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Examining the Feasibility of a Uniform Civil Code in India

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ABSTRACT

The tale of Uniform Civil Code in India is as old as the British Raj, when the government made uniform criminal and contract laws but abstained from getting involved in personal laws. Time and again, call for a Uniform Civil Code was heard in the Parliament, but as a result of various propagandas and obstructions, its fate got limited to Article 44 of the Directive Principle of the State Policy.

This paper gives a brief insight into the civil codes of different countries and continents of the world, and highlights some of their discriminatory provisions. It traces the history of Uniform Civil Code in India, and explains the unfortunate circumstances which led to its not coming into effect till date.

Through this paper, I have examined the historical aspects, conflicts, political issues, and cases in which question of a common civil code was at the center. The personal laws of different religions of the country, in one way or another, permit discrimination, and violate the rights guaranteed by the Constitution. But, even after decades of trying to reform these laws, we have failed to do away with their oppressive parts, because even in a secular country like India, religion seems to have gained a higher ground than the Constitution.

India is a land of religions and diversities, but a common code which will govern all the citizens uniformly in civil matters is needed to ensure that no human rights violation takes place under the cover of Freedom of Religion, because such discriminatory practices or customs are not an integral part of any religion, and so they must be discontinued, and a common code that confirms to the Constitution irrespective of religion is the only way to protect the fundamental rights of the citizens, and keep secularism alive in India.

I. INTRODUCTION

A Civil Code, in its general meaning, is the codification of private law relating to property, family, and obligation. While dealing with civil lawsuits, the code of civil procedure is followed.

The Code of Ur-Nammu, which was written around 2100-2050 BC, is the oldest civil code

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surviving in present day[2]. It is credited to the Sumerian King Ur-Nammu. But, the best known ancient code is that of the sixth Babylonian King Hammurabi, that was written around 1754 BC. The Code of Hammurabi was the Babylonian code of law that governed ancient Mesopotamia. These codes dealt with various issues, including family matters such as inheritance, marriage, divorce etc. However, in not only criminal, but also civil matters, they were discriminatory to women, slaves, and those belonging to the lower castes.

II. CIVIL CODES AROUND THE WORLD

Europe

In the 19th Century, after the French Revolution, the Napoleonic Code was enacted in France in 1804. The Code dealt with things like domicile, guardianship, marriage, succession and other such civil matters. Even though the original Napoleonic code talked of equality before law, the 'equality' was only among men, and did not extend to women. They were still subordinate to the men of their families. Along with this, the non-whites were treated harshly and slavery was allowed in French colonies. The Code influenced the laws across Europe, and its modified version still remains in place in a large part of France[3].

Later, in 1900, the German Civil Code (*Bürgerliches Gesetzbuch*) was enacted. It was influenced by the Bavarian Code of 1756 and the Prussian Code of 1794, and was majorly motivated by the Napoleonic Code of 1804. This codified German family law was a result of a revised draft after criticism and protests regarding its inaccessible and technical nature, and also the favourable condition that it created for the exploitation of labors, and treatment of women as second class citizens.

Even then, the Code did very little to improve the civil rights of women, and the laws were not reformed until the late 20th Century. The German Civil Code remains in effect today, with a modified and liberal version that gives full equal rights to women[4].

Influenced by the Napoleonic Code and the German Civil Code, Eugen Huber, a Swiss jurist, adopted the Swiss civil code in 1902, which came into effect in 1912. In the beginning, its national codification was prevented by constitutional provisions of 1848 that left private family matters to the cantons. In 1896, the federation assumed the authority to deal with civil matters, and the Swiss private law was given uniformity.

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[2] Encyclopaedia Britannica, *Law Code.*
[3] Robert Wilde, *A History of the Napoleonic Code*, THOUGHTCO. (Updated July 31, 2019) https://www.thoughtco.com/the-napoleonic-code-code-napoleon-1221918.
[4] Nicole Sotelo, *The German Civil Code (Bürgerliches Gesetzbuch, BGB)* (1900), TOWARDS EMANCIPATION? http://hist259.web.unc.edu/german-civil-code-burgerliches-gesetzbuch-bgb-1900/.

The Americas

The legal codes of the United States are a collection of common law rules, with the exception of the state of Louisiana, which has a legal system based on the Roman law. Since its enactment in 1808, the Louisiana Civil Code has constantly been revised and updated.

Some American counties like Haiti, Bolivia, and Costa Rica copied and adopted the French Civil Code, while the Dominican Republic put the original Napoleonic Code into force in the year 1845. The Civil Code of Quebec replaced the Civil Code of Lower Canada in 1991, which came into effect in the year 1994. Other American counties like Panama and Cuba have a history of adopting codes from other countries and later replacing them with their own.

Asia

In the Portuguese territories of Asia, the Portuguese Civil Code was introduced in 1868. It is still in effect in the Indian territories of Goa, Daman and Diu, and Dadra and Nagar Haveli. Macau adopted its own civil code in 1999, which was based on the Portuguese Code of 1966.[5]

Other Asian counties like Japan, Indonesia, Korea and Thailand derived their civil codes from those of European countries.

III. UNIFORM CIVIL CODE

A Uniform Civil Code is a set of rules that govern all civil matters by one common law. It defines a law that is uniform to all those who are governed by it, irrespective of their religion or personal beliefs.

In India, civil matters like marriage, divorce, inheritance, adoption and maintenance are part of personal laws, which are unique to every religion. Goa is the only territory that has a uniform civil law based on the Portuguese Civil Code of 1867. The code deals uniformly with family matters. But, while it is about the concept of absolute equality,[6] the marriage laws are not gender-just as Hindu men have the right to polygamy under certain circumstances.[7] There are other similar provisions that indicate that the Goa Civil Code is not strictly a uniform code.[8]

[5] JORGE A.F. GODINHO, *The Macau Civil Code- A Partial English Translation*, SEMANTIC SCHOLAR (Published 2013) https://www.semanticscholar.org/paper/The-Macau-Civil-Code-A-Partial-English-Translation-Godinho/ff13d5cc5225ef46f02deed33433d8738de68efe.
[6] Margaret Mascarenhas, *Goa's Civil Code*, MARGARET MASCARENHAS AT HOME, http://mmascgoa.tripod.com/id12.html.
[7] PARTHA S. GHOSH, THE POLITICS OF PERSONAL LAW IN SOUTH ASIA: IDENTITY, NATIONALISM, AND THE UNIFORM CIVIL CODE 19-22 (Routledge 2007).
[8] Id.

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IV. HISTORY AND BACKGROUND

The history of Uniform Civil Code dates back to British India when, on the basis of the Lex Loci report of 1840, the British government made uniform laws related to crime, contract and evidence but intentionally left the personal laws out of it, so as to not engage in the religious matters of the diversified communities of India. But the personal laws deprived women of their right to inheritance, remarriage and divorce, and hence, were discriminatory to them. Protests from progressive sections of the country and women's organizations and the need for legislative reforms led to the passing of laws that were beneficial to women- such as The Indian Succession Act 1865, the Hindu Widow Remarriage Act of 1865, the Married Woman's Property Act, 1923 and the Hindu Inheritance (Removal of Disabilities) Act of 1928, which ensured the economic security of women and their right to property.

In the year 1937, the Hindu Women's Right to Property Act was passed, assuring the rights of women. However, interference into the personal matters of people led to debates and controversies. This led to the formation of the B.N Rau Committee in 1941, for determining the necessity for a common Hindu law. The committee came to a conclusion that the time for a codified Hindu law had come, that would give equal rights to women, and recommended codification of laws relating to marriage and succession.

A draft code was prepared by the committee that dealt with succession, marriage, adoption, and maintenance. The draft was to become law on January 1, 1948 but by then India had become a free nation and the legislature became preoccupied with the task of building a new regime.

In 1948, the select committee chaired by Dr. B.R. Ambedkar made some significant changes to the Bill and it was presented in the Parliament for discussion. While Pundit Jawaharlal Nehru, the first Prime Minister of India, his followers, and women members supported the implementation of a Uniform Civil Code, and B.R Ambedkar recommended it, the Bill was criticized by Dr. Rajendra Prasad (the first President of India), Vallabhbhai Patel and others of Hindu fundamentalist views. Their criticism revolved around provisions of monogamy, divorce, coparcenary to women, and inheritance to daughters. Another ground for criticizing the Bill was its application on only those belonging to the Hindu religion, while it should have been applied to all citizens regardless of their religion.[9] It seemed to the traditionalists and fundamentalists that codifying the Hindu law would mean interference in the religious matters, but the codification had nothing to do with the religion itself, only the parts that were

[9] John Banningan, *The Hindu Code Bill*, 21 Far Eastern Survey 173,173–176. (1952).

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discriminatory and of archaic nature.

After several discussions, revisions and oppositions, the Hindu Code Bill was split into four separate Bills:

1. Hindu Marriage Act
2. Hindu Succession Act
3. Hindu Minority and Guardianship Act
4. Hindu Adoption and Maintenance Act

These Bills faced significantly less opposition, and during the years 1952-1956, they were introduced, and passed by the Parliament[10]

Nehru was of the view that such a law reform was imperative to the nation's all-round development. However, codifying the Muslim law seemed to be an even more of a controversial issue. The Muslim Assembly members argued that a common code would be "tyrannical" and violate of their right to freedom of religion (Article 25), also, it would infringe their personal laws that had been an integral part of their religion for ages. Three Assembly members, Alladi Krishnaswami Ayyar, K M Munshi, and B R Ambedkar addressed these points, and explained how "advanced Muslim countries" like Turkey and Egypt had done away with such personal laws and all the minorities had submitted to a secular law, and that the aim of a uniform code was to unite the nation, and not trample on the rights of the minorities[11]. Munshi recounted the time when the Memons, who had always followed Hindu customs, were "unwillingly" brought within the ambit of Shariat Law in 1937, and asked where their rights were when that happened. Although, his point was that for unification of the country, it was important for personal laws to be divorced from religion[12].

The Hindu Code was in conflict with the instructions of Manu and Yajnavalkya, as the laws discriminated against women and did not give them freedom or equal rights, and the link between faith and community laws was questioned.

Ambedkar, while addressing the Constituent Assembly, said, "I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having

[10] RINA WILLIAMS, POSTCOLONIAL AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (annotated, Oxford University Press, 2006).
[11] Vaibhav Purandare, *How Muslim fears were allayed, and the UCC became a directive principle*, TIMES OF INDIA (Sep 8, 2017, 06:42 IST), https://timesofindia.indiatimes.com/india/how-muslim-fears-were-allayed-and-the-ucc-became-a-directive-principle/articleshow/60417611.cms.
[12] Id.

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this liberty for?"[13]

However, he assured the Muslims that the state would not impose any laws on anyone. In November 1948, he had disagreed with the amendment suggested by some Muslim members that nothing in the provisions of a common civil code would affect their laws, but suggested that the shift to a common code must be voluntary, bringing only those under it who were willing to be bound by it.[14]

To indicate that the implementation of a Uniform Civil Code was open for a parliamentary discussion in the future, Article 44 was added in the constitution as a Directive Principle. It states that, "The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India." The dream of Ambedkar, Munshi, and others like them to have a common civil code for the whole of India that would govern all citizens irrespective of their religions was boxed up as a mere mention in the list of Directive Principles of the State Policy of the Indian Constitution. This decision to not make the code enforceable by law did not fit well with progressive women members like Rajkumari Amrit Kaur and Hansa Mehta.

Aparna Mahanta wrote, *"Failure of the Indian state to provide a uniform civil code, consistent with its democratic secular and socialist declarations, further illustrates the modern state's accommodation of the traditional interests of a patriarchal society".*[15]

V. SPECIAL MARRIAGE ACT

The Special Marriage Act was enacted in 1954, which provides for the marriage of any citizen, or any Indian national in a foreign country, irrespective of their religion. Those who decide to come under this law are permitted to marry outside the purview of the personal laws of their religion. According to this Act, polygamy is illegal. Also, the inheritance and succession would be governed by the Indian Succession Act, and not by the personal laws. The Act also deals with divorce, and maintenance of a divorced wife. It is generally beneficial to Muslim women who do not get to exercise these rights under their personal laws.[16]

Enactment of the Special Marriage Act was the closest the parliament could come to having a secular, uniform code for the citizens of India, who would be governed by a common code,

[13] Vikas Pathak, *Ambedkar favoured common civil code*, THE HINDU (DEC 01, 2015 05:04 IST), https://www.thehindu.com/news/national/ambedkar-favoured-common-civil-code/article7934565.ece.
[14] Id.
[15] Aparna Mahanta, *THE INDIAN STATE AND PATRIARCHY*, 1 STATE AND NATION IN CTX OF SOC. CHG. 88, 95 (1994).
[16] Dr. C. K. Mathew, *Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach*, THE HINDU CENTRE (OCT 25, 2019, 05:26 PM IST) https://www.thehinducentre.com/publications/issue-brief/article29784007.ece.

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rather than their own personal laws.

The historic case of Shah Bano brought back the issue of Uniform Civil Code.

The Shah Bano Case

In 1985, Shah Bano, a Muslim woman who had been divorced by her husband of 40 years through the system of Triple Talaq, filed a petition under Section 125 of the Code of Criminal Procedure (CrPC), which deals with maintenance, and is applicable to all citizens of India irrespective of their religion. Two other Muslim women had previously received maintenance under the Criminal Code in 1979 and 1980 respectively.

The Supreme Court ruled in favour of Shah Bano, increasing the amount that her husband had to give her as maintenance, and directed the Parliament to frame a Uniform Civil Code. The court observed, "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."[17]

This decision of the Supreme Court was diluted when the Rajiv Gandhi government passed the Muslim Women (Protection of Rights in Divorce) Act in 1986. The Act made Section 125 of CrPC inapplicable on Muslim women, as according to it, maintenance was payable to a divorced wife only during the period of iddat, not thereafter. In 1987, it was reported by

[17] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 1 SCC 556 (India).

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Rajendra Kumar Bajpai, the Minister of Social Welfare, that no women were given maintenance by the Waqf Board in 1986.

Once again, prevalence of religious laws over secular laws dominated the lives of women, and also hampered the Women's Movement in India in the 1980s.

However, later in **Daniel Latifi** and **Shamima Farooqui** judgments, the Supreme Court upheld the Shah Bano judgment, and the Muslim Women (Protection of Rights in Divorce) Act, 1986 was nullified.

Sarla Mudgal V. Union of India(1995)

In 1995, the cases of four petitions came before the court under Article 32 where the husbands of three Hindu women had converted into Islam for the purpose of entering into second marriage, as bigamy is prohibited in Hindu law.

It was held that conversion into Islam just for the purpose of having a bigamous marriage was in contravention of Section 494 of the Indian Penal Code. The Bench also strongly advocated the introduction of a Uniform Civil Code in India.[18]

Lily Thomas V. Union of India (2000)

In this case, Lily Thomas was the petitioner on behalf of a woman named Sushmita Ghosh whose husband had converted into Islam so that he could marry another woman, as polygamy is prohibited in Hindu law but allowed in Islam.

She urged the court to declare polygamy in the Muslim law unconstitutional. The need for a Uniform Civil Code was also advocated and the law laid down in Sarla Mudgal case was upheld by the Court[19].

John Vallamattom V. Union of India (2003)

John Vallamattom was a Catholic Roman Priest who was one of the petitioners who went to Court as they were denied the right to bequeath property for charitable and religious purposes under Section 118 of the Indian Succession Act. It was discriminatory and put unreasonable restriction on donation of property for charitable and religious purposes by Will.

As the restriction applied only on Indian Christians, the Apex Court held that Section 118 of Indian Succession Act was discriminatory and unreasonable, and therefore, violative of Article 14 of the Indian Constitution.[20]

[18] Sarla Mudgal v. Union of India (1995) SC 1531 (India).
[19] Lily Thomas v. Union of India (2000) 6 SCC 224 (India).
[20] *Declaration of Section 118 of the Indian Succession Act, 125 as Unconstitutional: SC*, PATHLEGAL

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The Court declared Section 118 of the Act unconstitutional, and the section was struck down. Justice V. N. Khare said in his judgment of the case, "*I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Art. 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Arts. 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Arts. 25 and 26 of the Constitution"*[21]

Once again, a call for Uniform Civil Code was made by the Supreme Court but it remained a dormant Directive Principle.

Shayara Bano V. Union of India (2017)

Shayara Bano was a woman whose husband of 15 years had divorced her through the Triple Talaq system (talaq-e-biddat). She filed a Writ petition in Supreme Court, asking three practices, namely talaq-e-biddat, polygamy, and nikah-halala (a practice in which a divorced Muslim woman who wants to remarry her husband has to marry, consummate marriage, and obtain divorce from a second husband before she can go back to her first husband), to be held unconstitutional.[22]

The Court ruled in her favour and declared Triple Talaq unconstitutional. The Muslim Women (Protection of Rights on Marriage) Act, which was passed in 2019, having a retrospective effect from 19th September (2018), criminalizes the practice, and under the Act, an aggrieved woman can demand maintenance for her dependent children.[23]

The judgment was a step towards ensuring rights of Muslim women in marriage, and also doing away with arbitrary personal laws.

VI. NEED FOR A UNIFORM CIVIL CODE

The recurring debates over a Uniform Civil Code for all citizens of the country bring us to the question- is there a need for a common civil code?

https://www.pathlegal.in/Declaration-Of-Section-118-of-the-Indian-Succession-Act,1925-blog-2383599.

[21] M.P. RAJU, UNIFORM CIVIL CODE: A MIRAGE 132-133 (Media House Delhi 2003).

[22] Shayara Bano v. Union of India (2017) 9 SCC 1 Writ Petition no. 118 of 2016 (India).

[23] Special Correspondent, *President Ram Nath Kovind gives assent to triple talaq bill,* THE HINDU (Aug 01, 2019, 09:30 AM IST), https://www.thehindu.com/news/national/president-ram-nath-kovind-gives-assent-to-triple-talaq-bill/article28780061.ece.

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India has been a land of diversities, and over the last few centuries, the country has witnessed social and legal reforms that have shaped India into a progressive nation- the abolition of Sati Pratha (a practice among Hindus in which a widow sacrificed herself by sitting in the funeral pyre of her deceased husband), abolition of untouchability, codification of Hindu laws, abrogation of Section 118 of the Indian Succession Act, criminalization of Triple Talaq system, decriminalization of Section 377 of Indian Penal Code and doing away with other such regressive practices and laws.

To be able to answer the question of whether or not there is a need for a common civil code, we first need to look at the problems surrounding the different personal laws in India.

The personal laws in India deal with family matters such as marriage and divorce, inheritance, adoption, and maintenance. Parts of these personal laws are discriminatory and against the fundamentals of the Indian Constitution.

Christian Law

In India, Christians who seeks to dissolve their marriage must seek a decree of Nullity from the Roman Catholic Church, and also from the Court of law. The existence of two parallel adjudicatory bodies for the same matter is not only inconvenient, but discriminatory to those belonging to the Christian community.[24] This discriminates against those belonging to the Christian community, violating Article 14 and 15 of the Indian Constitution.

Also, if a Christian couple files for a divorce on the ground of mutual consent, they have to wait through a 2-year separation period, unlike the 1-year separation permitted by the Hindu, Parsi, and Special marriage Acts. This difference is in conflict with Article 14, 15 and 21 of the Constitution.

Hindu Law

The codification of Hindu law expanded the rights of women in matters of marriage, maintenance, and inheritance. However, there are provisions of the Hindu laws that still remain archaic and discriminatory.

Under Section 9 of the Hindu Marriage Act, 1955, a person has the right to approach the Court if their spouse has withdrawn from their society without reasonable excuse. This provision is highly discriminatory as it is a violation of Article 14, 19 and 21.

The indirect gender discrimination of the law must not be ignored, as held by the Andhra

[24] The Law Commission of India Report No. 90, The Grounds of Divorce Among Christians in India: S. 10, Indian Divorce Act, 1869.

Pradesh High Court in T Sareetha v. T Venkatasubbaiah, that the remedy of restitution of conjugal rights was largely used as an "engine of oppression to be operated by the husband for the benefit of the husband against the wife."[25] Unfortunately, the decision of Supreme Court in Saroj Rani v. S.K. Chadha overturned this judgment, making a notion that the sanctity of marriage is more important than individual freedom and rights.[26]

Another aspect where the Hindu personal law discriminates against women is adoption. According to the Hindu Adoption and Maintenance Act, 1956, only an unmarried woman can adopt a child. A married woman cannot adopt in her own name; she can only consent to an adoption by her husband, while a man can adopt in his own name, although, only after the consent of his wife (or wives, in case he has more than one wife living at the time of adoption). This violates Article 14 and 21 of the Constitution.

Muslim Law

Recently, the prevalent system of Triple Talaq among Muslims was declared unconstitutional by the Supreme Court. Even though it was a step towards ensuring rights of Muslim women, there are still discriminatory practices in Islam that have found permission under the Muslim personal law.

While polygamy is an offence under Section 494 of the Indian Penal Code, it does not apply to those who are governed by the Shariat law. Islam allows a Muslim man to have four wives at a time, which, without question, is discriminatory to every woman and in violation of Article 14 and 21.

When it comes to marriageable age, Islam does not define a fixed age, rather, it is when a person attains "maturity" or puberty that they become of marriageable age. There's no legal age for marriage, which in a way, permits child marriage.

The practice of Nikah Halala is highly oppressive and an extreme violation of a woman's basic rights. It is a practice in which a woman, who has been divorced by her husband and seeks to marry him again, has to marry another man first, consummate the marriage and then obtain divorce before she can go back to her husband.

Another archaic and whimsical practice among Shia Muslims that lets men enter into "temporary marriage" is Muta Marriage. In this, the duration of the marriage and the amount

[25] Divya Srinivasan, *'Restitution of Conjugal Rights' is an archaic, unconstitutional law and its time is up,* THE LEAFLET (Nov 2, 2018), https://theleaflet.in/restitution-of-conjugal-rights-is-an-archaic-unconstitutional-law-and-its-time-is-up/

[26] Id.

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of dower is pre-defined in the Muta contract. If the woman gets pregnant during the muta period, the child belongs to the man, but his denial is a sufficient ground for the child to not belong to him.[27] Almost all conditions and provisions of Muta marriage are discriminatory against women, violating their rights guaranteed in Article 14, 19 and 21.

Under Muslim law, the mother is not recognized as the natural guardian of the minor, not even after the death of the father, which is again discriminatory.

Parsi Law

The Parsi personal law has no provisions regarding adoption and the law does not recognize adoption as a way to bear children. It deprives a childless couple of having any legal means to adopt, being in contradiction of Article 21.

Further, the Act provides for establishment of Parsi Matrimonial Courts, giving appellate jurisdiction to the High Court. It puts unnecessary burden on those belonging to the Parsi community and defeats the purpose of formal courts.[28]

The arbitrary and discriminatory provisions of these personal laws hamper the progress of the country as a whole, but more importantly, they take away the fundamental rights of an individual that is guaranteed by the Constitution.

In **Joseph Shine v. Union of India**, the Supreme Court decriminalized adultery and held that "a law that treats women differently based on gender stereotypes is an affront to women's dignity."[29] The statement stands true not only for a discriminatory provision of criminal law (Section 497 of Indian Penal Code), but also for any other law or practice that affects the women of the country, even if it is part of a personal law.

The uniformity of criminal law that applies equitably to all citizens, ensures their equal treatment by the law. The same uniformity and equality is needed in matters of civil law. Implementation of a Uniform Civil Code would ensure adherence to constitutional law, making it an indispensable part of family law so that no provision of the law is in conflict with the fundamental rights of the citizens, and that no one is discriminated against.

VII. UNIFORM CIVIL CODE AND FREEDOM OF RELIGION

It has been argued that implementation of a Uniform Civil Code would hinder the spirit of

[27] Astu Khandelwal & Shashwat Patwa, *Muta Marriage*, 1 IJLMH, 2018, 3-4.
[28] Saisha Bacha, *What India Needs is More Gender Just Laws, Including Personal Laws, for its Women*, CITIZENS FOR JUSTICE AND PEACE (Jun 12, 2017), https://cjp.org.in/what-india-needs-is-more-gender-just-laws-including-personal-laws-for-its-women/.
[29] Joseph Shine v. Union of India (2018) SC 1676 (India).

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secularism by violating the Right to Freedom of Religion guaranteed under Article 25 of the Constitution. This argument is not based on logic, rather it is a result of fundamentalist mindset and misinterpretation of the Constitution.

Matters that are concerned with marriage, divorce, adoption, succession, and maintenance are not religious, but of individual freedom and rights. Replacing discriminatory personal laws with a uniform law that upholds the supremacy of constitutional rights over religious practices is a necessity in a country like India where religion is used to cover the oppression and discrimination faced by many.

Secularism is the separation of State from religion. A secular State is tasked with the job to separate itself from religion, and not make laws based on religious practices. However, this does not mean that religious practices that are whimsical, discriminatory, or in violation of the basic principles of the constitution should go unchecked.

As important as it is to understand the Right to Freedom of Religion under Article 25, it is as important to realize that Article 25(2) (a) provides that the State can make laws to "regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice."[30] Therefore, enactment of a Uniform Civil Code, that would be in coordination with the constitutional provisions, and free of any bias or dominance that comes with religious personal laws, comes under Article 25 (2) (b) of the Constitution.

As held in the Shayara Bano judgment, Triple Talaq is not an essential religious practice of Islam, so it is not protected under Article 25(1).[31] That it was declared unconstitutional, and criminal, is a proof that religious practice, or personal law violative of the Constitution are not immune to being reformed or struck down. It is imperative to note that practices like Triple Talaq or polygamy are not as significant to religion as they are to patriarchy and whims.

Another breakthrough in context of securing women's rights by upholding the secular nature of laws over unfair and discriminatory practices is the Sabarimala case. The exclusion of women of menstruating age from entering the temple did not only violate their right to equality but also their freedom to religion, and Article 17 (abolition of untouchability) as they were barred from entering, and worshipping in the temple. In his judgment, Justice Dipak Misra also observed that excluding women on the basis of their gender cannot be held as an essential

[30] INDIA CONST. art. 25, cl. 1.

[31] Arundhati Katju, *Triple Talaq: Personal Law and Colonial Shadow in Contemporary India*, CONSTITUTIONNET (FEB 27, 2018), http://constitutionnet.org/news/triple-talaq-personal-law-and-colonial-shadows-contemporary-india.

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religious practice, and that the exclusion "is subject to State mandated reform".[32]

Freedom of religion is a fundamental right. But, so is the right to equality. Any, and all claims that seek to put religion or their oppressive practices above basic human rights- especially the rights of women, who have constantly been subject to discrimination and unfair treatment by the society, are regressive and archaic.

Implementation of a Uniform Civil Code would not take away any individual's right to freedom of religion, it would only ensure that the guarantee under Article 25 does not become an excuse to deprive someone of their basic human rights.

VIII. PERSONAL LAWS AND ARTICLE 13

Every time there is a debate over reforming personal laws or replacing them with a secular and common law, those against the process make the same tired claim; that personal laws are not laws within the meaning of 'law' or 'law in force' defined under Article 13 of the Constitution, and so, they do not come in purview of the constitutional provisions, and are not subject to reforms.

Article 13 (1) of the Indian constitution states that laws inconsistent with, or in derogation of fundamental rights, are, to the extent of their contravention, void.[33]

13(2) states that the State shall not make any laws that take away or abridge the fundamental rights conferred by the constitution in Part III, and any such law, would be void to the extent of its contravention of the rights.[34]

According to Article 13(3)(a), "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; and,the clause states that "laws in force" includes laws 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 any such law or any part thereof may not be then in operation either at all or in particular areas.

The Courts of India have had numerous conflicting views regarding the matter: In **State of Bombay v. Narasu Appa Mali**, it was held that personal laws were not included within the scope of the expression "law in force", and therefore could not be subjected to the provisions of Article 13.[35]

[32] Indian Young Lawyers' Association v. State of Kerala (2018) SC 1690 (India).
[33] INDIA CONST. art. 13, cl. 1.
[34] INDIA CONST. art. 13, cl. 2.
[35] VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA 101

While in the case of **Narsingh Pratap Deo v. State of Orissa**, the Court held that though theorists may not find it easy to define a law, the main features and characteristics of law are well recognized, and that stated broadly, a law generally is a body of rules which have been laid down for determining legal rights and legal obligations which are recognized by courts, hence, observing that personal laws are laws under Article 13.[36]

Both codified and uncodified laws are based on one or more of the following: order, rule, regulation, custom or usage, and are referred to in courts to support petitions or decisions. Dismissing them as something outside the meaning of law would be illogical, given the history of codification of Hindu law, or the striking down of Section 118 of Indian Succession Act, or the recent ban on Triple Talaq.

Justice Chandrachud's view in Sabarimala case seems noteworthy in the above context. He wrote, "Custom or usage cannot be excluded from 'laws in force'. The decision in Narasu also opined that personal law is immune from constitutional scrutiny. This detracts from the notion that no body of practices can claim supremacy over the Constitution or its vision of ensuring the sanctity of dignity, liberty and equality."[37]

Examining the meaning of 'law', 'law in force' and Article 13 in its totality, it is safe to establish that personal laws, do in fact, come within the purview of constitutional validity, and therefore, any provision of such laws that are in conflict with the fundamentals of the Constitution must be declared void.

IX. APPROACHING UNIFORMITY IN A SECULAR WAY

India is a land of diversities. People of different cultures, religions, histories, and beliefs have lived here for centuries. What makes India unique is the unity amongst all the diversity, with individuals having respect for, and being tolerant of the differences.

A democratic State like India can achieve complete secularism only when the laws that govern the citizens are secular and unbiased. The criminal law provides for same punishments to all offenders for the same offences, ensuring equality before law, and justice. A crime committed by one person takes away the rights of another, and to give justice to the victim, it's necessary that the criminal is punished.

There is no argument in the fact that criminal law and civil law deal with very different issues,

(University of Toronto Press. 2008).

[36] Mihir Desai, *Courts' Flip-Flop on Personal Laws*, 3 COMBAT LAW (India Together, FEB 2005).

[37] Krishnadas Rajagopal, *With Sabarimala Verdict, 'Ghost of Narasu' is Finally Exorcised,* THE HINDU (SEPT 28, 2018, 10:14 PM IST), https://www.thehindu.com/news/national/justice-chandrachud-ends-the-unchallenged-reign-of-a-bombay-hc-verdict/article25074175.ece.

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but, as they are both applied on individuals, it becomes mandatory to ensure that the laws are equal for everyone. If a practice that is prohibited in the personal laws of one religion is permitted in another, it is discriminatory to members of both the religions, but the bigger concern is the unfairness or discrimination of the practice itself.

Implementation of a Uniform Civil Code in India is need of the hour, but its success would depend on its secular approach towards matters of marriage, divorce, inheritance, adoption, and maintenance, as they are more related to an individual's rights than to religion More importantly, enacting a common civil code should contribute to guaranteeing freedom of religion with realization of individual freedom and rights, and in no way lead to imposition of majority viewpoint over the minorities, as feared by many.

It is gender justice and equality that the progressive citizens seek from the laws they are governed by, and implementation of a Uniform Civil Code would be based on humanitarian grounds, securing justice for all- especially women, who need written laws to protect them in a society that uses stereotypical and discriminatory customs and practices to dominate them.

It is imperative to note that there are provisions in the personal laws that advocate equality of genders and are progressive in nature. Including these provisions while making a uniform code would be in the interest of all, encouraging acceptance of the Code.

X. CONCLUSIONS

Through tracing the history of civil codes around the world, and a microscopic view of the existing personal laws in India, the need and feasibility of a Uniform Civil Code can be well-established.

It is unfortunate that due to absence of consensus coupled with political reasons, the fate of a uniform code was limited to Directive Principles of the State Policy under Article 44 of the Constitution. Looking back at all the debates surrounding personal laws, their codification, and reforms, it is clear that the claims of those who oppose it are based on resistance to change and the patriarchy that is so ingrained in the society that it is infused in customs and practices that hide under the covers of personal laws.

Codification of Hindu law was not an easy task. It was opposed and criticized on various grounds, but ultimately, the doors opened and a codified law that gave greater rights to women came into light. Of course the law is still not perfect, but the point is that change is always uncomfortable, but the only way to a better society, is raging against the resistance of regressive mindset and reforming all those aspects of the existing laws that are discriminatory or violative

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of human rights, and making laws that are just, fair, unbiased, and secular to their core.

In the past few years, the Courts of India have struck down discriminatory laws, proving that in a secular and democratic country like India where the Constitution is the supreme law, there is no room for discrimination or arbitrariness.

It is needless to say that personal laws are not above the Constitution, and they must conform to the constitutional fundamentals, and be subject to reforms. Those who stand against bringing personal laws under the purview of the Indian constitution, stand against the very spirit of equality.

Uniform Civil Code would be a new dawn for India. The time for its enactment is riper than ever, and it is hopeful to expect that it will be accepted and adopted.

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