CHAPTER - VIII

UNIFORM CIVIL CODE AND ITS FEASIBILITY

BACKGROUND:

India is a country of plurality of race, religion, caste, economic status, social status, political status and so on and so forth. In order to forge unity out of diversities in Constituent Assembly there were discussions over uniform civil code. Muslim members opposed Uniform Civil Code on the ground of infringement of their right of freedom of religion. On the other hand, most of the members approved Uniform Civil Code on grounds of uniformity, consistency and clarity of law, integrity and unity of the nation.

Initially, the idea of uniform civil code was raised in the Constituent Assembly in 1947 and it was incorporated as one of the directive principles of state policy by the sub-committee on fundamental rights and clause 39 of the draft directive principles of state policy provided that state shall endeavour to secure for the citizens a uniform civil code. The argument put forward was that different personal laws of communities based on religion, "kept India back from advancing to nationhood" and it was suggested that a uniform civil code "should be guaranteed to Indian people within a period of five to ten years".1 The Chairman of Drafting Committee of the Constitution, Dr. B.R. Ambedkar, said that "We have in this country uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal code operating throughout the country which is contained in the Indian Penal Code and the Criminal Procedure Code. The only province the civil law has not been able to invade so far is marriage and succession.... And it is the intention of those who desire to have Article 35 as part of Constitution to bring about the change."2 He further pointed out that it was not correct to say that Muslim law was immutable and uniform throughout India up to 1935. The shariat law did not apply to North West Frontier Provinces where the Hindu law of succession and other matters were followed so

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2 Lok Sabha Secretariat, Constituent Assembly Debates Vol.III 551 (23 Nov, 1948).
much so that in 1939, the Muslim legislature had to abrogate the application of Hindu law to Muslims of the North West Frontier Provinces and apply shariat law to them. Similar situation prevailed in the United Provinces, the Central Provinces and Bombay where the Muslims to a larger extent were governed by the Hindu law of succession. In order to bring them at par with other Muslims who followed shariat law, the legislature enacted a law applying the shariat law to the rest of India. In North Malabar, Marumakkathayam, matriarchal law of succession applied equally to Hindus and Muslims.¹

The power of Parliament to reform and rationalise the personal laws is unquestioned. The command of Article 44 is yet to be realised. The correct perspective appeared to have been placed by Shri K.M. Munshi during the Constituent Assembly Debates. He said:

Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors — and important factors — which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say. ‘Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation.

Though Ambedkar was supported by Gopalaswamy Ayyangar and others but Jawaharlal Nehru intervened in the debate. Nehru said in 1954 in Parliament, “I do not think that at the present the time is ripe for me to try to push it (Uniform Civil Code) through.”² Since the uniform civil code was a politically sensitive issue, the founding fathers of the Constitution arrived at a honourable

¹ Lok Sabha Secretariat, Constituent Assembly Debates Vol.III 551 (23 Nov 1948)
compromise by placing it under article 44 as a directive principle of state policy.

(ii) GENDER EQUALITY UNDER INDIAN CONSTITUTION:

Indian Constitution expressly stands for gender equality. However, even after half a century from the framing of the Constitution, the ideal of uniform civil code is yet to be achieved. Women, who make up nearly half of India, continue to clamour for a gender just code to enjoy equality and justice irrespective of the community to which they belong. The uniform civil code is required not only to ensure (a) uniformity of laws between communities, but also (b) uniformity of laws within communities ensuring equality between the rights of men and women.¹

Article 44² of the Constitution provides for a reform to the personal laws specially those relating to the minorities and to remove gender bias therein. But the state has shown reluctance to interfere with these laws because religvion has been proving to be a “formidable barrier” to reform the personal laws.

(iii) WOMEN AND RELIGION

The Supreme Court in *Danial Latifi and another v. Union of India*³ upheld the validity of Sections 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, as not being violative of articles 14, 15 and 21 of the Constitution of India. Under section 3 of the Muslim Women (Protection of Rights on Divorce) Act 1986, a Muslim husband is liable to make reasonable and fair provision for future of divorced wife which includes maintenance also, so she is not entitled to claim maintenance under section 125 of Criminal Procedure Code, 1973. Under section 4 of the Act, divorced Muslim woman unable to maintain herself after iddat period can proceed against her relatives or Wakf Board for maintenance. Rajendra Babu J., on behalf of a five judges bench consisting of Patnaik Mohapatra, Doraiswamy, Patil, JJ., and himself observed that:-

In interpreting the provisions where matrimonial relations is involved we have to consider the social conditions prevalent in our

² The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.
³ AIR 1996 SC 1023 (para 12).
society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated gives up her all other avocations and entirely devotes herself to the welfare of the family in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life.....When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognized by persons belonging to all religions\(^1\).

Nevertheless, some leading experts did not toe this line. For example, Professor S.P. Sathe,\(^2\) strongly criticized this judgment that on the one hand the learned judge had observed that solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraint. But, at the same time, Professor Sathe rightly maintains that gender justice is a universal concern and particularly after the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which has been passed by the United Nations and which has been signed by India, there is an additional responsibility on the Indian Supreme Court not to construe statutes so as to cause such gender discrimination. Further, article 21 of the Constitution has been held in include the right to live with dignity and a Muslim woman suffering from destitution or having

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\(^1\) AIR 1996 SC 1023 at P. 757

\(^2\) S.P. Sathe, "From Shah Bano to Daniel La'ifi" The Lawyers Collective Vol.17 at 9 (Jan 2002).
to go from pillar to post in search of her potential heirs to provide for her maintenance would certainly not be living with dignity.

The Supreme Court itself has earlier held in Vishakha v. State of Rajasthan\(^1\) that the provisions of the Constitution have to be interpreted as informed by CEDAW, thereby incorporating that declaration within articles 14, 21 and 19(1)(g) of the Constitution. Therefore, if the same approach is to be sustained, the Muslim Women’s Act of 1986 had to be either interpreted so as to provide full protection against vagrancy by imposing responsibility on the husband who was directly connected with the matrimonial life or has to be struck down as being violative of articles 14, 15(2) and 21 of the Constitution. However, the court chose to uphold the law by interpreting it liberally so as not to deprive a Muslim woman of what had been given by the earlier law.

Significantly, the Supreme Court have taken a turn again regarding the matter of a Public Interest Litigation by a Christian priest, John Vallamattom and other citizens of Christian community, challenging the validity of the section 118 of the Indian Succession Act, 1925, while striking down the said section as being violative of article 14 of the Constitution, and also concerned over the contradictions in marriage laws of various religions, in a historic judgment emphasized the need for a legislation by parliament on a common civil code. Stressing that there was no “necessary connection” between religious and personal laws in a civilized society, a three-judge bench, headed by V.N. Khare, CJI, held that it was a matter of regret that article 44 of the Constitution, which provided for the state to “endeavour” to secure a uniform civil code for its citizens throughout India, had not been effected. The court further observed that “Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of the national integration by removing the contradiction based on ideologies.”\(^2\)

Observations of this Court in Pannalal Bansilal Pitti v. State of A.P.\(^3\) are apposite. In a pluralistic society like India, people having faith in different religions, different beliefs and tenets, have peculiar problems of their own.

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\(^1\) (1997) 6 SCC 241.  
\(^2\) John Vallamattom v. Union of India, 2003(5)SCALE 384.  
\(^3\) (1996) 2 SCC 498 at P. 510
A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counterproductive 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 a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be expedient and incorrect to think that all laws have to be 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 freedom is subject to public order, morality and health. So the article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

The provision of Article 44 of the Constitution of India is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Sarla Mudgal v. Union of India\(^1\) it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

\(^1\)(1995) 3 SCC 635

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In *Sarla Mudgal*\(^1\) the Supreme Court has judicially noticed it being acclaimed in the United States of America that the practice of polygamy is injurious to "public morals", even though some religions may make it obligatory or desirable for its followers. The Court held that polygamy can be superseded by the State just as State can prohibit human sacrifice or the practice of sati in the interest of public order. The personal law operates under the authority of the legislation and not under the religion and, therefore, the personal law can always be superseded or supplemented by legislation.

In *Mohd. Ahmed Khan v. Shah Bano Begum*\(^2\) the Constitution Bench was confronted with a canvassed conflict between the provisions of Section 125 Criminal Procedure Code 1973 and Muslim personal law. The question was: when the personal law makes a provision for maintenance to a divorced wife, the provision for maintenance under Section 125 Criminal Procedure Code would run in conflict with the personal law. The Constitution bench laid down two principles; firstly, the two provisions operate in different fields and, therefore, there is no conflict, and secondly, even if there is a conflict it should be set at rest by holding that the statutory law will prevail over the personal law of the parties, in cases where they are in conflict.

In *State of Bombay v. Narasu Appa Mali*\(^3\) the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (25 of 1946) was challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution of India. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar held:

> A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.

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1. Ibid
2. (1985) 2 SCC 556
3. AIR 1952 Bom 84 at P. 86 : 53 Cri LJ 354
Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religion recognized the necessity of a son for a religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is a recognized institution according to Hindu religious practice, Their Lordships stated in no uncertain terms:

The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the facts, till a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislature with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion.¹

Social welfare and social justice is recognized without any demur. Divorce, unknown to ancient Hindu law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim personal law. Article 44 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise².

One cannot remain immune from the misery of the women in our society which are the worst victims of human behavioural pattern and the social fabric of which we often remain proud of. The Hindu society which worships females as

¹ AIR 1952 Bom. 84 at P. 86
² AIR 1952 Bom. 84 at P.86.
Goddess in various forms, to name a few: Laxmi (for wealth); Saraswati (Literacy); Durga (for power); Kali (to destroy the evil); Vaishno Devi; Radha of Krishna, Sita of Ram; Parvati of Shiva and many more. Our most important and pious river is the Ganges, the female. The earth (dharti-mata) is female; Even our country (Bharat-mata) is female. This happens only in India. We are said to be the people with religious belief and most superstitious.

The relationship between man and woman is human relationship and not legal relationship. The human aspects of which are most vital. Women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world’s income and own less than one-hundredth per cent of world’s property.

Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of Political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory, therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity.

The empirical study by anthropologists and sociologists reveals that the customary laws of the tribes are not uniform throughout Bharat. Even in respect of intestate succession, they are not uniforms. Though the customs of the tribes have been elevated to the status of law, obviously recognized by the founding fathers in Article 13(3)(a) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental

1 (1996) 5 SCC 125

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rights. In *Sant Ram v. Labh Singh*¹, the Supreme Court held that the custom as such is effected by Part III dealing with fundamental rights.

**MARRIAGE AND RELIGION**

Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu law, marriage is a sacrament. Both have to be preserved.

The alleged violation of Article 21 is misconceived. What is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to the procedure established by law. It is conceded before us that actually and factually none of the petitioners has been deprived of any right of his life and personal liberty so far. The aggrieved persons are apprehended to be prosecuted for the commission of offence punishable under Section 494 Indian Penal Code, 1860. It is premature, at this stage, to canvass that they would be deprived of their life and liberty without following the procedure established by law. The procedure established by law, as mentioned in Article 21 of the Constitution, means the law prescribed by the legislature. The judgment in *Sarla Mudgal case*² has neither changed the procedure nor created any law for the prosecution of the persons sought to be proceeded against for the alleged commission of the offence under Section 494 of Indian Penal Code, 1860.

The grievance that the judgment of the Court amounts to violation of the

¹(1964) 7 SCR 756
²Sarla Mudgal, President, Kalyani v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569

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freedom of conscience and free profession, practice and propagation of religion is also far-fetched and apparently artificially carved out by such persons who are alleged to have violated the law by attempting to cloak themselves under the protective fundamental right guaranteed under Article 25 of the Constitution. No person, by the judgment impugned, has been denied the freedom of conscience and propagation of religion. The rule of monogamous marriage amongst Hindus was introduced with the proclamation of the Hindu Marriage Act. Section 17 of the said Act provided that any marriage between two Hindus solemnized after the commencement of the Act shall be void if at the date of such marriage either party had a husband or wife living and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly. The second marriage solemnized by a Hindu during the subsistence of a first marriage is an offence punishable for bigamy under the penal law.

Freedom guaranteed under Article 25 of the Constitution is such freedom which does not encroach upon a similar freedom of other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit this belief and ideas in a manner which does not infringe the religious right and personal freedom of others. It was contended in Sarla Mudgal case that making a convert Hindu liable for prosecution under the Penal Code would be against Islam, the religion adopted by such person upon conversion. Such a plea demonstrates the ignorance of the petitioners about the tenets of Islam and its teachings. The word “Islam” means “peace and submission”. In its religious connotation it is understood as “submission to the will of God”; according to Fyzee (Outlines of Mohammedan Law, 2nd Edn.) in its secular sense, the establishment of peace. The word “Muslim” in Arabic is the active principle of Islam, which means acceptance of faith, the noun of which is Islam. Muslim law is admitted to be based upon a well-recognised system of jurisprudence providing many rational and revolutionary concepts, which could not be conceived of by the other systems of law in force at the time of its inception. Sir Ameer Ali in his book1 has observed that the Islamic system, from a historical point of view was the most interesting phenomenon of growth. The small beginnings from which it grew up and the comparatively short space of time within

1 Mohammedan Law, Tagore Law Lectures, 4th Edn., Vol. 1 257
which it attained its wonderful development marked its position as one of the most important judicial system of the civilized world. The concept of Muslim law is based upon the edifice of the Shariat. Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another though capacity to do justice between co-wives in law is a condition precedent. Even under the Muslim law plurality of marriages is not unconditionally conferred upon the husband. It would, therefore, be doing injustice to Islamic law to urge that the convert is entitled to practise bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion. The violators of law who have contracted a second marriage cannot be permitted to urge that such marriage should not be made the subject-matter of prosecution under the general penal law prevalent in the country. The progressive outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means, who apparently are found to be guilty of the commission of the offence under the law to which they belonged before their alleged conversion. It is nobody’s case that any such convertee has been deprived of practicing any other religious right for the attainment of spiritual goals. Islam which is a pious, progressive and respected religion with a rational outlook cannot be given a narrow concept as has been tried to be done by the alleged violators of law.

The following observations of the Supreme Court in Sarla Mudgal case are relevant for the study –

We also agree with the law laid down by Chagla, J. in Robasa Khanum v. Khodadad Irani case wherein the learned Judge has held that the conduct of a spouse who converts to Islam has to be judged on the basis of the rule of justice and right or equity and good conscience. A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse is obviously not a dispute ‘where the parties are Muslims’ and, therefore, the rule of decision in such a case was or is not required to be the ‘Muslim personal law’. In such cases the court shall act and the Judge shall decide according to

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justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of Section 494 of Indian Penal Code, 1860.

Looked from another angle, the second marriage of an apostate husband would be in violation of the rules of natural justice. Assuming that a Hindu husband has a right to embrace Islam as his religion, he has no right under the Act to marry again without getting his earlier marriage under the Act dissolved. The second marriage after conversion to Islam would thus be in violation of the rules of natural justice and as such would be void.

In *Ram Prasad Seth v. State of U.P.*¹ a learned Single Judge held that the act of performing a second marriage during the lifetime of one’s wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practicing or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, Rule 27 of the U.P. Government Servant’s Conduct Rules requiring permission before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

In *Badruddin v. Aisha Begum*² the Allahabad High Court ruled that though the personal law of Muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with any person. A similar anti-bigamy provision is to be found in several States Service Conduct Rules framed by the States governing the conduct of their civil servants.

¹ (1957) 2 LLJ 172 : AIR 1957 All 411 and AIR 1961 All 334 : (1961) 2 LLJ 247
² 1957 All LJ 300
In *R.A. Pathan v. Director of Technical Education*\(^1\) having analysed in depth the tenets of Muslim personal law and their base in religion, a Division bench of the Gujarat High Court held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (cited before the Court) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

In *Maharshi Avadhesh v. Union of India*\(^2\) Supreme Court had referred to the judgment in *Sarla Mudgal*\(^3\) case and held:

> We may further point out that the question regarding the desirability of enacting a uniform civil code did not directly arise in that case. The questions which were formulated for decision by Kuldip Singh, J. in his judgment were these:

> Whether a Hindu husband, married under Hindu law, by embracing Islam, can solemnize a second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be a Hindu? Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code.

Sahai, J. in his separate but concurring judgment referred to the necessity for a uniform civil code and said:

> .....The desirability of uniform code can hardly be doubted. But it can concretize only when social climate is properly built up by elite

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\(^1\) (1981) 22 Guj LR 289  
\(^2\) 1999 Supp (1) SCC 713 at P. 581-82  
of the society, statesmen amongst leaders whoa instead of gaining personal mileage rise above and awaken the masses to accept the change.

Sahai, J. was of the opinion that while it was desirable to have a uniform civil code, the time was yet not ripe and the issue should be entrusted to the Law Commission which may examine the same in consultation with the Minorities Commission. That is why when the Court drew up the final order signed by both the learned Judge it said the writ petitions are allowed in terms of the answer to the questions posed in the opinion of Kuldip Singh, J.' These questions we have extracted earlier and the decision was confined to conclusions reached thereon whereas the observations on the desirability of enacting the uniform civil code were incidentally made.

Similarly in Pannalal Bansilal Pitti v. State of A.P.\(^1\) this Court pointed out:

> Whether 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 pluralist society like India in which people have faith in their respective religions, beliefs, or tenets propounded by different religions or their offshoots, the founding fathers, while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faith, born in different castes, sex or sub-sections in the society speaking different languages and dialects in different regions and providing 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 thereof in one go perhaps may be counterproductive 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 a law is a slow process and the

\(^1\) (1996) 2 SCC 498 at P. 510
legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages.

The personal laws of each religion contain different essentials of a valid marriage. The new code should have the basic essentials of valid marriage which shall include:

(i) The new code should impose monogamy banning multiple marriages under any religion. Polygamy discriminates against the women and violates their basic human rights. It also adheres to Article 21 of the Constitution and basic human values.

(ii) The Prohibition of Child Marriage Act, 2006 is for all irrespective of religion of the parties. The Act should be implemented strictly to prohibit child marriages in the society.

(iii) Registration of marriage should be made compulsory. A valid marriage will be said to have solemnized when the man and the woman sign their declaration of eligibility before a registrar. This will do away with all the confusion regarding the validity of the marriage.

(iv) The grounds and procedure for divorce should be specifically laid down. The grounds enumerated in the code should be reasonable and the procedure prescribed should be according to the principles of natural justice. Also, there should be a provision for divorce by mutual consent.

This area throws up even more intractable problems. In Hindu law, there is a distinction between a joint family property and self-acquired property which is not

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1 Seema v. Ashwani Kumar, AIR 2006 SC 1158; and Law Commission of India, 205th Report on "Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other allied Laws."(2008)
so under the Muslim law. The Hindu Undivided Family, formed under the Hindu law, run businesses and own agricultural lands. Under the Uniform Civil Code, this institution of Hindu Undivided Family, peculiar to the Hindus, has to be abolished. There are also fetters imposed on the extent to which one can bequeath property by will under the Muslim law. Considering all these, the Uniform Civil Code should include:

(i) Equal shares to son and daughter from the property of the father, whether self acquired or joint family property. There should be no discrimination based on sex in the matters of inheritance.

(ii) Provisions for inheritance of the property of mother, which she has self acquired or acquired through her father or relatives.

(iii) The provisions relating to will should be in consonance with the principles of equity. There should be no limitations imposed on the extent to which the property can be bequeathed, the persons to whom such property can be bequeath and the donation of the property by will for religious and charitable purpose.

(iv) The essentials of valid will, the procedure for registration and execution of the will should be provided for.

(v) Provisions for gifts should not contain any limitations, though essential of valid gift and gift deed should be specified.

The maintenance laws for the Hindus and Muslims are very different. Apart from personal laws, a non-Muslim woman can claim maintenance under Section 125 of Code of Criminal Procedure. A Muslim woman can claim maintenance under the Muslim Women (Right to Protection on Divorce) Act, 1986. The Uniform Civil Code should contain the following with regards to maintenance:

(i) A husband should maintain the wife during the marriage and
also after they have divorced till the wife remarries and vice-versa.

(ii) The amount of alimony should be decided on basis of the income of the husband, the status and the lifestyle of the wife and vice-versa.

(iii) The son and daughter should be equally responsible to maintain the parents. The reason for this being that if she claims equal share of the property of her parents, she should share the duty to maintain her parents equally.

(iv) The parents should maintain their children – son till he is capable of earning on his own and daughter, till she gets married or capable of earning.

Thus based on these fundamental principles, an unbiased and fair Uniform Civil Code can be framed which will be in consonance with the Constitution.

In the case of Lata Singh v. State of U.P.\(^1\), Markandey Katju J. observed that the nation is passing through a crucial transitional period in our history, and the supreme court can not remain silent in matters of great public concern such as inter-caste marriage or inter-religious marriage. The caste system is a curse on the nation and sooner it is destroyed the better. In fact it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence inter-caste marriage are in fact in the national interest as they will result in destroying the caste system. However disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage are threatened with violence or violence is actually committed on them. Such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country and once a person becomes a major he or she can marry whatsoever he or she likes. If the parents of boys and girls do not approve of such inter-caste marriages or inter-religious marriage the maximum they can do is that they can cut of social relations with the

son or daughter but they can not give threats or commit or instigate acts of violence and can not harass the person who undergo such inter-caste or inter-religious marriage. We sometimes hear of “honour” killing of such persons who undergo inter-caste or inter-religious marriage of their own free will, there is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment. Only this way we stamp out such acts of barbarism.

(iv) FREEDOM OF RELIGION AND UNIFORM CIVIL CODE

The idea of Uniform Civil Code had struck at the heart of illogical custom and orthodoxy. Minoo Masani, in Sub-Committee on Fundamental Rights suggested for making of Uniform Civil Code as justifiable right. The Sub Committee turned down the proposal of Masani by 5 : 4 majority. Constituent Assembly put Uniform Civil Code in Part IV Directive Principles of State Policy. Article 44 does not put on the state any condition for its implementation. In other cases state’s limits of economic capacity and developments are preconditions for implementation of Directive Principles of State policy.

Implementation of Article 44 does not depend on economic capacity and development of the state. Codification of Personal Laws would not incur any extra expenditure on the state. The only thing which is required is political will.

In order to implement Article 44 initially for Hindus, a committee under the chairmanship of Hari Vilas Sarda was set up. On the report of committee Hindu Personal law was codified, and following statutes were enacted:

(A) Hindu Marriages Act, 1955,

(B) Hindu Succession Act, 1955, and

(C) Hindu Minority and Guardianship Act, 1956.

A voice was also raised for codification of personal law of Muslims, when the Hindu Law was codified. Muslim leaders as usual opposed codification of personal law in Constituent Assembly. They also continued to oppose it even after codification of Hindu Law.
The Main points for contest and resentment by Muslim were – plurality of wives, inhuman divorces against the principles of equality of man and woman. Muslim fundamentalists oppose codification of marriage and divorce for their equalization with Hindus. Muslims claim that they regard the Quaran and Hadis of Mohd. As the highest and the final law for them. That permit a man to have 4 wives at a time. That provides for easy divorce of wives.

Marriage, divorce, succession and adoption, etc. are personal liberties of an individual. He may marry or not so is with the case of divorce, succession, etc. Personal liberty of an individual is to be exercised in society so like other freedom. Solemnization of marriage is to be in accordance with the restriction of the society. A muslim who keeps 4 wives at a time can very easily say that his act is in conformity with that of Quran and Hadis and also approved by Muslim community at large. Polygamy is not generally approved and practice by Muslim community. Polygamy is only an exception rather deviation from general rule of monogamy. Its survey may reveal that in present time Muslim in general do not approve and practice rather oppose polygamy as any other community.

When we evaluate the whole situation and we think cool mindedly then we find that keeping of 4 wives at a time was the maximum limits for permitting of marriages. It was not Quaranic mandate. When we trace the historical reasons for such permission then we come to know that Islam was spread through Jehads – religious wars. In Jehads young male members were killed leaving behind young ladies and small children as orphan because in Islam there is no concept of joint family. Quran orders for giving of Zakat, i.e. obligatory charity and Khearat that is voluntary alms. Zakat and Khearat proved insufficient for young widows and small children. By giving Zakat and Khearat a person could not establish any sentimental relationship with widows and children. By solemnization of marriages there could be established sentimental relations and obligations for maintenance of women. The institution of marriage was created in order to regulate the most charming,
natural instinct of sex

At the time of Mohd. Sahib debauchery was prevalent so he had intention to control this social evil and by permitting 4 wives at a time he controlled debauchery. This stopped leading of licentious sexual immorality and provided for keeping of sexual morality and maintenance of widows and orphan children.

In the present situation there are no Jehads. In modern time numerical strength of male and female is not disproportionate as it had been at the time of Mohd. Sahib. We do not face problem of maintenance of war widows and children. So permission for marrying of 4 wives at a time was might be relevant but today the situation is already quite change so it does not have any relevance in present time in India. Likewise law of divorce which was scaled in favour of male should be based on equality of man and woman. In old time, a woman was considered as property, so having large number of women was matter of social pride but this is not the situation in present time. In law of evidence value of witnesses of man and woman was not equal in past. But now we give same reliability to evidence of man and woman.

Our constitution under Article 14 gives equality before the law and equal protection of laws to all citizens – man and woman. Article 44 for inconformity with Article 14. Universally equality of man and woman is recognized in every field of life. Idiotic and inhuman perpetuation of polygamy and unequal and under-privileged position of women in matter of divorce are against nature and open insult of womanhood. Outdated inequality-based customs are against the sacred tenets of Islam. Therefore, various Islamic countries have codified their personal laws, thereby banned polygamy and made divorce laws in favour of women. Many Muslim authors favour Uniform Civil Code. There common conscience has emerged in favour of Uniform Civil Code at National Convention on Unified Civil

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2 Ibid, P. 123.
(3) Ganni: Reform of Muslim Personal Law, 1986.
Code held by Bar Council of India in 1986.

Personal Law and Religion are different matters. A person may not follow any religion – an atheist, even he has personal matters of marriage etc. Conversion or re-conversion and again conversion one religion to another religion not necessarily change personal life of a man. A person may belong to one religion and may follow and respect tenets of other religion. Mohd. Hidayatullah, Ex-Chief Justice of Supreme Court and Vice-President of India willed that after his death his dead body be burn. So after his death his dead body was not cremated but was burnt. This ritual did not turn Hidayatullah less Muslim. Religion and personal matters stand on different footings.

When one thing is good for one religious community it is equally good for other religious community on humanitarian grounds.

In *Mohd. Ahmed Khan Vs. Shah Bano Begam*¹, the Supreme Court held that a Muslim woman can also claim maintenance from her husband under Section 125 of Code of Criminal Procedure, 1973, the Supreme Court in this case pleaded for codification of personal laws as provided in Article 44 of Constitution.²

Under the pressure of Muslim Ulama, Government of Rajiv Gandhi passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 whereby decision of the Supreme Court was nullified. This enactment of Parliament violated Articles 14, 15(3), 39(a) and 44. In case of *Jordan Vs. S.S. Chopra*, the Supreme Court pointed out that the time now has come for complete reform of law of marriage and make uniform law applicable to all persons irrespective of religion.³ Recently, Kerala and Calcutta High Courts have gave their decisions for maintenance of divorced Muslim wives on the line of *Shah Bano* case.

In *Sarla Mudgal Vs. Union of India*⁴, the Supreme Court directed the Government to take fresh look at Article 44. In this case a Hindu man married to a Hindu woman, he knew that he could marry 4 wives at a time by converting to Islam. He converted to Islam and solemnized second marriage with another lady

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¹ (1985) 2 SCC 556  
⁴ AIR 1995 SC 1531.
without divorcing his first Hindu wife. The Supreme Court held that the husband could be punished for bigamy under Section 494 of IPC. Hindu marriage does not dissolve automatically. It can only be dissolved by decree of divorce by competent court on any of the ground under Section 13 of the Hindu Marriages Act, 1955. R.M. Shah and Kuldeep Singh, J.J. observed that since 1950 Government have failed to implement constitutional mandate of Article 44. J. Kuldeep Singh observed that there were no necessary relations between religion and personal law in a civilized society.

(v) **SECULARISM V/S UNIFORM CIVIL CODE:**

Marriage, succession and like matters are secular matters so they can be regulated by law.¹ The spine of controversy revolving around Uniform Civil Code has been secularism and the freedom of religion enumerated in the Constitution of India. The preamble of the Constitution states that India is a “secular democratic republic”. This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It does not mean allowing all religions to be practiced. It means that religion should not interfere with the mundane life of an individual.

¹ In S.R. Bommai v. Union of India², as per Justice Jeevan Reddy, it was held that religion is the matter of individual faith and cannot be mixed with secular activities. Secular activities can be regulated by the State by enacting a law.

In India, there exist a concept of “positive secularism” as distinguished from doctrine of secularism accepted by America and some European states i.e. there is a wall of separation between religion and State.

In India, positive secularism separates spiritualism with individual faith. The reason is that America and the European countries went through the stages of renaissance, reformation and enlightenment and thus they can enact a law stating that State shall not interfere with religion. On the contrary, India has not gone

¹ Sarla Mudgal Vs. Union of India, 3 SCC 635.
² (1994) 3 SCC 1.
through these stages and thus the responsibility lies on the State to interfere in the matters of religion so as to remove the impediments in the governance of the State.

Articles 25 and 26 guarantee right to freedom of religion. Article 25 guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. But this right is subject to public order, morality and health and to the other provisions of Part III of the Constitution. Article 25 also empowers the State to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice and also to provide for social welfare and reforms. The protection of Articles 25 and 26 is not limited to matters of doctrine of belief. It extends to acts done in pursuance of religion and, therefore, contains a guarantee for ritual and observations, ceremonies and modes of worship, which are the integral parts of religion.

Uniform Civil Code is not opposed to secularism or will not violate Article 25 and 26. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters re of secular nature and, therefore, law can regulate them. No religion permits deliberate distortion. The Uniform Civil Code will not and shall not result in interference of one’s religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the Uniform Civil Code a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a common law.

Justice Khare, in the recent case John Vallamattom v. Union of India, said, “It is no matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution.”

The Chief Justice also cautioned that any legislations which brought succession and like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation. Article 25 confers right to practice and profess religion, while Article 44 divests religion from social relations and personal law.

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2 AIR 2003 SC 2902.
The whole debate can be summed up by the judgment given by Justice R.M. Sahai. He said, "Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentiality civil and ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative, both, for protection of the oppressed and for promotion of national unity and solidarity.

(vi) WORKING OF UNIFORM CIVIL CODE UNDER INDIAN SCENARIO:

The philosophy behind the Portuguese Civil Code was to strengthen the family as the backbone of society by inculcating a spirit of tolerance between husband and wife and providing for inbuilt safeguard against injustice by one spouse against the other. Commenting that the dream of a Uniform Civil Code in the country finds its realization in Goa, former Chief Justice of India Y.V. Chandrachud had once expressed hope that it would one day "awaken the rest of bigoted India".

So Polygamy and unequal divorce customs are not essential parts of Islam but they are against Article 44 of the Constitution.

Prof. Fyzee suggested in National Convention on Unified Civil Code that a National Commission having representation of major communities be appointed.

In *Sarla Mudgal v. Union of India* the Supreme Court observed:

Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus

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1 Mohammad Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945
2 (1995) 3 SCC 635 : 1995 SCC (Cri) 569
along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a ‘common civil code’ for the whole of India.

It may not be relevant to mention here that the Family Courts Act, 1984 Section 7(1) provides for exclusive jurisdiction of Family Court to deal with any suit or proceeding between parties in respect of any matrimonial/family matters where Family Courts do not exit the jurisdiction of District Court remains. Matrimonial matters of Muslims, Parsis and Christians are outside the jurisdiction of the Family Court.

Court has no power to give directions for the enforcement of the Directive Principles of State Policy as detailed in Chapter IV of the Constitution which includes Article 44. Supreme Court has time and again reiterated the position that directives, as detailed in Part IV of the Constitution are not enforceable in courts as they do not create any justiciable rights in favour of any person. Reference in this behalf can be made to the judgments of this Court in P.M. Ashwathanarayana Setty v. State of Karnataka and Kesavananda Bharati v. State of Kerala. In this case also no directions appeared to have been issued by this Court for the purpose of having a uniform civil code within the meaning of Article 44 of the Constitution. Kuldip Singh, J. in his judgment only requested the Government to have a fresh look at Article 44 of the Constitution in the light of the words used in that article. In that context direction was issued to the Government for filing an affidavit to indicate the steps taken and efforts made in that behalf. Sahai, J. in his concurrent but separate judgment only suggested the ways and means, if deemed proper, for implementation of the aforesaid directives. The Judges comprising the Bench were not the only Judges to express their anguish. Such an observation had earlier also been made in Shah Bano case and Jorden Diengdeh v. S.S. Chopra. The apprehension expressed on behalf of the Jamat-e-Ulema Hind and the Muslim Personal Law Board is unfounded but in order to allay all apprehensions we deem it

1 Halsbury’s Laws of India, Vol. 28, Para 150.1394
3 (1973) 4 SCC 225.
4 (1985) 2 SCC 556 : 1985 SCC (Cri) 245
5 (1985) 3 SCC 62
proper to reiterate that Supreme Court had not issued any directions for the codification of a common civil code and the Judges constituting the different Benches had only expressed their views in the facts and circumstances of those cases.

Thus introduction of Uniform Civil Code will not cause any extra cost to the state.

FEASIBILITY OF ENACTING A COMMON CODE

The Constituent Assembly placed the matter of uniform Civil Code under Article 44 of the Constitution (outside the Part-III, Fundamental Rights). In 1954, the first Prime Minister, Pt. Jawahar Lal Nehru said that time has not ripe to try to push uniform Civil Code. Since then repeatedly the Apex Court and many religious scholars have shown the need to enact of uniform Civil Code\(^1\). In the words of the Apex Court, uniform law, though is highly desirable, enactment thereof in one go perhaps may be counterproductive to unity and integrity of the nation. The mischief or defect which is most acute can be remedied by the process of law at stages.

The Apex Court also opined that a common Civil Code will help the course of the national integration by removing the contradictions based on ideologies.

Now it can be said that the time is ripe to implement the provisions of Article 44 of the Constitution of India.

END NOTE:

Under Part III of the Constitution of India right to freedom of religion has been provided but it is not restricted. It is subject to certain provisions as laid down therein. At the same time, under Article 44 of the Chapter IV it has been provided for “Uniform Civil Code” to all citizens irrespective of their religious persuasion. It is seen that all members of the Constituent Assembly were of not the one view, therefore, this provision was placed under Chapter IV with the hope that in due course of time Article 44 of the Constitution shall be implemented. But only

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personal laws of the Hindus have been unified/codified in different Acts. However, personal laws of Muslims as well as other religions remain as it is.

Time to time, the Apex Court and many scholars of the all religions have propagated the need of a uniform civil code for all citizens like criminal laws. Time has come to apply the same set of laws in regards to marriage, divorce, adoption and succession to all citizens. Secularism can be achieved only by implementing Article 44 of the Constitution. Accordingly proposals have been made for a 'Uniform Civil Code' under this Chapter.