CHAPTER – 5

UNIFORM CIVIL CODE: JUDICIAL OUTLOOK

In a democratic country the judiciary plays an important role as dispute resolving mechanism. It has very wide powers to expound the provisions of the Constitution and to bring into practice the basic philosophy underlying the provision. The Constitution of India guarantees to all person equality, freedom of conscience and religion. The state is under Constitutional obligation to make earnest effort towards the establishment of one civil code for all persons. Although the courts have sought to effect uniformity in personal laws, but the wave to codify has been firmly upset by parliament because of political considerations. However the courts have consistently emphasized the need of the Uniform Civil Code. The Uniform Civil Code is required not only to ensure uniformity of law between communities but uniformities of laws within communities ensuring equality between rights of men and women.\(^1\) But diverse personal laws exist in India which is applicable to all religious groups in the matters relating to their family relationships such as marriage and divorce, maintenance, custody of children, guardianship of children, inheritance and succession, adoption and the like. In fact, the absence of uniformity in laws governing these vital interpersonal relationships has resulted in the denial of constitutionally mandated equality of all citizens before the law and equal protection of laws. Therefore, the personal laws of various communities need to be discussed in brief before we try to see the outlook of judiciary on the issues relating to the personal laws of the various religious communities.

5.1 Judicial Approach in cases of Polygamy

Marriage is the basic institution in all progressive societies which has been ordained for the protection of the society from immoral acts on the one

hand and continuance of the chain of the society itself on the other. Marriage whether considered as a contract or sacrament confers a status of husband and wife to the parties of marriage. It confers a status of legitimacy on the children. Out of it arise certain rights and obligations to the spouses. Fundamentally, marital relations regulate human behaviour between persons of opposite sex. Norms set up for regulating the marital behaviour is different from place to place and from society to society. So far as the Hindu society was concerned, the religious rules have more effect than any other element. Amongst the Hindus, marriage is considered to be holy union and a religious necessity. But a Hindu cannot have more than one wife living at a time. A marriage between two Hindus is void, if either party has a spouse living at the time of marriage.\(^2\) So polygamy has been abolished under the Hindu Marriage Act 1955.

The Muslim marriage is a contract between two parties of different sexes who agree to cohabit on certain terms. The ceremony of *nikah* binds the two persons together. Both the parties must agree to be married though a Muslim may have four wives. If Marries fifth time; the marriage is not void, but irregular which may be rectified by divorcing any one of the other wives at a date not later than the performance of the fifth ceremony. There are two major legislations on Muslim personal law i.e. the Dissolution of Muslim Marriages Act, 1939 and the Muslim Woman (Protection of Rights on Divorce) Act, 1986 in India. So the Muslim law has not yet been properly codified. These two Acts are not the reformed or modified laws. In the present Society the Muslim law appears to be grossly inadequate.

Similarly the personal laws of Christians i.e. The Indian Divorce Act, 1869 and The Indian Christian Marriage Act, 1872 are outdated. The first attempt to change these laws was made in 1962 in the 15th Report of Law

\(^2\) Section 5(1) Hindu Marriage Act 1955.
Commission and a bill was prepared accordingly which was lapsed when the then parliament dissolved. Then the National Commission for Minorities (NCM) forwarded the draft bill on reforms of Christian personnel laws to the Government and urged to enact a single law named ‘Christian family laws’. But Indian legislature has left the Christian laws untouched.\(^3\)

The Parsi personal laws are based on Hindu customs and the rule of English Common law. A Parsi marriage is a contractual marriage but the sacramental element has also not been eliminated altogether.\(^4\) For a valid Parsi marriage the performance of ‘Ashirvad ceremony’ which literally means blessings is essential. In *Pershotam v. Mehrba*\(^5\) it has been observed by the Hon’ble Bombay High Court that Ashirvad means a prayer or exhortation to the parties to observe their marital obligation. Section 4 of the Parsi Marriage and Divorce Act, 1936 makes remarriage unlawful during the lifetime of the wife or husband except when such marriage (i) has already been declared null and void or (ii) has been dissolved, therefore, second marriage will be unlawful during the lifetime of the wife or husband. Even though a Parsi may change his or her religion or domicile they shall remain bound by the provisions of the Act.\(^6\)

In India there is no statutory law on marriage and divorce for the Jewish community. The Jews in India practice monogamy. A Jews can not lawfully contract a second marriage during the continuance of the first. A mutual consent of the parties is a must for contracting a valid marriage. In the absence of such consent the marriage is void although the parents of minors can contract for a marriage either boy or girl may nullify the agreement. Thus, the Hindu, Muslims, Christians, Parsis and Jews have been following different patterns and recognize different values. Monogamy

\(^1\) See the news item entitled "Bill on Christian personnel law submitted" published in *the Pioneer* (LKO) dated 7-12-1997, P.3.
\(^2\) Section 3, Parsi Marriage and Divorce Act, 1936.
\(^3\) ILR 13 Bom. 302
\(^4\) Sec. 52 (2) Parsi Marriage and Divorce Act, 1936.
is followed in all except in Muslims. Under the Constitution of India where equality is the basic principle, the personal laws relating to marriage are not equal for the members of the various communities.

The first case in which the rule of polygamy was challenged and held intravires the Constitution was in the State of Bombay v. Narasu Appa Mali.\textsuperscript{7}

In this case the validity of the abolition of polygamy in particular community under the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 was challenged principally on two grounds. Firstly, It has been contended that the personal laws applicable to Hindu and Muslim/ Mohammedans in the Union of India are subject to the provisions contained in the part III of the Constitution of India and as such they would be void to the extent to which their provision are inconsistent with the Fundamental Rights guaranteed by part III of the Constitution. Secondly, in so far as both these personal laws allow polygamy but not the polyandry, this discriminate against women only on the ground of sex. So the provision of permitting polygamy offends against the provision contained in Article 15 (1) and Article 13(1) of the Constitution of India. In other words after the commencement of Constitution bigamous marriages among Hindus as will as Muslims became void and both became liable to be punished under Section 494 of Indian Penal Code, 1860 and yet the impugned Act specifically provides for the punishment for the Hindus alone. Thus it discriminates against the Hindus solely on the ground of religion.\textsuperscript{8} The former Chief Justice Hon'ble MC Chagla of the Bombay High Court had observed in this case that:\textsuperscript{9} “One community might be prepared to accept and work for social reform; another may not yet be prepared for it, and Article 14 does not lay down that any legislation that the state may embark upon must necessarily be of an all embracing character.

\textsuperscript{7} AIR 1952 Bom. 84.
\textsuperscript{8} Ibid, 90.
\textsuperscript{9} Id., p.87.
The state may rightly decide to bring about social reform by stages and stages may be territorial or they may be community wise. From these considerations it follows that there is discrimination against the Hindus in the applicability of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 the discrimination is not based only upon ground of religion. Equally so if the law with regard to the bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds”

The other judge in this case Justice Gajendragadkar although delivered separate judgement agreeing with the Hon’ble Justice Chagla opined that the classification made between Hindu and Muslim for the purpose of legislation was reasonable and did not violate the right to equality under Article 14 of the Constitution. Further, stressing on the need of Uniform Civil Code he observed that:

“Article 44 of the Constitution is, in my opinion very important in dealing with this question. This Article says that the state shall endeavour to secure for the citizens a Uniform Civil Code through out the territory of India. In other words, this Article by necessary implication recognises the existence of different codes applicable to the Hindus and Mohammedans in matters of personal law and permits their continuance until the state succeeds in its endeavour to secure for all the citizens a Uniform Civil Code. The personal laws prevailing in this country owe their origin to the spiritual texts. In several respects their provisions are mixed up with and are based on considerations of religion and culture so that the task of evolving a Uniform Civil Code applicable to different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws
at this stage and laid down a directive principle that the endeavour must hereafter be to secure a Uniform Civil Code through out the territory of India. It is not difficult to imagine that some of the members of the Constituent Assembly may have felt impatient to achieve this ideal immediately; but as Article 44 shows this impatience was tempered by considerations of practical difficulties in the way. That is why the Constitution contents itself with laying down the directive principle in this article”.10

Thus, the High Court while upholding the validity of the legislation favoured the introduction of the Uniform Civil Code and court rightly held that the institution of polygamy was not based on necessity. If there was no son out of first marriage then instead of taking recourse to second marriage the proper course was adoption of a son. As for the contention regarding the discrimination between Hindus and Muslims, the court very clearly observed that classification was reasonable and did not violate Article 14 of the Constitution. Further, the court also emphasized that the said legislation must be enforced in its true spirit as an essential step to secure for the citizens a Uniform Civil Code through out the territory of India.11

A similar case came before Madras High Court where the provision of Madras Hindu (Bigamy and Divorce) Act, 1949 was challenged in the case of Srinivasa Aiyer v. Saraswathi Amma.12 Section 4 of the said Act was challenged which provide “Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and woman either of whom has a spouse living at the time of such solemnization shall be void”. Apart from this provision, the other grounds regarding the Constitutional validity of the Act were same as in case of the State of Bombay v. Narasu Appa Mali where the validity of the

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11 Id., p.95.
12 AIR 1952 Mad.193.
legislation was upheld by the court. While rejecting all the contentions put before the court the Hon'ble Judges Satyanarayan Rao and Rajgopalan pointed out that the abolition of polygamy did not interfere with the religion because if a man did not have natural born son he could adopt one. Relying on the judgment of United States Supreme Court in Reynolds v. United States the Court further observed that whilst the religious belief was protected by the Constitution, but religious practices were subject to state regulations. The court was of the view that state was empowered to regulate religious practices through appropriate legislation whenever it was in the interest of social welfare and aimed at the reforms intended to by the wise founding fathers of the Constitution. Therefore, keeping in view the Constitutional philosophy of Uniform Civil Code the court upheld the Madras Hindu (Bigamy and Divorce) Act, 1949 and declared it constitutional.

In another case of Ram Prasad v. State of UP Section 5 (1) of the Hindu Marriage Act 1955 and Rule 27 of the Uttar Pradesh Government Servant conduct Rules 1946 were challenged on the ground that the provisions are violative of Article 25 of the Constitution and hence unconstitutional. In this case the petitioner wanted to remarry for the sake of a son. The petitioner supported his case by citing religious books which permitted to marry a second wife in the presence of the first if his first wife is incapable of bearing a male child. Justice Mehrotra of Allahabad High Court rejected the contention of the petitioner and upheld the validity of Section 5(1) of The Hindu Marriage Act 1955 and Rule 27 of UP Government Service Conduct Rules 1946 and held that: “Hindu religion

14 (1870) 98 US 145.
15 AIR 1957 All. 411.
16 Rule 27 provides that “no government servant who has a wife shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.”
17 Ibid. PP. 414-415.
permitted a second marriage in certain circumstances but it can not be regarded as an integral part of Hindu religion. The presence of a son may be essential to achieve religious salvation but that does not necessarily mean that in the presence of a wife who has a living female child and there being a right to adopt second marriage is no obligatory as to form a part of Hindu religion.

In the case of \textit{Itwari v. Asghari}^{18} related to Muslim Personal law the important issue before the Court was to pass a decree of the restitution of the conjugal right against the first wife of the petitioner. The main contention was that Muslim personal law allows second marriage even while first marriage subsists. Therefore, the petitioner was entitled to the consortium of the respondent under his Muslim personal law. Justice Dhawan of Allahabad High Court refused to grant a decree of restitution of conjugal rights and observed that: “Muslim law as enforced in India has considered polygamy as an institution to be tolerated but not encouraged and has not conferred upon the husband any fundamental right to compel his first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists but if he does so and then seeks the assistance of the civil court to compel his first wife to live with him against her wishes in that case the circumstances in which his second marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first. The onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first and it would be inequitable for the courts to compel her against her wishes to live with such a husband. There are no divergent forms of cruelty such a Muslim

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\textsuperscript{18} AIR 1960 All. 684.
cruelty, Hindu cruelty or Christian cruelty but the concept of cruelty is based on universal and humanitarian standards.”

Similarly, in *Shahulameedu v. Subaida Beevi* Justice Krishna Iyer while upholding the rights of a Muslim wife to cohabit with her husband who had taken a second wife yet held her entitled to claim maintenance under Section 488 of the (old) Code of Criminal Procedure, 1898. The court was of the view that the Muslim husband enjoyed an arbitrary, Unilateral power to inflict divorce did not accord with Islamic injunctions and stressed on the element of monogamy among the Muslims. He further referred to the Muslim scholarly opinion to show that the Koran enjoined monogamy upon Muslims and departure therefore was only an exception.

In case of *B. Chandra Manil Kyamma v. B. Sudershan* the Andhra Pradesh High Court also held that the second marriage is void from its inception and conversion to another religion can not make it valid. In this case a Hindu husband contracted second marriage during the subsistence of the first marriage and to escape the objections of the first wife, he converted to Islam and then remarried according to Islamic customs. The Court emphasized that strictly speaking both Hindu and Muslim tenets were against the second marriage during the life time of the first wife and therefore, marriage is void. Thus, second marriage may strictly be prohibited during the subsistence of first marriage. The judiciary has always favoured monogamy as a form of marriage. Any deviation to this rule is discrimination towards the members of that community. So keeping in view Article 44 of the Constitution it has become necessary to secure uniform law for all.

Further, in a historic judgement in *Sarla Mudgal v. Union of India* the Supreme Court has directed the then Prime Minister Narsimha Rao to take fresh look at Article 44 of the Constitution which enjoins the state to secure

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19 Ibid. PP. 686-687.
22 (1995) 3 SCC 635.
a Uniform Civil Code which according to the court is imperative for both protection of the oppressed and promotion of national unity and integrity. The court also directed the Union Government through the Secretary to Ministry of Law and Justice to file an affidavit by August 1995 indicating the steps taken and efforts made by the Government towards securing a Uniform Civil Code for the citizen of India.

The main issue in this case was whether a Hindu husband married under Hindu law, after conversion to Islam, without dissolving the first marriage, can solemnize a second marriage. In this case a registered society working for the welfare of woman filed a public interest litigation, whereas three other petitions filed by the petitioners were also disposed with this petition. In all these four cases husband's solemnized second marriage with another woman after they converted to Islam. On the basis of the facts of the cases, the court held that a Hindu Marriage continues to exist even after one of the spouse converted to Islam. There is no automatic dissolution of Hindu marriage. It can only be dissolved by a decree of divorce on any of the grounds mentioned in Section 13 of the Hindu Marriage Act 1955. Accordingly, the Court held that the second marriage of Hindu after conversion to Islam was illegal and the husband was liable to be prosecuted for bigamy under Section 494 of the Indian Penal Code.

As regards the question of “Uniform Civil Code” the Division Bench of the Supreme Court comprising Justice Kuldip Singh and Justice RM Sahai in their separate and concurrent judgments observed that: “Since 1950 a number of Governments have come and gone but they have failed to make any efforts towards implementing the Constitutional mandate under Article 44 of the Constitution. Consequently, the problem today is that many Hindus have changed their religion and have converted to Islam only for the purpose of escaping the consequence of bigamy. This is so because Muslim law permit more than one wife and to the extent of four. Further, Kuldeep Singh J said that Article 44 is based on the concept that there is no
necessary connection between religion and personal law in a civilised society. Marriage succession and like matters are of a secular nature and therefore, they can be regulated by law. No religion permits deliberate distortions. Much apprehension prevails about bigamy in Islam itself. Many Islamic countries such as Syria, Tunisia, Morocco, Pakistan, Iran and other Islamic countries have codified their personal laws to check its abuse. He pointed out that even in America it has been judicially acclaimed that the practice of polygamy is injurious to public morals even though some religion may make it obligatory or desirable for its followers. It can be regulated by the state just as it can prohibit human sacrifices or the practice of sati in the interest of public orders.23

After this bold decision in Sarla Mudgal’s case a review petition was filed by various persons i.e. Members of Muslim personal Law Board and Jamat Ulema Hind and a writ petition was also filed by woman’s organization ‘kalyani.’ The writ petition and review petition were disposed of in Lily Thomas and Others v. Union of India24 Here again the question involved was whether a Hindu who is already married and having wife living gets converted into Islam and marries again commits bigamy or not under Section 494 of the Indian Penal Code, 1860. The court clearly held that till the time of marriage of a Hindu is dissolved under the Act none of the spouses can contract second marriage. Further, the Supreme Court has emphasized that in order to curb the tendency on the part of Hindu males to resort to conversion to Islam whenever they want to have second wife, the legislature must enact Uniform Civil Code as directed under Article 44 of the Constitution. But the court further added that the desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when social climate is properly built up by the elite of the society, statesman amongst leaders who instead of gaining personal mileage rise above and awakes the masses to accept the change. The issue should be entrusted to the law commission

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23 Ibid, PP. 646.
24 AIR 2000 SC 1650.
which may examine the same in consultation with the Minorities Commission. That is why the court the court clarified that its direction was only an obiter dictum and not legally binding on the Government. The apprehension expressed on behalf of Jamat Ulema Hind and Members of Muslim personal Law Board is unfounded.

Similarly, in *Pannalal Banisilal Pitti v. State of Andhra Pradesh*25 the court pointed out that: “The first question is whether it is necessary that the legislature should make law uniformly applicable to all religious or charitable or public institutions and endowments established or maintained by people professing all religions. In a pluralists society like India in which people have faith in their respective religions, belief or tenets propounded by different religions or their off shoots, the founding fathers, while making the Constitution, were confronted with problem to unify and integrate people of India professing different religion faiths, born in different castes, sex or sub-Sections in the society, speaking different languages and dialects in different regions and provided a secular Constitution to integrate all Sections of the society as a United Bharat. The Directive Principles of the Constitution themselves visualize diversity and attempted to foster uniformity among people of different faiths. A uniform law, though is highly desirable, enactment there of in one go perhaps may be counter productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to law is a slow process and the legislature’s attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages.

The above judgments clearly reflect that apex court did not want to take a lead to bring about any change in the situation especially after the decision in Shah Bano's case which was highly criticised by the Muslim fundamentalists. Later on, under pressure the Central Government passed the Muslim woman (Protection of Right on Divorced) Act, 1986. Therefore, the Courts have not issued directions for codification of Uniform Civil Code but expressed their views on fact and circumstances of the cases.

5.2 Judicial Response in cases of Divorce and Maintenance

In our contemporary society, divorce is a large aspect of Indian personal law of every community. No longer is marriage an indissoluble among any community in India. A marriage which was broken down irretrievably is not a stable marriage and stability of marriage requires that it should be dissolved with maximum fairness and minimum bitterness, distress and humiliation. But the dissolution of marriage under different personal laws is not an equal basis which further brings discrimination among the members of the society. The provisions of divorce are almost the same for Hindus, Christians, Parsi’s except the Muslims. Although Hindu Marriage Act 1955 strictly enforces monogamy but a marriage performed under this Act cannot be dissolved except on the grounds available under Section 13 of the Act. Divorce has never been intended to produce an alternative to the monogamous family but merely to mitigate hardships, where for special reasons; the continuance of marriage was felt to be intolerable.

In Muslim law marriage is considered as a civil contract. The parties are equally free to enter into marriage relation as well as too got out of it. The Muslim husband has been given unilateral power to divorce his wife any

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time without any reason where as wife’s volition in this regard is subordinate to that of the husband. Although the Dissolution of Muslim Marriage Act 1986 was passed to give same relief to Muslim wife on certain grounds\textsuperscript{28} for obtaining divorce but this Act no way restricts the arbitrary power of Muslim husband to pronounce talaq (to release the wife from the contract of marriage).

The Indian Divorce Act, 1869 deals with the dissolution of a Christian marriage. Under Section 10 of the Act, a husband can get his marriage dissolved if he can prove that his wife has been since the solemnization of marriage been guilty of adultery but wife should prove that husband has committed two faults without reasonable excuse for two year or upwards. Now with amendment in Section 10 of the Indian Divorce Act, 1869 both the husband and wife have the same grounds. Not only has this, women now had some more additional grounds for divorce viz. rape, sodomy and bestiality. In \textit{Anil Kumar Mahsi v. Union of India and another},\textsuperscript{29} the Supreme Court while accepting the discriminatory nature of Section 10 has observed that: “as for as ground of adultery is concerned it is the husband who is in favourable position as against the wife, since it is not enough for the wife to prove adultery simpliciter on the part of her husband. Undoubtedly, it is the wife who is at disadvantage.” The Parsi’s personal law is based on Hindu Customs. Like under Hindu law any married person may obtain divorce on any of the nine grounds given in the Parsi Marriage and Divorce Act 1936.\textsuperscript{30}

Regarding the maintenance all personal laws accept the basic idea of women having some right to support in the event of dissolution of a marriage. But these rights are circumscribed by various conditions under the different personal laws. In a recent case \textit{Balwant kaur and another v. Chanan Singh and Others}\textsuperscript{31} the Hon’ble Supreme Court observed that a

\textsuperscript{28} Section 2, Dissolution of Muslim Marriage Act, 1986.
\textsuperscript{29} (1994) 5 SCC 704
\textsuperscript{30} Section 32 The Parsi Marriage and Divorce Act 1936.
\textsuperscript{31} (2000) 6 SCC 310.
widowed daughter if she has no income of her own or no estate of her husband to fall back on can claim maintenance from her father or mother. Not only had this Supreme Court also observed that this right would get attached to the estate which might get transmitted to the heirs of the deceased.

Under Hindu law both the spouses are entitled to the right of maintenance during the pendancy of the proceedings and permanent alimony in case decree of divorce is granted. The right to maintenance is also available to Hindus under Hindu Adoption and Maintenance Act, 1956 to the women, children mother and father. Similarly, a Christian wife is also entitled to claims expenses during the matrimonial proceedings and permanent alimony after the decree of divorce from her husband. On the other, under the personal law of Parsis both the husband or wife shall pay to the plaintiff maintenance and support such sum for a term not exceeding the life of the plaintiff.

Unlike Hindu Law, marriages under Muslim law do not stand dissolved immediately on divorce but continues to be effected for certain purposes during the period of iddat. Muslim law givers lay down different rules regarding claim of maintenance by the wife when marriage is dissolved by death or by divorce. When the marriage is dissolved by death the wife is not entitled to maintenance during the period of iddat but when marriage is dissolved by the divorce the wife is entitled to maintenance during the period of iddat. If the divorce is not communicated to the wife after the expiry of the period of iddat she is entitled to maintenance till it is communicated to her. The Shias and Shafies lay down that wife is not entitled to maintenance even during the period of iddat if marriage is dissolved in the irrevocable

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32 Section 24 and 25, Hindu Marriage Act, 1955.
33 Section 23, Hindu Adoption and Maintenance Act, 1956.
34 Section 36 and 37, Indian Divorce Act 1869.
35 Section 39 and 40 of the Parsi Marriage and Divorce Act, 1936
36 Fadrarin v. Aistra (1957) All. LJ 300
form. They, however, admit that if the irrevocable divorce is pronounced during the period of pregnancy, the wife is entitled to maintenance until delivery. The Muslim authorities also lay down that if the marriage is dissolved on account of wife's apostasy, or for some cause of criminal nature, then she is not entitled to maintenance even during the period of iddat. On the expiry of the period of iddat, the wife is not entitled to any maintenance under any circumstances. Muslim law does not recognize any obligation on the part of a man to maintain a wife whom he had divorced.37 Even where the maintenance is granted to a Muslim wife under Section 488 of the Code of the Criminal Procedure (Section 125 of the new code) and she is divorced by her husband then she is not entitled to maintenance. The result is that a Mohammedan may defect an order made against him under Section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife ceases in that case on the completion of her iddat.38

It was in view of this opinion that Criminal Procedure (Amendment) Act, 1973 remodelled the old section 488 and the new provision defines39 “wife” as to include a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. But Justice Chandrachud observed that even without this amendment a Muslim has an obligation to maintain his divorced wife under the Muslim personal law and Muslim texts are unable to establish this proposition. One must have regard to the entire conspectus of the Muslim personal law in order to determine the extent, both in quantum and its duration of the husband liability to provide for maintenance of an indigent wife who has been divorced and unable to maintain herself.

Thus, Muslim Women (protection of rights on Divorce) Act, 1986 has consolidated and harmonized the different schools of Muslim laws in the matter of payment of maintenance to the wife on divorce. Section 5 of the said Act makes it optional on the choice of both the parties to claim maintenance. Apart from the personal laws of various communities the Section 125 of the Criminal Procedure Code, 1973 recognizes and gives effect to the fundamental and natural duty of a man to maintain his wife, children and parents. This is a legal obligation of his being husband, father, son or daughter capable of maintaining the claimant. Though this section is equally applicable to persons of all religions it has nothing to do with conjugal rights of the spouses but only and exclusively deal with the maintenance. This section treats spouses equal irrespective of their religions whether the spouses are Hindus, Muslims, Christians or Parsis is wholly irrelevant in the application of these provisions. Similarly, on these lines, there is need of one common code in case of matters relating to the issue of marriage, divorce, maintenance etc.

So the personal laws of all the religious communities are no more than just codification of legal customs of the communities governing all aspects of their domestic life. All religions in some way or other have a negative bias which has been ratified and perpetuated by the adoption of laws based on religious customs of these communities. Therefore, the judiciary has tried to provide justice to the parties by interpreting laws in a liberal manner and further also stressed on the need of Uniform Civil Code in India.

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40 Section 5, Muslim Women (Protection of Rights on Divorce) Act, 1986.
41 Section 125 (1) If any person having sufficient means neglects or refuses to maintain – a) his wife, unable to maintain herself; or b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself; or c) his legitimate or illegitimate child (not being a minor daughter) who has attained majority but by reason of any physical or mental abnormality or injury unable to maintain itself, or d) his father or mother, unable to maintain himself or herself, a magistrate of the first class, may order such person to make monthly allowance for the maintenance of such person.
In *Yousuf v. Sowramma*\(^{42}\) a case under the Muslim law on the divorce
Justice Krishna Ayer held that under Section 2(1) of the Dissolution of
Muslim Marriage Act, 1939 the wife was entitled to sue for dissolution of her
marriage on the ground that she was not maintained by her husband for two
years even if there was a good cause for husband’s failure to maintain her.
He further held that husband was not bound to maintain a wife who refused
herself to him or was otherwise disobedient or she left the husband’s house
an account of cruelty. The adjudication of wife’s claim for khula as a right
under Muslim law and under Section 2 (1) of the Dissolution of Muslim
Marriage Act, 1939 far from being supererogatory was directly and
appropriately called for in this case. The learned judge did maintain that the
statement that the wife could buy a divorce only with the consent of or as
delegated by the husband was not wholly correct. This decision may
undoubtedly be a step towards the liberalisation of Muslim wife’s rights after
her marriage. As Justice Krishna Iyer has very clearly observed that the
personal laws must run in accordance with the provisions of the
Constitution. It is the function of the judiciary to construe the words of
personal laws with the passage of time which is the need of the hour in the
light of the Constitution mandate. It is highly desirable to read the personal
laws in the light of the philosophy contained in the Article 44 of the
Constitution\(^{43}\).

In *Aboobaker Haji v. Mamu koyaa*,\(^{44}\) a case before the High Court of
Kerala, Krishna Iyer. J not only decided that a judicial divorce may be
granted in India under Section 2(ii) of the Dissolution of Muslim Marriage
Act, 1939 on the grounds that a husband has neglected or failed to provide
maintenance for his wife even in circumstances in which he is under no

\(^{42}\) *AIR* 1971 Ker. 261.

\(^{43}\) *Makku Rawther’s Childern vs. Manahapra Charayil, AIR* 1972 Ker. 27; *D. Chelliah Nadar vs. G. Lalita Bai, AIR* 1978 Mad. 66.

\(^{44}\) *1971 KLT.* 663
legal duty to support her which seems to me, with respect an wholly unjustifiable interpretation of the statute -- but also that a wife is entitled to divorce under Section 2(ix) of the Act (i.e. on any of the grounds which is recognized as valid for the dissolution of marriage under Muslim law) if her marriage has broken down. In this case, a young woman allegedly under instigation from her father asked for divorce on the ground that her life has become insufferable for reasons of neglect and cruelty and she did not want to cohabit with her husband. Since cruelty and neglect not having been proved, the case was remanded to the court below to find out the fact of breakdown of marriage.

In an attempt to narrow down the gap between the general provision regarding maintenance⁴⁵ and the provisions under the personal laws of Hindus the three judge’s bench of the Supreme Court in case of Bhagwan Dutt v. Smt. Kamla Devi⁴⁶ stressed that provisions under Criminal Procedure Code should be made applicable to all persons irrespective of their religion. In this case the issue was regarding the scope of Section 488 presently 125 of the Criminal Procedure Code, 1973 and Section 23 of the Hindu Adoptions and Maintenance Act, 1956. Both these Sections provides for the maintenance which a wife can claim from her husband. The main issue for consideration in this case was that whether the earnings and income of wife should be taken into consideration while deciding a case in favour of wife who wants maintenance from her husband. There was difference of opinion on the issue between the District Court and the High Court and the case came to the Supreme Court by way of special leave petition. While delivering the judgment on behalf of other two judges Justice Sarkaria

⁴⁵Section 125, Criminal Procedure Code, 1973
⁴⁶AIR 1975 SC 83.
observed47: “Section 488 is intended to serve a social purpose and to prevent vagrancy and destitution and to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and the requirements of the wife for such moderate living can be fairly determined only if her separate income also is taken into account together with the earnings of husband and his commitments. Further, commenting on the relationship between Section 488 and Section 23 he observed that the former provides a machinery for the summary enforcement of the moral obligations of a man towards his wife and children so that they may not out of sheer destitution became a hazard to the well being of orderly society. On the other Section 23, provides for the fixation of rate of maintenance allowance for the enforcement of the rights of Hindu wives or dependents under their personal law. Thus, the scopes of two laws are different. Section 488 is applicable to all persons belonging to all religions and has no relationship with the personal laws of the parties.

While dealing with a different issue that whether the compromise deed executed by the husband and the wife can exclude the operation of Section 125 of Criminal Procedure Code 1973, the Supreme Court in the case of Bai Tanira v. Ali Fissali48 upheld the right to ask for maintenance despite the compromise. The facts of this case were that Bai Tahira has been divorced in 1962 and thereafter the defendant married to a second wife. In the compromise deed a flat and Rs 5,000 had been adjusted as the ‘mehr49 and iddat50 money. It was also mentioned in the deed that she had

48 AIR 1979 SC 362.
49 Mehr in Muslim law is regarded as consideration for the marriage and is in theory payable by the husband to the wife before consumation. The Muslim law allows its division in two parts. One of these in "prompt" and is payable before the wife can be called upon to enter conjugal domicile. The other is "deferred" which is payable on the dissolution of the contract of marriage by either of the parties or by divorce.
no further claim against her husband. But when in 1973 the Criminal Procedure Code was amended, Bai Tahira filed an application for maintenance under Section 125 in the trial court. Ultimately the case went to the Supreme Court in appeal against the decision of Bombay High Court. Justice Krishna Iyer delivered the judgment on behalf of Tulzapurkar J. and R.S Pathak. J. upheld the right to ask for maintenance despite the compromise deed executed between the both. He opined:\(^51\):

“A new statutory right was created as a projection of public policy by the code of 1973, which could not have been in the contemplation of the parties in 1962. No settlement of claims which does not have the special statutory right of divorce under Section 125 can operate to negate the claim nor can Section 127 rescue the respondent from his obligation. Payment of mehr money as a customary discharge is within the cognizance of that provision. But what was the amount of mehr? ....Rs 5,000 and interest from which could not keep the woman’s body and soul together for a day – unless she was prepared to sell her body and give up soul ! The point must be clearly understood that the scheme of the complex of provisions in chapter IX of the Criminal Procedure Code, 1973 has a special purpose. Abused wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the street. Where the husband by a customary payment at the time of divorce has adequately provided for the divorce a subsequent series of doles is contraindicated. This is the theological interpretation, the sociological decoding of the text of the Section 127 of the Criminal Procedure Code, 1973. The keynote thought is adequacy of payment which will take reasonable care of her maintenance...”

\(^50\) “iddat” on the other hand is maintenance that is payable after divorce and that is intended to provide for the divorced wife during her pregnancy if she is pregnant, or for a period of three months to exclude the possibility of pregnancy.

\(^51\) Ibid, pp. 365-366.
The learned judge further strongly observed: “The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is reasonable substitute. The legal sanctity of the payment is certified by the fulfillment of the social obligation not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the court is to pay true homage to the Constitution. In Tahira’s case the ‘mehr’ which had been agreed to between the parties at the time of marriage was Rs, 5,000 the court said that the amount was reasonable. It said if the first payment by way of mehr as ordained by customary law has a reasonable relation to the object or is a capitalized substitute for the order under Section 125 ... not mathematically but fairly then Section 127 (3) (b) sub serves the goal and relieves the obligator, not pro tanto but wholly. The purpose of the payment under any customary or personal law must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of Section 127 (3) (b) is manifestly to recogonise the substitute maintenance arrangement by lumps sum payment organised by the custom of the community or the personal laws of the parties ...... the proposition, therefore, is that no husband can claim under Section 127 (3) (b) absolution from his obligation under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance52.

Thus, the court held that the purpose of payment of any kind of maintenance under any customary or personal law must be to provide her with enough to maintain herself. There must be rational relation between the sum so paid and its potential as provisions for maintenance and to interpret it otherwise is to defeat the basic objective of maintenance allowance. Therefore, neither the compromise deed nor the lump sum payment made

52 Id, P. 366.
by the husband can release him from liability for maintenance of his wife until she has not remarried. In other words, the Supreme Court construed the provision of Muslim law and gave Tahira the relief she wanted.

The issue of maintenance under Criminal Procedure Code and payment of mehr money and iddat allowance was again raised before the Supreme Court in case of Fuzlunbi v. Khaded Bai\(^5\) whereby the Supreme Court restated the Muslim personal law on the subject. In this case the appellant Fuzlunbi was married to Khaded Bai in 1966. She was ill treated by her husband and ultimately she went to her parent’s house along with her son and filed a petition before the Magistrate under Section 125 Criminal Procedure Code for maintenance for herself and her son. The Magistrate granted monthly maintenance allowance. Khaded Bai went to the High Court but the decision of the Magistrate was upheld. Later on just to save himself from the liability the husband resorted to the unilateral power to talaq and tendered the sum of Rs. 500/- by way of mehr and Rs 750 towards maintenance for the period of iddat. The appellant filed a revision petition in the High Court but was of no use and finally the case went up to the Supreme Court Justice Krishna Iyer known for her dynamic approach while delivering the judgment of the bench for himself and on behalf of Justice Chinnappa Ready and Justice A.P. Sen observed that:

“What ever the facts of a particular case, by enacting Section 125-127 charges the court with human obligation of enforcing maintenance or its just equivalent to ill-used wives and cast away ex-wives, only if the woman has received voluntarily a sum at the time of divorce sufficient to keep her going according to the circumstances of the parties. He further observed\(^5\): “Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127 (3) (b) as it does in Section 125. So a farthing is no

\(^5\)AIR 1980 SC 1730
\(^5\) Ibid, pp 1736-37.
substitute for a fortune or naive consent equivalent to intelligent acceptance. The amount earlier awarded is the minimum”. Therefore, the Supreme Court concluded that there is no conflict between the provisions regarding mehr and iddat of Muslim law and provision under Criminal Procedure Code, 1973 regarding maintenance. The Muslim husband is under obligation to maintain his wife even after divorce if she is unable to maintain herself and the Criminal Law provisions have overriding effect over the personal laws of any religious community.

Further, the Supreme Court has cast judges in the role of activists to take the country towards uniformity and observed:

“Law does not stand still. It moves continually. Once this is recognised, then the task of the judge is to put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere machine, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect thinking of the structure as a whole --- building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.”

In *Mst. Zoha Khatoon v. Mohd. Ibrahim*55 Supreme Court while ignoring the Muslims law texts referred before the court held that the appellant continues to be the wife of respondent despite the decree of dissolution of marriage and is entitled to maintenance allowance awarded by the Magistrate. The High Court of Allahabad erred in quashing the order of the Magistrate. In this case the High Court cancelled the orders of the maintenance allowance passed by the Magistrate on the ground that when the divorce proceeds from the wife under the Dissolution of Muslim Marriages Act, 1939 then the wife can claim maintenance from her husband

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55 AIR 1981 SC 1243
neither under the Muslim law nor under Criminal Procedure Code, 1973. While dealing with the issue that whether wife can claim maintenance under Section 125 and 127 of the Criminal Procedure Code, 1973 or not, Justice Fazal Ali on behalf of the majority delivered the judgment and observed⁵⁶: “The view taken by the High Court is erroneous and is based on a wrong interpretation of clause (i) (b) of the explanation to Section 125(1) of the Criminal Procedure Code. Under clause (b) the wife continues to be a wife within meaning of the provisions of the code even though she has been divorced by her husband or has otherwise obtained a divorce and has not remarried”. Thus, the Supreme Court by ignoring the orthodox Muslim law covered the case of appellant under Section 125 of the Criminal Procedure Code, 1973. In this way it is a bold step taken by the judiciary to provide the justice to Muslim women.

The issue regarding the application of Section 125 of Criminal Procedure Code, 1973 in case of divorced Muslim woman was followed and expounded even further and some what intensively in the highlighted case of Mohd. Ahmad Khan v. Shah Bano Begum.⁵⁷ It was also argued that earlier decisions⁵⁸ on the application of Section 125 Criminal Procedure Code, 1973 by the courts were wrongly pronounced and the issue may be considered by the larger bench of the Supreme Court. In this case Shah Bano Begum was married to Mohd. Ahmed Khan in 1932 and in 1975 after forty three of their married life the appellant drove out the respondent out of matrimonial home. Thereafter, in 1978 the respondents filed a petition against the appellant under Section 125 of the Criminal Procedure Code, 1973 before the judicial Magistrate for the maintenance of Rs 500 per months. Then appellant divorced the respondent by an irrevocable talag in November 1978 and appellant took the main defence that after divorce respondent has ceased to be his wife and he was under no obligation to

⁵⁶Ibid P. 1248
⁵⁷ AIR 1985 SC 945
provide maintenance for her. The appellant further contended that he has been paying maintenance of Rs. 200 per month for the last two years and had deposited a sum of Rs 3000/- in the court by way of dower for the period of iddat. But the trial court decreed the suit in favour of respondent and directed the appellant to pay a princely sum of Rs 25 per month to the respondent. In a revision order in 1980, the High Court of Madhya Pradesh enhanced the maintenance allowance to Rs 179.20 per month. It is against this decision of the High Court that present appeal by way of special leave came before the Hon’ble Supreme Court. The main issue before this court was that does the Muslim Personal law impose no obligation upon the husband to provide for the maintenance of his divorced wife? In support of Appellant’s main defence was taken from the text books of well known authors on the subject. According to Mulla’s after the divorce, wife is entitled to maintenance only during the period of iddat. If an order is made for the maintenance of wife under Criminal Procedure code, 1973 and the wife is divorced afterwards, then the order ceases to operate on the expiry of the period of iddat. Tyabji’s also mentions that on expiry of the iddat after talaq the wife’s right to maintenance ceases whether based on Muslim law or on an order under the Criminal Procedure Code. Dr Paras Diwan who is considered authority on Family Law also stated that: “when a marriage is dissolved by divorce the wife is entitled to maintenance during the period of iddat and on expiration of the period of iddat, the wife is not entitled to any maintenance under any circumstance. Muslim law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced”. While commenting on the works of the well known authors on Muslim law, Chief Justice Chandrachud himself and also on behalf of other judges

59 Mohammedan’s law (18th ed) PP 301-302
60 Muslim law, (4th ed.) PP 268-69
61 Muslim law in Modern India, Allahabad Law Agency (1982) P 130
namely, D. A. Desai, O. Chinnrapa Reddy, E.S. Venkataramiah and Rangnath Misra JJ. Observed62:

"The statements in the test books viz. Mulla’s ‘Mohammedan law’; Tyabji’s ‘Muslims law’ and Paras Diwan’s ‘Modern Muslim Law’ are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. Section 125 of Criminal Procedure Code, 1973 deals with cases in which a person who is possessed of sufficient means neglects or refuses to maintain amongst others, his wife who is unable to maintain herself. Since, the Muslim personal law which limits the husband’s liability to provide for maintenance of the divorced wife to the period of iddat does not contemplate or countenance the situation envisaged in Section 125 of Criminal Procedure Code, 1973, It can not be said that the Muslim husband according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife who is unable to maintain herself, the husband’s liability to provide maintenance for her ceases with the expiration of the period of iddat. But if she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Criminal Produce Code, 1973. Therefore, there is no conflict between Section 125 and Muslim personal law on the question of maintenance for a divorced wife who is unable to maintain herself." 

The matter should have probably been dealt with by the Supreme Court as a question of interpretation limited to the parties to the litigation. Instead, the Muslim Personal Law Board and the Jami’at al Ulama –i-Hindi were allowed to intervene in the manner in the matter. The Supreme Court commented on the extreme stands that were taken in the case. It is a matter of deep regret that some of the interveners who supported the appellant

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took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submission of the All India Muslim Personal Law Board has gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorcee should maintain herself. The Facile answer of the board is that the personal law board has devised the system of Mehr to meet the requirements of women and if a woman is indigent, she must look to her relatives including nephews and cousins to support her. This is a most unreasonable view of law as well as life.

Thus, the five judges bench of the Supreme Court reaffirmed its earlier decisions and held that as a matter of interpretation there is no conflict between the provisions of Section 125 of the Criminal Procedure Code, 1973 and those of the Muslim Personal Law on the question of Muslim husband’s obligation to provide maintenance for a divorced wife who is unable to maintain herself. Therefore, the Supreme Court wants to set the question of priority to rest once for all. This decision is a good example of judicial activism and may be considered as a first step to achieve the goal of Uniform Civil Code as desired by the Constitution makers. Further, the Supreme Court also took upon them the task of giving effect to the objective of Article 44 of the Constitution. They said:

"It is also a matter of regret that Article 44 of the Constitution has remained a dead letter. It provides that ‘The state shall endeavor to secure for the citizen’s 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 matters of the reforms of their personal law. A common civil code will help the cause of national integration by removing

63 Id, P. 954.
disparate loyalties to law 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 the competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasion on a common platform. But a beginning has to be made if the Constitution is to have any meaning. Inevitably the role of the reformers 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 65.

Thus, the Supreme Court reached to the conclusion that the right conferred by Section 125 of the Criminal Procedure Code, 1973 can be exercised irrespective of the personal law of the parties 66. But this decision attracted public attention and led to an uproar among a certain Section of the Muslim Community which the government then in power sought to control by promptly enacting the Muslim Women (Protection of Rights on Divorce) Act, 1986, which is not only contrary to the mandate of Article 44 but which also contains precisely those provisions the Supreme Court had condemned as a “most unreasonable view of law as well as life”.

While dealing with the issue of different grounds of divorce under different personal laws the Supreme Court in case of Ms. Jorden Diengdah v. S.S. Chopra 67 emphasized the need for one common code relating to judicial separation, divorce and nullity of marriage. In this case wife

65 Ibid, P. 954
66 Id., P. 949
67 AIR 1985 SC 935
The petitioner belonged to Khasi tribe of Meghalaya, but was brought up as a Christian. The husband (respondent) was a Sikh. They were married in 1975 under Indian Christian Marriage Act, 1972. The petitioner sought nullity of marriage on the ground of impotency of the husband and also submitted before the court that the marriage had virtually broken down irretrievable. However, the High Court rejected the plea for nullity of marriage and ordered for judicial separation. Against this order an appeal was filed before the Supreme Court. After analysing the provisions regarding the dissolution of marriage under various laws, Justice Chinnappa Reddy observed:

"The time has come for a complete reform of the law of marriage and makes a uniform law applicable to all people irrespective of religion or caste. It is necessary to introduce irretrievable breakdown of marriage and mutual consent as a ground of divorce in all cases". The court also stressed that now it is for the legislature to take initiative in this direction and directed that a copy of the decision must be supplied to Law Ministry. When two persons can not remain together then the better way is that they must be separated by law. If law is handicapped then this situation can make the life miserable for both the parties.

Again the issue of claim of maintenance of the first wife under Muslim law was raised in case of Begum Subanu alias Sairu Banu v. A. M Abdul Gafoor. In this case the question that came up for consideration before the Supreme Court was whether a Muslim wife whose husband married with another woman or has taken mistress can claim maintenance from her husband? The main deference taken by the respondent was that since the husband is permitted by Muslim law to take more than one wife and this

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68 Indian divorce Act, 1869; Hindu Marriage Act 1955; Parsi Marriage and Divorce Act, 1936; The Special Marriage Act, 1954 and Dissolution of Muslim Marriage Act 1939
69 Ibid., P. 940
70 AIR 1987 SC 1103
does not give a ground to the first wife to live separately and claim maintenance. But the Supreme Court reiterated\textsuperscript{71} that irrespective of the husband’s right under his personal law to take more than one wife, his first wife would be entitled to claim maintenance and separate residence if he takes a second wife. Further, while analysing the provisions of explanations to subsection (3) of Section 125 of the Criminal Procedure Code, 1973 the Supreme Court held that the explanation has to be construed with reference to the two classes of injury (namely taking of a second wife and by taking of a mistress as contemplated by the explanation to the sub Section (3) of Section 125) caused to the matrimonial rights of the wife, and not with the husband’s right to marry again. The women chosen by the husband to replace the wife is a legally married wife or a mistress is immaterial. Therefore, the respondent’s contention that his taking another wife will not entitle the appellant to claim separate residence and maintenance can not be sustained. The Supreme Court concluded that the explanation of subsection (3) of Section 125 is of uniform application to all wives including Muslim wives whose husbands have either married another woman or taken a mistress\textsuperscript{72}. Thus, the Supreme Court reaffirmed the decision of Shah Bano Begum’s case\textsuperscript{73} and laid down a solid foundation for the Uniform Civil Code in spite of the enactment of Muslim women (protection of rights on divorce) Act, 1986.

In Mangila Bibi v. Noor Hussain\textsuperscript{74} Section 3 of the Muslim women (Protection of Rights on Divorce) Act, 1986 was challenged in an appeal before the Calcutta High Court. The petitioner in this case was married to Noor Hussain in March 1986. At the time of marriage they executed a ‘Kabinnama’ (agreement) in which power to give divorce which primarily belongs to husband was delegated to his wife in accordance with the personal laws. The petitioner contended that after marriage she was ill-

\textsuperscript{71} Ibid, PP.1107-1108
\textsuperscript{72} Id, P. 1109.
\textsuperscript{73} AIR 1985 SC 945
\textsuperscript{74} AIR 1992 Cal. P. 92
treated at husband place and ultimately driven away. Then she dissolved the marriage and communicated this to the husband according to the delegated power under ‘kabinnama’. The petitioner also informed in writing about this to the Muslim Marriage Registrar and kazi within reasonable time. Thereafter the petitioner filed an application under Section 3 of the Act that the respondent did not pay any maintenance dower and other properties given to her at the time of marriage as agreed in ‘kabinnama’. But the Magistrate refused to grant claim on the ground that exercise of power by the petitioner was not according to the ‘kabinnama’ and the marriage still subsists between the two but the High Court, however, overruled the decision of the Lower Court and held that: 75 “The power to give divorce which primarily belongs to the husband may be delegated to his wife either absolutely or conditionally. There is no authority which prohibits the wife to exercise the power of divorce delegated to her by husband…” In the instant case, even through the ‘kabinnama’ bears the signature of both the spouses, the groom of his own will bound himself with the condition that his wife would be in a position to give talaq ex parte and at her will. Such a stipulation cannot be regarded as a bilateral delegation of the power to give talaq. Thus, the husband had unilaterally delegated to the wife a power to divorce unconditionally and it is not prohibited even by the personal law of the parties. The High Court liberally interpreted sub-section (3) of Section 125 of the Criminal Procedures Code, 1973 to cover all situations irrespective of religion of the parties despite the fact that Muslim women (protection of rights on divorce) Act, 1986 had already come into existence. The objective is to curtail the limits of personal laws in the interest of various communities and in the interest of the society at large.

In another case of *P. Jayalakshmi v. Ravi Chandran*, 76 the controversy arose regarding the jurisdiction of Family Courts and Judicial Magistrate under Section 125 of Criminal Procedure Code 1973. In this case

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75 Ibid PP. 94-95
76 AIR 1992 AP 190
during the pendency of the suit for the restoration of conjugal rights before the Family Court the petitioner filed an application under Section 125 for maintenance. The defence taken by the respondent was that matter was sub-judice before the competent authority. Therefore the present application under Section 125 was not maintainable. The court rejected the plea of the respondent and held that: "the right to seek maintenance under Section 125 Criminal Procedure Code, 1973 is an independent right and the pendency of the proceedings under the Hindu Marriage Act, 1955 in the Family Court is no bar for its maintainability outside the jurisdiction of Family Court." This decision makes it clear that court has endeavoured to expand the jurisdiction of the Family Court and boldly held that maintenance is an independent right.

Similarly, the High Court of Kerala in M. Alavi v. T.V Safia tried to liberally interpret Section 125 of Criminal Procedure Code, 1973. In this case it was contended that the wife who was leading adulterous life after divorce was not entitled to maintenance either under Section 125 of the Criminal Procedure Code 1973 or under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The High Court held that a divorced Muslim woman can file an application under Section 3 claiming various reliefs provided therein as the provision no where say that women would not be entitled to get the relief if she had been living in adultery. It is not possible to add something which is not given in the provision and regarding Section 125 (4) the Court observed that this subsection has no application to a woman who has already been divorced by her husband. The simple reason is that a divorced woman can never be said to be committing adultery even if she has got promiscuous sexual relationship with other persons." Thus, the Section 125 (4) does not apply to the present case and

77 Ibid PP 191-92
78 AIR 1993 Ker. 21
the wife is entitled to maintenance under Section 125 (3) of Criminal Procedure Code, 1973 and Section (3) of the Act of 1986.

In *Bishnu Charan Mohanty v. Union of India*\(^{79}\) the Constitutional validity of the Section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged on the ground that this Section provides right of option on the basis of sex and religion so this is violative of Article 14 and 15(1) of the Constitution of India and hence it may be declared unconstitutional. The Chief Justice B.L. Mansaria of Orissa High Court observed that merely because the basis of classification made by the legislation is based on religion would not ipso facto make the legislation offensive of Article 15(1) of the Constitution. The same has to be discriminatory in the sense that it involves an element of unfavorable bias. Apart from this the classification must have been made only on the basis of religion which would not be so if there exists historical, personal or other persons supporting the classification. The provision of Section 5 of the Act permitting Muslim husband to opt to be governed by Section 125 Criminal Procedure Code, 1973 has no unfavorable bias. Therefore, Section 5 of the Act is not violative of Article 15 of the Constitution.\(^{80}\) Thus, the various High Courts have tried to give liberal interpretation to the provisions relating to the maintenance given under the personal laws of the various religious communities and to the provision of maintenance under Criminal Procedure Code, 1973 to give relief and justice to the parties without any exemption and exception. This depicts certainly a dynamic approach of the judiciary towards the issues relating to the personal laws of the various communities.

Further, in *Progati Varghese v. Cyril George Varghese*\(^{81}\) a case under Indian Divorce Act 1869, the full bench of the Bombay High Court struck down the Section 10 of the Act under which a Christian wife had to prove adultery along with cruelty or desertion while seeking a divorce on the

\(^{79}\) AIR 1993 Ori. 176  
\(^{80}\) Ibid P 177  
\(^{81}\) AIR 1997 Bom.49
ground that it violates the Fundamental Right of a Christian woman to live with human dignity under Article 21 of the Constitution. The court also declared Section 17 and 20 of the Act invalid which provided that on annulment or divorce passed by a District Court was required to be confirmed by a three judges of the High Court. The court also said that Section 10 of the Act compels the wife to continue to live with a man who has deserted her or treated her with cruelty. Such a life is sub-human as it is denial to dissolve the marriage when the marriage has broken down irretrievably.

In *Noor Saba Khatoon v. Mohd. Quasim*, a case relating to claim of maintenance in the Supreme Court, it has been held that a divorced Muslim woman is entitled to claim maintenance for her children till they become major. This judgment was given by the court while allowing an appeal by appellant challenging the judgment of Patna High Court which had reduced the amount of maintenance. The Court clarified that both under the Muslim personal law and under Section 125 of the Criminal Procedure Code, 1973 the obligation of the father was absolute when the children were living with the divorced wife. This right was not restricted, affected or controlled by divorced wife’s right to claim maintenance for two years from the date of birth of the children under Section 3(1) (b) of the Muslim women (Protection of Rights on Divorce) Act, 1986. In this case the appellant was married with respondent according to Muslim rites on October 27, 1980. Three children were born out of wedlock but subsequently the respondent divorced the appellant. The trial court granted maintenance of Rs. 200/- pm. to wife and Rs 50/- per month for each of the three minor Children but the appellate court held that she was entitled to maintenance only for two years under Muslim Women (Protection of Rights on Divorce) Act, 1986. The Patna High court further modified the appellate courts order and held that only one child was entitled for maintenance for a period of two years.

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82 AIR 1997 SC 3280
The Supreme Court while setting aside the judgment of Patna High court held that the High court fell in complete error in holding that the right to maintenance of the children under Section 125 of the Criminal Procedure Code, 1973 was taken away and superseded by Section 3(1) (b) of the Act of 1986. The children of Muslim parents are entitled for the period till they attain majority or are able to maintain themselves which ever is earlier and in case of female till they get married. The court directed the husband to pay the arrears of maintenance in respect of children within one year in four equal quarterly instalments. Any single default in the payment of arrears would entitle the appellant to recover the entire balance amount with 12 percent interest as per law. While stressing on the objective of Section 125 Criminal Procedure Code, 1973 the court gave its opinion that under Sections 125 to 128 of the Criminal Procedure Code, 1973 a self contained procedure has been provided for a wife divorced or not to claim maintenance from husband or other relatives. The purpose of these provisions were to provide immediate means of subsistence to the applicant before she withered away by hard way of life and realities for lack of minimum means and were applicable to all applicants irrespective of the community, caste and creed they belong to. The court further observed:

"We have opted for secular republic, secularism under the law means that the state does not owe loyalty to any particular religion and there is no state religion. The Constitution gives equal freedom to all religions and every one has the freedom to follow and propagate his own religion. But the religion of individual or denomination has nothing to do in the matter of socio-economic laws of the state. The freedom of religion under the Constitution does not allow religion to infringe adversely on the secular rights of the citizens and the power of the state to regulate the socio-economic relations".
In another land work judgment in *Danial Latif v. Union of India*\(^3\) a five judge Constitution bench of the Supreme Court upheld the Constitutional validity of the Muslim women (Protection of Rights on Divorce) Act, 1986 and held that a Muslim divorced woman has right to maintenance even after *iddat* period under the Act of 1986. The court said that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which clearly extend beyond the *iddat* period in terms of Section 3(1) (a) of the Act. Also a divorce woman who has not remarried and who is not able to maintain herself after *iddat* period can proceed as provided under Section 4 of the Act against her relations who are liable to maintain her in proportion to the properties which they may inherit on her death according to Muslim law from such divorced woman including her children and parents. If the relatives are found unable to pay her maintenance the Magistrate may direct the state wakf board established under the Wakf Act, 1913 to pay such Maintenance.

Recently in a significant ruling relating to the maintenance claim of Muslim women\(^4\), the Supreme Court has held that provision of Section 125 of the Code of Criminal Procedure, 1973 are still applicable to them despite the 1986 enactment of the Muslim Women (Protection of Rights on Divorce) Act, made in the wake of the Shah Bano case. In view of this, a Bench of Justices Arijit Pasayat and D.K. Jain directed the Allahabad High Court to have a fresh look into the maintenance claim of Iqbal Bano from Aligarh, who was a victim of the “*triple talaq*” by her husband given in one go and also to dispose it of within six months to avoid unnecessary delay as the case had been lingering in the courts for nearly two decades. While setting aside the order of the Allahabad High Court denying maintenance to Bano as per Sections 125 and 126 (1) of Criminal Procedure Code, 1973 the Bench said the provisions of the twin Sections had to be looked into a broader prospect, which essentially were civil in nature. In this case the

\(^3\) AIR 2001 SC 3262  
\(^4\) The Tribune, Chandigarh dated, June 9, 2007
Judicial Magistrate, Aligarh had allowed maintenance of Rs.450 in 1994, but the Additional Sessions Judge had reversed the order on an appeal by her husband. The Sessions Judge said after the enactment of the Act of 1986, a Muslim woman could only claim maintenance under its provisions and not under Sections 125 and 126 (1) of the Criminal Procedure Code, 1973. Her appeal against the Sessions Judge order was also rejected by the Allahabad High Court, holding that no illegality was committed in the judgement. But the Supreme Court disagreed with the High Court ruling that after the enactment of the Act of 1986, provisions under Criminal Procedure Code, 1973 would not apply to the Muslim women’s maintenance cases, saying the Law Commission had noted that often deserted wives were compelled to live with their relatives far away from places where husband and wife last resided. Further, the Bench also said that the proceedings under Section 125 of Criminal Procedure Code, 1973 are civil in nature and application under clause (b) and (c) of Section 126 for maintenance has to be filed at the place of residence of the person from whom the maintenance was claimed.

Very recently the Gujarat High Court in a Criminal Revision Petition also ruled that a divorced Muslim woman is entitled to maintenance under Section 125 of the Criminal Procedure Code, 1973 and not under the Muslim Women (protection of Rights On Divorce) Act, 1986, because her maintenance application was filed when she was still married and the said law applied only to divorced women. In this case nearly after two decades of legal struggle, while reversing the order of the additional Session Judge, Justice D. N. Patel restored the order of the Chief Judicial Magistrate and ordered that maintenance be paid to the woman effective from 1986 to the present day. The court said that the Muslim Women (protection of Rights on Divorce) Act was enacted in May 1986 in the wake of the Shah Bano judgment upholding the right of Muslim women to seek the maintenance under the Criminal Procedure Code, 1973. The Act had diluted the Supreme
Court judgment and among other things stipulated that the maintenance to a divorced woman be given only during the period of *iddat* or till 90 days after the divorce according to the provisions of Islamic Law. On the other hand, Section 125 of the Criminal Procedure Code, 1973 is the general provision for maintenance of wives, children and parents and applies to every one irrespective of religion\textsuperscript{85}.

Furthermore, even the Supreme Court while rejecting the argument that the proviso of the Section 125 of Criminal Procedure Code, 1973 can not override the community’s personal law, allowed the claim of maintenance to the “second” wife and children from a irregular marriage. The Court ruled that: “As for as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law and the wife and the children of such marriage would be entitled to maintenance under the provisions of Section 125 of the Code of Criminal Procedure.” Therefore the fact that the marriage was not solemnized as per the customs and was irregular can not be a ground for depriving the woman or the children from that marriage of the maintenance claim. Under Section 125 Criminal Procedure Code, 1973 a duty is cast upon a person to maintain his wife, minor children, handicapped children (even if major) besides aged parents if either of them is unable to fend for himself\textsuperscript{86}.

The above decisions of the judiciary will surely make the job of the legislature of introducing the Uniform Civil Code much easier.

5.3 Judicial Response in cases relating to Property and Succession

The property and succession rights under the personal laws of the various religious communities are not the same and equal. Now under the Hindu Succession Act, 1956 daughters have equal share in the ancestral

\textsuperscript{85} The Tribune dated March, 13, 2008
\textsuperscript{86} The Tribune dated March, 20, 2008
A married daughter has no right to shelter in her parent’s house, nor maintenance charged for her being passed on to her husband. However, a married daughter has a right of residence in the dwelling house if she is unmarried or has been deserted, divorced or widowed. A woman has full rights over any property that she has earned or that has been gifted and willed to her provided she has attained majority. A married woman has exclusive right over her individual property. Upon the death of her husband she is entitled to an equal share of her portion, together with her children.

Under Muslim Law, the daughter’s share is equal to one half of the son’s in keeping with the concept that a woman is worth half a man but she has full control over her property. Daughters have rights of residence in parent’s houses as well as right to maintenance until they are married. In case of divorce, charge for maintenance reverts to her parental family after the *iddat* period. A Muslim wife does not enjoy equal status to man. She retains controls over her goods and properties. She has right to *mehr* according to the terms of the contract agreed to at the time of marriage. She will inherit from him to the extent of one eighth if there are children or one fourth if there are none. If there is more than one wife, the share may diminish to one sixteenth. In case where there are no shares in the estate as prescribed by law, the wife may inherit a greater amount by will. A Muslim may dispose of one third of his property by will.

The Christian in India are governed by the Indian Succession Act 1925 with regard to the intestate and testamentary succession. But the Travencore Christian Succession Act 1916 and the Cochin Christian Succession Act 1921 are the laws in force in respect of intestate succession in their respective localities as per Section 29(2) of the Indian Succession Act 1925. Under the Act of 1925, there is no discrimination between sons.

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87 Section 6 Hindu Succession Act, 1956  
88 Section 23 Hindu Succession Act, 1956  
89 Section 15 Hindu Succession Act, 1956  
and daughters with regard to the distribution of the intestate father's property. The intestate's property (after deducting the widow's share) is shared equally among his children. In case the intestate has no lineal descendants and if father is dead, his mother and sisters are also entitled to inherit his property91. Married women acquire the domicile of her husband if she had not the same domicile before and a wife's domicile during marriage follows the domicile of her husband and acquire interest in the property92 whereas Section 33 of the Act deals with rights of a widow to inherit the property of her husband who has not made any will. But both under the Travencore and Cochin Succession Acts there is evident and unjustifiable discrimination against women. The most controversial feature relates to rights of a daughter to the property of her intestate parents. Under the Travencore Succession Act, 1916 the sons and their lineal descendants shall be entitled to have whole of the intestate’s property subject to the claim of the daughter for “streedhanam” fixed at one fourth of the value of the share of a son or Rs.5000 whichever is less.93 Any streedhanam promised but not paid shall be a charge upon the intestate property. Under the Cochin Succession Act, 1921 the daughter gets a share along with the sons but her share shall be one third in value of that of a son.94

Although Parsis follow Hindu custom, but Parsi women are excluded from a share in the estate of the male. They are given only right to maintenance. There are separate rules for the distribution of the assets of a male and a female. The son’s share in his father’s property is twice that of a daughter. The widow gets only as much as any of her sons. If the intestate’s parents survive him, then the father gets half the share of the son that is the same as of the daughter. The Parsi mother is in a worse position than the

91 Section, 44, The Indian Succession Act, 1925.
92 Section, 15 and 16, The Indian Succession Act, 1925.
93 Section 28, The Travencore Christian Succession Act, 1916
94 Section 20(b), The Cochin Christian Succession Act, 1921
Hindu mother who under the Hindu Succession Act, 1956 gets a share equal to that of a widow and the children. When a Parsi woman dies intestate, leaving her husband and children, the property is divided equally among the widower and children. Thus, the son is entitled to an equal share of the mother's property along with the daughter but the daughter is not entitled to the same right when she inherits the property of her father. Mother and daughters are the worst sufferers in the Parsi's community. A Parsi woman is not afforded any protection against arbitrary decision e.g. a Parsi male can disinherit his wife or daughters by making his will. Thus, the Parsi women tolerate inequality in a democratic country like India.95 Parsi women are discriminated against by laws which have no basis in the community's religious beliefs. The Parsi's, a community with 90% literacy, a strong hold on the industrial and professional life of the country although they are one of its smallest minority communities, have among the most unjust inheritance laws in the Country today, which finally goes on to prove the discrimination and gender biases do not disappear with progressive education.96

Thus, after having a brief look at the personal laws of various communities it has been noticed that some of the laws have become outdated and irrelevant to meet the needs of the present century. We require a more systematic and uniform law pattern to provide equality to the members of various communities. Hence, there is an urgent need of enactment of Uniform Civil Code as desired by the members of the Indian Constituent Assembly while making the Constitution for an Independent India.

The first case which came before the Court regarding the discrimination in matters relating to property and succession was before the Punjab and Haryana High Court in case of Smt. Gurdial Kaur v. Mangal

95 Supra note 90 PP. 91-93.
96 The law and Indian women: A Study by the YMCA of India Printed by Madhulika p.34.
In this case, one Mr. Sandhu an unmarried young man died on May 5, 1956 leaving behind some land. One of distant collateral (respondent in the present case) took possession of the land as his sole heir. In order to exclude herself from the prevailing customs and take the benefit of Hindu Succession Act 1956 (which became applicable in Jan. 1956), she contended that her son died in June 1956. Relying on the decision of lower court, the High court refused to accept the contention of the appellant and further observed that: “The Custom against Jats of Punjab prevailing prior to enactment of Hindu Succession Act under which a mother was disinherited on her re-marriage was a valid custom. It did not discriminate against Jats merely on the grounds of caste or race as compared to other Hindus governed by their personal laws. Nor did the fact that it disinherited a mother alone on re-marriage and not the father who continued to be an heir of the estate of his pre-deceased son in spite of remarrying render it as discriminatory merely on the ground of sex. This is so because right of succession varying between heirs belonging to different sects had to be determined according to the personal law or the usage by which a party is governed. Thus, the prevailing custom is not violative of Article 15 of the Constitution of India. Further, if the argument of discrimination based on caste, creed or race could be valid, it would be impossible to have different personal laws in this country.”

In Mohammad Abu Zafar Mohammad Ibrahim v. Israr Ahmed and others\(^98\) the main issue was that whether a person who is a bhumidar under the U.P. Zamindari Abolition and Land Reform Act, 1951 can make a valid waqf of his bhumidari rights in the land. It was argued that the Waqf has been created in favour of mosque first to save land from the provisions of Zamindari Abolition and Land Reform Act, 1951 and it constitute a fraud. This transaction, therefore, may be dealt with under the relevant provisions of Transfer of Property Act, 1882 in the light of Article 44 of Indian

\(^{97}\) AIR 1968, PLR 396
\(^{98}\) AIR 1971 All. 366
Constitution. But the respondents contended that Waqf not being a transfer inter-vivo, so not governed by the Transfer of Property Act and are governed by the tenets of Muslim Law as per the provisions of Muslim Personal Law (Shari’ at) Application Act, 1937. The learned judge while hearing second appeal observed that in the absence of any prohibition in the UP Zamindari Abolition and Land Reforms Act, 1951, there does not appear to be any bar to be a bhumidar creating a waqf of his bhumidari rights in the land. Our Constitution guarantees religious freedom to all the citizens of India under Article 25. Every citizen is free to follow his own religion and if in accordance with the tenets of a religion a citizen proposes to transfer his agricultural or non-agricultural property for purposes which are religious, there is no bar to do so under the provisions of the Constitution of the India. Hence, in the present case, the court could not bring the case under the spirit of Article 44 because there was no provision under the U.P. Zamindari Abolition and Land Reforms Act, 1951 which could help the Court to invalidate the transfer of land for religious purposes.

In another case where the issue was raised regarding the conflict between the Muslim Personal law and Article 44 of the Constitution, the Kerala High Court clearly opined that provisions of the Personal Laws must run in accordance with the provisions of the Constitution. In Makku Rawther’s Children: Assan Rawther and others v. Manahapara Charayil, the main issue was regarding the hiba or gift which can be made by an oral agreement between the parties and same are exempted from the registration under Section 129 of the Transfer of Property Act 1882 which excludes the operation of the Registration Act 1908. It was challenged on the ground that Section 129 of the Act which excludes the operation of the Registration Act in case of hiba is violative of Article 14 and 15 of the Constitution and therefore, it may be declared void under Article 13 of the Constitution. Justice V.R. Krishna Iyer, after reviewing the basic of different

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99 AIR 1972, Ker. 27.
personal laws regarding the concept of gift as prevalent in India observed that:

“Whatever might have been the content of the gift in Section 129 of Transfer of Property Act when it was originally enacted; its meaning has to be gathered today in the Constitutional perspectives of Articles 14, 15, 25 and 44 of the Constitution. The application of Muslim personal law to gifts does not preclude the application of other laws which do not run counter to the rules of Muslim Law. A Muslim gift may be valid even without a registered deed and may be invalid even with registered deed. The important thing is that the old laws must be tuned up to the new law of the Constitution and the spirit of the times. Therefore, all kinds of gifts under the different personal laws must comply with the provisions of the Registration Act 1908.”

Thus, with this decision the court emphasised on the need of the Article 44 of the Constitution. Furthermore, it is the dynamic function of the judiciary to interpret the personal laws keeping in view the changing scenario in India.

In D.Chelliah Nadar v. G. Lalita Bai100 the controversial issue arose before the Madras High Court was that whether the Christians in India regarding interstate succession would be governed by the Christian Succession Act (Regulation II of 1092 Travencore) or Indian Succession Act 1925. The plaintiff submitted before the trial court that he may be governed by the State Law but the trial court rejected the plea and held that state law stands repealed by the Indian Succession Act, 1925. The reading of Section 3 of the Act makes it clear that the state government by an official notification can exempt the operation of the said Act because the subject matter lies in the concurrent list. Though the Travancore Regulation is confined to Christians in that State and the Indian Succession Act has a

100 AIR 1978 Mad. 66
Universal application as provided under the Act. In the light of Section 29(2) of the Indian Succession Act neither the Travancore Regulation was repealed nor was its application made inapplicable to Indian Christians in case of intestate succession. Thus the Travancore regulation is a law corresponding to Indian Succession Act. Therefore, the plaintiff is governed by the Travancore Regulation II of 1092. The court has tried to avoid the conflict of laws on the issue. But the matters regarding property and succession require one uniform law in India.

In its recent decision in John Vallamattom v. Union of India¹⁰¹ a three judge bench of the Supreme Court has once again expressed regret for non-enactment of common civil code. In this case the petitioner has challenged the validity of Section 118 of the Indian Succession Act, 1925 on the ground that it was discriminatory under Article 14 and also violative of Articles 25 and 26 of the Constitution. Section 118 of the Act imposed restriction on a Christian having nephew or a niece or any other relative as regard his power to bequeath his property for religious or charitable purposes. The definition in the Act did not include wife of a testator or near relative while an adopted son was included as a relative. So a Christian testator having a nephew or niece must execute the will at least 12 months before his death and deposit it within 6 months otherwise the bequeath for religious or charitable use would be void. This restriction does not apply to a person having wife. The Court held that Section 118 of the Succession Act is unconstitutional being violative of Article 14 of the Constitution while Article 25 and 26 have no application in this case as disposition of property for religious and charitable uses are not an integral part of Christian religion. Article 25 and 26 only protect those rituals and ceremonies that are integral part of religion. The Chief Justice of India Justice V.N.Khare in view of the facts of the case forcefully reiterated the view that the Common Civil Code be enacted as it would solve such problems and also observed that:

¹⁰¹AIR 2003 SC 2902
"Article 44 is based on the premise that there is no necessary connection between religion and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. These two provisions i.e. Article 25 and 44 shows that former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is not a matter of doubt that marriage, succession and the like matter of a secular character can not be brought with in the guarantee enshrined under Article 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect till date. A common civil code will enhance the cause of national integration by removing the contradictions based on ideologies."

Thus, the various judicial decisions given by the Courts in matters relating to marriage, divorce, maintenance, property and succession clearly indicates the earnest efforts made by the judiciary to ensure the application of Article 44 of the Constitution to avoid the conflict arising out of the personal laws of the various communities. The courts have rightly observed that the religion must be subordinated to the laws of the Country enacted with reference to actions by general consent as properly the subjects of the primitive legislations. Gajendragadkar, J. rightly opined that Article 44 of the Constitution is an important Article which recognises the existence of different laws applicable to Hindus and Mohammedans in the matters of personal law and permits their continuance until the state succeeds in its endeavour to secure for all the citizens a Uniform Civil Code. The judiciary has gone to the extent of holding that the time has now come for a complete reform of personal laws and make a uniform law applicable to all people irrespective of their sex, religion and caste. Now it is high time for the legislature to take initiative in this direction. The objective of Uniform Civil

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102 Davis v. Beason (1889), 133 US 637.
103 State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84
Code can be achieved only if the state legislature and communities endeavours to take initiative to accept the Constitutional philosophy underlying the Uniform Civil Code and take action in this regard to awaken the masses to accept the change.