslim in the Shah Bano Case. The Church establishment in Kerala also launched a concerted campaign against the Supreme Court judgement Priest belonging to the *Roman Catholic, Jacobite, Church of South India* and *Kananya Churches* criticised the judgment in pulpit pronouncements. Pamphlets were distributed by churchmen and the meetings were organised to mobilise Christian opinion against the judgement. The Church of South India priests on two consecutive Sundays assured young Christian men that they would continue to get what they had been getting all along and the law did not change anything. *A new Personal law for Christians was demanded by Bishop Abraham Marclemis of Kananya Church.* He said that the Supreme Court judgement has created an economic impasse for the Christian community and this judgment was likely to destroy

the whole Christian Community of India. He was very critical of the judgement where no property could be transferred without the consent of female. The *Jacobite Church* similarly demanded a new personal law for Christians. The Chruch's opposition to the application of the Indian Succession Act instead of the Travancore Succession Act has no obvious religious basis. Apparently one of the reasons why the Churches so vociferously opposed the judgement was that a portion of '*Stridhanam*' traditionally goes to the Church and if the practise was suspended the Churches stood to loose materially.[117]

Meanwhile, a private members Bill[118] ws introduced in the parliament by Professor P.J. Kurien, a senior Christian Congress (I) members of Kerala. Significantly, the M.P. who move this bill represented a constituency where rich Christian land owners are powerful.[119] The Bill sought to modify the Supreme Court judgment so that it is not given retrospective effect.

The religious functionaries' solidarity with men rather than women in this instance is a clear illustration of how the power of religion is used to prepetuate male privilege. Neither the Succession law nor the Christian Divorce law is a strict application of Canon Law. The *Indian Divorce Act*, based on an outdated English enactment, is still prevented by the religious leaders from being modified. No justification is forthcoming either from them or the government for this situation.[120] In view of the

government's stand in response to the Muslim community's demand that the Shah Bano judgment be overturned by legislation, it is not impossible that the state may enact the Kurient Bill into law if there is sufficient agitation on the part of the Christian religions leaders. The significance of the state's agreement to treat religio-political leaders as the sole spokesmen of the community and to give religious Personal law a status higher than non-religious civil law can not be understated. The state may in future be compelled to accede to similar demands by other communities, at the risk of being made to appear inconsistent.

I. Reform in Parsi Personal Law

As far as the Parsi Personal Law is concerned a move to reform it was taken up by Parsi Central Association in 1923. A sub-committee was appointed to suggest suitable changes. The sub-committee known as the Parsi Law Revision Sub-committee submitted its report in 1927. The Parsi Central Association sent five hundred copies of this report to all the Parsi Associations, Anjumans, delegates of the Parsi Chief Matrimonial Court, to Parsi Jurists and Publicists all over India and even to Parsi Associations in China and Persia also. This report was also published in the press and certain modifications were also circulated for public opinion. A conference was arranged under the auspices of the Parsi Panchayat with twenty five Parsi Associations taking part. These modifications were approved by

twenty one associations and four of them did not support the modifications as they were 'ultra conservative' in their views and do not as a rule approve of any changes in keeping with the changing times.[121] Thus, a bill to amend the Parsi Marriage and Divorce Act, 1865 was considered by the Federal Assembly in 1936. This bill was first introduced in the Council of state in 1934 by Sir Phiroze Sethna. It was circulated for opinion and a joint Select Committee was appointed to consider the bill in 1935. The Select Committee reported to the Council of State in 1935 and it passed the bill on 13.iii.36. The Federal Assembly considered the bill in April 1936.[122]

As far as the applicability of Parsi Personal Law is considered it applies to Zoroastrian Children born to Zoroastrian parents; and children of a Parsi father and a non-Parsi mother who have been admitted to the Zoroastrian religion. If a Parsi woman marries to a non-Parsi the child born to her are not admitted as Parsis. The difference in rules governing children of non-Parsi mothers and fathers is apparently based on a Bombay High Court decision.[123] It was held in that case that in a marriage between a Parsi woman and a non-Parsi man the presumption is that the wife will have to accept the religious faith of her husband. It means that the children will be brought up according to the religion of the father. Thus, this discriminatory definition of who is a Parsi is not based on the religious tenets of Zoroastrianism but is due to the judgement of Bombay High Court in *Sir Dinshaw Case*.

However, one of the priests of the community is reported to have said that a Parsi woman marrying a non-Parsi was guilty of adultery and the children if the Union would be illegitimate.

Similarly, the rules embodied in the Parsi Marriage and Divorce Act, 1936 and the Indian Succession Act 1925 applicable to Parsis are not even claimed to be based on the tenets of Zoroastrianism. *As explained above the modifications into the Parsi Personal law were brought about by consulting members of the community and not merely the religious leaders.*[124] *Anklesaria* believes that Parsi Personal law is based on Hindu customs and the rules of English Common Law. Parsi immigrants arived in India in the seventh century and there is little documentation of the legal system which governed them when they first arrived. They took on Hindu customs and institutions like the *Panchayat* for administration of their affairs and priests had the final say in all religious matters. However, Parsi Personal Law like all other Personal law has been assumed to be a religious law and the community has not been forthcoming with suggestions for change until recently. If it is accepted that rules of Parsi Personal law are not religious rules. Then there remains no justification for continuing with rules that discriminate against women. A plausible explanation that can be put forward for this state of affairs is that Parsis are a religious minority and the state is reluctant to interfere with their personal matters.[125]

The Government of India has not made much effort to modify the Parsi laws, rules that discriminate against women. It was, in 1986, for the first time that a Parsi Marriage and Divorce Amendment Bill was introduced in the Rajya Sabha (on 24 November, 1986) and passed by the Lok Sabha and then the Rajya Sabha on 3.vii.87. It received the assent of the President on 25.iii.88, and came into force on 15.iv.88.[126] The process of amending the Parsi Marriage and Divorce Act, 1936 was initiated by the Board of Trustees of the Bombay Parsi Panchayat. It submitted recommendations to the government which introduced the bill to amend the Act and enacted it in March 1988. However, the provisions discriminating againt women continue to exist and most of the amendments have been described by Phiroze Vatul, a Parsi lawyer, as of 'cosmetic nature'.[127]

From the above discussion it is clear that the attitude of the state towards reform in Personal Laws of majority and minority communities is not same. As far as the Hindu majority is concerned the state reformed their Personal Law although still the Hindu Personal Law does not treat women at par with men. The reform in Hindu Personal Law was an urgent need of the hour and that's why the state, to some extent reformed Hindu Personal Laws. But as far as the minority religions Personal laws are concerned the state just after the partition did not try to interfere in that area on the assumption that this endeavour will hurt the religious minorities and alienate them from the majority. One more

reason for not interfering in minority religious Personal laws was that the state did not want to give the impression of coercion in the matter of religious laws and whenever the state tried to interfere in the personal laws of the minorities that was vehemently opposed by the minorities. Upon this attitude of the state Archna Parashar comments :

> "The national leader's special consideration for the Muslim minority in post partition period was thus not based on any constitutional principle. The national leaders were not constitutionally bound to treat minorities any differently from the Hindu majority. In the context of the religious personal laws if the state assumed the authority to reform Hindu Personal Law, it could have done the same with regard to Muslim and other religious personal laws. The decision not to reform the minorities' religious personal laws was most likely based on the assumption that being a minority, it was easy to alienate them by giving the impression of coercion in the matter of religious laws. As explained above the advantage of giving special status to the religious personal laws of Muslims, and other minorities, was that the goverment was more likely to get the cooperation of the Muslim religio-political leaders in its task of nation building."[128]

Summary

Historically, personal laws of the minorities were discriminatory to women except Parsi law. While Hindu laws were reformed by the State, the same could not be done, as the policy was to reform them on the demands of the community concerned. Hence, clearly the reform process is based on the minority status of the community and not as per the position of women. Some efforts have been made in regard to Parsi and Christian laws.

Legislative Activity with Regard to Muslim Personal Law

Apart from the general impression Muslims too, like Hindus, tried to reform their laws time to time. The Jamiat-ul-Ulema Hind was of the opinion that only *Ulema* can interpret *Shariat*. While the political elites represented by Muslim League considered all such questions of reform in comparison to their Hindu counterpart. Introduction of *Shariat* Application Bill in Federal Assembly in 1935 was first such an attempt by Jamiat-ul-Ulema-i-Hind. Debates in Assembly brought several contradictions in open. *Ulema* and Muslim League differed on certain points. Bill was sent to Select Committee. The result was that some un-Islamic customs were accepted under the Bill. *Khojas* and *Memons* were allowed to carry on their customs despite objections by *Ulema*. Although it failed to a Uniform Islamic Law but the enactment set the pattern for the future.

Dissolution of Muslim Marriages Act 1939

Dissolution of Muslim Marriages Act, 1939 was a constructive attempt by the *Ulema* to enhance the position of women. There were diverse procedure for dissolution of marriage by women according to school of thoughts. Hanafi law permitted dissolution on the conversion of women. To stop the practice of conversion, *Ulema* decided to streamline the procedue. In 1936 Muhammad Ahmad Kazmi introduced a Bill in Federal Legislative Assembly which was based on the *Al-Hilal-Al Najizalil halilal-Al Ajza* of Maulana Ashraf Ali Thanvi. After the consideration of Select Committee, the Assembly adopted it in 1939. Final enactment of the Act dissatisfied *Ulema* and they tried to get it stalled but failed. Finally it passed and is enforced irrespective of school of thoughts. This attempt proves that political and religious leaders used legislative opportunities for the betterment of their women-folk.

The Special Marriage Act 1954

In post-independence India, the policy of government was to cover all communities under one law. When the Special Marriage Act, 1954 was introduced in the Lok Sabha, Muslim members felt some apprehensions and Kazi Ahmad Hussain said in House that minorities must heard and their pleas be incorporated for any change. In last the Bill did not excluded any community and covered all. A heated debate took place and Muslim League

expressed grave concern over Special Marriage Act. Despite passing out the Bill, it was made clear that Parliament should not interfere in *Shariat* and the Acts of Parliament must not encourage Muslims to leave their religion. Special Marriage Act, was portrayed as a secular law.

Hindu Law Reforms Act

During the debates on the Hindu Code Bill, the government often faced the charge of interfering with Hindu Laws. Government stand was that this is the first step towards Uniform Civil Code. But the later developments show that either the government was shying away from enacting Uniform Civil Code or their position did not permit them to embark upon such a mission.

The Criminal Procedure Code 1973

In 1973, Criminal Procedure Code, 1898 was replaced by Criminal Procedure Code, 1973. It enabled womens particularly Muslim women, to obtain maintenance after divorce under sec. 125 CrPC. It also defined the word "wife" which includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried. Objections were raised by Muslim scholars on this definition. Ibrahim Sulaiman Sait opined that Muslim Personal Law does not include a "divorced wife". After much controvercy, the bill was passed with modifications and satisfied the Muslims at large.

The Adoption Bill, 1972

Since 1956, efforts were made to have a perfect Adoption Bill. This effort has opposed by Muslim *Ulema* due to conflict with tenets of Islam. In last nothing concrete could be achieved as the government accepted that the *Shariat* Act, 1937 and Article 372 of the Constitution of India does not allow to change Muslim Personal law.

The Muslim Women (Protection of Rights on Divorce) Act 1986

A bitter socio-politico controversy took place after the judgement of Supreme Court in Shahbano case. Muslim masses were mobilised to oppose the judgement and Parliament had to intervene to alter the judgement by enacting above titlted Act. Lok Sabha debates show that opponents of the Bill took refuge behind the plea that it will violate Articles 14, 15(1), 15(A) (e) and 44 of the Constitution. The supporters were of the opinion that Supreme Court misinterpreted *Qur'an* and the judgement was an interference. To rectify the mistake done by the Supreme Court the Act should be passed. The Bill was passed because socio-religio leaders managed the public outcry and government wanted to respect the views of the Muslims.

Reforms in Other Minority Religious Personal Laws

Some reforms were also carried on Parsi and Christian laws. Among Christians Succession laws were diverse although their

marriage and divorce laws were Uniform. In future government may reform Christian laws, if public pressure built because Supreme Court judgement in Mary Roy's case in 1986 became controversial like Shahbano case. Reform of Parsi laws was taken up by Parsis themselves since 1923.

In short state is trying to achieve equality of men and women but its attitude differs for Hindus and minorities due to several reasons.

References

1. The Jamiat-ul-Ulema-i-Hind was established in 1919 (Faruqi, 1963). The Muslim League was formed as a result of Muslim land owners and others with commercial interest who wanted to form a separate politicalparty in view of the Congress compaign for self-rule. The first All India Muslim League conference opened in Karachi on 29th December, 1907 (Hussain, A. 1985, p. 200). 'Pakistan : The Crisis of the State', in *Islam, Politics and the State. The Pakistan Experience* (ed.) A. Khan, pp. 195-228, London : Zed Books
2. M. Hasan (1986, pp. 1074-79), who says that the communitarian concerns of the Jamiat's Ulema were not limited to the religious domain and to specific issues relating to the Shariat, and that they intervened in politics not as spokesmen of Muslim alone but of other groups as well. Their religous idiom and the use of Islamic symols was intended to serve the secular objective of rallying the populace around the Indian national movement.
3. The Shariat application bill later on became the Muslim Personal Law (Shariat) Application Act, 1937 which is the most important legislation as far as Muslim Personal Law in India is concerned.
4. Legislative Assembly Debates, Vol. 17, pp. 4157
5. (See the bill in the gazette of India, part V, 1985, p. 136).
6. Syed Khalid Rashid, Muslim Law, p. 34 (1996).
7. Legislative Assembly Debates, Vol. III, 37, p. 2528.
8. Sir Mohammad Yamin Khan, *Ibid*, pp. 2530, 2532; Nairang, p. 2536.
9. Nairang, *Ibid*, p. 2535.
10. *Id.* at 2528-44.
11. H.M. Abdullah, *Ibid*, p. 2529; Khan Bahadur Sheikh Fazl-i-Haq Piracha, p. 2538.

12. Sir henry Craik, *Ibid*, pp. 2543-44.
13. Abdul Qaiyum, Legislative Assembly Debates, V, 9. IX. 37, p. 1427.
14. *Id.* at 1433-44.
15. *Id.* at 1431-32.
16. Muhammd Anwar-ul-Azim, *Id.*; p. 1437.
17. *Id.*, p. 1445, for Jinnah's views on personal law reform see Mahmood 1976, pp. 111-45.
18. Sec. 3 of *Shariat* Application Act runs as follows.
    (1) Any person who satisfies the prescribed authority -
        (a) that he is a Muslim, and
        (b) that he is comeptent to contract within the meaning of section 11 of the Indian Contract Act 1872, and
        (c) that he is resident of the territories to which this act extends may, by declaration in the prescribed from and filed before the prescribed authority, declare that be desires to obtain the benefit of the provisions of this section, and thereafter the provisions of the section 2 shall apply to the declarant and all his minor children and wills and legacies were also specified.
    (2) Where the prescriebd authority refuse to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.
19. Sec. 2 of the Act runs as follows :

    "Notwithstanding any custom or usage to the contrary, all questions (save question relating to agricultural land) regarding intestate succession, special property of females,

including personal property inherited or obtained under contract or gift or any other provision of Personal law, marriage, dissolutin of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubara't, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious edowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat)."

20. Fyzee, A.A.A., Outlines of Muhammadan Law.

21. Y. Singh, *Modernisation of Indian Tradition : A Systematic Study of Social Change*, pp. 73-80 (1973); Baxi, U. "Muslim Law Reform, Uniform Civil Code and the Crisis of Common Sense in Family Law and Social Change" (ed.), Tahir Mahmood, p. 27 (1975).

    Yogendra Singh describes the changing nature of Islamisation thus : 'It began as a process of external impact and conversion of low caste Hindus to the Muslim great tradition, then it emerged as a process of status mobility within the Islamic social structure very much like sanskrititization, and finally it regained its earlier orthodoxy; sub-cultural frills which are outside the tradition of Islam are purposely renounced with the view that Muslims must consolidate themselves into an organic whole irrespectie of divergent little traditions." (1973, p. 201).

22. Archana Parashar, Women and Family Law Reform in India, p. 150 (1992, New Delhi).

23. *Ibid.*

24. Legislative Assembly Debates, V, 17, iv, 36, p. 4162.

25. Present day Saudi Arabia.

26. Gazette, part V, 1936, p. 154.

27. It gave certain women the option of puberty, i.e. the right to repudiate a marriage if it was performed while the women was still a minor and if the union had not been consummated. Discussion on the exact parameters of the

right show the concern of the Muslim religio-political leaders to maintain the authority of the father and the grand father rather than to safeguard the rights of women who was married during her minority (LAD, I, 9. ii, 39, pp. 615-53).

28. Legislative Assembly Debates, v. 26. viii, 38, pp. 1090 et seq. especially pp. 1098-1099.

29. *Supra note*, pp. 152-153, Legislative Assembly Debates, v. 9. ix. 38, pp. 1954.

30. Kazi Muhammad Ahmad Kazmi, Legislative Assembly Debates, I, 9. ii. 39, p. 616.

31. *Supra note* at 154.

32. *Supra note* at 155.

33. Syed Khalid Rashid, *Muslim Law*, p. 110 (1996).

34. W.C. Smith, *Modern Muslim in India : A Social Analysis*, pp. 264-65 (1957).

35. *The Times of India*, Nov. 17, 1953

36. *The Times of India*, Sept. 15, 1954.

37. *The Hindu*, April 27, 1955, quoted by D.E. Smith, ed. *Religion, Politics and Social Change in the Third World : A Source Book*, p. 421 (1963).

38. The Indian Muslim League, the remaining component of the pre-independence Muslim league, passed resolution in Feb. 1949 that 'this meeting views with alarm and grave concern the failure of the Constituent Assembly provide for the continued preservation and protection of the Personal laws of the Muslims and other religious communities.

39. Karandikar, M.A. *Islam in India's Transition to Modernity*, p. 298 (1968).

40. *Supra note at* 162.

41. Seth Govind Das, Constituent Assembly Debates, Feb. 24, 1949, p. 862.

42. Parliamentary Debates, Sept. 20, 1951, cols. 2927-28.

43. Ambedkar, Parlimentary Debates, Sept. 20, 1951, cols. 2950-51.

44. Ambedkar, Constituent Assembly Debates, April 9, 1948, pp. 3651-52.

45. Parliamentary Debates, Feb. 6, 1951, col. 2466.

46. Parliamentary Debates, Feb. 7, 1951, col. 2490.

47. *Supra note* at 164.

48. *See* for example, *Times of India*, Sept. 15, 1959, *National Herald*, Dec. 12, 1959; *National Herald*, May 3, 1955.

49. In the intervening years since the reform of Hindu Personal Law until 1973, Personal law reform had dropped out of focus as an issue of ongoing public debate. As pointed out in Hindu law chapter, the state was nevertheless redefining the inheritance rights by enacting Land Ceiling Laws. The extent of change, and how it was introduced, however, form a subject for further research which cannot be taken up here. The other significant event was that the government of India on 22 sept. 1971, appointed a committee to make 'Comprehensive examination of all the questions relating to the rights and status of the women in this country' which would provide the necessary guidelines for formulating social policy. The committee submitted its report on 31st Dec. 1974 (Toward equality, 1974).

50. Section 488 of the Criminal Procedure Code, 1898.

51. For the following account see Lok Sabha Debates, August 30, 1973, cols. 235-39, 245-47, 317-19.

52. *Supra note* at 165.

53. *See Hindustan Times*, Oct. 10, 1972, where it was reported that the Prime Minister, Mrs. Gandhi has asked the Muslims in India to start the process of reform along the same lines as had been adopted in the Arab countries. At the same time she also gave the assurance that her government would not agree to impose any reforms unless the Muslims themselves wanted them.

54. Mohd. Koya, Lok Sabha Debates, August 30, 1973, col. 317.
55. Lok Sabha Debates, vol. 36, August 30, 1973, Ckayses 235-239, 316-318.
56. Ram Niwas Mirdha, Lok Sabha Debates, August 30, 1973, col. 245.
57. It is on record on Lok Sabha debate that letters had been sent to the Prime Minister by the religious heads of various institutions, including Maulana Mohd. Yusuf, Amir of Jamaat-e-Islami, protesting inclusion of the explanation to section 125 in the Cr.P.C. Bill. Muslim leaders led by Maulana Mufti Ateequr Rahman, President of Muslim Majlis-i-Mushawarat met Mrs. Gandhi personally.
58. Tahir Mahmood, *Muslim Personal Law : Role of the State in the Subcontinent*, p. 117 (1977).
59. *See* the statement of the Deputy Speaker of the Lok Sabha in Lok Sabha Debates, Dec. 11, 1973, col.250.
60. Indian Law Reports, 25, 1897, col. 9.
61. *LSD*, Dec. 11, 1973, cols. 316-17.
62. Lok Sabha Debates, vol. 34, Dec. 11, 1973. Clauses relevant 312-313 and 318.
63. *See* Tahir Mahmood, 'The Lamented Mrs. Indira Gandhi – A tribute (obituatory)'. 4/4 *Islamic CLQ 285* (1984).
64. See Sec. 127 clause 3(b), Cr.P.C., 1973.
65. *Supra note* 63 at 117
66. *Supra note* 22 at 168
67. Lok Sabha Debates, August 26, 1972. cols. 12-14.
68. *See*, The editorial in the *Hindustan Times* Dec. 18, 1980.
69. Clause 13 provides that after adoption the adopted child shall be considered to be born to the adopting parent(s). The rights of the adopted child are specified are specified as excluding the right to marry he/she could not have

married in the natural family. Also the adopted child will not be divested if any property and will not divest anyone else of property that had vested before the date of adoption.

70. Surah 33, Ayat 4, 5.

71. For further detail see articles in the Radiance views weekly issues of Dec. 19, 1978; Dec. 11, 1979, Oct. 23-29, 1983, Dec. 11-17, 1983; Jan. 1-7, 1984.

72. Sahih Bukhari.

73. *See* "Beg's Letter to Rizvi in Radians" Oct. 23-29, 1983; *see* also 4th annual report of the minority's commission 1983, pp. 18-19 and annexure IX, pp. 208-29.

74. *Supra note* 22 at 171.

75. *Hindustan Times*, Dec. 18, 1986.

76. *Supra note* 22 at 172.

77. Beg's Letter to Rizvi in Radiance Nov. 23-29, 1983.

78. Mohammad Shabbir, *Muslim Personal Law and Judiciary*, p. 287 (1988).

79. Mohd. Ahmad Khan vs. Shah Bano Begum, AIR, 1985 SC 945.

80. The Muslim Personal Law Board was established in 1973 as an organisation to study matters regarding the Shariat. Mohd. Shafi Moins describes the creation of this board as significant because before its creation the govt. had never expressed any opinion about the feelings of Muslims. But immediately after the creation of the board, the govt. declared that no changes in Muslim Personal law shall be made until Mulsims themselves desire them. See Defence of Sharit, difficulties and solutions (N.D.) an Urdu Publication of Jamaat-e-Islami, Delhi.

81. *India Today*, Nov. 11, 1985

82. Engineer, A.A., The Shah Bano Controversy, p. 12 (1987)

83. *Id.* at 10.

84. *Inquilab* Dec. 22, 1985, Engineer, A.A., 1987, p. 209.

85. *Ibid.*

86. The Code of Criminal Procedure (Amendment) Bill to amend Sections 125-127; Lok Sabha Debates, May 10, 1985, cols. 406-408.

87. For further detail see Shouri, *Times of India*, March 4, 1986; See also Shourie, A., Religion in Politics, p. 92 (1987).

88. Lok Sabha Debates, August 23, 1985, Cols. 419-55.

89. Ansari's speech reported in *Times of India* Nov. 23, 1985.

90. Lok Sabha Debates, Dec. 20, 1985, cols. 404-42.

91. *Gazette of India*, Part II, Section 2, 25 Feb. 1986, pp. 1-3; The Statement of Objects and Reasons, p. 4.

92. *Supra note* 78 at 288.

93. *See* for detail, Tahir Mahmood, "The Muslim Women (Protection of Rights on Divorce) Act, 1986, Pespective and Prospects", vi, *Islamic CLQ* (Vol. 6 : Nos. 2&3, June-Sept., 1986, pp. 160-161).

94. *Supra note* 78 at 288.

95. The Rajya Sabha passed the bill on May 9, 1986. The President gave his assent on May 19, 1986 and thereafter the Act came into operation.

96. The discussion in the Constituent Assembly concerned the enactment of a UCC and Ambedkar's statement was to the effect that it is perfectly possibly that the future Parliament may make a provision ... so that in the initial stage the application of the Code may be purely voluntary (Constituen Assembly Debates, Nov. 23, 1948, p. 551).

97. *Supra note* 22 at 179.

98. Lok Sabha Debates, May 5, 1986, Col. 313.

99. *Id.*

100. *Supra note* 22 at 180

101. Parliamentary Debates Sept. 20, 1951, Col. 2950

102. Shourie, *Times of India*, Sunday Review, March 16, 1986.
103. Lok Sabha Debates, May 5, 1986, Cols. 350 & 356.
104. Lok Sabha Debates, May 5, 1986 Cols. 418, 420.
105. *Ibid*, Cols. 356, 389, 403-4, 405, 444-45, 468.
106. *Ibid*, Cols. 490-91.
107. *Ibid*, Colm. 501.
108. *Supra note* 78 at 287.
109. *Id.* at 289.
110. *Supra note* 22 at 188.
111. Fifteenth and Ninetieth report of the Law Commission of India, 1960 and 1983.
112. Bill 62b of 1962.
113. *Gazette of India*, Extraordinary, Part 2, Section 2, June 22, 1962.
114. *Supra note* 22 at 190.
115. Mrs. Mary Roy vs. State of Kerala and others AIR 1986 SC 1011.
116. The daughter had a right to inherit the father's property if there was no son. In the presence of the sons of intestate, the daughter did not inherit anthing. The provision for giving the daughter one quarter share or Rs. five thousand whichever is less, by way of stridhanam, which may be loosely translated into dowry.
117. Devadasan, E.D., *Christian Law in India* (1984).
118. Bill No. 129 of 1986.
119. Mathew, G., "Negating Women's Equality", *Hindustan Times*, March 3, 1987, 1987.
120. A further difficulty faced by some Christians is that the state legal system does not recognise an annulment of marriage by the Church and vice versa. However, the Church refuses to marry a person who had obtained a

Church dissolution of previous marrige but does not have a dissolution decree from the court.

121. Sir Phiroze Sethna, Legislative Assembly Debates, V, 1936, p. 4151.

122. Legislative Assembly Debates, iv, 1935, pp. 3246-247; Legislative Assembly Debates, v, 1936, pp. 4149-153.

123. Sir Dinshaw M. Petit v. Sir Jamsetji Jijibhai, 1909(11) Bom. LRP 85.

124. Another instance where the priest and community members made an arguement about rules is described by paymaster (1954, pp. 104-5) where he says, "The mobeds (priests) and Behdins of Navasari held a meeting on 3rd of June this year to fix the rule of 'adoption'. It was decided as follows : The adopted son is the legal heir of the person adopting him, and should recieve all the properyt of his 'patron' in the event of the later's death. If any person other than the adopted son puts forward a claim on the dead man's property, he is guilty of an offence agaisnt the Anjuman. A man may lawfully adopt any person as his heir during his life time. It is not lawful, however, for his wife to adopt anyone after his death. If it is necessary to adopt an heir after death, such adoption must have the sanction of the Anjuman. The adopted son incurse the liabilities of his father and must pay all his debts. He must also perform all his necessary ceremonies for his 'dead' patron, and the wife of the dead man may if she like, live inthe house of the husband till death. A fine of Rs. 101 was fixed as penalty for any breach of these regulations.

125. *Supra note 22* at 193.

126. *Gazette of India*, Extraordinary, Part II, March 29, 1988, p. 1.

127. *Indian Express*, June 7, 1988 quoted in Archna Parashar, *Women and Family Law Reform in India*, p. 194 (1992), New Delhi.

128. *Supra note* 22 at 96.

Chapter - 9

Changes in Muslim Personal Law : Can Sharia Law be Modified?

Chapter - 9

Changes in Muslim Personal Law : Can Sharia Law be Modified?

In this chapter, the researcher has tried to analyse the reforms in Muslim Personal Law. For meaningful research, it is very important to discuss the position of *Shariah* in context of reforms. *Ijtihad* and sources of Islamic law have been taken into account. Emphasis has been laid on contructive analysis and attention is given to amendments during the times of Caliphs and Imams.

The problem of reform in Muslim Personal Law in India has assumed a highly controversial and complex nature. The opponents of reform regard the *Shariah* law as absolutely immutable, while reformists reject their theory. The later feel that since the *Shariah* law had been amended by the Muslim jurists themselves, during the first few centuries falling the emergence of Islam and many of its principles had been reformed, in the recent past, in several Muslim countries. There should be no objection to its reform in India as well. The present chapter deals with this problem –

(1) Whether it is permitted to have any reform in Islamic *Shariah* law,

(2) If it is so then, what should be the mechanism for such a reform.

(3) What are the areas where such reforms are required in India.

A. Whether it is Permitted to have Any Change in Islamic Law

Going through the history of Islam we find that the Caliphs and *Imams* did very much juristic activity in early days of Islam. During the life time of Prohphet Mohammad (SAW) there was no problem at all as Prophet Mohammad (SAW) was guided by Almighty Allah through Angle Gabrael, whenever he faced any problem. That is why it is believed by the Muslims that *Qur'an* contains the direct words of Almighty Allah and the *Sunnah*-whatever Prophet (SAW) said, did or tacitly approved, contains the indirect word of Allah. After the demise of the Prophet, the Rightly guided Caliphs strictly followed the injunctions of the *Qur'an* and the *Sunnah*. Whenever they found nothing in the *Qur'an* or the *Sunnah* they exercised their own '*Ray*' i.e. reasons and judgement. Pages of Islamic History reveals that reforms were frequently introduced in the *Shariah* law by the ancient jurist themselves. Caliphs Umar and Ali had overruled some principles of law settled by their predecessors. Imam Mohammad Al-Shaybani had set aside some of the verdicts of his master Imam Abu Hanifa : Ghazzali had deviated from certain principles of law laid down by Imam Shafei; Shaybani had dissented from some of the opinions of Imam Malik and so on.

These are the facts of Islamic history which needs some explanation.

The Prophet (SAW) of Islam had not come with any '*Corpus juris*'. Neither *Qur'an*, nor the *Sunnah* had furnished any

exhaustive code of law. These '*nusus*' had provided only the fundamentals of *Shariah* law. Formation of detailed legal rules was left to the Prophet (SAW) during his life time. After his demise, the mission was taken over by the Caliphs who were the administrative-cum-ecclesiastical heads of the Islamic state, and, at a latter stage, by the *Ulema*, jurists and interpreters of revealed law. Through the media of their judgement and fatwas, they filled the scriptural skeleton of the law with flesh and blood.[1]

The tool employed, for the purpose, by the interpreters of law was the exercise of reason the validity of which had been decreed by the Prophet (SAW) himself. The exercise of reason assumed in the hands of jurists, the form of various sources of Islamic legislation. Some of these sources were;

1. *Qiyas* (Analogy)
2. *Istehsan* (Equity)
3. '*Urf*' and '*Ada*' (Custom and Usage), and
4. *Masaleh-al-Mursalah* (Public Interest).

Muslim law, thus, underwent a long process of evalution. The fabric of law was woven and re-woven with the spindle of juristic interpretation or administration. During these period of development, Islamic law remained a law in the making. In this period, if a latter jurist or interpreter overruled the law settled by the precedecessors, it constituted a step towards the development of law. Difference of law in this period of Islamic legal history,

infact, formed part of the process of legal evolution. So when Umar Farooq set aside Siddiqui ruling, abrogated Shaybani a Hanafi precedent, Ghazzali overruled a Shafei principle, Tufi dissented by a Hanbali verdict or Moosa Kazim deviated from Jafari ruling, each of the doctors of law aimed at the further systematization of legal principles. All this juristic activity was based strictly on the interpretation of the mandatory laws revealed by the *Qur'an* or settled by the Prophet (SAW) under divine authority.[2]

Due to the above mentioned juristic activity several schools of Islamic law were established in different parts of the Muslim world. These school were based on the same sources but having conflicting doctrines in the matters of detail keeping in view the public interest or public welfare.

The study of the Holy *Qur'an* leads us to the inference that there exist only two alternative ways of human behaviour. One consists in the obedience of the Holy Prophet (SAW) and the other in obeying one's own desires and urges, the former is the truth path while the later leads astray and is '*zalal*'. no third alternative is available, Allah ordains :

> And now we have set thee (O Mohammad) on a clear road of (our) commandment. So follow it, and follow not whims of those know naught. Lo! They can avail thee naught against Allah.[3]

Another verse exhorts the Holy Prophet (SAW) in unequal terms to act according to whatever has been revealed to him. Any deviation from this course amounts to leaving Allah and opting for the obedience to protecting freinds beside Him :

> "Follow that which is sent down unto you from Lord, and follow no protecting friends beside him. Little do ye recollect."[4]

Elsewhere in a verse the obedience to Allah and His Prophet (SAW) has been defined as an obligatory course of action and a reference back to Allah and His Prophet (SAW) in the event of disputes has been held as an essential ingredient of Faith (*Al-Iman*) :

> "Oye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the Messanger if ye are (in truth) believes in Allah and the Last Day. That is better and more seemly in the end."[5]

The Holy *Qur'an* has expressly stated in the following verse that a believer has no option left once Allah and His Prophet (SAW) have taken a decision on any matter :

> "And it becometh not a believing man or a believing women, when Allah and His Messenger have decided an affair (for them), that they should (after that) claim any say in their affair".[6]

The Holy Prophet (SAW) has similarly termed those constituting the greatest trial of the *Ummat* who ignore Divine revelation and alter the permissible into prohibited items on the basis of their own desires and intellectual disposition.[7]

The Holy Prophet (SAW) has, thus observed :

> "My people will be divided into numerous groups; the most corrupt will be those who decide *Deen* according to their views – prohibiting on that basis what Allah has permitted and legalising what Allah has prohibited?[8]

Thus, the *Qur'anic* verses and sayings of the Holy Prophet (SAW) corroborate the view that we, as Muslims, have no option to evade or bypass the *Shariat* and instead follow our own self made laws and codes of behaviour. This always holds true whatever the needs of secularism and national integration. And what possible justification can be offered to destroy distinct cultures, languages, faiths and religious teachings, after all these high sounding promises to ensure freedom of religion and guarantee protection to all these?[9]

B. Mechanism/Procedure for Change in Islamic Law

Now we should discuss the second problem. Is there any rule for alteration in the *Shariat* laws to accomodate changing needs of time, modern inclinations and the revolution in the social and political setup? In this connection, let us understand clearly, that a

Muslim is not free to adopt any course of action in violation of the limits set by Almighty Allah and the path shown by the Prophet Mohammad (SAW). If a Muslim violates the limits prescribed by the *Qur'an* and the *Sunnah* it means he had transgressed the limit set by Almighty Allah then he would commit a sin which a true believer would never like to adopt. Thus, the adoption of a course of action in matters of religion independently of text of the *Shariat* and its principle would certainly defeat its objectives and open the way to revolt against Islam and Divine commandments. It does not mean that the Islam ignores the contemporary trends, social changes and the needs of the time. If the *Shariat* fails to take due congnizance to new situations.and the inability of scholars of Islam to provide answer to the newly emerging issues and problems, then in course of time it would generate dissatisfaction with the religion. In the words of *Allama-Ibn-Qaiyem* :

> "I am of the opinion that right path lies in giving adequate and full consideration to the objectives of the *Shariat* and the understanding the spirit of its laws, on the one hand, and undertaking a search for finding solutions to the new problems and resolving the difficulties arising out of the changed in the light of the general principles of the *Shariat*, similitude and precedents on the other..."

It is this very 'path' that has been chosen by the companions of the Prophet (SAW) themselves and by the eminent *Ulema* in all stages of Islamic history. It has been reported about Hazrat-e-Abu Bakar that when some problem came before him. He first of all searched for its solution in the *Qur'an* and *Sunnah* and failing to get an answer in these two basic sources he would call a meeting of the companions of the Prophet (SAW) for advise and would decide the matter in the light of these consultation (i.e. *Ijma*).[10]

And Omar used to do like wise. If he failed to get anything in *Al-Kitab* and *Al-Sunna* he would ask : 'did Abu Bakr decide anything in this matter'? And if there happened some decision of Abu Bakr in this matter. He would decide accordingly otherwise he would call a meeting of the knowledgeable among the people and consult them and if they agreed on some opinion he could decide accordingly,[11]

More ever Hazrat Umar has indicated the procedure of *Ijtehad* in a letter to Abu Musa Ashari in the following words :

> "When you come across any issue which, according to your knowledge has not been pronounced upon by the Book (of Allah) and the *Sunnah* and you are yourself clear of your mind as to what ruling would be proper in this regard try to grasp the issue first. Find out similar and analogous cases. Then reason analogously, draw parallel and go in for what in your

> opinion would be the (ruling) most desirable to Allah and nearest to the truth in that regard.[12]

From the above ruling of Hazrat Umar it is crystal clear that he has laid down a definite procedure to deal with the new emerging problem in future. The procedure may be stated in following words :

> "The textual or reported precedents of decisions or laws relating to different issues that are available in *Shariat* should be kept in view so that issues and problems on which the text are silent may be decided by striking a similitude between the former and the latter. At the same time the subtle difference between the above mentioned two categories of precedents has to be kept in view to avoid doubts."

In addition to this he has pointed out the fundamental principle that the spirit of *Shariat* laws and its obejctives should never be lost sight so that in the process of drawing conclusions within newly emerging issues the interests of the *Shariat* and its aims and objects are not defeated."[13]

It is also evident from the life account of the companions of the Prophet (SAW) that they adopted the same procedure. The *Ulema* and *Mujtahideen* in every age had been similarly dealing with problems relevant to these periods keeping with the view of the objective of *Shariat* and delicacies of their time. The books

on Islamic jurisprudence are full of these examples. Hazrat Umar himself took numerous decisions taking into account the spirit of *Qur'an* and *Sunnah* and the expediency of this time. For example both during the period of Prophet (SAW) and Abu Bakr, ladies visited the mosque but Hazrat Umar could foresee that the said practice would lead to evils. The changed circumstances led him to the conclusion that the innocence of the eyes characteristic of the time after Prophet (SAW) was no more to be found. Keeping in view the difference between the desirability of visiting the mosque and prevention of vice he stopped the visits of ladies to the mosque by an order. Likewise he accorded due consideration to the importance of *jehad* and the necessities of war on one hand, and the need to safeguard Muslim society against corrupt practices on the other and set down four months as the maximum period for which warriors could stay away from home. This is why the author of the book '*Al-Qadah-fi-Al-Islam*' has observed as follows :

> "Umar strove to grasp the end in whose regard the verse was revealed and tried to understand the purpose for which the traditions came down and adhered to the substance and not the letter (thereof)."[14]

Similarly one more example of the *Ijtehad* is the problem of paid employment for religious duties pronouncing illegal by the

early jurists. Later the system of collective treasury fell into disorder, and the conditions worsened to such an extent that the only alternative to legalising it was the risk of extinction of *Qur'an*ic education – a havoc which could not be allowed to happen. The scholars of the time appreciated its urgency and look into the account the absence of any system of stipends for the collective treasury and also the lack of public zeal to ensure its continuance through voluntary contribution. In view of the above the *Ulema* and the religious elite of Bulkh legalised the acceptance of wages for the teaching and education of *Qur'an* for in the alternative either the teachers of *Qur'an* and their families would be exposed to the danger of liquidation and the ruin of their families or the *Qur'an*ic education itself could go by default. Subsequently payment on such religious services of symbolic significance as the call as to prayer and *imamat* were also ruled as permissible.[15]

It is stated in *Fatawa-e-Hamidiya* that :

> "So the later people pronounced on its permisibility and some of them allowed also employment for call to prayer and *imamat* for the above stated reason, and because both of them are symbols of the *Deen* and in their default lies the demolition of *Deen*. These are examples of exceptions made for necessity since necessity legalises what is not permisible."[16]

Thus we are exercising many new situations. They call for an answer in the light of the *Qur'an* and *Sunnah*. Some of these newly emerged situations and problems are unprecedented, and hence the books of Islamic *fiqh* are silent in this regard. While others, though not new, yet are accompanied with entirely unique circumstantial context and hence require re-appraisal in the light of *Qur'an* and *Sunnah* and a new solution harmonious in the interest of *Shariat*. Both of these are only different aspects of the function of *Ijtehad*.

Now the question arises the reform of Muslim Personal Law in India. *Shariah*, the code of Islamic law is generally regarded as immutable. The fundamental principles of *Shariah* are not open to reconsideration by man. In the legal theory of Islam, Allah is the only law giver and there exist no other basis of the legal fabric than the Divine will. While accepting this theory of immutability it should be clearly understood that what is immutable is actually the 'grundnorm' of the *Shariah* and not any of its varied interpretation.

C. How to Effect Changes in Islamic Law

It is, thus, clear that Islamic law by its very nature is amendable and changeable. The principles of Islamic jurisprudence, the numerous schools of thought in Islamic law and the practice of theologians throughout the practice of Islam show that Islamic law has always been flexible and adoptable, in order

to meet the legitimate and genuine requirements of the people at a given time and under specific conditions and circumstances. However, Islam being a particular way of living with certain objectives and principles guiding human activities and ambitions *it is not to say that change of every kind would be acceptable in Islam*. For the purpose of reconstruction of any particular principle of Islamic law, one has to make sure that :

i) The change in issue is not contrary to the basic teachings and objectives in Islam,

ii) Is the change is really in the interest of the society, leading to its welfare, happiness and prosperity, and

iii) The change will have no evil repercussions in the near or distant future.[17]

If the above three conditions, if satisfied then one may proceed to find out the ways and means to make reforms in Islamic law. Following procedure may be adopted for this purpose.

D. Method of Ijtihad

According to Islamic law there are four basic sources of Islamic law :

1. *Qur'an* (Book of Allah),
2. *Sunnah* (Traditions),
3. *Ijma* (consensus of opinion) and
4. *Qiyas* (Analogy).

The *Qur'an* is the fundamental source of Islamic *Shariah* and direct revelation by Almighty Allah (SAW) to the Prophet Mohammad (SAW). It consists of 114 chapters and the number of verses are 6666. The versus are of two kinds;

(a) verses which are mandatory, fundamental and of established meaning and, as such, the foundation of the Book, and

(b) the verses which bear allegorical meaning.

This implies that the interpretation of the verses of second category may be different from man to man, but no interpretation should be contrary to what has been laid down in the fundamental verses.[18]

Sunnah, is, what the Prophet (SAW) said, did or tacitly approved. It is indirect revelation or the indirect words of Almighty Allah. Although the main task of the *Sunnah* is to explain the meaning of the *Qur'an*, no *Sunnah* will be acceptable which, in content or spirit, stands opposed to the plain statements of the *Qur'an*.

Ijma and *Qiyas* together constitute the method of *Ijtehad*, a living source of legislation in Islam. They differ from each other in that the former is a collective opinion while the later is an individual one. They are sanctioned as sources of Islamic law in the *Qur'an* as well as in the *Sunnah*, and are to be made use of in cases where there is no explicit command of God or Prophet (SAW).[19]

It may be noted for the purpose of our discussion that though the *Qur'an*, *Sunnah*, *Ijma* and *Qiyas* are all accepted as main sources of Islamic jurisprudence, a point of difference between them is that the former two are recognized as absolute arguments while the later are arguments obtained by exercise of reason and hence not absolute. This is indeed a very significant point because it suggests that the door is still open for reassessment and re-evaluation of arguments which fall in the second category, in a given changed condition of the society. Such a reassessment or evalution amounts to *ijtihad*. The main tasks of a *Mujtahid* are :

(a) to suggest any change or amendment, if possible, in the law prescribed by the old doctors of Islamic jurisprudence, in order to meet a new situation, and

(b) to find a solution to new problems arising out of the changed social and economic conditions of the world.

In the former case the *Mujtahid* will have to go deep into the basis of particular principles. If the basis is found to be a verse of the *Qur'an* or Sunna a *Mujtahid* will have to see if the injunction concerned is *Nasus*, i.e., a clear verdict by God or by the Prophet (SAW) without assignment of any reason.

If so, change and no amendment would be possible. If, on the other hand, the particular injunction mentioned in the *Qur'an* or a *Sunnah* is based on a reason specified therein or indicated

by the Prophet (SAW) or by one of his eminent companions (either though words or by action), then it would be the task of a *Mujtahid* to see whether that particular case would be applicable to the new situation which he has to face. If a *Mujtahid* finds that a principle of Islamic law is not based on the *Qur'an* or a *Sunnah* and derives authority from mere conjecture and reasoning of a jurist interpreter, then he is entitled to express a different opinion, provided he is well-equipped and is in a position to argue his view point. Thus, he can possibly do even when an old jurist has based his decision on an interpretation which he put to a verse of the *Qur'an* or to a *Sunnah* according to his own understanding and that interpretation could be refuted on mere reasonable and logical grounds.[20]

Some of the important principles of *Ijtehad* are discussed below. Custom and usage play a very important role in the formulations of laws it is essential that a person who is not familiar with the custom and usage of the time is not eligible to give rulings on Islamic law. Some eminent jurists of Islam have disussed the importance of custom in the development of basic principles of Islamic law. Shah Waliullah of Delhi is one of them. Regarding custom and usage Imam Abu Yusuf, an important jurist of Hanafi School declares :

> "One who is not familiar with the custom of his time
> is not permitted to give a religious verdict."

Public interest is also a deciding factor in *Ijtehad.* Things good for the human society (*Masaleh-al-Mursalah*) constitute another factor determining the merit and value of an issue to be decided by the process of *Ijtehad.* This method of deducing rules from the Text *Qur'an* and *Sunnah* is very prominently used by the Maliki School. In addition to the above there are certain other rules which are necessary and which provide guidance in the process of *Ijtehad* are as follows :

a. Permisibility is at the root of all things;

b. He who is caught between two evils must prefer the lesser one;

c. A safeguard must be provided against an anticipated nuisance;

d. Necessity makes forbidden things permissible;

e. Prevention is better than cure;

f. Religion is an easy thing to be practised;

g. God does not impose upon any person a duty which is beyond his capacity.[21]

Further, social harmlessness of a thing, as stated by the Prophet (SAW), also counts in Islamic legislation. In this connection benefit may be taken even of the practice and experiment made by non Muslims.[22]

E. How to Reform Muslim Personal Law in India?

Under Islamic law although the injunctions laid down in the *Qur'an* and the *Sunnah* can not be changed by any human agency but where there is ambiguity and where a new problem has arisen then the recourse may be taken through *Ijma* and *Qiyas* which are the two methods of *Ijtehad*. *Ijma* is the collective method of *Ijtehad* while *Qiyas* is an individual effort.

Coming to the main problem of our discussion that is the Muslim Personal Law and Uniform Civil Code. We must be very clear that there are certain aspects of Islamic law which are said to be causing hardship to the Muslim community in general and women in particular. It is also alleged that there is a gender discrimination in Islamic law. Let us see what are those important areas where the problem is most burning and where certain kind of reform is required. Following are the main areas where reform is required.

1. Polygamy
2. Triple Divorce
3. Succession and Inheritance

1. Polygamy

Perhaps the most burning problem of our times is polygamy. It is said that the Muslim personal law gives liberty to the Muslims to contact as many as four wives at a time. But if we go through

the *Qur'an* and the history of Arabia we find that according to *Qur'an, monogamy is the general rule and polygamy is an exception* and allowed for certain exigencies. This is quite evident from the very text of the *Qur'an* in which this provision had been made. The verse relating to polygamy runs as follows :

1. "If ye fear that ye shall not deal fairly with the (female) orphan wards under you, (do not marry any of them),
2. but marry other women whom you like, two or three or four; and
3. if ye shall fear the ye shall not act equitably, then marry one only (from free women) or
4. from the female captives under your charge. This will faciliate just dealings on your part."[23]

The important point to be carefully noted here is that this verse does not enjoin polygamy. It only permits polygamy and that permition, too is given on a very strict condition, i.e. if one can be equitable between the wives. If one can not do justice between the wives he is forbidden to marry more than one wife. It may be noted that this verse was revealed after the battle of '*Uhad*' when the Muslim community was left with many orphans, widow captives. As Abdullah Yusuf Ali in his translation of the *Qur'an* points out that :

"Their treatment was to be governed by principles of

> the greatest humanity and equity. The occasion is past but the principles remain".[24]

If we go into the history of the Islam then we find that before the advent of Islam people generally lived in an age when fighting was the order of the day with the result that the number of men was much less than that of women. Such women were unfortunately left to live at a destitute and miserable life. This state of affair largely contributed to the continuance of the institution of polygamy. Such condition continued to prevail during the early period of Islamic history. It is no secret that Muslim were in state of perpetual war against an enemy bent upon there extirpation women lose their husband and young children lose their fathers. It was in order to meet such emergencies than Islam permitted a man to have wives more than one. There may be other circumstnaces, too, necessitating polygamy.

So polygamy in Islam is a remedy – is an exception rather than the rule. It has its uses and abuses. Islam guides against the later and allows the former under restrictions and within stringent limits. Polygamy comes under that category of legal principles within (*Ahkam*) which are called *Mubahat* (permissibles) and as such, like other permissible. If there comes a time when a certain permissible things begins to be abused and misused for nefarious ends shattering the moral structure of the society, then, an Islamic state or a Muslim society, as the case may be, would have every

right to interfere in the matter by stopping it temporarily and putting some restrictions on its operation.[25] In this connection, rapid growth in the population of mankind other social and economic repercussions of the practice of polygamy may be lawfully given consideration. However, the interest of those who are genuinely in need of having a second wife must not be jeopardized.[26]

2. Triple Divorce

Another important area where the need of *Ijtehad* arises is the divorce in general and triple divorce in particular. Allowing the practice of triple divorce in India is not in conformity with the true Islamic law but the practice, due to certain historical and legal reasons, have found a way in India where majority of the Muslims follow the Hanafi School of jurisprudence. There is no need to go into the historical reasons of triple divorce yet it is an established fact that the overwhelming majority of the Muslims in India consider triple divorce, due to their ignorance, as the only means of divorce available to them. They use it frequently and thus cause hardship to thousands of families including themselves.

Now we would see does Islam permits any reform or any restriction on triple divorce and its solution under Islamic law? Divorce, another *Mubah* (permissible thing), was described by prophet as (*Abghad-Al-Mubahat*), the most destestable of the permissible things. The practice of the unscrupulous of the

Muslim community in this regard has been disastrous to a sound social order causing misery to innocent women without any fault on their part. It is, a therefore, a demand in certain sections of community to consider the Islamic law of divorce with a purpose of finding out whether any changes could be introduced therein. There is ample ample scope for *Ijtehad* in respect of this problem also. First, it should be kept in mind that according to the *Qur'an*, in all disputes arising between husband and wife which may lead to breach – two judges are to be appointed from the respective people of the two parties.[27]

These judges are required to try to reconcile the parties, failing which a divorce, or *khula* would be the last resort. This implies that though it is husband who has to pronounce a divorce, yet certain limitations are placed upon the exercise of this right and he is not left free to use it arbitrarily. Ali, the fourth Caliph is reported to have told a husband who was under the impression that he had the sole right to repudiate his wife that he would have to abide by the judgement of the judges appointed under the verse referred to above. The Prophet (SAW) also is reported to have interferred in the matter, some times by disallowing a divorce pronounced by a husband and so restoring the marital relations and some times by treating three divorces at one. This shows that the authority constituted by law has the right to interfere in the matter of divorce. As such, Muslim jurists of any age will be entitled to make an amendment or effect a change in the existing law of divorce in order to meet an emergency of these time.[28]

The consideration a possible change in the law of divorce will be focussed on three points :

a. Whose pronouncement of divorce would be legally valid?

b. In what circumstances a divorce would be valid or invalid? and

c. What procedure of the pronouncement of divorce would be deemed as valid?

These points have been extensively discussed by our eminent jurists in the books. Their discussions certainly provide a wide scope for a *Mujtahid* in our time to exercise his own judgement and discretion in regard to the modern problems of divorce.[29]

As far as the womens' right to divorce is concerned this right is given to her and is called as *Khula*.[30] This is the most important right available to a Muslim woman as for as the dissolution of her marriage is concerned. It is almost equal to the right of husband to dissolve his marriage through divorce. The only difference between the husband right to divorce and wives right to divorce is that if the husband does not oblige the wife and refuses to divorce her through *Khula* she has to go to the *Qazi* or the court as the case may be. But unfortunately in India this right is not available to Muslim women due to the judicial misinterpretation of the rules relating to *Khula*. This lacuna which is causing hardships to thousands of Muslims women may be rectified by a pronouncement of the Supreme Court or by amendment in law by the Parliament.

3. Succession and Inheritance

The third most important aspect of Muslim Personal Law which is often criticised by the so called enlightened and progressive Muslims and the proponents of a Uniform Civil Code is the share of female in property matters and the exclusion of the grandson from the property of his grand father if the father predeceases. The problem of inheritance and the shares is given in *Qur'an* itself. If any supposed injustice is done on the basis of clear cut verdict in the *Qur'an* or the *Sunnah* then no Muslim is authorised (rather no human agency is authorised) to effect any change in that. If any rule of inheritance has been given by any school on the basis of *Ijtehad* then that may be amended by a latter *Ijtehad* fulfilling all the necessary requirements of a valid *Ijtehad.*

To conclude the whole discussion we can say that no human agency is competent to change or amend any of the explicit provisions of the *Qur'an* and the established practice of the Prophet (SAW). Every Muslim is bound to have faith in them and to severely follow them. A Muslim is also not free to interprete the verses of *Qur'an* and the traditions of the Prophet (SAW) which run counter to the unanimous interpretation of our predecessor. Within the limits prescribed by these *Ulema* the Muslim Personal Law may be reformed, if the circumstances so demand. Following are certain guidelines for proposed reform in Muslim Personal Law in India.

1. A list should be prepared enumerating all such laws which give rise to complications and difficulties and which call for solution.

2. If any one of the laws enlisted above are explicitly provided in *Qur'an* and *Sunnah*, it should be presumed that the difficulties and complication arise only because of lack of proper understanding compliance, or that the society needs to be morally toned up. The possibility may, however, be considered of subjecting these provisions of certain condition and limitations if they did not go against the spirit of the *Qur'an* and *Sunnah*. In most of the Muslim countries the changes which have taken place is that they have replaced the one provision of any school of Islamic jurisprudence and by any other provision of other school. In this regard we should act upon the advise of Shah Waliullah, that is, of the many opinions and verdict we should prefer that which is more in tune with the spirit of the *Qur'an* and the *Sunnah* and which may solve the problems with more satisfaction.

In this regard Maulana Syed Hamid Ali has formulated the procedure :

> "The need of the hour, therefore, is to constitute a committee consisting of *Ulema* representing various Muslim sects and organisations and Muslim jurists. This committee be entrusted with the task of

preparing a draft, leading eventually to the final drafting after a free and full discussion over it."[31]

From the Islamic point of view this draft will assume the status of law code for Muslims to abide by, yet because of the dispensation of things in the country which requires everysuch code to get the sanction of the Parliament before it can be enforced by the law courts, it will have to be referred to the Parliament. The effort will have to be made to get the finalised draft passed without any amendments. But if any amendments is deemed necessary it should be referred back to the aforesaid committee of Muslim *Ulema* and jurists.[32]

Summary

Reformation in Muslim Personal Law is a controversial issue, dividing the community for and against such a process. To address the issue meaningfully, several aspects as the permission to make any change and the manner for that shift including the identified areas must be considered.

When Prophet Mohammad (SAW) was at the helm of affairs, there was no problem. After his demise, Caliphs followed *Qur'an* and *Sunnah* in letter and spirit. They also applied their mind and judgement in this regard. *Shariah* law was amended several times during the Caliphat of Umar and Ali. Again in later period, several Imams interpreted certain principles according to their analysis.

In fact reasoning was the base for all such deviations and amendments. *Qiyas* (Analogy), *Istehsan* (Equity), *Urf* and *Ada* (Custom and Usage) and *Masaleh-al-Mursaleh* (Public Interest) were also the sources. In this way, Muslim Law passed through a long process of evolution. *Ijtehad* is the only way for effecting reforms in Islamic law.

In India, three areas of Muslim Personal Law demands attention for reforms. Polygamy, Triple Divorce, Succession and inheritance. Polygamy is not a facility but remedy sanctioned in Islam. In specified circumstances second wife can be taken. Triple divorce may be banned through the process of *Ijtehad*, as the practice followed in India is an innovation in Islamic law. Inheritance has been clearly discussed in *Qur'an* and it should be that way. Above all change must come from within and not by outside quarters.

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17. Sayeed Ahmad Akbarabadi, "How to Effect Changes in Islamic Law", *Islamic Law in Modern India*, Tahir Mahmood ed., p. 116 (1972)
18. *Id.* at 115
19. *Ibid*

20. *Id.* at 116
21. *Id.* at 116
22. The Prophet (SAW) is reported to have once made up his mind to prohibit cohabitation during the period of foster age. But he abondoned the idea when he came to know that the practice was in vogue amongst the people of Persia and Rome without any adverse effect either on the mother or the child.
23. *The Qur'an*, IV, 3
24. *Supra note* 17 at 120
25. Support for this is found in the history relating to the legislative policies of Umar b. Khattab, the second Caliph. For instance, a Muslim is permitted to marry a *Kitabiyya* women, but when 'Umar came to know that this practice was gaining popularity in the community he came forward to ban it and said :

    "I have no right to make an illegal thing legal or *vice versa*. But imagine what would happen to the maidens of Arabia if you got fascinated with the beauty of Roman girls".
26. *Supra note* 15 at 120.
27. *The Qur'an*, IV : 35, 130.
28. *Supra note* 15 at 121.
29. *Ibid.*
30. *Khul'a* : The literal meaning of *Khul'a* is to take off and to pull out. *Khul'a* means that the demand of *talaq* may be made on behalf of the woman from the man. Its one side is moral and the other is legal. Even as the Sharia'ah does not like the *talaq* on the moral side, it also does not like the *khul'a*, because the shari'ah's objective is one and the same place and notthe separation, and *talaq* or *khul'a* is valid only as the last remedy.

    Thus, termination of marital relation by the husband in consideration for a return agreed upon by the parties is

khul'a, whether it is through the word *khul'a* or by *mubara'at*, or by the word *talaq* or any of its synonyms.

The basis of the *khul'a* is the following verse of the *Qur'an*:

"And it is not proper for you at the time of bidding her farewell that what you have given her you take it back from her. However, this form is an exception that the spouses may not be within the compartment of Allah's limits. In such a case if you feel that they will both not fear of remaining on the divine path, then there is no distress if a common bond is signed by them that the woman, by giving something to the husband, may obtain separation from him." (Baqarah 2:229)

If the matter of *khul'a* may not be settled mutually and the matter may reach the court, then the court has the right to obtain the *khul'a* to keep the limits of Allah intact, by command and source.

In case of not obeying the order the court the example of *Jabr* (compulsion) is found in a decision of Hazrat Ali who had written in it to a voilent husband that "you will not be left as long as you may also be ready to accept the decision of the *Hakimin* as the woman has been."

31. Recently, on 26 July, 2001 "A compendium of Islamic Laws", containing a sectionwise compilation of the rules of *Shariat* falling into the domain of Muslim Personal Law, has been prepared for and on behalf of the All India Muslim Personal Law Board. It is based on the most authentic principles of the Islamic Law.

    The compendium is available both in Urdu and English. The complete operative part of the compendium, running into 440 sections, has been translated by Professor Tahir Mahmood. The English translation has been arranged under five parts covering 34 chapters

32. Maulana Syed Hamid Ali, "Changes in Muslim Personal Law: Scope and Procedure", *Muslim Personal Law*, in F.R. Faridi and M.N. Siddiqui, ed., p. 92 (1985)

Chapter - 10

Role of Muslim Thinkers, Minority Organisations, Successive Governments, Political Parties and Press

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The Role of Muslim Thinkers, Minority Organisations, Successive Governments, Political Parties and Press

If the Academics have failed to study the question of Uniform Civil Code in depth, the governments have also failed to communicate with the masses on the Uniform Civil Code. In the last fifty one years since the Constitution was adopted, the government has done little to lead the nation to the Uniform Civil Code. The government has not done much to discharge the burden of Article 44 of the Constitution of India. No steps have been taken to explain the contents and significance of Article 44. No measures have been adopted to a fight obscurantists who opposed the Uniform Civil Code. It is alleged that the government has been giving undue advantage to opponents of the Uniform Civil Code by giving weightage to the conservative elements to the Muslims Society and this attitude of the Government is only for the political games.

If we go into the history of the congress party the Indian National Congress since the pre-partitions days is assuring the Muslims that the government had no intention of tampering with their personal laws. This is evident from the resolutions passed by the Indian National Congress at its various sessions held

during the freedom struggle. These assurances continued even after the independence of the country. These assurances are generally given on the eve of elections and are seen to be well in keeping with secularism, Indian style, viz., equal status to all religions, opposition parties also can not be praised for their role. No party have been above political alliances with communal parties or giving membership and prominance to openly communal persons living up to the adage that politics makes strange bed fellows. During the Muslim Women's Bill controversy, apart from Communist Party of India and Communist Party of India Marxist, no other party took a principled, unequivocal stand against the Bill. Even their past history does not bear scrutiny. In the bye-elections that took place in the months that separated the Shah Bano judgement from the Muslim Women's Bills, no party save the two mentioned was able to forget its electoral compulsions.[1]

None of this behaviour is exactly designed to persuade the Muslims that the Uniform Civil Code is any more than the sword of Damocles having over their community's collective head. Indeed they may well ask, as some of their leaders are demanding, that Article 44 be repealed altogether.[2]

It is very unfortunate that when five decades have passed after the commencement of the Constitution we have nothing like

Uniform Civil Code which was considered by our constitution makers as a golden letter for the unity and the integrity of the country.

Thus, at this point it is very important to know the opinion of various religious communities and the persons who have some recognition and identity on behalf of religious sects. The purpose to study the public response, is that whether it is the opposition from the side of the general public or a small portion of a total population for the country which is opposing this directive.

A. Views of Muslim Thinkers and Minority Organisations

(i) Arguments against Uniform Civil Code

There is no denying to the fact that Muslim is first largest minority group in India, therefore, it is some what natural to know the attitude of the Muslims towards Uniform Civil Code. The Advocates of Muslims personal laws argue that their personal law is comprehensive and complete code of life. It has its origin in Divine Revelation and is, therefore, immutable. Muslim law relating to marriage, divorce, and inheritance, it is claimed by the critics of a Common Civil Code, has been handed down by the Prophet (SAW) and are, in this sense, divine and must, therefore, be unquestionably obeyed.[3] This is not a new thing that some Muslims are opposing Uniform Civil Code. If we go through the

history of the incorporation of Uniform Civil Code during the debate in the Constituent Assembly we find that it was strongly opposed by the Muslim members of the Constituent Assembly. They argued that the right of a group or a community or the people to follow and adhere to own its personal law is part of the way of life of those people who are following such laws; it is their religion and part of their culture. If anything is done affecting these personal laws it will considered as an interference in their age old laws which they are following from generation to generation. Thus secular state which we are dreaming to create should not do any thing to interfere with the way of life and the religion of the people.[4]

The minorities represented in the Constituent Assembly were Muslim, Christian, Parsi and Sikhs (on members). There were also Schedule Caste and Scheduled Tribe members. The Anglo-Indians have given a separate representation. The Buddhists and Jains were subsumed under Hindu (general constituency). It is to be noted that with the exception of Muslims all other minorities either acquiesed silently to the notion of a Uniform Civil Code or vigorously supported it.[5] It does not mean that all Muslims were against the Uniform Code just before the commencement of the constitution and after the conclusion of Constituent Assembly debate. Among the Muslims Chaudhri Haider is a glaring example

of that time who had strongly supported the idea of Common Civil Code in the following words :

> "I would therefore strongly urge the necessity of having one single Code to be named as the Indian Civil Code applicable to everybody living within the territory of Indian union irrespective of cast, creed or religious persuations. This is the just solution of communal problem. It appears to be solution in the interest of the unification of the country for building up one single nation with one single set of laws in the country."

Let us discuss some statements of Mulsim politicians and others who are opposed to the implementation of Uniform Civil Code in India. Mr. Bukhari of Muslim League stated on the floor of the Maharashtra Legislative Assembly in July 1972 that Indian Muslims would never concede to Parliament, or any State legislature, the power to legislate on matters relating to Islam. Mr. Bukahri teared that if attempts were made to infringe Muslim Personal law through legislation, it might endangers peace.[7] Ibrahim Sulaiman Sait, MP and the President of Indian Muslim League has been in the forefront of the protest by Muslim fundmantalists in *Shah Bano* case. He was also a leading light in the subsequent efforts by the orthodox to have the law changed.

Ibrahim Sulaiman Sait remanded that Sec. 125 of Cr.P.C. be amended to exclude Muslim and G.M. Banatwala on July 27, 1985 had introduced a private member's bill for amendment of Sections 125 and 127 of the Cr.P.C. to ensure that no court even again interfered in Muslim Personal Law. Mr. Abdul Samad of the Muslim League was of the views that nothing could be more heinous for a Muslim woman than to look up to her ex-husband for monthly dole. "It is *Haram* under Islamic Law".[8]

The All India Muslim Personal Law Board has also strongly defended the Muslim Personal Law and opposed the court judgement. The meeting of the Muslim Personal Law Board, held at Hyderabad in April 1973, expressed its determination to resist any change in the Muslim Personal Law. Two retired judges of Patna and Madras High Courts, Mr. Khalil Ahmad and Mr. Bashir Ahmad respectively (both members of the Board) told newsmen that the Board was determined to protect and safeguard the rights of the minority community. They also out lined the Boards future programme which would among other things, include the study and review of the Anglo-Muslim law from time to time to bring it in conformity with the *Shariah*.[9]

Maulana Syed Abul Hasan Ali Nadvi, President of the All India Muslim Personal Law Board, discloses that a Muslim

Personal Law Code with notes on Islamic legal terms and concepts is being compiled by the Board itself. The Maulana is not opposed to the optional Uniform Civil Code proposed by the government. However, he states that the Personal Law Board stands for continued application of Islamic law to Muslims even after the enactment of such a code, since there should be no compulsion in such matters in a democratic country.[10]

At a press conference in Goa on August 25, 1986, Mr, Shaikh Abdul Sattar, Secretary of All India Muslim Personal Law Board took the stand that *Shariah* laws should be made applicable to all states and Union territories in the country, including Goa. Strongly disputing the claims that dominant section of the local Muslim community, including a large number of women and youth, favoured retention of the old Portuguese to laws and were opposed to the *Shariah* laws due to easy availability of divorce and re-marriage under it, Mr. Sattar asserted that overwhelming majority of Muslim in Goa were with them and opposition to *Shariah* laws, if any, came only from a small section of misguided elements. He added that *Shariah* laws were based on Divine dictates and should be expected without questions by devout Muslims.[11] Another Muslim political party that is All India Majlis-e-Ittehadul Muslimin, in its annual conference held at Hyderabad in April 1973, urged that government adopt a

resolution in parliament or publish a white paper, categorically stating that it would not effect any change in the Islamic *Shariah* and the Muslim Personal Law.[12]

Speaking at a symposium on Common Civil Code organised by the Jamat-e-Islami Hind in Bombay in January, 1986, Maharashtra Jamat-e-Islami President Maulana Rashid Usmani said a Uniform Civil Code would not help the country and that it would be foolish to think that such a code would help curb communal riots and tensions.[13]

The working committee of Jamiat-e-Ulema passed a resolution on Muslim Personal law in April 1970 stating the Muslim considered the Personal Law to be essential part of their religion and stand, therefore, for *status quo*.[14]

The opponents of Uniform Civil Code have been holding the public meetings from time to time in different districts of the country to defend Muslim Personal Law by which they have tried to convince the Muslim masses that a Uniform Civil Code is injurious to their culture and religious freedom. It will be essential and interesting to refer these meetings in brief.

In May, 1972, a Muslim Personal Law Public meeting was held at Meerut in defence of the Muslim Personal Law by the Jamaitul-ulema.[15]

In Sept. 1972, at Hyderabad, a discussion was sponsored under the auspices of the Muslim youth association for voicing opposition to any change in Muslim Personal Law.[16]

In Dec. 1972, at Bhiwandi in Maharashtra state, a public meeting was convened by the Mohammadia Educational Society.[17]

In Dec. 1972 a huge All India Muslim Personal Law conventions was held in Bombay. The Jamat-e-Islami (Andhra Pradesh), Amarat-e-Sharia, Bihar and Orissa, Awami Tanzeem (Patna), Deeni Taleemi Council (Uttar Pradesh), All India Muslim League, Jamait-ul-Ulema-Hind, Anjumane-Mhdvia Idarah-e-Ainul Hudda Sunni Khoja Jamat, all these organizations voiced their opposition to change in Muslim Personal Law.[18]

In additional to the above public meetings Muslim women's Conferences were also held in defence of Muslim Personal Law. About 2,000 Muslim women of Bombay and Thana expressed opposition to any change in the Muslim Personal Law, at a meeting organised by the Jamaat-e-Islami in 1972.[19]

An all Maharashtra Muslim Personal Law Women's conference was held in Bombay on April 30 and May 1, 1973. This meeting endorsed the resolution passed by the All India Muslim Personal Law convention held at Bombay in Dec. 1972, viz. :

1. "That the Muslim Personal Law the integral part of the Muslim faith and religion and no Muslim has a right to deviate from the *Shariah* laws;

2. That the commandments of the *Shariah* are based on divine revelation and, therefore, no parliament has the right to amend or annul Muslim Personal Law;

3. That the introduction of Uniform Civil Code are any legislation which would make Muslim Personal Law ineffective is contrary to the International Charter of Human rights''[20].

Maulana Habibur Rehman, in his Article 'Muslim Personal Law or Islamic *Shariah*' says that there is no need of change in Muslim Personal Law. Since it had been framed by taking into consideration all the situations and hence Muslim Personal law has the capacity to deal with all the situations.[21]

The well known authority, Mohd. Yunus Saleem, has pointed out as regards Muslim countries where reforms are said to have been introduced that no where is maintenance awarded to a divorcee till she re-marries (except perhaps communist South Yemen). He questioned the Supreme Court's authority to unnecessorily doing beyond the terms of reference to held that the amount of unpaid dower was not payable to Muslim women on divorce but as a mark of respect, ignoring the fact that *fixation of dower amount was different from its payments*. In India, in a majority of cases the declared dower remains and paid till dissolution of marriage either on account of death or due to

divorce. Does it mean that a husband who does not pay the deferred dower to his wife during the life time has no respect for his wife?[22]

Asghar Ali Engineer, a progressive Muslim scholar says about Common Civil Code[23] :

> "....As for a Uniform Civil Code, there are several formidable problems, even if it is treated as panacea for women's problems which it is not. First the minority communities of Muslims, Christians and Parsis are not politically and religiously prepared to accept any such enactment and no government wishing to be re-elected can run such a grave risk. The difficulty in such a enactment is not restricted to the opposition from the minorities alone. The problem becomes much more complex when we realise that the majority community is also far from being homogeneous in respect of its customs, traditions and laws.... "

Jamat-e-Islami Hindi[24] a powerful Muslim organisation passed resolutions on July 5, 1995 on the ruling of *Sarla Mudgal case* :

> "The Central Advisory Council (CAC) of the Jamat-e-Islami Hind takes with concern the way being paved for implementing Uniform Civil Code... and strongly supports the resolution of Muslim Personal Law

> Board (calling upon the government to delete Article 44 or introduce an exemption clause to indicate that a Uniform Civil Code would not be imposed upon Muslims and reluctant minorities).... It seriously feels that voice having been raised from time to time to implement Uniform Civil Code in the country is a matter of serious anxiety and torment– and rightly so – for the Indian Muslims .... The CAC also calls upon the Indian Muslims to raise the voice against the Uniform Civil Code in a peaceful, democratic and dignified manner and mould their social life in accordance with the Islamic laws....

All India Muslim Personal Law Board[25] in its 13th session held on 28-30 Oct., 1999 at Mumbai passed the following resolution on Uniform Civil Code :

> "The Board feels that inspite of ... non-inclusion of Uniform Civil Code in the agenda of the government, direct or indirect efforts would be made in this direction because the BJP, which ... is the biggest component of the ruling Alliance has not dropped this subject from its agenda and (calls upon) the Muslims to be watchful and be ready to resist any effort to affect changes in the Muslim Personal Law, by indirect or parallel legislation.

> (Reiterates its view) to the Government, the political parties and the countrymen in general that the Muslim Personal Law i.e. the Islamic Family Laws are an integral part of the religion of Islam, ... Muslims and other communities have deep attachment to their religion-based family laws, it is in the interest of the country to create confidence in them that there is no threat to ... their distinct identity and therefore."[26]

All India Muslim Personal Law Board also demanded that any uncertainty about the continuance of the personal laws be set to rest by the Government.

(ii) Arguments in Favour of Reform of Muslim Personal Law

We have seen in the preceding paragraphs that a big majority of the Muslims are not in favour of reform in Muslim Personal Law and they are opposed to the enactment fo a Uniform Civil Code in India. Muslims are divided on the question of reform of the personal law. The orthodox Muslims opposed the reform the personal law and the liberals are in its favour. The liberals (or secularists) do not enjoy the confidence and respect as religious scholars are of the community in general. They are often criticised for their malafide attempt to degrade Islam in order to be recognized by the Hindus as 'liberal' and 'progressive'. Late Hamid Dalvai strongly advocates Common Civil Code under which all marriages should be registered. The status of all married

women should be governed by the Common Civil Code. Dalwai wants 'purdah' to be legally banned and family planning to be made compulsory. Muslims, who opposed reforms on the ground of religion, according to Hamid Dalwai, should be governed strictly according to *Shariah* law in its entirety. For example, a Muslim caught stealing should have his hands cut off in public. Similarly, a Muslim who speaks a falsehood, should be publicly whipped or a Muslim women found guilty of adultery should be stoned to death in public.[27] Mr. Dalwai further pointed out that the main purpose of the organisers of the All India Muslim Personal Law convention was not so much to discuss the personal law as to hatch some kinds of conspiracy against India. The majority of the organisers he asserted, were anti-national elements who wanted to create a 'Pakistan' in India for Muslim under the guise of discussing the *Shariah* laws.[28]

Eminents citizen Dr. Zahir Ahmad Saeed lamented :

> 'The Muslim women will be pushed back by two centuries while the country is poised to take a leap to the 21st century. Having a accepted sec. 125 all these years, why does the Muslim male wants to shirk the responsibility of maintenance now.?"[29]

Ansar Harwani, former M.P., and veteran freedom fighter said on March 3, 1986, that Prime Minister Rajiv Gandhi who claims

have broken many traditions had upheld the Congress tradition of not sacrificing Muslim votes. Commenting on the Bill, he said,

> "I have no doubt that *Mullah* will hail Mrs. Gandhi as a defender of their faith and will give him full support."

Founder Chairperson women India trust, Kamila Tiyyabji says there is no conflict between Personal Law and Civil Laws. The *Shariah* is a very lose and humane document. The only problem is that for centuries it has been interpreted by male chauvinist to suit their interest. I am amazed that Rajiv Gandhi has accepted its chauvinist interpretation of maintenance and given into the fundamentalist on this issue.[30]

On March 8, 1986 in New Delhi the Indian Federation of Women Lawyers passed a resolution stating that the Bill will undermine the secular nature of the Republic adopted in the preamble of the constitution by the 42nd Amendment. A Federation press release said the provisions of the bill in so for as they provide for maintenance to be paid by the state exchange in the event of the failure of the other categories mentioned there in is 'highly discriminatory'. It discriminated between Muslim divorced women and divorced women of other communities.[31] Najma Heptullah has gone on record saying that only 3% of the Muslim women are divorcee whereas the fact is that one in every four house holds has a divorcee and practically every family is effected. The Bill provides no real protections to these women.

They will be pushed into the hands of the *Maulvies*. The Wakf Boards and its finances are controlled by the fundamentalist. If the government similarly intends to help divorcees, it should bring these Boards under government control.[32]

The *SAHELI*, a relatively new organisation in the field of women welfare in a memorandom submitted to president Gyani Zail Singh, urged him not to give his assent to the Muslim Women's Bill. This is a naive hope, a course, as the president is cosntitutionally obliged to sign eventually, but it is a measure of SAHELIES' feeling against the Bill.[33]

The Indian Law Institute, New Delhi, sponsored a seminar on Jan. 1972 at Delhi on "Muslim Personal law in Modern India". The seminar asserted that certain changes in Islamic Personal Law in India were necessary and stated that such changes are possible and derivable within the general framework of Islamic *Shariah*.

Mr. A.A. Fyzee, a well known authority on Islamic Law said at a public meeting organised by the secularist -

> "A secular state must keep the idea of a Common Civil Code before the people. But such a reform calls for voluntary effort. The government would not act until the Muslim community itself acted on it".[34]

Prof. Fyzee, an enlightened Muslim intellectual is of the view that the proper course for the government is to appoint a

commission to put forward prosposals for a Uniform Civil Code, in which representation of the major communities, such as, Hindus, Muslims, Christian, Zoroastrians and Sikhs would be included. Justice M.H. Beg at a symposium in Tellichelli March 1973, spoke in support of prohibiting polygamy by law and favoured judicial intervention in divorce. He wanted separation of religion from strictly social, economic and legal matters. He desired a Common Civil Code to be enacted in which all that was good in Muslim Personal law should be incorporated.[35]

Mr. Asghar Ali Engineer, Director, Institute of Islamic Studies is of the opinion that the bill is not only a retrograde measure but is totally unIslamic in sprit.[36] He criticised the Indian government for yielding to the pressure of a orthodox Muslims and accepting their 'dictates' on the question of Personal law much against the "Constitutional Principle of Secularism."[37] Engineer finds that the general feeling among Muslims is that a Common Civil Code is synonyms with a Hindu Code, specially when the demands come from communal Hindus.

> "Secularist and nationalist have done nothing to allay these fears" he says. Engineers feels that there is no need for a Common Civil code. 'What is important is justice to women. A long as it can be done within the frame work of Muslim Personal law, why abolish it?

he asks. The current controversy (On Shah Bano) is political and not religious."[38]

Speeking at a seminar on Uniform Civil Code held in Cochin on Dec 5, 1985 Miss Sona Khan, Senior lawyer of the Supreme Court, pointed out that whenever there was reform movement within the Muslim community, the fundamentalist had opposed it. The affluent women have always been left untouched by these sections. The poor women are their targets of attack.[39] Miss Sona Khan further said that the Present demand of the Common Civil Code at this juncture had pushed back its enactment by another 20 years. The Uniform Civil Code must be welcomed with open arms, she added.

Former Indian Cricket Team Captain, Mansoor Ali Khan Pataudi has said that the furore against the Supreme Court judgement should be viewed in the background of the 'insecurity' felt by India Muslims. He said for various reasons Muslim in India do not have the same opportunity for education, employment and advancement as the other communities have. The *Shah Bano* judgement was used by many public for furthering this feeling of insecurity. The crisis of the moment is not the Bill or the *Shah Bano case* but a sense of insecurity among minority community. As for the Bill before Parliament Mr. Pataudi said that it had been hastly drafted and should be considered more carefully.[40]

The fact can not be denied that the Muslim reformists disapprove Muslim Personal Law because of the havoc it has wrought whenever its operates. The law is frowned upon due to the fact that it makes divorce easily available and permits easy remarriage. Unfortunately liberal Muslim opinion lacks a specific forum. Needless to say, the advice and suggesstion given by Muslim reforms, academics and intellectuals has left conservatives and those in favour of the status quo unmoved, since the liberal opinion in the community is unfocussed, there being no group, party, and institutions through which sentiments can be effectively expressed.

B. Role of Successive Governments

The controversy over the Uniform Civil Code is not something new. It came into prominence since the inception of the Indian Constitution. Article 44 of the Indian Constitution says that the state shall endeavour to secure for all the citizens of India a Uniform Civil Code. But unfortunately this Article is very often opposed by one section of community or the other. Hence the Government has consistently maintained that the initiative for formulating a Uniform Civil Code must come from the communities themselves and that it will not move in the matter until they are ready to accept a Uniform Civil Code. In this way the state instead of making any serious attempt in this direction

tends to adopt an indifferent attitude ostensibely as a matter of political expediency.[41] In the following section the researcher traces the conduct of state in the legistature with regard to the Uniform Civil Code.

When the Hindu Code Bill was introduced in the Parliament, the question of secularising other personal laws was raised. Views expressed by the Parliamentarians against the Hindu Code Bill are found in the record of Parliamenary debates. They were of the view that Common Civil Code should be introduced instead of secularising the laws of Hindus alone. At the time of introducing the Hindu Code Bill the then Prime Minister, Pandit Jawahar Lal Nehru, took for granted the willingness of the community to change its personal law and as to change the personal law of the Muslim as soon as they too are not willing to accept the change by a process of education. On this Mr. More a member of Parliament reacted by saying that it was not lack of wisdom but reaction which causes the assured unwillingness of the Muslims to accept the change. Pt. Nehru said.

> "The honourable member is perfectly entitled to his views on his subject. It he or any body else willing a Civil Code Bill, it will have my extrime sympathy. But I confess I do not think that at the present moment the time is ripe in India for me to try to push it

through. I want to prepare ground first and this kind of thing it one method of preparing the ground."[42]

Although various amendments have been made in the marriage and divorce laws of Hindu till now the Indian government and stewards of the social reform have not been able to prepared the ground as yet to change the personal law of the Muslim. History rather appears to support the view point of Mr. More than of Pt. Nehru whose preparing the ground by passing the Hindu Code Bill is by no means less than an act of legislative discrimination against the Hindus because the other half the promised unfulfilled.[43]

Dr. Upendra Baxi[44] too is sore at such a prospect that had come to pass. He squarely lays the blame on the shoulders of the government for not giving leadership to the cause of secularising Muslim Personal Law in the manner of Hindu Personal Law. And for always sitting idle waiting for the spontaneous response of community. He also attribute the motive of electoral advantage of getting the backing of minority support by a policy of studied inaction in the matter of government.

The response of the government was that the members supporting Hindu Code Bill and asking instead for a Uniform Civil Code, were not making the demand on principle Ambedkar claimed that the opponents of the Hindu Code were damanding a

Uniform Civil Code as a tactics. These people probably thought that it would take a long time to enact a Uniform Civil Code, but he could produce such a bill within two days. However, he gave no further reasons for not introducing a Uniform Civil Code. Instead he countered the objection that a Hindu Code Bill should be made applicable to every one by saying that other communities had not been consulted on the matter and that a secular state did not mean that it could flout the sentiments of the people.[45]

The government is the Provisional Parliament and subsequently in the first Lok Sabha, continued its stand that the Hindu Code was but the first step towards a Uniform Civil Code. Nevertheless doubt were expressed whether, after the enactment of Hindu Code Bill, the legislature would bother to enact a Uniform Civil Code[46]; he had articulated the same idea in 1949.[47]

Following the enactment of Hindu Reforms Acts there was no significant activity on the part of State to initiate the process for the enactment of a Uniform Civil Code.[48] Until the *Shah Bano* controvery brought the issue of religious personal laws and legal equality for wemen into sharp focus. The government decision to introduce the Muslim Womens Bill in the Lok Sabha attracted the charge that the government was succumbing to the pressure of religious fundamentalists of the Muslim Community. It was probably to counter this suggestion that the Prime Minister announced that the government would introduced a Uniform Civil

Code bill in the forthcoming Mansoon session of the Parliament in 1986.[49]

But it did not mean that the government did not give any assurance to the Muslim minority regarding non implementation of Uniform Civil Code or not interfering in their Personal laws. In Oct. 1972, while addressing the Minority cell of the Gujarat Congress Pradesh Committee at Gandhi Nagar, the then Prime Minister of India, Late Mrs. Indira Gandhi, urged Indian Muslims themselves to start the process of considering changes in their personal law. In this context she further adviced them to get assimilated in the majority culture in the same way as the Parsis had assimilated themselves with the people of Gujarat[50]. On another occasion Mrs. Indira Gandhi assured a delegation of Muslim leaders led by Sheikh Abdullah, that met her in New Delhi, in August 1973, that there was no proposal before the government to change the Muslim Personal Law and there was no reason at all for Muslim to feel agitated over the issue.[51]

The Congress Central Parliamentary Board in 1973 reiterated that the government had no intention of making any alteration in the Muslim Personal law. The All India Congress Committee General Secretary said that the Board took the opportunity to declare that it would stand by the All India Congress Committee's 1938 resolution in this connection and assured the Muslim minority that there was going to be no change in their personal law against their wishes.[52]

Late Mr. Fakhruddin Ali Ahmad, then President of India in 1972 in an election meeting at Hyderabad, stated that so long as the Congress Party remained in power, the rights of Muslims would be protected at any cost and that there would not be any change in the Muslim Personal Law.[53]

Coming to the next regime of Mr. Rajiv Gandhi, the attitude of the government not only remained non interference in Muslim Personal law but going a step further he strenghtened the government stand on non-inteference of Muslim Personal law by Passing a Bill in the Lok Sabha, that is, Muslim Women Bill. In order to allay the apprehensions arising from the Supreme Court Judgement in *Shah Bano case* Prime Minister Rajiv Gandhi decided to introduce the Muslim Women (Protection of Rights on Divorce) Bill in the Parliament with the plan that the government could not remain insensitive to the feelings and reactions of large sections of people, specially on delicate matters such as religion, custom, and cultural identities. The hush-rush circumstances in which the move was made to introduce the Bill were both unseemly and unwarranted. As an opposition member pointed out that the Bill was not mentioned in the list of business or even the supplementary list. The government's attempt to introduce the Bill without consensus. has raised a number of doubt in the minds of the people. Is Rajiv Gandhi honestly intrested in protecting

Muslim Women? or is he more interested in protecting the Muslim votes? Why has the government chosen to take the drastic step of amending the Constitution at the behest of what Rajabali calls the forces of reaction, without consulting the other point of view, even within the Congress (I)? Does it sincerely believe that it is practically possible for divorced Muslim women to obtain protection from the cruelty and barbarity of their men through the clauses of this Bill? Has Mr. Gandhi stopped to consider the consequences of his action will have on the other minorities.[54]

Some opposition members condemned the government's move to appease the Muslim fundamentalist through legislation. Mr. Indradeep Sinha of the C.P.I. and Mr. V. Gopal Swami of the D.M.K. strongly criticised the ruling party's Bill in the Rajya Sabha and said, 'This clearly indicated that the rulling party had yielded to the pressure of Muslim fundamentalist.[55]

It is true that the Mulsim Personal Law Board had organised massive demonstrations against the Shah Bano verdict and that both Hindus and Muslim communities were creating communal tension in the country. But should the laws of the law be held to ransom by a handful of communalists?

Hari Jai Singh says that It will be a pity if the politics of the compromise is allowed to degenerate into the politics of surrender before the forces of reaction and obscurantism.[56]

As regards Rajiv Gandhi government's views on Uniform Civil Code, the Prime Minister, Rajiv Gandhi in an interview to the editor of Tamil fortnightly *Thughlak*, Madras on January 13, 1986 said that he is in favour of a Uniform Civil Code but wants it to be introduced only after a concensus reached among political parties, religious leaders and imminent personalities. He further said that :

> "Uniform Civil Code in our Constitution and it may be a very good thing if we can have it, But I do not see it coming about immediately. Before we get a Uniform Civil Code or a decision is taken about it must come by a specific decision, some sort of unanimity that we need in such a Code."

He further said :

> "It is not for me to codify the Muslim Law. It is for Muslim personalities and some senior people to come forward and see what can be done. Unless it is codified and it is put down on paper, it is going to be difficult for the courts to interpret it."[57]

The government clarified its stand on Uniform Civil Code in the following words :

> "It has been the consistent policy of the government not to interfere in the personal laws of any community

until the initiative therefore comes from the community concerned. *In view of this the government do not propose to bring in any legislation on Uniform Civil Code.*"[58]

The Government made a submission before the Supreme Court in Oct. 1996 :

"... Due to absence of uniformity of views among the different sections of citizens in the country as to the enactment of Uniform Civil Code of laws relating to marriage, succession etc., it is not possible for the union government to enforce a Uniform Civil Code for all communities in the country."[59]

Union Law Minister D. Swami clarified the government's stand on Uniform Civil Code in the following words :

"The government does not propose to introduce a Uniform Civil Code in the country....

"...The government would not interfere in the personal laws of the minority communities. A Uniform Civil Code can be introduced only when the initiative comes within the minority communities."[60]

On 29th March, 1990 the Government reassured the minorities that any amendment to their personal laws will be made only upon the initiative of the community concerned :

"A Common Civil Code for all Indian Citizens would involve amendments to the Personal Laws of various communities. The government policy is to undertake such excercise on the initiative taken by the minority communities themselves. In view of the recommendation received from certain persons and associations belonging to minority communities, efforts are being made to ascertain the consensus of the minorities."[61]

Again in 1991 the government declared its policy of non-interference in the personal laws of minority communities in following words :

"Introduction of Uniform Civil Code for all citizens will necessarily involve changes in the Personal laws of the minority communities. The consistent policy of the government has been not to interfere on its own in the Personal Laws of the minority communities unless initiative for the change comes from such communities."[62]

During the surcharged atmosphere in 1986, Prime Minister Rajiv Gandhi declared the policy of the government in these memorable words :

"I do not see it coming about immediately. Before we get a Uniform Civil Code or talk about it, it must

come by a specific decision, some sort of unanimity that we need such a code."[63]

All these arguments of government spokesmen against Uniform Civil Code imply that there is a direct nexus between the Uniform Civil Code and Muslim Personal Law as though introduction of former is designed to cancel or even override the later. To consider the Uniform Civil Code as something aimed solely at Muslim Personal law is to give a wholly mistaken twist to the argument.[64]

From the statements of government spokesmen, it appears that the government does not have a firm and clear stand. Theoretically a good many of government spokesmen seem in favour of reforming Muslim Personal Law, But in practice, seem reluctant to reform it because of political considerations.

C. Role of Opposition Parties

This section incorporates the stand taken by the oppostion parties on the Uniform Civil Code. The Janata Party President, Mr. Chandra Shekhar, on April 15, 1986 is reported to have observed in Pune, 'The Talaq Bill was absolutely unnecessary. I wonder why the government brought it."[65]

Mr. Syed Shahabuddin, another Janata Stalwart, says :

"First I must make it clear that the Constitution does not envisage a Common Civil Code but only a

Uniform Civil Code. A Uniform Civil Code, in turn, does not necessarily mean one single code for all sections of population but one that broadly reflects the varied ethos in the Country. I do not think that there is any constitutional compulsion to intoruduce an Uniform Civil Code as the Contitution does not set any time limit for this process".

He further said that :

"I do not subscribe to the view that a Uniform Civil Code is essential for a National integration or the survival of a country on the other hand, if we force a Uniform Civil Code on unwilling people it will jeopardise National Unity when a Uniform Civil Code is enacted and if any rule in it contravenes the *Shariah,* Muslim should be granted exemption from it. Every law allows for exceptions. A Muslim can not, in good faith, violate the *Shariah*. We should avoid a situation in which a good Muslim can not be a good citizen as well.'[66]

The National executive of the Bhartiya Janta Party at its 3 day meeting held at Chandigarh in Jan. 1980, in a resolution condemned the, "virulent campaign" launched against the Supreme Court by the Muslim League and Jamaat-e-Islami following the court's Judgement in *Shah Bano case*. The

executive meeting described the judgement as "pre-eminently just and sensible".

The B.J.P. demanded that the amendment proposed be abandoned forthwith since it went counter to the spirit of the Indian Constitution, one of whose directive principles require the state to move towards a Uniform Civil Code[67].

The B.J.P. Bombay Unit at its executive committee meeting in Dec. 1985 demanded the expulsion of Union Environment Minister, Z.R. Ansari for his criticism of the Supreme Court judgement. According to the committee he had insulted the Constitution and lowered the prestige of Parliament. The committee has decided to observe 1986 as the Common Civil Code Year.[68]

The Communist Parties have in this case taken a clear but cautious stand, upholding the principle of maintenance for divorced women, but reaserving judgement on the speedy implementation of a Uniform Civil Code. Mr. M. Basava Punnaiah, C.P.I Polit Bureau Member condemned in Calcutta on Dec 28, 1985 the statement made by the Prime Minister in support of Muslim conservatism that the western conception of the equality was not applicable to Muslim women in India.[69]

The Polit Bureau of the Communist Party of India (Marxist) considers the Supreme Court judgement... as a judgement in the right direction. It ... said that :

> "Religious practises violative of human rights and dignity and sacerdotal suffocation of essential civil and material freedom, are not autonomy but oppression."[70]

The Central Committee endorsed the stand taken by the Polit Bureau on the issue of a Uniform Civil Code .... 'Our party welcome the broad direction in the judgement. At the same time certain remarks in the judgement give an impression that the Hindu social laws have been reformed while in reality discrimination against Hindu women continue in the present setup. Instead of imposing a Common Civil Code by the state decree, it is a essential that the rights of women and their equal status are taken up for all communities and existing laws be amended or fresh legislations initiated providing equality for women in marriage, property and other social matters. This can help in paving the way towards evolving a Common Civil Code.'[71]

The national council of CPI on 22 July, 1995 expressed 'Serious concern over the calculated attempts by the B.J.P. to communalise the issue of social reform. It has announced to make framing of Uniform Civil Code a central issue of its poll campaign. It is obvious that by making the framing of Uniform Civil Code a poll issue, the B.J.P. has added a new plank to its strident Hindutva campaign.' Framing of Uniform Civil Code is not a communal problem. It is basically a problem of social reform in the society.

The national council opined that framing of a Uniform Civil Code is a very complicated issue. *Not only Muslims but almost all the religious communities in our country have their own personal laws. In such a situation, framing of Uniform Civil Code have to be preceded by reforms in various personal laws and customary laws.*

Uniform Civil Code can be framed only on the basis of a broad consensus over the issues and it has to be based on gender equality. Imposition of Uniform Civil Code from above will be counter productive.[72]

The Janata Party President Subramanyam Swami said that the BJP is not sincere about the implementation of Uniform Civil Code in his own words :

> "The BJP, if it is sincere about the Uniform Civil Code should begin by imposing in on its own leader and cadres when Ram Jethmalani was the Vice-President of the BJP for a number of years the BJP never questioned him as to why he has two legally wedded wives living in the city of Bombay 2 kms. apart. One BJP Rajya Sabha member from Gujrat has three legally wedded wives, not to mention another top leader of BJP who has kept a woman in his house for 25 years and reared children through her. It is this fraud that exposes the BJP's commitment to Uniform Civil Code."

"Besides calling for Uniform Civil Code in marriages we need a common code in other areas which BJP never raises; for example, the income-tax relief provided to Hindu Undivided Families (HUF) is not available to Muslim families. This does not bother the BJP because the Hindus are beneficiaries. In this inequity in law. Muslims are the losers. The crux of the BJP campaign for Uniform Civil Code is thus a creation of hatred and alienation of Muslims from Indian society and by such hatred to consolidate the Hindu votes. The BJP is not pro-Hindu because it has never come up with a; single idea for reform in Hindu society, but it is purely an anti-Muslim party because its programmes revolve around undoing the position of Muslims in Indian society. In this respect BJP is a de-facto agent of Pakistan because Pakistan also propagates that Hindus and Muslims cannot be treated equally in India."[73]

An important leader of the BJP L.K. Advani said that :

"If the BJP is voted to power not only Muslim law, even Hindu, Christian and other laws would be changed suitably within the constitutional framework."[74]

Another important leader of BJP, Atal Bihari Vajpayee also declared that 'The BJP will launch a national debate and a campaign on awareness on the question of a Common Civil Code' .... He further said that :

> "Political parties have not seriously tried to convince our Muslim friends that a Common Civil Code does not mean something that is anti Muslim ... There are practises under the Hindu Law also that need to be modified or amended."[75]

D. Role of the Press

Vasudha Dhagamvar is very critical about the role of press, when she says :

> "Admittedly even the national press has to give its readership good stories. Disastrous events and outrageous opinions make better copy, 'sell' more. But the press has other responsibilities too not least of which is to state the truth however dull it may be. Hamid Dalwais, Asghar Ali Engineer and the Satyashodhak Samaj command very little press. Their meetings are hardly reported and their protests given little space. This was also the experience during the Muslim Women's Bill. Neither the reformer nor the pro-Uniform Civil Code Muslims are able to get publicity for their views...."[76]

But the above assessment of the press is not correct. Most of the national English dailies and the leading newspapers in Hindi are always supportive of the idea of a Uniform Civil Code. Those Muslims who are pro-reformer and in favour of the implementation of the Uniform Civil Code are given space for their write-ups. They are also invited for talks on radio and television. In contrast the views of orthodox Muslims and opponents of the Uniform Civil Code are not given space for their write-ups and views. Of course, the media gives importance to the reports of the public demonstrations, dharnas, rallies and functions organised by Muslims as the masses attend this type of functions in large numbers. The media cannot suppress these news beyond a certain limit. Since Hamid Dalwai, Asghar Ali Engineer and the organisations like Satyashodhak Samaj have almost negligible following in the masses that's why they do not get that publicity which is given to Shahbuddin, Zia-ur-Rahman Ansari, Banatwala, *Ulema* and organisations like Muslim Majlis-e-Mushwarat and All India Muslim Personal Law Board.

It is, therefore, submitted that the English press and Hindi press are supportive of the implementation of the Uniform Civil Code. But the *Urdu* press is totally against such a move as the *Urdu* has now become the language of the Muslims. The newspapers generally try to satisfy their readers and the views expressed in the write-ups in Urdu dailies, fortnightlies and the magazines overwhelmingly contain the material which is against

the imposition of Uniform Civil Code. It means that the majority of the Muslims do not want the abrogration of their Personal Laws. In this way we can say that the press like politicians, scholars, social workers, human rights activists is also divided on communal lines. The role of the press should be to present the correct picture of the problem. But our national press has failed to discharge its duties honestly.

Summary

It is highly unfortunate that the role of press and politician in this regard has been quite poor and has badly failed to generate a congenial environment to promote the objective of Uniform Civil Code. The politicians have not so far shown any strong endeavour because of political consideration. Their motive seems to be that by talking of Uniform Civil Code publicly they will loose their vote bank and it will be better for them to be silent on this important issue. Similarly, the state has also not made any serious effort to discharge this constitutional obligations. It is evident from the above study that the government has not taken any serious steps to explain the contents and significance of Article 44. It is clear from the study that no party has so far raised itself above the political alliances with communal parties.

The government's stand since the independence is not to implement the mandate of Article 44 on minorities without their consent. It have seen that, since pre-partition days, the Indian

National Congress has maintained its commitment to the protection of personal laws of various communities. All Prime Ministers from Pandit Jawaharlal Nehru to Narsimha Rao, although supporting the view that Uniform Civil Code should be for all the communities, also have maintained that this would not be done without the approval of the community concerned. This approach is different for the majority community as they do not have that sense of insecurity as the minorities have in their minds. Whatever changes were made in classical Hindu Law in 1955-56 they were very essential for the Hindu community. But even in those Acts and later on in their amendments the government has inserted so many laws which are against the philosophy of Uniform Civil Code. Even the NDA government headed by Mr. Atal Bihari Vajpayee has also left the issue of Uniform Civil Code untouched on the basis of consensus reached between the various constituents of National Democratic Alliance.

Thus, the situation remains same that the Uniform Civil Code is not going to be applied on minorities without their consent in near future.

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Chapter - 11

Conclusion and Suggestions

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No doubt the issue of the reform of personal Laws of different communities and the enactment of Uniform Civil Code is not an easy task. It is a very controversial and sensitive issue. The analysis is also difficult. The most disturbing, rather disappointing feature of the above mentioned controversy (Debate) is that it is mostly political and sentimental, ill informed and hardly conducive to make either parties understand one another's mind. As a matter of fact there has been no real debate at all. The protagonists express their views in the English press, the opponents reply in the Urdu press. The protagonists refer to the winds of change to the spirit of modernity and to the constitutional provisions relating to a Uniform Civil Code; while their opponents quote the *Qur'an* and *Sunnah*, emphasize the religious and cultural rights of the minority, and the long history of existing laws. Specific proposals for change are rarely debated. Bad sociology, fictious statistics and heresay accounts of what has been happening in the Muslim countries are glibly swallowed by the limited readership of a few modernists while the masses and the *Ulema* are generally satisfied by cursory argument

supposed by supposely awe-inspiring authority, which in reality serves only their own complecency. Islamic injunctions such as the restricted permission to polygamous marriages or to the rules relating to divorce or inheritance are seldom explained to the citizens of modern India in terms understandable to them.[1]

Champions of democracy shamelessly cite laws imposed by military dictators and there is no one to give them a lie as to the background and evolution of these exposed changes. No comparative study of the Islamic provisions relating to marriage, divorce, inheritance etc. and their 'modern' alternatives have been made so that an unbiased citizen could formulate his own views in well informed manner.

Muslim Personal Law, is in fact, another name of the cultural and social freedom of the Indian Muslims. It implies essentially that Muslims are free to maintain their cultural entity and abide by Islamic *Shariah* in certain specified fields and that in these fields codes of law will adjudicate in accordance with Islamic laws. In actual practise however, this freedom is limited to divorce, inheritance, endowments and other related matters. During the British period these matters were, in general, decided in the light of Islamic law and the practice continues down to this day.[2]

The distinction between 'Personal' and 'non Personal' laws which was unknown to early India became noticeable during Muslim rule. this distinction further consolidated during the British Period because the British followed the policy of non-interference with the religious susceptibilies of the native Indians. They thought that anything could not be wiser than to ensure that the Hindus and the Muslims should be governed by their respective 'personal laws' in matters relating to succession, inheritance, marriage etc. This policy was laid down in no uncertain terms under the Regulations of 1772 and 1793. The legislative ventures in the area of 'Personal Laws', during the period, were sporadic and peacemeal, and were undertaken to meet a need here and a demand there. Most of these were corrective and reformative legislations, favoured by public opinion.

Soon after independence the question of position of personal laws got entangled into the whirlpool of national politics. Heated debates took place in the Constituent Assembly on this issue; and inspite of the best efforts made by the Muslim members, the majority of the members of the Constituent Assembly were unwilling to provide a constituional protection to the variety of personal laws for all time to come. Instead they introduced Article 44 in the Constituton, which envisages a 'Uniform Civil Code'.

This article that asks the State 'to endeavour to secure for the citizens a Uniform Civil Code through out the territory of India', has often been used as a challenge or threat to the existence of the variety of personal laws. This article has been particularly used agaisnt Muslim Personal Law as if it is only this law which is a stumbling block in the procurement of a 'Uniform Civil Code'. This myth does not hold water at all.[3]

On the basis of above anlaysis, it deserve due consideration that champions of the Uniform Civil Code who believe that without it homogenity is not possible which is imperative for the unity and national integration of India. It must not be ignored that Uniform Civil Code is one of the directive principles of state policy out of a host of other directives. It possesses only a persuasive force rather than compulsive authority, as its no implementation is not enforceable by the court of Law.[4]

The deep rooted multiplicity of personal law, religion, language, culture and custom are the real hurdles of in the way of the implementation of Uniform Civil Code in India. The diversities of family law of different communities, the tribal's own laws and customs, the belief of the people that the source of law and religion is the same and that faith, law and religion are intermixed and interwoven, have prompted people to oppose the Uniform

Civil Code from its very inception. The Uniform Civil Code under Article 44 is just one of the several other directive principles of state policy, while Articles 25, 26 and 29 which deal with religious and cultural freedom are the fundamental rights and both conflict with each other. In such conflicting situation fundamental rights are mandated to prevail constitutionality.[5]

History bears living testimony that when great Emperor, Akbar, introduced '*Din-e-Ilahi*' and Ashoka introduced '*Dhamma*' at the cost of the prevalent laws of the people it counter blasted.[6] Mughals and British rulers of the Indian subcontinent preserved the personal laws of Hindu and Muslim communities because of the dominant view held that Personal Laws were too much identified with the religion and culture of the people. The British regime appointed various law commissions from time to time on the issue of codification. Nevertheless, the British administration was of the view that by virtue of findings of the commission that personal laws could not be codified as such excercise would amount to interference with religious and cultural matters of the people.[7]

Sometimes the proponents of the Uniform Civil Code cite the example of Muslim countries where certain changes have taken place in those areas which we, in India, call Muslim Personal Law.

They also argue that in the early days of Islam the Caliphs and *Imams* did certain juristic activities and changed frequently the laws introduced by their predecessors. Pages of Islamic history reveal that changes were frequently introduced in the *Shariah* law by the ancient jurist themselves. Caliph 'Umar' and 'Ali' had overruled many principles of law settled by their predecessors. Imam 'Shaibani' had set aside some of the verdicts of his master Imam 'Abu Hanifa'; 'Ghazali' has devidated from certain principles of law laid down by Imam 'Shafei'; 'Shatebi' had dessented from some of the opinions of Imam 'Malik' and so on.

The Prophet of Islam had not come with any '*Corpus Juris*'. Neither the *Qur'an* nor the *Sunnah* had furnished an exhaustive code of law. These *Nasus* had provided only the fundamentals of the law. Formation of detailed legal rules was left to Prophet during his life time. After his demise, the mission was taken over by the Caliphs who were the administrative cum-ecclesiasticial heads of the Islamic state, and, at a later stage by the jurists and interpreters of the revealed law. Through the media of their judgements and fatwas they filled the scriptural skeleton of the law with flesh and blood.[8]

Muslim law, thus underwent a long process of evolution. The fabric of law was woven and rewoven with the spindle of juristic

interpretation or adminsitration. During this period of development, Islamic law remained a 'law in the making'. In this period if a later jurist or interpretor overruled the law settled by the predecessors, it constituted a step towards the development of law. Difference of opinions, among the doctors of law in this period of Islamic legal history, infact, form part of the process of legal evolution. All this juristic activity was based strictly on the interpretation of the mandatory laws revealed by the *Qur'an* or setted by the Prophet (SAW) under Divine Authority. As a result of such juristic activities, several schools of law based on the same sources but having conflicting doctrines in the matters of details, established their authority in several parts of the Muslim world. In the later phases of Islamic history, the principles of one or the other schools of law were accepted in toto by the various Islamic people.[9]

According to the Islamic legal theory 'Allah' is the only law giver and these exists no other basis of the legal fabric than the Divine Will. *Shariah*, the code of Islamic law is regarded as immutable by the Muslims. The Fundamental Principles of the *Shariah* are not open to reconsideration by man. The theory of immutability means what is immutable is actually the '*grundnorm*' of the *Shariah* and not any of its varied interpretations.. There are

four schools of Sunni Law and three schools of Shia Law. These school has its own system of law. Many principles of law in one school are significantly different in the other school. In this situation as a general practise an individual should adhere to any one of the school in toto and is not allowed to make his own choice of legal rules from various schools. Nevertheless, all the schools have equilegal validity and sanctity under Islamic Law. Since none of them enjoy any superiority over others the judges, jurists and legislatures may apply the principles of a school of Islamic law other than that which may be locally prevalent. This flexible nature of Islamic law was the basis of legislative reforms, barring a few exceptions in certain Muslim countries which are often cited by the proponents of Uniform Civil Code to effect changes in Muslim Personal Law. From the above discussion we may safely derive two conclusions :

1. Muslim countries have not amended the principles of Islamic law under the influence of any western law.

2. They have not altered the basic norm of the Islamic law as the fundamental laws of Islam are sacrosanct. They cannot be altered by any man made law. They have just substituted one rule of Islamic law by substituting it from any other school of Islamic law.

Moreover, if any state has replaced Islamic law by a secular law then this is an act of transgression. The most dangerous point of the entire controversy is that the role of Supreme Course which has time and again raised the issue of Uniform Civil Code knowing fully well that Article 44 of the Constitution is judicially unenforceable. The court expessed extremely uncalled for views about the desirability of the enactment of Uniform Civil Code in three well known cases. viz. *Shah Bano*, *Jorden Diengdeh* and *Sarla Mudgal case*. In these three cases the issue was never Uniform Civil Code but the Supreme Court under the garb of judicial activism inserted unnecessary, unwarrented, *obiter dictas* which it could have easily avoided without affecting in the least the *ratio decidendi* in the above mentioned cases. In this way the Supreme Court unintentionally provided inflammatory material to those who want to forcibly enforce their personal laws on minorities in the name of Article 44. But the last case decided by the Supreme Court i.e. *Ahmedabad Women's Action Group case*[10] has clarified the position and the ambiguities created by *Sarla Mudgal's case*. In this case three writ petitions were filed under Article 32 of the Constitution challenging the constitutionality of various provisions of different personal laws. The court, in this case, quoting its observations from its earlier decision, rejected

all the petition holding that the issues involved were the matters of state policies with which the court is generally not concerned. The Supreme Court further clarified that its earlier observations in *Sarla Mudgal's case* regarding the desirability of the enactment of Uniform Civil Code, was made incidentally. Thus, it is a welcome decision of the Apex Court of India in which the court rightly realised that while considering the sensitive matters like Uniform Civil Code, it must exercise judicial restraint. This judgement has for the time being put the controversy into the cold but no one knows for better when the controversy will arise again.

India, being a secular state must not interfere with the Personal Law of the people which was an essential and integral part of their religion, faith, culture, moral ethics and way of life. The abrogation or replacement of personal laws should not be treated as a measure of 'social welfare and reform'. It is noteworthy that the British government in India, did not endeavour to scrap or touch upon the Personal Laws. This was not a new policy which the Britisher's had followed. Infact the policy of non-interference in religious and personal matters can be traced from the days of Mohammad Bin Qasim's invasion of Sind. When after defeating the local ruler the Islamic empire gave liberty to the local inhabitants to 'worship their Gods' and 'to live in their

houses in whatever manner they liked'. This policy of non-interference in personal and religious matters was also followed during the Sultanat period with few exceptions. The Mughal rulers also followed the policy of non-interference with the Personal laws of Indians and virtually in view of the sanctity and sensitivity that Personal laws are the part, and parcel of religion and that practice of personal law establishes the cultural identity too, hence as political expediency, the Britishers did not interfere in the Personal laws of the Indians and left them untouched.

The Muslim Personal Law is constitutionally protected and exempted from any kind of interference from outside under Article 25 of the Constitution. The reason is that section 2 of Muslim Personal Law (*Shariat*) Application Act, 1937 states that questions relating to marriage dower, divorce, maintenance, custody, guardianship and inheritence matters are to be settled in accordance with *Shariat*, if the parties are Muslims. Part III of the Constitution of India is devoted to the rights which includes Articles 25, 26, 29 and 30 dealing with the freedom to profess and practise religion and establishing educational institutions to protect the cultural identity of the minorities in India. Moreover the governing, principle of the Constitution is 'Equality before law' and 'Equal protection of laws' as given under Article 14, therefore

Muslim Personal Law being fundamental right of Muslim is as much protected by the Constitution as other personal laws of other religious communities.

Constitutionally speaking the Directive Principles of State Policy is not enforceable. Although the Supreme Court has enlarged and extended the scope of directive principles of state policy but in case of conflict between fundamental rights and directive principles the fundamental right will prevail.

Now we come to the reasons given for enforcing Uniform Civil Code. Following reasons are cited by the proponents of the Uniform Civil Code.

1. That it is a glaring example of appeasement of Muslims. The males among them are allowed to marry four wives, thus multiplying numbers and causing excessive growth rate in population.

2. That separate Personal laws contribute to separation among Muslims.

3. That the Uniform Civil Code will lead to national integration and draw the Muslims into the national mainstream.

4. Uniform Civil Code will lead to communal harmony for the

loss and, consequently, the life style of all the communities will be coloured in the same hue and tang.

5. That such a code will uplift the dignity and status of women in India.

6. That this code will strengthen secularism.

Hence the secular principles require the state to enforce uniform laws to all citizens disregarding religion. Although the arguement that Muslim Personal law is causing excessive growth rate in population is the weakest as it has no basis in fact, it is this argument which has become part of the Hindu folklore. The rate of incidence of polygamy among Muslims is lesser than the non-Muslims as has been shown by various surveys conducted by the governental and non-governental organisations. But it is not the polygamous Muslim males that matters it is their women in reproductive age group who give birth to children. Wider distribution of women under monogamy will tend to increase birth rate, while polygamy decreases it. Then it is not true that muslims do not adopt birth control measures because of their religion. If any sections of Muslims do not easily take to family planning, the reasons lie in their socio-economic backwardness, especially female illiteracy and not in religion.

The next reason mentioned above arrognantly implies that Muslims are not in the national mainstream and need to be bullied into it. What exactly does this 'being in the national mainstream' mean? The Muslims have, despite cultural and physical invasions retained their distinctive identity and still live a different life style which is naturally bound to be at variance with others due to their distinguish philosophy of life and religion. Evidently, it is this preservation of identity and separate carriage that amounts to 'not being in the national mainstream' according to the emissaries of a Uniform Civil Code. This immersion into the national mainstream is also the backbone of the term 'national integration'. But what about the facts that the terms 'national integration' and 'mainstream' are as vague as they are undefined? If the cherished identity of each community fades away into some imaginary national mainstream in the current softpush button laws will it lead to national integration or disintegration? People being humans and not machines can never be expected to part with their identity and laws without disturbing harmony and concord.

A common code anywhere can only harm national integration, for true integration in a democracy stands for tolerance and coexistence of various communities. This also answers the next reasons set forth for enforcing a common code – the communal

harmony will be achieved through a Uniform Code. Wrenching the laws and culture that are beloved to a community and deriving it to adopt alien laws can hardly create goodwill or harmony between communities.

The arguments about nationalism and secularism seeking to homogenise culture are not valid in theory or in practise. Matters like marriage, divorce, or adoption are culture bound; and any attempt to bring them under one law will cause serious damage to cultural norms and values of groups.

India is a secular state, but it is also a plural society with diversity of culture. Democracy gives full play to pluralism, in cultural matters which require a regime of legal pluralism.

Cultural autonomy and pluralism should, however, not mean right to deny women justice. *Concern for gender justice is absolutely valid, whereas concern for uniformity is not.* Muslim women, like Hindu women, suffer from a number of disabilities because of their historical backwardness and powerlessness. In certain spheres, Muslim women suffer more than Hindu women; in certain other areas it is the Hindu women who are more oppressed.

There is therefore a strong case for reforming Muslim

Personal Law to secure Muslim women justice, as it is important to reform Hindu family laws to secure justice to Hindu women.

In the case of Muslims, glaring example of injustice are instant unilateral divorce by husband and an unfattered male right to polygamy. In the case of Hindu women their disinheritence, under certain state laws, from agricultural land and non-availability of divorce on the basis of temperamental incompatibility are some examples of injustice. Thus women of both community suffer, under law, for want of provision for divorcee's share in the matrimonial property.

Now what is the solution? The solution of the above mentioned problem does not lie in implementing the mandate of the Article 44 of the Constitution of India. We have already seen that the fate of Special Marriage Act, 1954 in which the idea of Uniform Civil Code was translated into action in 1954. While explaning the objectives of the Special Marriage Act late Prime Minister Pt. Jawaharlal Nehru expressed that it was a step to achieve the goal of Uniform Civil Code. This Act's applicability was on voluntary basis. Muslims opposed the content and consequences of the Act through their religious scholars and their political leaders but this Act had not been popular why Indian citizens for the purpose of the marriages are not universally

adopting the provisions of this Act – for registration of their marriages. If under peculiar and adverse circumstances any marriage is registered under the provisions of Special Marriage Act, 1954. How society reacts? Are the advocates of Uniform Civil Code in India able to reply in convincing manner in Indian context?

The Hindu law reform which were enacted in 1955-56 are also an eye opener for the proponents of the Uniform Civil Code. If we go into the history of these Acts we would find that for passing these Acts many compromises were made by the government. Sometimes these compromises were to satisfy the orthodox Hindus and sometimes it was done for political expediency. Many provisions of old Hindu law were retained in the four Hindu legislations mostly injurious to women. Many practices of old Hindu law were retained which were derogatory to the women. Even the subsequent changes made in the four Hindu legislations have strengthened the religious based Hindu Personal law rather than secularising the Hindu law.

It is a common belief – and a great myth – that only the Muslims of India have a Personal law and that it is that law alone which is stalling the procurement of 'Uniform Civil Code' through out the territory of India' as envisaged by the Cosntitution. It is

clear from the discussion in previous chapters of the thesis that in our country there are a variety of personal laws applicable to different communities. They are as follows :

(i) Hindu Personal Law, largely codif but partly uncodified (also applicable, *mutatis mutandis* to Buddhists, Jains and Sikhas);

(ii) Customary law of Hindus, Buddhists, Jains and Sikhs where ever protected by legislation are case laws;

(iii) Tribal law of Hindus and others;

(iv) Christian Personal Law – codified but archiac;

(v) Parsi Personal Law – wholly unreformed and uncodified;

(vii) Muslim Personal Law - reformed but largely uncodifed.

Generally, the supporters of Uniform Civil Code project the issue in such a fashion that it appears that it will be the minorities, especially the Muslims, who will have to give up their Personal Laws. But, if the Muslims, Christians and Parsis were to give up their Personal law abruptly, what could be the substitute for them. Obviously, the Special Marriage Act, 1954, Indian Succession Act, 1925, and The Guardians and Wards Act, 1986. *How could, then these minorities be expected to adopt the said laws when the majority communities has not done so.* If the idea is to impose the Hindu law enactments of 1955-56 in the name of

Uniform Civil Code on the minorities then the minorities especially the Muslims are not going to accept it. Muslims being in minority are bound to be sensitive and they feel that Uniform Civil Code is one of the devises to destory their religious and cultural identity. This sense of insecurity has increased manifold after the demolition of Babri Mosque and the rise of communal forces in the country.

Of course there are certain areas in Muslim Personal Law where the reform is urgently needed. These areas are polygamy and divorce. The solution of these problem lies in reforming these laws so that the women stop from suffering due to the consequences of these laws.

Islamic Law by its very nature and structure is amendable and changable. However, Islam being a particular way of living with certain objectives and principles guiding human activities and ambitions. It is not to say that every kind of change would be acceptable in Islam. For the purpose of reconstruciton of any principle of Islamic Law, on has to make sure that :

(i) The change in issue is not contrary to the basic teaching and objectives in Islam;

(ii) Is the change really in the interest of the society, leading to its welfare, happiness and prosperity;

(iii) The change will have no evil repercussions in the near or distant future.

If the above three conditions are satisfied then one may proceed to find out the ways and means to make reforms in Islamic law. The method of *Ijtehad* is provided in Islamic Law. This method suggest that the door is still open for reassessment and revaluation of arguements based on reasoning which is called *Ijtehad*. The main task oa *Mujtahid* is :

(a) To suggest any change or amendment, if possible, in the law prescribed by the old doctors of Islamic jurisprudence, in order to meet a new situation; and

(d) To find a solution to new problems arising out of changed social and economic conditions of the world.

Thus through the medium of *Ijtehad* the problem faced by the Muslim Women may be solved. There is no need to impose an alien code on the Muslims in the name of Uniform Civil Code. Since Uniform Civil Code has resentment and discontent amongst Indian minorities especially Muslims, hence same is not wise to take up this thorny issue at the cost of annoyance of Indian minorities.

Previous discussions in the earlier chapters of this thesis lead us to suggest the following measures that, it is hoped will be helpful in solving the vexed problem of the implementation of a Uniform Civil Code throughout the territory of India. The suggestions are as follows :

(a) Although the state is reluctant to impose Uniform Civil Code on diverse people, the minimum it should do to generate those conditions that will make a progressive and broad minded out look of the people.

Education obviously can play a vital role in this regard. The solution to the problem lies in spreading education among the ignorant masses. It is the duty of the government to raise the social, educational and economic standard of the ignorant masses which will ultimately make them aware of their rights and obligations.

(b) Since the Muslims are the most backward among the minorities in India, the long term solution to the problem of reform in Muslim Personal Law lies in spreading education among Muslim masses. It is the duty of the social workers, leaders and the government to raise the social educational and economic standard of 'orthodoxy'. It is the duty of the

Muslim intelligentia to educate the Muslim community about its rights and obligations.

The only obstacles in the reform of Muslim Personal Law are the backwardness of the community and the lack of courage and fear on the part of Muslim leadership.

(c) To guage the feelings of the community the government should hold the referendum in the minority communities in which all adult men and women can participate. Before the reforendum the government should propogate the importance of referendum through press, radio, television, internet and public meetings conducted by all the shades of opinion.

(d) The government must prepare a good environment for Uniform Civil Code by explaining the contents and significance of Article 44. It should take steps and find out means to fight obscurantists who oppose the move of Uniform Civil Code. A conservative section of the citizen must be made to understand the utility of uniformity of laws so that they do not stand in the way of implementation of 'Article 44' of the Constitution.

(e) The state should bring social reform slowly and in stages, and the stages may be territorial or they may be community-wise.

(f) In deciding the kind of code that should be enacted the two possible courses of action are – an optional Uniform Civil Code enacted to coexist with the various religious personal laws, as Special Marriage Act, 1954, exists with other religious marriage law or the other option to be replaced the existing religious-personal-laws with the Uniform Civil Code. The Constitution does not indicate weather the Uniform Civil Code should be optional or compulsory. At face value, the first option seems eminently desirable, that is that the state provides a law that incorporates sex-equality but if any individual does not wish to give up their religious personal law they woved continue to be governed by the religious personal law.

(g) An attempt should be made to enact a model Uniform Civil Code embodying what is best in all personal laws. It must be a synthesis of the good in our diverse personal laws. It should represent one, drawn up by consultation between the – different communities in India on the principle of give and take.

(h) The vast majority of Muslims in India are afflicted with a sense of insecurity and anxities and this in turn has bred deep religiousity in them. A good course of action for

educated liberal Muslims to adopt would be to actively involve in the basic problems of Muslim society.

(i) There are certain areas in Islamic law which do not reflect the correct Islamic position for example 'Triple-Divorce' and '*Khul'a*'. The Muslims generally think that the only mode of the dissolution of the marriage by the husband is 'Triple-Talaq' similarly the concept of '*Khul'a*' is misunderstood in India. The concept of '*Khul'a*' udner Islam is almost analogous to the power of divorce in the hands of husband. If these two branches are explained to the Muslims by the '*Ulema*' and the press, television, radio by the government then the problem of 'Triple Divorce' may be curtailed to a large extent.

(j) In case of '*Khul'a*' it is wrongly understood that without the consent of husband a Muslim wife can not obtained '*Khul'a*'. This erraneous concept is the result of Privy council ruling in 19th century. This can be rectified either by the Parliament or by a decision of the Supreme Court – thus giving very important power in the hands of Muslim women.

(k) The minorities especially Muslims must be assured that the government is their well wisher and does not want to impose an alien law upon them by force. The government must also

remove the feelings of insecurity and dissatisfaction among the Muslims.

(l) The reform of Muslim Personal Law should be encouraged by the government through the leading and respected *Ulema* of Muslim community. The solution of the problem of the Muslim Personal Law should be searched within the Islamic law. No effort should be made to cross the limits set by the Islamic law i.e. *Shariat.*

(m) To dispel the fear from the minds of the minority especially the Muslim the state can repeal 'Article 44' of the Constitution or at least to treat it as unworthy of being activised. Removal of this threat or perception of threat to Muslim identity will, it can be hoped, cause the enlgithened sections of Muslims to undertake the required reforms.

(n) The government should never try to impose a uniform code of family laws on its citizens specially the minorities for the sake of 'national unity' or national integration. Such a move by the government will further alienate the Muslims because they would consider it to be extending the Hindu majority rule over them. This would cause discontent and rebellion in the Muslim community and would be injurious to the 'national unity' and 'naitonal integration'.

(o) Before enacting a Uniform Civil Code throughout the territory of India the government must also keep in mind the religious freedom guaranteed under 'Article 25' and 'Article 26' of the Constitution.

The government must also take into account the legality and enforceability of 'Article 44' and the relationship between Fundamental Rights and Directive Principles of state policy. The state must realise that in case of conflict between Fundamental Rights and the Directive Principles of the Constitution of India must the former shall prevail over the later.

If the above measures are adopted sincerely and honestly the problem of implementation of 'Article 44' can be solved in India.

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5. Mohd. Shabbir, Muslim Personal Law, Uniform Civil Code and Judicial activism : A critique, XII, ALIG L.G. 1997, p. 76.
6. *See* Aftab Ahmad, 'Uniform Civil Code and Constitution of India' (unpublished paper presented in All India Muslim Personal Law Board Conference on 11-13 Sept. 1995, Banglore).
7. *Ibid.*
8. Tahir Mahmood, "Precedent for Law Reform in Islamic History : Relevance for India", *Muslim Personal Law* F.R. Faridi and M.N. Siddiqui, ed., p. 164.
9. *Ibid.*

APPENDICES

Appendix - I

Government of India Act 1915

Section 112. Law to be administered in cases of inheritance and succession

The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defedant is subject.

Appendix - II

Government of India Act 1935

292. Existing law of India to continue in force

Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the laws in force in British India immediatly before the Commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

298. Persons not to be subjected to disability by reason of race, religion etc.

1. No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown of India, or be prohibited on any such grounds from acquiring, holding or disposing of peroprty or carrying on any occupation, trade, business or profession in British India.

Appendix - III

Text of Constituent Assembly Debates

Article 35.

Mr. Mohammad Ismail Sahib : (Madras Muslim) : Sir, I move that the following *proviso* be added to article 35 :

"Provided that any group, section or community of people shall not be obliged to give up its own personal law in case if it has such a law."

The right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and this provision should really be made amongst the statutory and justiciable fundamental rights. It is for this reason that I along with other friends have given amendments to certain other articles going previous to this which I will move at the proper time.

Now the right to follow personal law is a part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal law, it will be tantamount to interference with the way of life of those people who have been observing these laws for generation and ages. This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people. The Matter of retaining personal law is

nothing new; we have precedents in European countries. Yugoslavia, for isntance, that is, the kingdom of the Serbs, Croats and Slovenes, is obliged under treaty obligations to guarantee the rights of minorities. The clause regarding rights of Mussalmans reads as follows :

"The Serbs, Croats and Solvene State agrees to grant to the Mussalmans in the matter of family law and personal status provisions suitable for regulating these matters in accordance with the Mussalman usage.

We find similar clauses in several other European Constitutions also but these refer to minorities while my amendments refer not to the minorities alone but to all people including the majority community, because it says,

"Any group, section or community of people shall not be obliged" etc. Therefore it seeks to secure the rights of all people in regard to their existing personal law.

Again this amendment does not seek to introduce any innovation or bring in a new set of Laws for the people, but only wants the maintenance of the personal law already existing among certain sections of people. Now why do people want a uniform civil code as in Article 35? Their idea evidently is to secure harmony through uniformity. But I maintain that for that purpose

it is not necessary to regiment the civil law of the people including the personal law. Such regimetnation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law there will be no discontent or dissatisfaction. Every section of the people, being free to follow its own personal law will not really come in conflict with others.

Shri Suresh Chandra Majumdar; (West Bengal General) : Sir, on a point of order, what is being said now is a direct negation of Article 35 and cannot be taken as an amendment. The Honourable Member can only speak in opposition.

Mr. Vice-President : I hold that the Honourable Member is in order.

Mr. Mohammad Ismail Sahib : Therefore, Sir, what I submit is that for creating and augmenting harmoney in the land it is not necessary to compel people to give up their personal law. I request the Honourable Mover to accept this amendment.

Mr. Naziruddin Ahmed : Sir, I beg to move :

"That to article 35, the following *proviso* be added, namely:-

"Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law."

In moving this, I do not wish to confine any remarks, to the inconvenience felt by the Muslim Community alone. I would put it on a much broader ground. In fact, each community, each religious community has certain civil laws inseparably connected with religious beliefs and practices. I believe that in framing a uniform draft code, these religious laws or semi-religious laws should be kept out of its way. There are several reasons which underlie this amendment. One of them is that perhaps it clashes with article 19 of the Draft Constitution. In article 19, it is provided that 'subject to public order, morality and health, and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion'. In fact this is so fundamental that the Drafting Committee has very rightly introduced this in this place. Then in clause (2) of the same article it has been further provided by way of limitation of the right that "Nothing in this article shall affect the operation of any existing law or preclude the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice." I can quite see that there may be many pernicious practices which may accompany religious practices and they may be controlled. But there are certain religious practices, certain religious laws which do not come within the exception in

clause (2) *viz.* financial, political or other secular activity which may be associated with religious practices. Having guaranteed, and very rightly guaranteed the freedom of religious practice and the freedom to propagate religion. I think the present article tries to undo what has been given in article 19. I submit, Sir that we must try to prevent this anomaly. In article 19 we enacted a positive provision which is justiciable and which any subject of a State irrespective of his caste and community can take to a Court of Law and seek enforcement. On the other hand, by the article under reference, we are giving the State some amount of latitude which may enable it to ignore the right conceded. And this right is not justiciable. It recommends to the State certain things and therefore it gives a right to the State. But then the subject has not been given any right udner this provision. I submit that the present article is likely to encourage the State to break the guarantees given in article 19.

I submit, Sir, There are certain aspects of the Civil Procedure Code which have already interfered with our personal laws and very rightly so. But during the 175 years of British rule, they did not interfere with certain fundamental personal laws. They have enacted the Registration Act, the Limitation Act, the Civil Procedure Code, the Penal Code, the Evidence Act, the Transfer of Property act, the Sarda Act and various other Acts. They have

been imposed gradually as occasions arose and they were intended to make the laws uniform although they clash with the personal laws of a particular community. But take the case of marriage practices and the laws of inheritance. They have never interfered with them. It will be difficult at this stage of our society to ask the people to give up their ideas of marriage, which are associated with religious institutions in many communities. The laws of inheritance are also supposed to be the result of religious injunctions. I submit that the interference with these matters should be gradual and must progress with the advance of time. I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the State to make the Civil Code uniform is in advance of the time. As it is, any state would be justified under Article 35 to interfere with the settled laws of the different communities at once. For instance, there are marriages practices in various communities. If we want to introduce a law that every marriage shall be recognised and if not it will not be valied, we can do so under Article 35. But would you invalidate a marriage which is valid under the existing law and under the present religious beliefs and practices on the ground that it has not been registered under any new law and thus bastardize the child born?

As I have already submitted the goal should be towards a uniform civil code but it should be gradual an with the consent of the people concerned. I have therefore in my amendment suggeted that religious laws relating to particular communities should not be affected except with their consent to be ascertained in such a manner as Parliament may decide by law. Parliament may well decide to ascertain the consent of the community through their representatives, and this could be secured by the representatives by their election speeches and pledges. In fact, this may be made an article of faith in an election, and a vote on that could be regarded as consent. These are matters of detail. I have attempted by my amendment to leave it to the Central Legislature to decide how to ascertain this consent. I submit, Sir, that this is not a matter of mere idealism. It is a quesiton of stern reality which is not a matter of mere idealism. It is a question of stern reality which we msut not refuse to face and I believe it will lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country. What the British in 175 years failed to do or was afraid to do, what the muslims in the course of 500 years refrained from doing, we sould not give power to the state to do all at once. I submit Sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy...

Mahboob Ali Baig Sahib Bahadur : Sir, I move that following *proviso* be added to article 35.

"Provided that nothing in this article shall affect the personal law of the citizen."

My view of article 35 is that the words "Civil Code" do not over the strictly personal law of a citizen. The Civil Code covers laws of this kind : laws of property, transfer of property, law of contract, law of evidence etc. The law as observed by a particular religious community is not covered by article 35. That is my view. Anyhow, in order to clarify the position that article 35 does not affect the personal law of the citizen, I have given notice of this amendment. Now, Sir, if for any reason the framers fo this article have got in their minds that the personal law of the citizen is also covered by the expression "Civil Code", I wish to submit that they are overlooking the very important fact of the personal law being so much dear and near to certain religious communities. As far as the Mussalmans are concerned, their laws of succession, inheritance, marriage and divorce are completely dependent upon their religion.

Shri M. Ananthasayanam Ayyangar : It is a matter of contract.

Mahboob Ali Baig Sahib Bahadur : I know that Mr. Ananthasayanam Ayyanagar has always very queer ideas about the

laws of other communities. It is interpreted as a contract, while the marriage amongst the Hindus is a Samskara and that among Europeans it is a matter of status. I know that very well, but this contract is enjoined on the mussalmans by the Quran and if it is not followed, a marriage is not a legal marriage at all. For 1350 years this law has been practiced by Muslims and recognized by all authorities in all states. If to-day, Mr. Ananthasayanam Ayyangar is going to say that some other method of providing the marriage is going to be introduced, we refuse to abide by it because it is not according to our religion. It is not according to our code that is laid down for us for all times in this matter. Therefore, Sir, it is not a matter to be treated so lightly. I know that in the case of some other communities also their personal law depends entirely on their religious tenets. If some communities have got their own way of dealing with their religious tenets and practices, that cannot be imposed on a community which insists that their tents should be observed.

Shri L. Krishnaswami Bharthi : it sought to be done only by consent of all concerned.

Mr. Vice-President : Mr. Bharthi, the majority community has always been so very indulgent that I would ask you as a personal favour to give the fullest possible freedom to our Muslim brethren to express their views. I would ask you to exercise patience for a litle while, I know they feel very strongly on this matter.

Shri L. Krishnaswamy Bharthi : My point was, Sir, that it was not an attempt at imposition. If anything is done, it will be done only with the consent of all concerned, and the Honourable Member need not only labour that point.

Mr. Vice-President : It is understood and I thank you for it.

Mahboob Ali Baig Sahib Bahadar : Now, Sir, people seem to have very strange ideas about secular State. People seem to think that under a secular State, there must be a common law observed by citizens in all matters, including matters of their daily life, their language, their culture, their personal laws. That is not the correct way to look at this secular State. In a secular State, citizens belonging to different communities must have the freedom to practice their own religion, observe their own life and their personal laws should be applied to them. Therefore, I hope the framers of this article have not in their minds the personal law of the people to cover the words "civil code". With this observation, I move that it may be made clear by this proviso, lest an interpretation may be given to it that these words "civil code" include personal law of any community.

B. Pocker Sahib Bahadur : (Madras Muslim) : Mr. Vice President, Sir, I support the motion which has already been moved by Mr. Mohamad Ismail Sahib to the effect that the following provisio be added to article 35.

Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law."

It is a very moderate and reasonable amendment to this article 35. Now I would request the House to consider this amendment not from the point of view of the Mussalaman community alone, but from the point of view of the various communities that exist in this country, following various codes of law with reference to inheritance, marriage, succession, divorce, endowments and so many other matters. The House will note that one of the reasons why the Britisher, having conquered this country, has been able to carry on the adminsitration of this country for the last 150 years and ove rwas that he gave a guarantee of following their own personal laws to each of the various communities in the country. That is one of the secrets of success and the basis of success and the basis of the adminsitration of justice on which even the foreign rule was based. I ask Sir, whether by the freedom we have obtained for this country, are we going to given up that freedom of conscience and that freedom or religious practices and that freedom of following one's own personal law and try to aspire to impose upon the whole country one code of civil law, whatever it may mean, which I say as it is, may include even all branches of civil

law, namely, the law of marriage, law of inheritance, law of divorce and so many other kindred matters?

In the first place, I would like to know the real intention with which this clause has been introduced. If the words "Civil Code" are intended only to apply to matters of procedure like the Civil Procedure Code and usch other laws which are uniform so far as Indian is concerned at present well, nobody has any objection to that, but the various Civil Courts Acts in the various provicnes in this country have secured for each community the right to follow their personal laws as regards marriage, inheritance, divorce etc. But if it is intended that the aspiration of the State should be to override all these provisions and to have uniformity of law to be imposed upon the while people on those matters which are dealt with by the Civil Courts Acts in the various provinces, well I would only say, Sir, that it is a tyrannous provision which ought not to be tolerated : and let it not be taken that I am only voicing the feeling of the Mussalmans. In saying this, I am voicing forth the feeling of ever so many sections in this country who feel that it would be really tyrannous to interfere with the religious practices, and with the religious laws, by which they are governed now.

Now, Sir just like many of you, I have received ever so many pamphlets which voice forth the feelings of the people in these

matters. I am referring to many pamphlets which I have received from organizations other than Mussalmans, from organizations of Hindus, who characterize such interferences most tyrannous. They even question, Sir, the right and the authority of this body to interfere with their rights from the constitutional point of view. They ask : Who are the members of this Consutituent Assembly who are contemplating to interfere with the religious rights and practices? Were they returned ther eont he issue as to whether they have got this right or not? Have they been returned by the various legislatures the elections to which were fought out on these issues?

If such a body as this interferes with the religious rights and practices it will be tyrannous. These orgnizations have used a much stronger language than I am using. Sir, therefore, I would request the Assembly not to consider what I have said entirely as coming from the point of view of the Muslim community. I know there are great differences in the law of inheritance and various other matters between the various sections of the Hindu community. Is this Assembly going to set aside all these differences and make them uniform? By uniform, I ask, what do you mean and which particular law, of which community are you going to take as the standard? What have you got in your mind in enacting a clause like this? There are the Mitakshara and Dayabaga

systems; there are so many other systems followed by various other communities. What is that you are making the basis? Is it open to us to do anything of this sort? By this one clause you are revolutionizing the whole country and the whole setup. There is no need for it.

Sir, as already pointed out by one of my precedessors in speaking on this motion, this is entirely antagonsitic to the provision made as regards Fundamental Right in Article 19. If it is agnostic what is the purpose served by a clause like this? Is it open to this Assembly to pass by one stroke of the pen an article by which the whole country is revolutionized? Is it indeed? I do not know what the framers of this article mean by this. On a matter of such importance, I am very sorry to find that the framers and draftsmen of this article have not bestowed sufficiently serious attention to that. Whether it is copied from anywhere or not, I do not know. Anyhow, if it is copied from anywhere, I must condemn that provision even in the Constitution. It is very easy to copy sections from other constitutions of countries where the circumstances are entirely different. There are ever so many multitudes of communities following various customs for centuries of thousands of years. y one stroke of the pen you want to annul all that and make them uniform. What is the purpose served? What is the purpose served

by this uniformity except to murder the conscience of the people and make them feel that they are being trampled upon as regards their religious rights and practices? Such a tyrannous measure ought not to find a place in our Constitution. I submit Sir, there are ever so many sections of the Hindu community who are rebellign against this and who voice forth their feelings in much stronger language than I am using. If the framers of this article say that even the majority community is uniform in support of this, I would challenge them to say so. It is not so. Even assuming that the majority community is of this view. I say, it has to be condemned and it ought not be allowed, because, in a democracy, as I take it, it is the duty of the majority to secure the sacred rights of every minority. It is a misnomer to call it a democracy if the majority rides roghshod over the rights of the minorities. It is not democracy at all; it is tyranny. Therefore, I would submit to you and all the Members of this House to take very serious note of this article; it is not alike that to be passed like this.

In this connection, Sir, I would submit that I have given notice of an amendment to the fundamental right article also. This is only a Directive(Principle.

Mr. Vice-President : That may be taken up at the proper time.

B. Pocker Sahib Bahadur : What I would submit is only this. The result of any voting on this should not be allowed to affect the fate of that amendment.

Mr. Hussain Imam : (Bihar : Muslim) : Mr. Vice-President, Sir, India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything. In the north, we have got extreme cold; in the south we have extreme heat. In Assam we have got more raisn than anytwhere else in the world : about 400 inches; jsut near up in the Rajputana desert, we have no rains. In a country so diverse, is it possible to have uniformity of civil law? We have ourselves further on provided for concurrent jurisdiction to the provinces as well as to the Centre in matters of succession, marriage, divorce and other things. How is it possible to have uniformity when there are eleven or twelve legislative bodies ready to legislate on a subject according to the requirements of their own people and their own circumstnaces. Look at the projection we have given to the backward classes. Their property is safeguarded in a manner in which property is not safeguarded in Scheduled areas. I know of Jharkhand and Santhal Parganas. We have given special protection to the aboriginal population. There are certain circumstances which demand diversity in the civil laws. I, therefore, feel, Sir, that in addition to the argumetns which have been put forward by my friends who spoke before me, in which they feel apprehensive that their personal law will not be safe if this Directive is passed. I suggest that there are other difficulties

also which are purely constitutional, depending not so much on the existence of different communities as int he existence of different levels in the intelligence and equipmetn of the people of India. You have to deal not with an uniformly developed country. Parts of the country are very very backward. Look at the Assam tribes, what is their condition? Can you have the same kind of law for them as you have for the advanced people of Bombay? You must have a great deal of difference. Sir, I feel that it is all right and a very desirable thing to have a uniform law, but at a very distant date. For that, we should first avait the coming of that even when the whole of India has got educated, when mass illiteracy has been removed, when people have advanced, when their economic conditions are better, when each man is able to stand on his own legs and fight his own battles. Then, you can have uniform laws. Can you have, today, uniform laws as far as a child and a young man are concerned?

Even today under the Criminal law you give juvenile offenders a lighter punishment than you do to an adult offenders. The apprehension felt by the members of the minority community is very real. Secular state does not mean that is anti-relihious State. It means that it is not irreligious but non-religious and as such there is a world of difference between irreligious and non-religious. I therefore suggest that it would be a good policy for

the members of the Drafting Committee to come forward with such safguards in this provision as well as meet the apprehension genuinely felt which people are feeling and I have every hope that the ingenuity of Dr. Ambedkar will be find a solution for this.

Shri K.M. Munshi : (Bombay General) : Mr. Vice-President. I beg to submit a few considerations. This particular cluase which is now before the House is not brought for discussion for the first time. It has been discussed in several committees and at several places before it came to the House. The ground that is now put forward against it is firstly that it infringes the Fundamental Right mentioned in article 19, and secondly, it is tyrannous to the minority.

As regards article 19 the House accept it and made it quite clear that "Nothing in this article shall affect the operation of the existing law or preclude the State from making any law (3) regulating restricting. I am omitting the unnecessary words, "or other secular activity which may be associated with religious practices; (b) for social welfare and reforms." Therefore the House has already accepted the principle that if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would to Parliament to make laws about it without infringing the Fundamental Right of minority.

It must be remembered that if this clause is not put in does not mean that the Parliament in future would have no right to enact a Civil Code. The only restriction to such a right would be article 19 and I have already pointed out that article 19, accepted by the House unanimously permits legislation covering secular activities. The whole object of this article is that as and when the parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt may be made to unify the personal law of the country.

A further argument has been advanced that the enactment of a Civil Code would be tyrannical to the minorities. Is it tyrannical? Nowhere in advanced Muslim countries the personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a Civil Code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such right. But I go further. When the Shariat Act was passed or when certain laws were passed in the Central Legislature in the old regime,, the Khojas and the Cutchi Menons were highly dissatisfied.

They then followed certain Hindu customs; for generations since they became converts they had done so. They did not want to conform to the Shariat; and yet by a legislation of the Central legislature certain Muslim members who left that Shariat law would be enforced upon the whole community carried their point.

The Khojas and the Cutchi Menons most unwillingly had to submit to it. Where were the rights of minority then? When you want to consolidate a community, you have to take into consideration the benifit which may accure to the whole community and not to the customs of a part of it. It is not therefore correct to say that such an act is tyranny of the majority. If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority, has to submit to the Civil Code. It is not left to be tyrannical to the minority.

The point however is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole community may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from rights of parties as regards inheritance or succession. What have these thing got to do which religion I really fail to understand. Take for instance the Hindu Law Draft which is before the Legistative Assembly. If one look at Manu and Yagnavalkya and all the rest of them, I think most of the provisions of the new Bill will run counter to their injuctions. But after all we new are an advancing society. We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practice. If however the

religious practice in the past have been so constructed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. This is what is emphasized by this article.

Now look at the disadvantages that you will perpetuate if there is no Civil Code. Take for instance the Hindus. We have the law of Mayukha applying in some parts of India, We have the law of Mayukha applying in others, and we have the law of Dayabagha in Bengal. In this way, even the Hindus themselves have separate law and most of our Provinces and States have started making separate Hindu law for themselves. Are we going to permit this piecemeal legislation on the ground that it affects the personal law of the country? It is, therefore, not merely a question for minorities but it also affests the majority.

I know there are many among Hindus who do not like a Civil Code, because they take the same view as the honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession etc. is really a part of their religion. If that were so, you can never give, for instance, equality to women. But you have already passed a Fundamental Right to that effect and you have an article here which lays down that there should be no discrimination against sex. Look at Hindu Law: you get any

amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, you can not pass a single law which would elevate the position of Hindu women to that of men. Therefore, there is no reason why there should not be a civil code throughout the territory of India.

There is one important consideration which we have to bear in mind and I want my Muslim friends to realise this, that the sooner we forget the isolationist outlook on life, it will be better for the country. religion must be restricted to spheres which legitimately appertain to religion and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors and important factors which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say, "Well, we are not merely a nation because we say so, but also in effect, by the way we live by our personal law. We are a strong and consolidated nation." .From that point of view alone, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that this

is an attempt to exercise tyranny over a minority, it is much more tyrannous to the majority. This attitude of mind perpetuated under the Bitish rule, that personal law is part of the religion, has been fostered by the British and by Biritish courts. We must, therefore, outgrow it, If I may just remind the honourable Member who spoke last of a particular incident from Fereshta which comes to my mind, Allauddin Khilji made several changes which offended against the Shariat, though he was the first ruler to establish Muslim Sultanate here. The Kazi of Delhi objected to some of his reforms, and his reply was : "I am an ignorant man and I am ruling this country in its best interest. I am sure, looking at my ignorance and my good intentions the Almighty will forgive me. When he finds that I have not acted according to the Shariat". If Allaudding could not, much less a modern government accept the proposition that religious rights cover personal law or several other matters which we have been unfortunately trained to consider as part of our religion. That is my submission.

Shri Alladi Krishnaswamy Ayyar : (Madras : General) : Mr. Vice-President, after the very full exposition of my friend the Honourable Mr. Munshi, it is not necessary to cover the whole ground. But it is as well to understand whether there can be any objection to the article as it runs.

"The State shall endeavour to secure for the citizens a uniform civil Code throughout the territory of India."

A Civil Code as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform civil code through out the territory of India?

The second objection was that religion was in danger, that the communities cannot live in amity if there is to be a uniform civil code. The Article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. What it aims at is to try to prepare at a common measure of agitation in regard to these matters. It is nt as if one legal system is not influencing or being influenced by another legal system. In very many matters today the sponsors of the Hindu Code have taken a lead and not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon into the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging always to the past. We are departing from the past into an important particular, namely, we want the whole

of India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation or is this country to be kept up always as a series of competing communities? That is he question at issue.

Now, my friend Mr. Pocker levelled an attack against the Drafting Committee on the ground that they did not know their business. I should like to know whether he has carefully read what happened even in the British regime. You must know that the Muslim law converts the field of contracts, the field of criminal law, the field of divorce law, the field of marriage and every part of law as contained in the Muslim law. When the British occupied this country, they daid, we are going to introduce one criminal law in this country which will be applicable to all citizens, be they Englishmen, be they Muslims. Did the Muslim take exception, and did they revolt against the British for introducing a single system of criminal law? Similarly we ham(of contracts governing transactions between Muslims and Hindus, between Muslims and Hindus. they are governed not by the law of the Koran but by the Anglo-Indian jurisprudence, yet no exception was taken to that. Again, there are various principles in the law of transfer which have been borrowed from the English jurisprudence.

Therefore, when there is an impact between two civilizations or between two cultures, each culture must be influenced and

influence the other culture. If there is a determined opposition, or if there strong opposition by any section of the community. it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without Article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.

Now, again, there are Muslims and there are Hindus, there are Catholics, there are Christians there are Jews, in different European countries. I should like to know from Mr. Pocker whether different personal laws are perpetuated in France, in Germany, in Italy and in all the continental countries Europe, or whether the laws of cuccession are not coordinated and unified in the various States. He must have made a detailed study of Muslim jurisprudence and found out whether in all those countries there is a single system of law.

Leave alone people who are there. To-day, even in regard to people in other parts of the country, if they have property in the continent of Europe, where the German Civil Code or the French Civil Code obtains the people are governed by the law of the place in very many respects. Therefore, it is incorrect to say that we are invading the domain of religion. Under the Muslim law, unlike under Hindu law marriage is purely a civil contract. The idea of a sacrament does not enter into the concept of marriage in

Muslim jurisprudence though the incidence of the contract may be governed by what is laid down in the Koran and by the later jurists. Therefore, there is no question of religion being in danger. Certainly no Parliament, no Legislature will be so unwise as to attempt it apart from the power of the Legislature to interfere with religious tenetes of pioples. After all the only community that is willing to adapt itself to changing times seems to be the majority community in the country. They are willing to take a leaf from the Muslims for the purpose of reforming even the Hindu Law. Therefore, there is no force in the objection that is put forward to Article 35. The future Legislatures may attempt a uniform Civil Code or they may not. The uniform Civil Code will run into every aspect of Civil Law. In regard to contracts. procedure and property unifomity is sought to be secured by their finding place in the Concurrent List. In respect of these matters the greatest contribution of British jurisprudence has been to bring about a uniformity in these matters. We only go a step further than the British who ruled in this country. Why should you distrust much more a national indigenous Government than a foreign Government which has been ruling? Why should our Muslim friends have greater confidence, greater faith in the Britis rule that in a democratic rule which will certainly have regards to the religious tenets and beliefs of all people?

Therefore, for these reasons, I submit that the House may unanimously pass this article which has been placed before the members after due consideration.

The Honourable Dr. B.R. Ambedkar : Sir, I am afraid I cannot accept the amendments which have been moved to this article. In dealing with this matter, I do not propose to touch on the merits of the quiestion as to whether the country should have a Civil Code or it should not. That is a matter which I think has been dealt with sufficiently for the occasion by my friend, Mr. Munshi as well as by Shri Alladi Krishnaswamy Ayyar. When the amendments to certain fundamental right are moved, it would be posible for me to make a full statement on this subject, and I therefore do not propose to deal with it here.

My friend Mr. Hussain Imam, in rising to support to amendments asked whether it was possible and desiratable to have a uniform code of laws for a country as vast as this is. Now I must confess that I was very much surprised at that statement, for the simple reason that we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughoutr the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Laws of Transfer of Property, which deals with property relations and which is operative

throughout the country. Then there are the Negotiable Instruments Acts and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its contents and applicable to the whole country. The only province the Civil Code has not been able to invade so far is Marriage and Succession, It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about the change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact covered the whole lot of the field which is covered by a uniform civil Code in this country. It is therefore too late now to ask the question whether we could do it. As I say, we have already done it.

Coming to the amendments, there are only two observations which I would like to make. My first observation would be to state that members who put forth these amendments say that the Muslim personal law, so far as this country was concerned, was immutable and uniform through the whole of India. Now I wish to challenge that statement. I think most of my friend who have spoken on this amendment have quit forgotten that up to 1935, the North-West Frontier Province was not subject to Shariat Law. It followed the Hindu law in the matter of succession and in other

matters, so much so that it was in 1939 that the Central Legislature had to come in to the field and to abrogate the application of the Hindu law to the Muslims of the North-West Frontier Province and to apply the Shariat law to them. that is not all.

My honourable friends have fogotten, that, apart from the North-West Frontier Province, up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu law in the matter of succession. In order to bring them on the plane of uniformity with regard to the other Muslims who observed the Shariat Law, the Legislature had to intervene in 1937 and to pass an enactment applying the Shariat law to the rest of India.

I am also informed by my friend Shri Karunakara Menon that in North Malabar the Marumakkathayam Law applied to all not only to Hindu but also to Muslims. It is to be remembered that he Marumakkathayam Law is a Matriarchal form of Law and not a Patriarchal form of law.

The Mussulmans, therefore, in North Malabar were up to now following the Marumakkathayam Law. It is therefore no use making a categorical statement that the Muslim Law has been an immutable law which they have been following from ancient times. That law as such was not applicable in certain parts and it has

been made applicable ten years ago. Therefore, if it was found necessary, that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindu law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by Article 35. I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments to the sentiments to the Muslim community.

My second observation is to give them assurance. I quite realise their feelings in the matter, but I think they have read rather too much into article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of this country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfactly possible that the Code shall apply only to those who made a declaration that are prepared to be it so that at the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat law which should be applied to Mussulmans provided a Mussulman who wanted that

he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors. It would be perfectly possible for parliament to introduce a provision of that sort, so that the fear my friends have expressed here will be altogether nullified. I therefore submit that there is no subsatance in these amendments and I oppose them.

Mr. Vice-President : The question is :

"That the following *proviso* be added to article 35 :

"Provided that any group, section or community or people shall not be obliged to give up its own personal law in case it was such a law.

The motion was negatived.

Mr. Vice-President : The question is :

"That to article .U 35, the following *proviso* be added, namely.

"Provided that the personal law of any community which is guaranteed by the statute shall not be shanged except with the previous appoval of the community ascertained in such manner as the Union Legislature may determine by law."

The motion was negatived.

Mr. Vice-President : The question is :

"That Part IV of the Draft Constitution be deleted"

The motion was negatived

Mr. vice-President : The Question is :

The motion was adopted

Article 35 was added to the Constitution

Appendix - IV

Constitution of India

13. Laws inconsistent with or in derogation of the fundamental rights.

(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 boid.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "Law" includes any Ordinace, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made bya Legislature or other competent authority in the territory of India before the commencenment of this Constitution and not previously repealed, notwithstanding that any

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

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

14. Equality before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, libility, restriction or condition with regard to -

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

19. Protection of certain rights regarding freedom of speech, etc.-

(1) All citizens shall have the right -

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to from associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) ....

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of

India, the security of the State, friendly relations with freign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause *(b)* of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause *(c)* of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses *(d)* and *(e)* of the clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause *(g)* of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said subclause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

(i) the professional or technical qualificaions necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

21. Protection of life and personal liberty.

No person shall be deprived of his life personal liberty except according to procedure established by law.

25. Freedom of conscience and free profession, practice and propagation of religion.-

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to

freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a character to all classes and sections fo Hindus.

Explanation I. - The wearing and carrying of *Kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II. - In sub-clause (b) of clause (2), the referece to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

31. Compulsory acquisition of property.

(1) No person shall be deprived of his property same by authority save by authority of law. [*Omitted* by the Constitution (44th) Amendment Act 1978]

37. Application of the principles contained in this Part.

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless

fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

44. Uniform civil code for the citizens.

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

225. Jurisdiction fo existing High Courts.

Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue to powers conferred on that legislature made by virtue to powers conferred on that legislature by this Constitution, the jurisdiction of, and the law administrated in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of Justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution :

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise fo such jurisdiction.

245. Extent of laws made by Parliament and by the Legislatures of States.

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-terrtorial operation.

372.Continuance in force of existing laws and their adaptation.

(1) Notwithstanding the repeal by this Constitution of the enactm ents referred to in Article 395 but subject to the other provisions of this Constitution, 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 order competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with te provisions of this Constitution, the President may by order make 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 effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law.

(3) Nothing in clause (2) shall be deemed -

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature of other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanaition I.- The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Contitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II.- Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.- Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this constitution had not come into force.

Explanation IV.- An Ordinace promulgated by the Governor of a Province under s. 88 of the Government of India Act 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyound the said period.

LIST III

(Concurrent List)

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

Appendix - V

Mussalman Wakf Validating Act, 1913

[7th March, 1913]

An Act to declare the right of Mussalmans to make settlements of property by way of *wakf* in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of *wakf* created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes;

and whereas is expedient to remove such doubts :

It is hereby enacted as follows :

1. Short title land extent :

(1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) In extends to the whole of India except the state of Jammu and Kashmir.

2. Definitions. In this Act unless there is anything repugnant in the subject or context :

(1) "*Wakf*" means the permanent dedication by a person professing the Mussalman faith of any property for any

purpose recognized by the Mussalman law as religious, pious or charitable.

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

3. Power of Mussalmans to create certain *Wakfs*.

It shall be lawful for any person professing the Mussalman faith to create a *Wakf* which in all other respects is in accordance with the provision of Mussalman law, for the following, among other, purposes :

(a) for the maintenance and support wholly or partially of his family, childdren or descendants, and

(b) Where the person creating a *wakf* is Hanafi Mussalman, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated :

Provided that the ultimate benefit in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of permanent character.

4. *Wakfs* not to be invalid by reason of remoteness of benefit to poor, etc.

No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious

ru# fkdulwdeoh# sxusrvh# ri# d# shupdqhqw# qdwxuh# lv# srvwsrqhg# xqwlo diwhu# wkh# h{wlqfwlrq# ri# wkh# idplo|/# fkloguhq# ru# ghvfhqgdqwv# ri# wkh shuvrq# fuhdwlqj# wkh# *wakf.*

5. Saving of local and sectarian custom :

Nothing in this Act shall affect any custom or usage whether local or prevalent among the Mussalmans of any particular class or sect.

Appendix - VI

Muslim Personal Law (*Shariat*) Application Act, 1937

(Act XXVI of 1937)

[7th October, 1937]

An Act to make provisions for the applications of the Muslim Personal Law (*Shariat*) to Muslims.

WHEREAS it is expedient to make provisions for the application of the Muslim Personal Law (*Shariat*) to Muslims; it is hereby enacted as follows :

1. Short title and extent :

(1) This Act may be called the Muslim Personal Law (*Shariat*) (Application) Act, 1937.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Application of Personal Law to Muslims :

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage including *talak ila, Zihar, lian, khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties and *wakfs* (other than charities and charitable

institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims shall be the Muslim Personal Law (Shariat).

3. Power to make a declaration :

(1) Any person who satisfies the prescribed authority -

(a) that he is a Muslim, and

(b) that he is comeptent to contract within the meaning of section 11 of the Indian Contract Act 1872, and

(c) that he is resident of the territories to which this act extends may, by declaration in the prescribed from and filed before the prescribed authority, declare that be desires to obtain the benefit of the provisions of this section, and thereafter the provisions of the section 2 shall apply to the declarant and all his minor children and wills and legacies were also specified.

(2) Where the prescriebd authority refuse to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

4. Rule making power :

(1) The State Government may make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for all or any of the following matters, namely :-

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(b) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any persons in the discharge of his duties under this Act; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effects as if enacted in this Act.

5. Dissolution of marriage by Court in certain circumstances :

(Repealed by the Dissolution of Muslim Marriage Act 1939 (VIII of 1939) s. 6 (17-3-1939).

6. Repeals :

The undermentioned provisions of the Acts and regulation mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely :-

(1) Section 26 of the Bombay Regulation IV of 1827;

(2) Section 16 of the Madras Civil Courts Act, 1873;

(3) Repealed;

(4) Section 3 of the Oudh Laws Act, 1876;

(5) Section 5 of the Punjab Laws Act, 1872;

(6) Section 5 of the Central Provinces Laws Act, 1875;

(7) Section 4 of the Ajmer Laws Regulation, 1877.

Appendix - VII

The Dissolution of Muslim Marriages Act, 1939*

(Act VIII of 1939)

3 (Passed by the Indian ge islation)

Received the assent of the Governor-General on the 17th March, 1939

An Act to consolidate and clarify the provisions of Muslim law relating to suit for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

Whereas it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie; it is hereby enacted as follows:-

1., Short title and extent :

(1) This Act may be called The Dissolution of Muslim Marriage Act, 1939.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Grounds for decree for dissolution of marria e :

A woman married under Muslim law shall be entitle to obtain a decree for the dissolution of her marriage on any one or more

of the following grounds, namely :-

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years;

Provided that the marriage has not been consummated;

(viii)that the husband treats her with cruelty, that is to say :-

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical treatment, or

(b) associated with woman of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the *Koran;*

(ix) on any other ground which is recognised as a valid for the dissolution of marriages under Muslim law;

Provided that -

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and the husband appears either in person or through and authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court

within such period, no decree shall be passed on the said ground.

3. Notice to be served on heirs of the husband when the husband's whereabouts are not known :

In a suit to which clause (i) of section 2 applies -

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of filing of the plaint shall be stated in the plaint.

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit;

Provided that paternal uncle, and brother of the husband, if any, shall be cited as part even if he or they are not heirs.

Effect of conversion to other faith :

The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage :

Provided that after such renunciation, or conversion, the woman shall be entitled to otbain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2;

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

4. Rights of dower not to be affected :

Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

5. Repeal of Section 5 of Act XXVI of 1937 :

Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937, is hereby repealed. (Repealed by Act XXV of 1942).

Appendix - VIII

Muslim Women (Protection of Rights on Divorce) Act 1986

(No. 25 of 1986*)

(First published in the Gazette of India (Extraordinary). Part II, Section I dated the 19th May, 1986).

An act to protect the rights of Muslim Women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Thirty-seventh Year of the republic of India as follows :

1.. Short title and extent :

(1) This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions :

In this Act, unless the context otherwise requires :

(a) "divorced woman" means a Muslim woman who has married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law :

(b) "*iddat* period" means, in the case of a divorce woman :-

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar montsh after the divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier.

(c) "Magistrate" means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973(2) of 1974) in the area where the divorced woman resides;

(d) "prescribed" means prescribed by rules made under this Act.

3. *Mahr* or other properties of Muslim women to be given to her at the time of divorce :

Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to -

(a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce a reasonable and fair

provision and maintenance to be made and paid by her former husband for a period of two years from the respective date of birth of such children;

(c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or *dower* or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that –

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children, or

(b) the amount equal tot he sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her.

make an order, within one month of the date of filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such *mahr* or dower or of the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman :

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) faisl without sufficient cause to comply with the order, the Magistrate may issue a warrant for leaving the amount of maitnenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2) of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term

which may extend to one year or until payment if sooner made, subject to such persons being heard in defence and the said sentence being imposed according to the provisions of the said Code.

(4) Order for payment Maintenance :

(1) Notwithstanding anything contained in the fom m(going provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is notable to maintain herself after the *iddat* period, the may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order :

Provided that where divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her :

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the

Magistrate on the ground of his or her not having the means to pay the same, order that the share of such relatives in the maintenance ordered by him, be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the(. same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of the them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second provision of sub-section (1), the Magistrate, may, by order, direct the State *Wakf* Board established under Section 9 of the *Wakf* Act, 1954 (29 of 1954), or under any other law for the time being in force in a State functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1), or as the case may be, to pay the share of such of the relatives who are unable to pay, at such periods as he may specify in his order.

5.. Option to be governed by the provision of sections 125 to 128 of Act 2 of 1974 :

If on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her former

husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Section 125 or the Code of Criminal Procedure 1973 (2 of 1974), and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation : For purposes of this section, "date of the first hearing of the application" means the date fixed in the summon for the attendance of the respondent to the application.

6. Power to make rules :

(1) The Central Government may by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the foregoing power, such rules may provide for –

(a) the form of the affidvit or other declaration in writing to be filed under Section 5,

(b) the procedure to be followed by the Magistrate in disposing of application under the Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters,

(c) any other matter which is required to be or may be prescribed.

3. Every rule made under this Act shall be laid as soon as may be after it is made, before each House of Parliament, while it

is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, land if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. Transitional provisions :

Every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure, 1973(2) of 1974), pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in this Code and subject to the provisions of Section 5 this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

Appendix - IX

The Muslim Women (Protection of Rights on Divorce) Rules, 1986

Ministry of Law and ustice (Legislative Department) Notification No. G.S.R. 776(E), dated the 19th May, 1986, published in the Gazette of India, Extraordinary, part II, Section 3(i) dated 19.5.86, pages 3-4).

In exercise of the powers conferred by Section 6 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986), the Central Government hereby makes the following rules for carrying out the purposes of the Act, namely.

1. Short title and commencement :

(1) These rules may be called the Muslim Women (Protection of Rights on Divorce) Rules, 1986.

(2) They shall come into force at once.

2. Definitions :

In these rules, unless the context otherwise requires,

(a) "Act" means the Muslim Women (Protection of Rights on Divorce) Act 1986 (25 of 1986).

(b) "Code" means the Code of Criminal Procedure 1973 (2 of 1974), and

(c) "Form" means form annexed to these rules.

3. Service of summons :

(1) Every summons issued by a Magistrate on an application made under the Act, shall be in writing, i m(n duplicate, signed by the Magistrate or by such other officer as he may, from time to time, direct, and shall bear the seal of the Court.

(2) Every such summons shall be accompanied by a true copy of the application.

(3) Every summons issued under sub-rule(1) shall specify the date of the first hearing of the application which shall not be later than seven days from the date on which the summons is issued.

(4) Every summons shall, be served by a police officer or by an officer of the Court issuing it.

(5) The summons shall, if practicable, be served personally on the respondent, by delivering or tendering to him one of the duplicates of the summons.

(6) Every respondent on whom the summons is so served shall, if so required by the serving officer, sign a receipt on the back of other duplicate.

(7) Where the respondent cannot, by the exercise of due deligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summosn is so left shall; if so required by serving officer, sign a receipt therefor on the back of the other duplicate.

(8) If the service cannot, by the exercise of due deligence, be effected as provided in sub-rule(6), or sub-rule (7), the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the respondent ordinarily resides, and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh summons in such a manner as it considers proper.

(9) When a Court desires that a summons issued by it shall be served at any place outside its local jurisdiction, it shall ordinarily send such summons in duplicate to a magistrate within whose local jurisdiction, the respondent resides, or is, to be there served.

(10) When a summons issued by a Court is served outside its local jurisdiction and in any case when an officer who served the summons is not present at the hearing of the case, the affidavit purporting to be made before a Magistrate that such summons has been served and a duplicate of summons purporting to be endorsed in the manner provided by sub-rule (6) or sub-rule (7) by the person to whom it was delivered or with whom it was left shall be admissible in evidence and the statements made therein shall be deemed to be correct unless and until contrary is proved.

(11) The affidavit mentioned in sub-rule (10), may be attached to the duplicates of the summons and returned to the Court.

10. Evidence. All evidences in the proceedings under the Act shall be taken in the presence of the respondent against whom an order for the payment of provision and maintenance, *Mahr* or dower or the delivery of property is proposed to be made or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner specified for summary trials under the Code.

Provided that if the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex-parte and any order so made may be set aside for good cause shown on application made within seven days from the date thereof subject to such terms so as to payment of cost to the opposite party as the Magistrate may think just and proper.

5. Power to postpone or adjourn proceedings. In every application under the Act, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until the witnesses in attendance have been examined unless the Court finds adjournment of the same beyond the following day to be necessary for reasons to be recorded.

6. Costs :

The Court in dealing with the application under the Act shall have power to make such order as to cost as may be just.

7. Affidavit under Section 5. An affidavit filed under Section 5 of the Act shall be in Form 'A'.

filed 8. Declaration under Section 5. A declaration in under Section 5 shall be in Form 'B'.

Form 'A'

Form of Affidavit

(See Rule 7)

I/We.................................... son/wife of .... aged .... years, resident of .... and .... son/wife of .... aged........... years, resident of .... hereby state on oath as follows :

1. That I/We have informed myself/ourselves of the provisions of Section 5 of the Muslim Women (Protection of Rights on Divorce), Act 1986 and of the provisions of Section 125 to 128 of the Code of Criminal Procedure, 1973.

2. That I/We .... desire to be governed by the provisions of Section 125 to 128 of the Code of Criminal Procedure, 1973 in preference to the provisions of the Muslim Women (Protection of Rights on Divorce) Act 1986.

3. That the contents are true.

Deponent/Deponents

Signed and verified at .... this the ....day of .... 19 ....

Deponent/Deponents

Form 'B'

Form of Affidavit

(See Rule 8)

I/We.................................... son/wife of .... aged .... years, resident of .... and .... son/wife of, ... aged........... years, resident of .... hereby declare as follows :

1. That I/We have informed myself/ourselves of the provisions of Section 5 of Muslim Women Protection of Rights on Divorce), Act 1986 and of the provisions of Section 125 to 128 of the Code of Criminal Procedure, 1973.

2. That I/We .... desire to be governed by the provisions of Section 125 to 128 of the Code of Criminal Procedure, 1973 in preference to the provisions of the Muslim Women (Protection of Rights on Divorce) Act 1986.

3. That the contents of the above declaration are true.

Deponent/Deponents

Signed and verified at .... this the ....day of .... 19 ....

Appendix - X

Caste Disabilities Removal Act 1850
(Act XXI of 1850)

An Act for extending the principle of s. 9, Regulation VII, 1832, of the Bengal Code throughout India.

PREAMBLE

Whereas it is enacted by s. 9, Regulation VII, 1832 of the Bengal code, that "whenever in any civil suit the parties to such suit may be of different persuations, when one party shall be of the Hindu and the other of the Muhammadan persuation, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuations the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled"; and whereas it will be beneficial to extend the principle of that enactment throughout India; It is enacted as follows :-

1. **Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced –**

So such of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be

held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in any Court.

Appendix - XI

Child Marriage Restraint Act, 1929

(as amended in 1978)
(Act No. XIX of 1929)
(October 1, 1929)

An Act to Restrain the Solemnization of Child Marriages; it is hereby enacted as follows :-

1. Short title, extent and commencement :

(1) This Act may be called the Child Marriage Restraint Act, 1929.

(2) It extends to the whole of India except thè State of Jammu and Kashmir and it applies to all citizens of India without and beyond India.

(3) It shall come into force on the Ist day of April, 1930.

2. Definitions. In this Act unless there is anything repugnant in the object or context.

(a) "child means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

(b) "child" marriage means a marriage to whcih either of the contracting parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is or is about to be theıeby solemnized; and

(d) "minor" means a person of either sex who is under eighteen years of age.

3. Punishment for male adult below twenty-one years of age marrying a child :

Whoever being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with simple imprisonment which may extend to fifteen days or with fine which may extend to one thousand rupees or with both.

4. Punishment for male adult above twenty-one years of age marrying a child :

Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine.

5. Punishment for solemnizing a child marriage :

Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. Punishment for parent or guardian concerned in child marriage :

(1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any

other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine :

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage fom being solemnized.

7. Offence to be cognizable for certain purpose :

The Code of Criminal Procedure, 1973, shall apply to offences under this Act as if they were cognizable offences

(a) for the purpose of investigation of such offences; and

(b) for the purpose of matters other than (i) matters referred to in section 42 of that Code, and (ii) the arrest of person without an order of Magistrate.

8. Jurisdiction under this Act :

Notwithstanding anything contained in section 190 of the Code of Criminal Procedure 1973, no Court other than of Metropolitan Magistrate or Judicial Magistrate of the first class shall take cognizance of, or try, any offence under this Act.

9. Mode of taking cognizance offences :

No Court shall take cognizance of any offence under this Act after expirty of one year from the date on which the offence is alleged to have been committed.

10. Preliminary inquiries into offences :

Any Court, on receipt of complaint of an offence of which it is authorised to take cognizance, shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1973, either itself make an enquiry under section 202 of that or direct a Magistrate subordinate to it to make such enquiry.

11. (Omitted by Act XLI) of 1949).

12. Power to issue injunction prohibiting marriage in contravention of this Act :

(1) Notwithstanding anything to the contrary contained in this Act, the court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnized, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued agaisnt any person unless the court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The court may either on its own motion or on the application of any person aggrieved, rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the court shall afford the applicant an early opportunity of appearing before it either *in person or by pleader, and if the court rejects the* application wholly or in part, it shall record in writing its reasons so for doing.

5. Whoever knowing that an injunction has been issued against him under sub-section (1) of this section, disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees or both :

Provided that no woman shall be punishable with imprisonment.

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