CHAPTER - VII

JUDICIAL PADYATRA
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[A] ROLE OF JUDICIARY AND THE DIRECTIVE PRINCIPLES

Under the Constitution of India the Indian Judiciary in general, and Supreme Court along with High Courts in particular, has been assigned an important role. Under the Constitution the law declared by the Supreme Court is the law of the land. The expression law declared under Article 141 is wider than the Law found or made, and implies the law creating role of the Court.¹ Under the power of Judicial review ² (Article 13 the Supreme Court and High Court have got power to save the provisions of the Constitution it-self.

The power of the judicial review in India has become so powerful that even the validity of the Constitutional amendment can also be reviewed by the Court on the ground that an amendment violates that basic-structure or features of the Constitution.³ In view of

2. The doctrine of Judicial review is based on the assumption that the Constitution is the supreme law of the land and all governmental organs, which owe their origin to the Constitution and derive their powers from its provisions must work within the frame-work of the constitution and must not do any thing which is inconsistent with the provision of the Constitution.
3. *See Kesava Nanda Bharti V. State of Kerala* A.I.R. 1973 SC 1461; *Minerva Mills Ltd. V. Union of India* A.I.R. 1980 SC 1789; it is important to note in this connection that at several occasion the Supreme Court has held that the judicial independence and judicial review is basic features of the constitution. See the cases cited in this note and *S.P. Gupta V. Union of India*, A.I.R. 1982 SC 149, *S.P. Sampath Kumar V. Union of India* A.I.R. 1987 SC 386; *P. Sambha Murthy V. State of A.P.* A.I.R. 1987 SC 663.
this development, the Supreme Court of India has been seen as the Supreme Court for India and also formed as one of the strongest Court of the world. That is why the Supreme Court is seen as the performer of the role of "a sentinel on the qui-vive", State of Madras V. V. G. Row, AIR 1952 SC 196 at 199.

Though the judiciary along with executive and legislature, is regarded as an organ of the State but under part IV of the Constitution (Directive principles) it is not specifically included in the definition of State. Article 37 of part IV of the Constitution also makes it clear that the provisions contained in part IV i.e. Directive principle of State policy shall not be enforceable by any Court but the said principle are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. In the light of these provisions it has been argued that like all other Directive Principles the mandate of Article 44 is also not enforceable in a court of law. In other words the court can not implement the said mandate of Article 44. We have already discussed earlier the role of Judiciary with regard to the Directive Principles. The result of our discussion was that, at times the judiciary not only used the Directive Principle to interpret the Constitution but also forced

4. Article 36 of the Part IV says "in this part unless the context otherwise requires the 'State' has the same meaning as in Part III. Under Part III the term 'State' has been defined under Article 12 which says "In this part unless the context otherwise requires the State includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory of India or under the control of the Government of India".
the Government to implement certain Directive Principle in various ways.

[B] JUDICIAL APPROACH

[I] Judicial Approach Before The Shah Bano Case

So far Article 44 is concerned, we have pointed out the views of a few scholars that unequal and discriminatory personal laws may be struck down by the Courts, as such provisions violate the fundamental right to equality and also Article 44 of the Directive Principles. On the other hand the opposite views say that since personal laws are protected under freedom of religion and since they do not come under the ‘law’ as defined in Article 13 such laws are beyond the reach of Fundamental Rights. These two contrary views have been used by the court in India with regard to Article 44. In this background now we may analyse in brief the approach of the Judiciary with regard to the UCC.

The history of Judicial behaviour tells that in initial stage it adopted a literal interpretation with regard to constitutionality of personal laws as well as implementation of the UCC. One of the earlier case in which the question relating to personal laws was involved was the case of State of Bombay v. Narasu Appa Mali.

This case has been discussed in detail in our discussion relating to freedom of religion. In this case a legislation prohibiting the polygamy only in Hindus in State of Maharastra

5. Here we will discuss only those cases in which the problem of UCC has been specifically dealt by the Courts.
was upheld. The Court though opined in favour of the UCC but it declined to struck down the discriminatory provision of personal laws. The limitation of the judiciary was explained by Justice Gajendragadkar, in following words:

"Article 44 of the Constitution is, in my opinion very important. This Article says that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. In other words, this article by necessary implication recognizes the existence of different Codes applicable to the Hindus and Mohammedans in matters of personal law and permits their continuance unless the State succeeds in its endeavour to secure for all the citizens a Uniform Civil Code. The personal laws prevailing in the country owe their origin to scriptural texts. In several respects their provisions are mixed up with and based on considerations of religion and culture; so that the task of evolving a Uniform Civil Code applicable to the 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 but laid down a Directive Principle that the endeavour must hereafter be to secure a Uniform Civil Code throughout the territory of India".7

In this case the court declined to accept the argument that the impugned legislation was applicable to Hindus and not to all the communities. The reasons were explained by Justice Chagla who observed:

"One community might be prepared to accept 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. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise. 8

He further observed, 9 "It is impressed upon us that our Constitution sets up a secular State, that Article 44 contains a directive to the State to secure for the citizens a Uniform Civil Code throughout the territory of India, and still the State of Bombay by this legislation has discriminated between Hindus and Muslims only on the grounds of religion and has set up a separate code of social reform for Hindus different from that applicable to the Muslims. While deciding this case Chagla C.J., relied heavily on Davis v. Beason. 10 In this case the constitutionality of an Idaho Statute of 1882, which outlawed bigamy was challenged. It was contended that the impugned Act infringed the religious freedom of the members of the Mormon Church and violated the First Amendment of the U.S. Constitution which provided that Congress shall not make any law respecting the establishment

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8. Ibid 87.
9. Ibid.
10. (1889) 133 U.S. 637.
of religion or forbidding the free exercise thereof. The members of this church used to practice polygamy as a part of their religious creed. Mr. Justice Field, who delivered the opinion of the Supreme Court, however, rejected the contention and observed: "However free the exercise of religion may be, it may be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.\textsuperscript{11}

Justice Gajendragadkar opined that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provisions of the Constitution contained in Article 14. He observed that the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, XXV of 1946 has been challenged principally on two grounds. It is first contended that the personal laws applicable to the Hindus and Mohammedans in the Union of India are subject to the provisions contained in Part III of the Constitution of India and as such they would be void to the extent to which their provisions are inconsistent with the fundamental rights guaranteed by Part III. It is then argued that in so far as both these personal laws allow polygamy but not polyandry they discriminate against women only on the ground of sex. If that is so, the provisions of the personal law permitting polygamy offend against the provisions contained in Article 15 (1) and as such are void to the extent under Article 13 (1). In other words, after the commencement of the Constitution bigamous marriages amongst the Hindus as well as

\textsuperscript{11} Ibid, P. 640.
the Mohammedans became void and the Hindus and Mohammedans who entered into such bigamous marriages became liable to be punished under Section 494. Penal Code; and yet the impugned Act specifically provides for the punishment of the Hindus alone; that is how it discriminates against the Hindus solely on the ground of religion.\textsuperscript{12}

The thorough examination of The State of Bombay v. Narasu Appa Mali's\textsuperscript{13} case reveals that the High Court favoured the introduction of the Uniform Civil Code and 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 discrimination between Hindus and Muslims, the court very clearly observed that the classification was reasonable and did not violate Article 14 of the Constitution.\textsuperscript{14} The court did not only uphold the validity of the legislation but 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 throughout the territory of India.\textsuperscript{15}

In 1952, the Madras High court had to face the similar problem when the Madras Hindu (Bigamy and Divorce) Act, 1949, was challenged in \textit{Sriniwasa Aiyar v. Saraswathi Ammal}.\textsuperscript{16} In this case Section 4 of the said Act was challenged which provide:\textsuperscript{17}

\begin{enumerate}
\item Supra Note 2, P. 90.
\item See Supra note 2, PP. 84-85.
\item Ibid, P. 87.
\item Ibid, P. 95.
\item A.I.R. 1952 Mad. 193.
\item See the Madras Hindu (Bigamy and Divorce) Act, 1949.
\end{enumerate}
"Notwithstanding any rule of law, custom or usage to the contrary any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnization shall be void."

Apart from this provision other grounds regarding the constitutional validity of the Act were the same as in the case decided by the Bombay High Court.18 While rejecting all the arguments put before the court the Madras High Court through Satyanarayan Rao and Rajgopalan JJ. pointed out that the abolition of polygamy did not interfere with religion because if a man did not have a natural born son he could adopt one.19 Relying on the judgement of U.S. Supreme Court20 it further observed that whilst religious belief was protected by the constitution, 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. 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.21

In Ram Prasad v. State of U.P.22 The Court did not regard the second marriage as an intrical part of Hindu religion.

18. See A.I.R. 1952 Bom. 84.
19. See Supra note 12, P. 194.
21. See the spirit of Article 44.
22. A.I.R. 1957 All. 411.
In \textit{Itwari v. Asghari},\textsuperscript{23} Mr. J. Dhawan observed:

"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 the 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 the 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."

"He further observed that 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.... Under modern condition it would be inequitable for the court to compel her against her wishes to live with such a husband. There are no divergent forms of cruelty such as Muslim cruelty, Hindu cruelty, Hindu cruelty or Christian cruelty but the concept of cruelty is based on universal and humanitarian standards."

In \textit{Mohamad Yunus v Syed Unnissa},\textsuperscript{24} The S.C. Observed that:

\textsuperscript{23} A.I.R. 1960 All. 684.
\textsuperscript{24} A.I.R. 1961 SC 808.
Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land), regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, khula and mubaraat, maintenance, dower, guardianship, gifts trust and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal, Law (Shariat).

In Shahulameedu v. Subaida Beevi\(^{25}\) Krishna Iyer, J. 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) Criminal Procedure Code. He said that the view that the Muslim husband enjoyed an arbitrary unilateral power to inflict divorce did not accord with Islamic injunctions. He went on to plead for monogamy among the Muslims. He referred to the Muslim scholarly opinion to show that the Koran enjoined monogamy upon Muslims and departure therefrom was only as an exception. That is why a number of Muslim countries\(^{26}\) have prohibited polygamy. He further observed that a keen perception of the new frontiers of Indian law hinted at in Article 44 of the Constitution was now necessary on the part of Parliament and the Judicature.


\(^{26}\) Like Syria, Tunisa, Morocco, Pakistan, Iran and Islamic Republics of the erstwhile Soviet Union.
In *B. Chandra Manil Kyamma v. B. Sudershun*\(^{27}\) the Andhra Pradesh High Court had to decide a very unique case. In this case a Hindu husband who had a Hindu wife contracted second marriage during the first marriage. This marriage was objected to by the first wife. Thereafter to escape from the objection of the first wife, they converted to Islam and then remarried according to Islamic customs. The court held that this second marriage is void from its inception and conversion to another religion cannot make it a valid one. 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, this marriage is void.

Thus the court in this case again stressed that second marriage may strictly be prohibited during the subsistence of first marriage. The court tried to give practical shape to the basic tenets of Hindu and Muslim religions which have prohibited second marriage. In this way the judiciary was always in favour of monogamy which is our cultural heritage.

The Allahabad High Court was of the view that there is no prohibition in the entire U.P. Zamindari Abolition and Land Reforms Act from making a gift of one's bhumi dhari right in favour of Almighty. In absence of any prohibition in the Act in the view of the clear provisions of Section 152 there does not appear to be any bar to be a bhumi dhar creating a Waqf of his bhumi dhari rights in the land."

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Commenting upon the relevance of Article 44 of the Constitution he further opined.\textsuperscript{28}

"What this provision (Article 44) has to do with the interpretation of U.P. Zamindari Land Reforms Act. This provision simply states as how laws will be made. 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".

The outcome of this judicial verdict is that while interpreting the provisions of Zamindari and Land Reform Laws, one has not to be carried away by the notions of personal law but allow the Transfer of Property in favour of mosque in the shape of Waqf keeping in view the religious purpose of the transfer of land. It may however be pointed out in this present case that the court has failed to bring the case under the spirit of Article 44. The reason for this failure was that there was no provision in U.P. Zamindari Abolition and Land Reforms Act, 1951 which could help the court to invalidate the transfer of Agricultural land for religious purposes. However the fact remains that Section 171 of ZA Act, 1950 has modified the law of inheritance among Muslims and they have accepted it by law of acquiescence.

\textsuperscript{28} Id.
In 1972 a very complicated issue was raised before the Kerala High Court in Makku Rawther’s Children: Assan Rawther and Other v. Manahapara Charayil,\textsuperscript{29} regarding Muslim Personal law and Article 44 of the Constitution. The main issue which came up for discussion was regarding the hiba or gift under Mohammedan Law. Under the Muslim law gift can be made by an oral agreements between the parties and the same are exempted for the registration under the Indian Registration Act, 1908. In this case an oral gift was made and the same was challenged on the ground that Section 129 of the transfer of Property which exclude the operation of Registration Act in case of hiba is violation of Articles 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 gathering the basics of different personal laws as prevalent in India and the philosophy behind the concept of gift and thereby making a law regarding registrations of gifts delivered a dynamic judgement and observed.\textsuperscript{30} 

"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. 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

\textsuperscript{29} A.I.R. 1972 Ker. 27.

\textsuperscript{30} Ibid, P. 33.
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."

The judgment clearly mentioned that the provisions of the personal laws must run in accordance with the provisions of the Constitution. It is the function of the judiciary to construe the words in the personal laws with the passage of time which Is the need of the hour in the light of constitutional mandate. Thus all kinds of gifts whether it belongs to Hindus or Muslims must comply with the section 17 (1), section 49 of the Registration Act and Section 123 of the Transfer of Property Act. The only exception to this general rule according to this judicial pronouncement is that non-secular gifts can be exempted from registration. In this way through this decision the court emphasized that personal laws in respect of gifts must be read in the light of Article 44 of the Constitution.

In *R.M.K. Singh v. State of Bihar*, a writ application was filed by the petitioner under Articles 226 and 227 of the Constitution claiming himself to be the convenor of the "Protection Board for Ancient. and Sacred Hills Ram Shilla. Pretshilla and Brahmayoni and Barabar of Gaya (Bihar) for quashing a notification of the State of Bihar, dated June 8,1974, imposing certain restrictions on the grant of quarrying permit to the lessees. The petitioner based his claim under the provisions of

Articles 25 and 26 of the Constitution as according to him, quarrying operations on any part of the hill amounted to an infringement of protection guaranteed to the Hindu public of freedom of conscience and the right freely to profess, practice and propagate their religion. There was a difference of opinion on the issue between Nagendra Prasad Singh and Sarwar Ali JJ. The judgement was delivered by third judge H.L. Agarwal J. and held that the petitioner was entitled to the reliefs claimed and the notification are vitiated in law and must be quashed and cancelled and the respondents be restrained from quarrying or conduct any mining operation themselves or through their agents on any part of Ram Shilla Hill.

The other case in which the Court declined to enforce the Directive of Article 44 under the pretext of enforcing the Fundamental Right was Gurdial Kuar v. Mangal Singh.\textsuperscript{32} In this case the Court refused to read the personal laws with Article 15 of the Constitution. The Court explained: "If the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the courts will have to go to the length of holding that only one Uniform Code of laws relating to all matters covering all castes, creeds or communities can be Constitutional. To suggest such an argument is to reject it".\textsuperscript{33} Here we have stated the two cases in which the courts declined to struck down the various personal laws being violative to Fundamental Right. But the Bombay High Court took

\textsuperscript{32} A.I.R. 1968 P. & H. 396.
\textsuperscript{33} Ibid, at 398.
a positive stand with regard to the spirit of the UCC in the sense that it upheld a progressive social legislation applicable to Hindus. Now we will discuss few cases in which the Courts have contributed in a different way. In these cases the courts have upheld the applicability to all citizens of those laws which are secular in nature. In Shahulameedu v. Subaida Beevi\textsuperscript{34} while interpreting the provisions relating to maintenance contained in section 488 of the Criminal Procedure Code the Kerala High Court extended its benefit to the wife of a bigamous Muslim staying away after the second marriage of her husband. In this case Justice Krishna Iyer provided the benefits of a secular law to a Muslim women and said:

"the Indian Constitution directs that the State should endeavour to have a Uniform Civil Code applicable to the entire Indian community, and indeed, when motivated by a high public policy, Section 488 of the Criminal Procedure Code has made such a law, it would be improper for an Indian court to exclude any section of the community born and bred up on Indian earth from the benefits of that law"\textsuperscript{35}

\begin{itemize}
  \item[34.] 1970 K.L.T., 4.
  \item[35.] Id. at 9.
\end{itemize}
The courts in Jammu and Kashmir Courts in the State of Jammu and Kashmir including the trial courts, High Court\(^{35A}\) and the late Board of Judicial Advisors\(^{35B}\) have been enforcing customs and maintaining the supremacy of customs over the rules of Muslims personal law. The revenue courts have gone a step ahead by holding that "inheritance to landed estate in Kashmir Province is governed by custom and not by the Shariat".\(^{35C}\) It has been universally held in Kashmir that "in matters of succession to agricultural property among Muslims, customary law and not the Shariat applies".\(^{35D}\) The sum and substance of the decisions of the revenue courts is that in matters of inheritance of agricultural land the first "rule of decision" is the custom and not the personal law of the parties as modified by custom. In connection with the customary law governing the Muslims of Kashmir in matters of inheritance and succession it would be necessary to familiarise oneself with terms such as khana damad,\(^{35E}\) pisar parwarda,\(^{35F}\) dukhtar khana nashin, dukhtar beruni khana\(^{35G}\). These are of customary origin. The order of succession is agnatic with the result that for succession to agricultural land females are excluded from inheritance. None of these incidents in the law of inheritance has any place under the Muslim personal law.

\(^{35A}\) "It has been laid down quite clearly a number of times that ordinarily parties are governed by their personal laws and the only exception are those in which one or the other party prove successfully that personal law is abrogated by such customs as are found to be prevailing". (Akbar Rather v. Azizi, 8 J & K.L.R. 264.)

\(^{35B}\) "It is well established rule of law that a custom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law. Not only each custom but alleged separate incident of a custom must be proved to exit as customary law". (Ahad Lone v. Azizi, 8 J & K.L.R. 118.)

\(^{35C}\) Abdullah v. Mst. Fazi, revision petition No. 101 dated 18th Har 2007 (Samvat) decided on 18th Assuj 2007 (Samvat).


\(^{35E}\) Husband of the daughter who resides in her father's home after marriage.

\(^{35F}\) An adopted son.

\(^{35G}\) A daughter married outside home and who resides with her husband in her conjugal home.
II Shah Bano and after math:

An arrested step towards Islamic reformation. Now we may discuss a case in which the Supreme Court extended the benefits of the secular Laws like Criminal Procedure Code to a Muslim women giving new look to the provisions of the Muslim personal law.

FACTS OF THE CASE

The facts of the Shah Bano\textsuperscript{36} case were as follows. In this case the appellant-Mohd Ahamad Khan who was an advocate by profession was married to the respondent Shah Bano in the year 1932. Three sons and two daughters were born at that marriage. In 1975 the appellant drove her wife out of the matrimonial home. In April 1978, Shah Bano filed a petition against her husband under section 125 of the Criminal Procedure Code in the Court of Judicial Magistrate, Indore, asking for maintenance at the rate of Rupees 500/- per month. On November, Six, 1978 appellant divorced the respondent by an irrevocable Talaq. The appellant defence to the respondents petition for maintenance was that she had ceased to be wife by reason of the divorce granted by him, that he was therefore under no obligation to provide maintenance, that he had already paid maintenance to her of the rate of 200/- per month for about two years and that he had deposited a some of rupees 3000 in the Court by way dower during the period of Iddat. In August 1979 the Magistrate directed to appellant to pay a sum, of Rs. 25/- per month to the Respondent by way of maintenance. The respondent had alleged that appellant earns a professional income of about Rs. 60,000 per years. In July, 1980 in revisional application field by respondent the High Court of M.P. enhanced the amount of maintenance to Rs. 179.20 per month. Again this order of the High Court the husband, field an appeal before the Supreme Court.

\textsuperscript{36} Mohd. Ahamad Khan V. Shah Bano Begani A.I.R. 1985 SC 945.
In this case the question before the Supreme Court was; does the Muslim personal law impose no obligation upon the husband to provide for the maintenance of his divorced wife, and whether the divorced Muslim wife is entitled to apply for maintenance under section 125 of Criminal Procedure Code.

OUTCOME OF THE SHAH BANO

This case was heard by a full bench of the Supreme Court comprising V. Chandrachud C. J., D.A. Desai, O. Chinnapa Reddy, E.S. Venkataramiah and R.N. Mishra JJ. The Judgment was delivered by the Chief Justice on behalf of the unanimous bench. In this case the Supreme Court analysed in detail the law relating to maintenance under Muslim law and Criminal Procedure Code. The Court's conclusions may be summarised as follows:

(i) Under section 125 Criminal Procedure Code even a Muslim women has right to refuse to live with her husband if he contracts another marriage. It shows that sec. 125 overrides the personal law, if there is any conflict between the two.

(ii) Since the Muslim personal law, which limits the husbands liability to provide for the maintenance of the divorced up to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold 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 her self. The argument of the appellant that, according to the Muslim personal law, his liability to provide for the maintenance of his divorced wife is limited to the
period of iddat, despite the fact that she is unable to maintain herself can not be accepted.

Therefore, there is no conflict between the provisions of Section 125 and those of the Muslim personal law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

(iii) The Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less justice to the teaching of the Quran.

(iv) The Supreme Court refused to accept the contention of the appellant that after paying the Mehr he does not have obligation to maintain a divorced wife under Section 127 (3), (b). The Court reached to the conclusion that, infact, Mehr, is an amount of which the wife is entitled to receive from the husband in consideration of the marriage and not an amount being payable in consideration of divorce. Divorce dissolves the marriage, therefore, no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce.

In the light of the aforementioned conclusions the Court dismissed the appeal and confirmed the judgement of M.P. High Court. The consequence of this judgement was that the respondent. Shah Bano became able to make an application under Section 127 (1) of Criminal Procedure Code for the increasing the allowance of maintenance guaranteed to her on proof of a change in the circumstances as envisaged by that section.
In the Course of its judgement Chief Justice Chandrachud also referred and touched the issue relating to the UCC and observed:

"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India". There is no evidence of any official activity for framing a Common Civil Code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A Common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the Courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it so palpable. But piecemeal
attempts of Courts to bridge the gap between personal laws can not take the place of a Common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.\textsuperscript{37}

The Shah Bano judgment attracted maximum controversy. The progressive and secular sections of the society welcomed the judgement but fundamentalist section of the Muslim community openly opposed the judgement. The judgement was interpreted as putting Islam in danger. It was seen as an interference with the shariat law i.e. personal law of Muslim Community. It was alleged that the judgment would help to impose a UCC over the Muslim Community. The academic world was also divided. Though most of the academics supported the judgment but few put strong dissents.

The critics of the judgment argued that maintenance to divorce was forbidden by Quran, it would lead to contract and proximity (for receiving payment) and to adultery. That Muslim law was immutable and though marriage under it was a contract it was a "sacred contract" and therefore, unchangeable. The whole concept of the UCC was once again challenged and a legislation to undo the effects of the judgement was demanded.\textsuperscript{38}

the post Shah Bano developments show that initially the Government was in the favour of the judgement but in view of the strong protests followed by mammoth processions and rallies

\textsuperscript{37} Ibid 954.

\textsuperscript{38} V. Dhagamwar (1989) P. 24.
of the Muslims it changed its stand. In order to undo the effect of the judgment the Rajeev Gandhi Government enacted the Muslim Women's (Protection of Right on Divorce) Act, 1986.

It was clear that the move of the Government was guided by political considerations Critising this conduct of the government. Dr. Dhagamwar has stated:

"The Shah Bano judgement stirred them (Muslims) in a big way but only because they were persuaded that their religion and personal law were in danger. A new phenomenon of public passions raised by religions considerations rather than reasoned debate preceding and dictating a legislation erupted on our public life.

However, in a country where over half the population is illiterate and has therefore no access to independent means of checking on what is told to them, this style of making democracy work should not surprise us."39

As we have pointed out that Shah Bano judgment was welcomed by the progressive sections of the society. First time a greater number of Muslims openly supported a progressive interpretation of the Muslim personal law. But, unfortunately the Indian rulers ignored such progressive but small voices. Once again the Government bypassed the enlightened members of the Indian society. One of the most unfortunate thing was that the

government used its legislative power to even obstruct the creative effort of the apex court to rationslise the out-dated provisions of a personal law.

A combination of politicians, pontiffs, and conservatives rushed through Parliament the so-called Muslim Women (Protection of Rights on Divorce) Act, 1986, that took away from unfortunate Muslim divorcees their right to relief under section 125 of the Code of Criminal Procedure, while professing to give them other rights whose value is still uncertain. That Act is not the subject; matter of the present discussion.

Reverting to Shah Bano, it is best to state the decision of the Supreme Court in the words of the learned judges themselves. After setting out Ayats (verses) of the Holy Quran, the court said:

These Ayats (verses) leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to his divorced wife. The contrary argument does less than justice to the teachings of the Quran: As observed by Mr. M Hidayatullah, in his introduction to Mulla's Mahomedan Law, the Quran is Al Furqan, that is, one showing truth from falsehood and right from wrong.

The judgement of the constitution bench seemed a direct challenge to an old standing rule of interpretation of the Islamic

40. Supra, note 2.
42. Supra, note 2 at 952.
Law (Shariat). The old rule had held the field for over a thousand years. This rule was evolved in the Abbasid period when the early Islamic Caliphate had yielded its republican form to a dynastic monarchy and empire. The purpose of this rule was to minimize the apprehended mischiefs that an autocrat or his appointed judges could do to the law and Islamic society, and to ensure that any such damage would be limited within narrow bounds. It also insulated the autocrats against radical and republican jurists, of whom there was no dearth. It was then laid down, allegedly by consensus; that the judges and the legislative authority of the caliph could only operate within the parameters of the rulings of the canonized masters of the law who had each, in one way or another, passed the test of their integrity to the satisfaction of the public and the ruler. Their rulings were acceptable to the autocrats and the public. This rule was accepted and recognized by the Privy Council in Aga Mohalillned.

They do not care to speculate on the mode in which the text quoted of the Koran, which is to be found in Sura II, vv 241-2, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imameea. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.43

43. Aga Mahomed Jafer V. Koolsom Beebee (1897) 24 I A 196 at 203-4.
By their deft juristic reasoning the Privy Council pleased the conservative elements. This rule had however, outlived its usefulness. South Asia's Islamic Erasmus, Sir Syed Ahmad Khan, strongly disapproved the continuance of this old rule, sometimes called taqlid (imitation). According to him, it had long outlived its usefulness. The real reason for the decline of the Muslims, according to Sir Syed Ahmad Khan, was that they have not yet realized that the present age demands a totally new legal system which should deal with social, political and administrative affairs. He held that the unwarranted seal of infallibility put upon the compilations of the ancient jurists had led to dire consequences. According to Sir Syed Ahmad:

1. The people were led wrongly to believe that the religion of Islam is directly related to all worldly matters and that, therefore, nothing can be done without obtaining a religious sanction.

2. If the laws and regulations, which the jurists had formulated in the context of the material and social conditions obtaining in those days, were accepted as the private judgements of certain learned personages, there would have been no harm. But unfortunately they came to be identified with Islam itself. Hence any attempt to modify or replace them by better laws came to be looked upon as heresy.
3. Due to these reasons, the books of the jurists were regarded as incorporating infallible truth and so sufficient for the guidance of our affairs. Civil and criminal, commercial and revenue codes were thought unnecessary and redundant.\footnote{44}

Sir Syed, therefore, called upon the Muslims to formulate a new legal code suited to present needs. In this work of Reconstruction, we cannot neglect or ignore the stupendous work done by the early jurists but we cannot be bound by it. We must go back to the original sources, the Quran and the Sunna.\footnote{45}

Dr. Sir Mohammed Iqbal also took the same view. He observed:

I know the ulema of Islam claim finality for the popular schools of Mahomedan Law, though they never found it possible to deny the theoretical possibility of a complete ijtihad (reinterpretation).... Since things have changed and the world of Islam is confronted by new force... I see no reason why this attitude should be maintained any longer. Did the founders of our Schools ever claim finality for their reasoning and interpretations? Never. The claim of the present generation of Muslim liberals to re-interpret the foundations of legal principles, in the light of their own experience and the altered condition, of modern life, is, in my opinion perfectly-justified. The teaching

\footnote{44}{Bashir Ahmad Das, Religions Thoughts of Sir Syed Ahmad Khan 135 (1975).}
\footnote{45}{Ibid.}
of the Quran that life is as a process of progressive creation necessitates that each generation, guided but unhampered by the work of its predecessors, should be permitted to solve its own problems.\textsuperscript{46}

This old rule of Islamic jurisprudence was outdated. Whatever may have been the merits of this old rule when it was evolved in the Islamic world, and in the turbulent period following, when the Muslim masses and intelligentsia were kept out of power and had little say in the decisions of autocrats and imperialists there is no doubt that this rule placed Islamic juristic and political thinking in a straitjacket very far from what the Prophet had envisaged.

Despite the wide consensus among the intelligentsia that this old rule must go, such was its entrenched strength that for the first six decades of the twentieth century only halting and cautious moves were made to soften it. In 1936-9 the efforts and inspiration of the late Maulana Ashraf Ali Thanvi led to a consensus of the ulema that may be considered a halfway house. At the time of enactment of the Dissolution of Muslim Marriages Act, 1939 the ulema agreed that, '[i]n cases in which the application of the Hanafi law causes hardship, it is permissible to apply the provisions of the Maliki, Shafei or Hanbali Law.'\textsuperscript{47} This new consensus or ijma was applied by the (British) Indian

\textsuperscript{46} Mohd. Iqbal, Reconstruction of Religions thoughts in Islam 168 (1994).

\textsuperscript{47} Gazette of India 1936, Pt. 5, at 154. For detail see Furqan Ahmad, 'Maulana Ashra Ali Thanavi : Juristic Thoughts and contribution to the Development of Islamic Law in the Indian Sub-continent', VI Islamic and Comparative Law Quarterly 71(1986).
Central Legislature in 1939 while enacting the Dissolution of Muslim Marriages Act, 1939. This statute, in substance, extended the principles of the Maliki law to all Muslims in India (as it then was). This principle is known as Takhayyur (eclectic choice), which was also applied by the Abdur Rashid Commission appointed by the Government of Pakistan in 1950 for the reform of Muslim Family Law. The recommendations of this commission resulted in the famous Muslim Family Laws Ordinance, 1965. It is still the law in Pakistan and Bangladesh under different names. It may well be adopted as the basis of reform in India.

The learned author has enumerated the progressive steps taken by other Muslim countries in this regards as a matter of comparative jurisprudence, the resolute struggle of the women of Pakistan, that took place under the banner of their various organizations, merits notice. These movements had an impact on the thinking of the legal profession and the people, particularly in Pakistan and Bangladesh. To some extent they muted the stridency of the ulema. They brought about a change in public mood, affecting the development of the law and having an impact on the judges and lawyers. This change is reflected in important court decisions in Pakistan and in Bangladesh. Since the language of the Supreme Court of India, Pakistan and Bangladesh remains English, and these tribunals cite each other's judgements in many matters, particularly in the field of Muslim Law, these may be referred to here.

The first of these decisions, given by the Supreme Court of Pakistan, is Khurshid Bibi. The judgement of S.A Rahman, J, reads in part:

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The question arises whether the wife is entitled as of right, to claim khula (dissolution) despite the unwillingness of the husband to release her from the matrimonial tie, if she satisfies the Court that there is no possibility of their living together, consistently with their conjugal duties and obligations.

[T]he fundamental laws of Islam are contained in the Quran and this is, by common consent, the primary source of law for Muslims. Hanafi Muslim jurisprudence also recognizes hadith, ijtehad, and ijma as the three secondary sources of law.49

After a discussion of the original sources, the learned judge concludes, 'the view taken by Kaikhus, J, in Bilquis Fatima,50 that the relevant verses of the Quran give a right of khula (wife's right to divorce) to the wife subject to the limitations mentioned therein is correct,51 This view was unanimously supported by Hamdur Rahman, Yaqub Ali, Fazle Akbar, AA Masood, JJ. Masood, J, in his concurring judgement emphasized:

The opinions of jurists and commentators stand on no higher footing than that of the reasoning of men, falling in the category of secondary sources of Muslim law, and cannot therefore compare in weight or authority with, nor alter, the Quranic law or the Hadith. If the opinions of the jurists conflict with the Quran and the

49. Ibid.
51. Supra, note 33.
Sunnah, they are not binding on courts and it is our duty, as true Muslims to obey the law of God and: the Holy Prophet.\textsuperscript{52}

A close reading of the concurring judgements reveals the epoch-making force of this decision. The specific point of matrimonial law decided in this case, namely, the establishment (or re-establishment) of the right of a married Muslim woman to obtain a dissolution of her marriage from her husband, without any allegation of fault on his part, was revolutionary. It was not only this result but the manner of reaching it, namely the primary reliance on the Quran and the Hadith that was revolutionary. This far exceeded the bounds of matrimonial law. This broke the tradition of taqlid, established at the time of autocratic monarchs and emperors in the Middle Ages,\textsuperscript{53} and continued as a matter of imperial policy by the colonial regime in India.\textsuperscript{54}

The unanimous declaration by all the judges of the Supreme Court of Pakistan constitutes the biggest change in the approach to Islamic Law ever since the doctrine of taqlid (precedent) was established over a thousand years ago in the period of the autocratic caliphs at Baghdad. This is identical with the view taken by the Supreme Court of India in Shah Bano, when the court unanimously declared, 'There can be no greater authority on this question than the Holy Quran.'\textsuperscript{55} This new approach is bound, by its very nature, to spread throughout the Islamic world.

\textsuperscript{52} Ibid.
\textsuperscript{53} Supra, note 3.
\textsuperscript{54} Supra, note 28.
\textsuperscript{55} Supra, note 2 at 945. It may be noted that the Supreme Court of India in Shah Bano declined to accept the views taken by the privy council on the issue of maintenance. Therefore, the Judgement was severely criticized by conservative Indian Muslims.
Thus, in Pakistan, Aga Mohd, earlier referred to, is no longer good law. The decision in Khurshid Bibi evoked criticism from a writer defending the old view of the Privy Council. Dr. Doreen Hinchcliff of the London School of Oriental Studies assailed the judgement on familiar lines.56 But, as another British scholar, Hodkins, sees it, Khurshid Bibi 'is now soundly established and unlikely to be challenged'.57 Unfortunately, the text of the judgement in Khurshid Bibi was not widely available in India in 1985 at the time of Shah Bano nor was its full implication then appreciated. For some years, its significance outside the field of Family Law was not understood even by writers who had the text.58 This judgement subjected the ulema in Pakistan to the discipline of Islam-alas seemingly for some years only-and of democracy, hopefully. This enabled Pakistan to avoid the kind of traumatic events that have occurred in some other (primarily Hanafi) Muslim countries like Turkey. These countries, which faced difficulty in adjusting some of the demands of the mullas, who often muster public support, with the urgings of the pragmatic modernists who control the State and army, perhaps, may profit from a study of Pakistan's experience in this regard. It is a ding-dong battle.59

57. Ibid.
58. Ibid at 229.
59. In a perceptive dispatch from Bahrain in The Hindu dated 27 June 1999, Kesava Menon views the situation in Iran, Algeria, Egypt, Turkey, finding that, 'In country after country in West Asia, religious forces that initially sought to mobilize people through violence (and bigotry) have learnt that they can progress only if they... delve deeper into the meaning of the Koran, try to understand its precepts in a broader philosophical framework and seek to match centuries old precepts with modern needs.'
REFLECTION OF THE INDIAN SUPREME COURT ON BANGLADESH

Perhaps much of the unseemly fanaticism exhibited by mullas at the time of Shah Bano, at the behest, it is said, of some politicians, would have been tempered if our intelligentsia, at least, had the opportunity to study these judgements, including one from the highest court in a neighbouring country which happens to be Muslim.

Bilquis Fatima and Khurshid Bibi, cited above, fostered a similar development in Bangladesh. In the Supreme Court (High Court Division) at Dhaka,60 on 9 January 1995, Mohd. Ghulam Rabbani and Syed Amirul Islam, JJ, delivered an admirably short but path breaking judgement relating to the same verse II: 241 of the Holy Quran that had figured in Shah Bano before the Supreme Court of India in 1985. The learned judges pointed out that 'the literal study of the Quran is discouraged by a section of Muslims. They insist that the readers should follow any one of the interpretations given by the early scholars. They go further saying that the door of interpreting the Quran is now closed.' Referring to the dictum of the Privy Council in Agha Mohd, the court noted:

This dictum of the Privy Council pronounced about one hundred years ago in 1897 AD cannot be followed on three grounds. Firstly the learned judges in the Privy Council were non-Muslims and they were anxious to decide such issues in accordance with the laws as

propounded by the Muslim jurists, rather than independently disregarding the Muslim jurists.

"Secondly Article 9 (1A) of the Constitution of Bangladesh ... states that 'Absolute trust and faith in Almighty Allah shall be the basis of all actions'. This indicates that Quranic injunctions have to be followed strictly without "any deviance.

Thirdly the Quran urges, 'Those to whom we have sent the Book should study it as it should be studied' [Q II: 121].\textsuperscript{61}

The learned Judges then cited the judgement of the Lahore High Court in Mst. Rashida Begum v Shahdin:

Reading and understanding the Quran is not the privilege or right of one individual or two. It is revealed in easy and understandable language so that all Muslims if they try may be able to understand and to act upon it. It is a privilege granted to every Muslim which cannot be taken away from him by anybody; however highly placed or learned he may be, to read and interpret the Quran. In understanding the Quran one can derive valuable assistance from the Commentaries written by different learned people of yore, but then that is all. These commentaries cannot be said to be the last word on the subject. Reading and understanding the Quran implies the interpretation of it and the

\textsuperscript{61} Ibid.
interpretation in its turn includes the application of it which must be in the light of the circumstances and the changing needs of the world. If the interpretation of the Holy Quran by the commentators who lived thirteen or twelve hundred years ago is considered the last word on the subject then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the times. It will cease to be a universal religion and will remain a religion confined to the time and place where it was revealed.⁶²

**THE LEARNED JUDGES CONCLUDED**

A civil court has jurisdiction to follow the law as laid down in the Quran disregarding any other law on the subject, if contrary thereto, even though laid down by earlier jurists or commentators of great antiquity and high authority and though followed for a considerable time. Under the Hindu law clear proof of usage can outweigh the written text of the law. But it is not so in the case of Islamic law. For it is an article of faith of a Muslim that he should follow without questioning what has been revealed in the Quran and disobedience thereof is a sin.⁶³

Then followed a discussion and interpretation of the verse in Quran II. 241, where the court reaches the same conclusion as did the Supreme Court of India in Shah Bano as earlier set out, and ruled:

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⁶² PLD 1960 Lah. 1142.

⁶³ Supra, note 45.
We hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of Iddat for an indefinite period, that is, till she loses the status of divorsee by marrying another person.\textsuperscript{64}

This valuable judgement of the High Court Division has unfortunately been overruled by the Appellate Division on the technical ground that the appellant therein did not receive adequate notice.\textsuperscript{65} The learned judges of the Bangladesh Supreme Court have at the same time recorded their obiter dicta criticizing the judgement on merits which, with due respect to them, may not be the last word on the subject.\textsuperscript{66} The Chief Justice delivering the decision of the Appellate Bench, however, appeared to favour a fair, just and reasonable legislation to remove the extreme hardship of divorced women in our society. Such statutory recognition of benefits and privileges for a divorced woman will not conflict with Muslim law.\textsuperscript{67}

Referring to the Shah Bano judgement, A.T.M. Mfzal, CJ, said:

It is to be observed that in the Shah Bano case the Indian Supreme Court was considering an application

\textsuperscript{64} Ibid.

\textsuperscript{65} See Judgement of the Appellate Division (Civil), 3 December 1998, Hafizur Raman v. Shamsun Nahar Begum 3 MLR (AD) 1999 at 41-88.

\textsuperscript{66} This writer is confident that the trend of international opinion in the Islamic world is rapidly moving in the direction of rational and humanistic interpretation of the law. See for example Syed Shahbuddin, 200 Muslim India 365 (August 1999).

\textsuperscript{67} Supra, 50 at 88.
for maintenance of a divorced Muslim woman filed under section 125 of the Code of Criminal Procedure 1973 and particularly the provision in the said section which read: 125(1)(a) If any person neglects or refuses to maintain... his wife unable to maintain herself [emphasis added by his Lordship]. In considering the defence taken by the husband and the interveners (including the All India Muslim Personal Law Board) on the basis of the aforesaid Personal Law of the Muslims the Court observed, 'We are of the opinion that the application of these statements of the law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife in all circumstances and in all events. That is not the subject matter of section 125.' The Indian Supreme Court then considered the aforesaid Ayats 241 and 242 of the Sura Baqara and observed, 'These Ayats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the Quran'.

The Shah Bano decision was thus a limited one given in the context of Section 125 of the CrPC.68
It is unfortunate that such advice was not given to the Indian ulema, in 1985-6. Resistance by section of the Indian ulema to the idea of a reasonable provision for divorced Muslim women is now much weakened. This is partly due to the impact of international Muslim opinion.  

CONCLUSION

Women's organizations, including those of Muslim women, are demanding immediate relief for Muslim divorcees, enabling resort to section 125 of the Code of Criminal Procedure, notwithstanding the Muslim Women's Act of 1986. The intelligentsia and the women's movement, particularly Muslims, should complete the task of demolition of the old and injurious ideas that Sir Syed Ahmad Khan and Dr. Sir Mohd Iqbal denounced.

We must notice a recent judgement of the Mumbai High Court, interpreting section 3 of the Muslim Women (Protection

69. See edit page article in the Pakistan Times, Lahore, dated 9 January 1986, by Maulana Rafiuddin Shahab, where the stand of the Indian ulema has been assailed. The Maulana wrote,

The Association of Indian Lawyers and Judges have condemned the attitude of the Muslims (for agitation against Shah Bano). They have treated the agitation of the Muslim masses as a challenge to the courts. This situation has provided an opportunity for the opponents of Islam to pass derogatory remarks about the faith. Shah Bano was divorced after spending a major part of her life with her husband. The (opponents of Islam) maintain that a religion which opposes the provision of maintenance allowance to an old helpless divorced woman cannot be a true religion.

of Rights on Divorce) Act, 1986. The court held that this section conferred a right on a divorced woman to claim a reasonable provision. The court held that this provision must take into account the needs for her future beyond the iddat period.

This is consistent with the view taken by the author of the celebrated Arabic Lexicon, Lissanul Arab, written seven hundred years ago, which said that 'mataa has no time limit becausey Allah has not fixed a time limit for the same. He has only enjoined the payment. The unrealistic view of certain ulema, that because Islam provides remarriage as a remedy for the divorcees, maintenance is unnecessary, must be rejected. In Indian conditions where such remarriages are infrequent, and polygamy is frowned upon, the divorcee's plight is pitiable. It is notable that in Egypt, which is perhaps the leading country governed by the Hanafi doctrine, the law provides:

A wife who after consummation of her valid marriage is divorced by the husband without her consent and without any fault on her part, shall be entitled, in addition to maintenance of iddat, to mata, equivalent to at least two years maintenance, subject to consideration for the financial status of the husband, the circumstances of the divorcee and the duration of the marriage between the parties. The husband shall be entitled to pay such mata, by instalments.72


72. Article 18A, Egyptian Law on Personal Status. 1929 as amended by Law 100 of 1985. This law has been approved by the Grand Shaikh of Al-Azhar (the Athenacum of the Sunni Muslim world) and has successfully withstood challenge in the Supreme Constitutional Court of Egypt.
He further says many, even among the most conservative ulema, hold that, although provision for the divorced wife under Quran II: 241 is not ipso facto, by the force of that text alone, legally enforceable, such provision, if provided for by positive legislation is not inconsistent with Islam and indeed promotes Islamic norms of justice.\textsuperscript{73} This question will be a challenge for the Supreme Court of India. Its outcome will be one that all women, including conscious Muslim women, and many men, will anxiously await.

The Supreme Court of India, speaking through Chandrachud, CJ, in Shah Bano, and earlier through Krishna Iyer, J,\textsuperscript{74} roused the conscience of the world public to the plight of divorced Muslim women. Since the wrong is long standing, in some Hanafi jurisdictions only, its remedy, whether by legislation or judicial decision, may take time, but will assuredly be achieved.

(iii) POST SHAH BANO SCENARIO

Jorden Diengdeh Case (1985)

The Diengdeh\textsuperscript{75} case is yet another example which focussed attention on the immediate and compulsive need for a UCC. The facts of this case exposed totally unsatisfactory state of affairs which arose due to lack of a UCC.

\textsuperscript{73} See even Bangladesh judgement, supra, note 49.
\textsuperscript{75} Ms. Jorden Diengdeh v. S.S. Chopra AIR 1985 S.C. 935, This Case was decided just after the Shah Bano judgement by a division Bench of the Supreme Court. The judgment was delivered by Justice O. Chinnappa Reddy on 10th May 1985.
The facts of the case were noble and peculiar. The wife, petitioner, belonged to the Khasi Tribe of Meghalaya, born and brought up as a Christian. The husband was a Sikh. They were married in the year 1975 under the Indian Christian Marriage Act 1872. The petitioner filed a petition for declaration of nullity of marriage or judicial separation in the year 1980 under the Indian Divorce Act 1976. The prayer for declaration of nullity of marriage was rejected by the High Court, but a decree for judicial separation was granted, on the ground of cruelty. The wife filed a special leave petition against the judgment of the High Court and sought a declaration of nullity of marriage on the ground of impotency of husband.

The Supreme Court found that marriage had broken down irrevocably, but, there was not way out for the couple since neither mutual consent nor irretrievable break down of marriage was a ground for divorce under the Indian Divorce Act, 1879. It may be noted here this Act, applies only to cases where the parties profess the Christian religion.

In this case Supreme Court analysed the provision of the said Act and compared it with other enactment and laws which provide for decrees of nullity of marriage divorce, judicial separation. The Court emphasised the need to have a UCC in India. In the light of the facts of this case justice O Chinnappa Reddy said: It is thus, seen that the law relating to judicial separation, divorces and nullity of marriage is, far from uniform, surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste it appears to be neccessary to introduce irretrievable
breakdown of marriage and mutual consent as grounds of divorce is all cases. The case before us is an illustration of a case where the parties are bound together by a marital consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better united. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and provide by law the way out of the unhappy situations in which couples like the present have found themselves.\footnote{76}

In this case Supreme Court also directed that a copy of the order might be forwarded to the ministry of law and justice for appropriate action. Quoting the judgement of the Shah Bano Case the Supreme Court once again highlighted the need to have a UCC in India.

In 1986 the Supreme Court\footnote{77} was again asked to clarify the position that after the Part-B States Laws Act, 1951, the members of the Indian Christian Community will be governed in case of intestate succession either by the Travancore Christian Succession Act, 1092 or the Indian Succession Act, 1925. The petitioner contended before the court that provisions of Travancore Act, are violative of the Art. 14 of the Constitution and, therefore, with the coming into force the Part-B States Act, her case is covered

\footnote{76. M.S. Jorden Diengdeh, V. Chopra A.I.R. 1985 S.C. 935, P. 940-941.}
\footnote{77. In Mary Roy V. State of Kerala, A.I.R. 1986 S.C. 1011.}
under Indian Succession Act. But on the other hand, it was argued by the respondent that Travancore Act is corresponding law to the Indian Succession Act and the case may be covered under former Act and hence petitioner is not entitled to any share in property. But the court after hearing the arguments of both side through Chief Justice Bhagwati held\(^78\) that on coming into force of Part-B States (Laws) Act, 1951 the Travancore Christian Succession Act, 1092 stood repealed, and case is covered under section 6 of the Indian Succession Act\(^79\) Thus so far as Indian Christians are concerned. Chapter II of Part V contains rules relating to intestate succession and a fortiori on the extension of the Indian Succession Act. would be applicable equitilly to Indian Christians in the territories of the former state of Travancore. It was further observed\(^80\) that it was a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of an earlier statute in a latter statute. Thus, the Supreme Court endeavoured to give less importance to laws based on particular religion and made applicable to the law which also applied to other communities in case of intestate' successions to the property. This is again a welcome decision of the court and may be helpful to unify the personal laws.

The issue which was decided by the Supreme Court in Shah Bano Begum case was again raised before the court in *Begum*

\(^{78}\) Ibid, P. 1014.

\(^{79}\) Section 6 reads that if immediately before appointed day be 1st April 1951, there was in force in any Part-B State any law corresponding to any of the Acts or ordinances extended that State that law shall, save as otherwise expressly provided in Part-B States (Laws) Act, 1951 Stand repealed.

\(^{80}\) Supra note 60, P. 1016.
Subanu alias Saira Banu v. A.M. Abdul Gaffoor. In this case the question that came up for consideration before the Supreme Court was whether a Muslim wife whose husband has married again in worse off under law than a Muslim wife whose husband has taken a mistress to claim maintenance from her husband. The main defence raised was that since the husband is permitted by Muslim Law to take more than one wife his second marriage cannot afford a legal ground to the wife to live separately and claim maintenance. But the Supreme Court reiterated 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. The Supreme Court went a step further in analyzing the provisions of Explanations to Sub-section (3) of section 125 and held that the explanation has to be construed with reference to the two classes of injury caused to the matrimonial rights of the wife and not with reference to the husband's right to marry again. Thus 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 cannot be sustained. The Supreme Court concluded by saying that the Explanation of sub-section (3) of section 125

82. Ibid., P. 1107.
83. Ibid., P. 1108.
84. 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.
85. Supra note 64, P. 1109.
is of uniform application to all wives including Muslim wives whose husbands have either married another wife or taken a mistress.

Thus the Supreme Court reaffirmed the decision of Shah Bano Begum and laid down solid foundation for the uniform civil code in spite of Muslim women (Protection of Rights on Divorce) Act. 1986.

The judicial response to encourage the constitutional philosophy of uniform civil code has always been quite praise worthy. But unfortunately the efforts on the part of the legislature show that nothing has so far been done by this august body to promote the philosophy of Article 44. The objective of uniform civil code can be achieved only if the three organs of the State endeavour to take initiative to put this philosophy into action.

**SARLA MUDGAL CASE**

In the history of UCC the *Sarla Mudgal case*86 generated big controversy. After the Shah Bano judgment this case is important because first time the Supreme Court ventured to ask the executive about the step which it had taken to implement Article 44 of the Directive Principles of the State Policy. The Court's activism once again put the problem of UCC on the national agenda.

The facts of this case was as follows. In this case the four petitions were filed under Article 32 of Constitution. The leading petition was filed by Ms. Sarla Mudgal-the president of a registered society working for the welfare of women. In all the four petitions the facts were similar in nature and the questions

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86. (1995)3 SCC 635.
for consideration before the Supreme Court was whether a Hindu husband, married under Hindu Law, by embracing Islam, can solemnise 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 offense under section 494 of the Indian Penal Code (IPC).  

In this case the Supreme Court analysed the statutory provisions and case law relating to the UCC. The judgment was delivered by a division Bench Comprising-Kuldip Singh and RM. Sahai JJ. Both the judges delivered separate but concurring opinions. Answering the questions the Court held that the second marriage of a Hindu husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in term of the provisions of section 494 Indian Penal Code and the apostate husband would be guilty of the offense under section 494 Indian Penal Code.

The Supreme Court highlighted the problem of polygamy and its misuse by non-Muslim males. In the light of the facts of this case the Supreme Court once again quoted with approval the Shah Bano and Diengdeh judgements and emphasised the need to have a UCC. The Court not only emphasised to have a UCC

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Section 494 of the Indian Penal Code says: Marrying again during lifetime of husbander wife-whoever having a husband or wife living, marriage in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.
in India but also went one step ahead and the requested the Govt. of India through the Prime Minister to have a fresh look at Art. 44 of the Constitution and endeavour to secure for the citizen a UCC throughout the territory of India. Showing the judicial activism the Supreme Court further directed the Govt. of India through Secretary, Ministry of Law and Justice to file an affidavit in the Court till August 1996 indicating therein the step taken and efforts made, by the Govt. of India, towards securing a UCC for the citizens of India.

In its concurring Judgement Justice Sahai made few valuable suggestions for achieving the UCC in India. He also criticised the misuse of polygamy by Muslims as well as non-Muslim. In this connection he suggested the government may also consider feasibility of appointing a committee to enact a Conversion of Religion Act, immediately, to check the abuse of religion by any person. The law may provide that every citizen who changes his religion cannot marry another wife unless he divorces his first wife. The provision should be made applicable to every person whether he is a Hindu or a Muslim or a Christain or a Sikh or a Jain or a Buddhist provision may be made for maintenance and succession etc. also to avoid clash of interest after death. This would go a long way to solve the problem and pave the way for a UCC.

THE CRITICISM OF JUDGEMENT

The observations and the direction of the Mudgal Case have been criticized on several grounds. Firstly, it has been said that the direction of the Court were made without the jurisdiction and
that the question of implemention of the UCC was not before the Court.

Secondly, the question whether what law should be made or not is a business of the legislature and the judiciary should not have any say over such matter. In other words the Parliament is not accountable to the Supreme Court if it does not undertake any legislation to implement Art. 44.

Thirdly, the Court's observation regarding the UCC constitute an obiter because the question of implementation of UCC was not a legal issue. Therefore, an obiter of the court has not binding effect.

With reference to the aforesaid criticism of the Mudgal case outcome it may be said that these objections are not fair. In its judgment the court did not wish to direct the government to implement Art. 44. Infact the court only wanted to draw the attention of the government towards their duty to implement Art. 44. It is true that the observation of the Court was obiter but it is not fair to say that the Court had not locus to express its opinion on a issue closely related to the real legal question. We have pointed out that the judiciary in a broader sense is part of the State and therefore, it is the duty of the judiciary to make every effort to achieve a UCC in India. It is also true that under Art. 44 the State has been asked only to endeavour to secure a UCC but the critics of the Court missed the spirit of the direction of the Court. In this connection supporting the Courts view point Prof. D.D Basu has rightly stated.88

"It is true that the function of legislation is that of the Legislature and not of the Courts. But legislation is sponsored by the Executive, in a Parliamentary form of government, as India has. Hence, once it is conceded that the Directive Principles in Part IV are binding on all the organs of the State (Art. 37), it was nothing improper for the Judges to point out to the Executive and the Legislature that they had failed in their duty to have due regard to the provision in Art. 44. In the Mudgal judgment, the Judges did not direct the Legislature to make a law or how to legislate, or the Executive to initiate it. What they have done is-

(i) To point out-

(a) that 'there is no justification in delaying indefinitely the introduction of a uniform personal law'

(b) that 'successive Governments till date have been wholly remiss in their duty of implementing the constitutional mandate under Art. 44 of the Constitution of India.

(ii) To request the Government of India to have a fresh look at Art. 44.

(iii) The Court seeks information as to the steps so far taken by the Government in the matter of implementing the Directive in Art. 44, ignoring the observations of the Courts since 1985. Such directions for information as to facts have been issued by the Supreme Court in matters relating to various other provision in Part IV.89

So far question of implementation of Art. 44 by the judiciary is concerned, it may be submitted, it is not first time that Supreme used its power in Sarla Mudgal case Under the Constitution of India the Supreme Court, at times, has remedied the inaction of the government to implement the various directive principles in Art. 38, 39, 39-A, 41, 42, 43 by issuing appropriate direction.\textsuperscript{90}

\textbf{However in \textit{Lilly Thomas v Union of India}.}\textsuperscript{91} The Court Clarified and reiterated that the Supreme Court has never issued directions for the codification of various personal laws into a uniform civil code-Judges have from time to time only expressed their views in the facts and circumstances of cases before them.

The appeal Court, it seems, was very much sensitive to Muslims opinion and in order to allay all apprehension in the mind. Thus it observed:

Learned counsel appearing on behalf of the Jamat-e-Ulema Hind and learned counsel appearing on behalf of the Muslim Personal Law Board have rightly argued that this 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. This Court has time and again reiterated the position that directives, as detailed in Part

\textsuperscript{90} \textit{Comptroller v. Jagannathan}, AIR 1987 SC 537.
\textit{Bandhua v. Union of India}, AIR 1984 SC 802.

\textsuperscript{91} (2000) 6 S.C.C. 224.
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 proper to reiterate that this Court had not issued any direction 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.

93. (1973) 4 SCC 225.
Learned Additional Solicitor General appearing for the respondents has submitted that the Government of India did not intend to take any action in this regard on the basis of the judgment alone.

Mr. Justice Sagir Ahmed observed with reference to Sarla Mudgal. That I also agree with brother Sethi, J. that any direction for the enforcement of Article 44 of the Constitution could not have been issued by only one of the Judges in Sarla-Mudgal case. In fact, Sarla Mudgal case\textsuperscript{95} was considered by this Court in Ahmedabad Women-Action Group (AWAG) v. Union of India\textsuperscript{96} and it was held that the question regarding the desirability of enacting a uniform civil code did not directly arise in Sarla Mudgal. I have already reproduced the order of this Court passed in Sarla Mudgal case on 23-4-1990 in which it was clearly set out that the learned counsel appearing in that case had, after taking instructions, stated that the prayers were limited to a single relief, namely, a declaration that where a non-Muslim male gets converted to the Muslim faith without any real change of belief and merely with a view to avoid any earlier marriage or to enter into a second marriage, any marriage entered into by him after conversion would be void.

These affidavits and the statement made on behalf of the Union of India should clearly dispel notions harboured by the Jamat-e-Ulema Hind and the Muslim Personal Law Board. I am also of the opinion, concurring with brother Sethi, J., that this

\textsuperscript{95} Sarla Mudgal President, Kalyani V. Union of India (1995) 3 SCC 635. 1995 SCC (Cri) 569.

\textsuperscript{96} (1997) 3 SCC 573

Ed : Para 7 above.
Court in Sarla Mudgal case had not issued any DIRECTION for the enactment of a common civil code.

However Mr. Justice Sethi was of the view that Islam should not be given a narrow concept. He lordship, thus, opined The grievance that the judgment of the Court amounts to violation of the 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 solemnised 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 solemnised by a Hindu during the subsistence of a first marriage is an offence punishable 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 raised 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 book Mohammedan law, Tagore Law Lectures, 4th Edn., Vol. I 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 which it attained its wonderful development marked its position as one of the most important Judicial systems of the civilised 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 practising 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.

Infact this Judgement has confused the issue of codification on the one hand the trend of Judicial response has been encouraging for the environment of U.C.C. on the other hand the court has taken an U-turn in this case on the one hand we find that the directive Principles of state policy are Fundamental in the governance of the country and that every Fundamental Right should be interpreted in the light of directive principle This Judgement not only Negativates the other Judgements of the courts in this regards but also is against the sprit of the constitution. specially after forty second ammendment Act. Commenting upon this case Prof. Virendra Kumar says :

But the decision of the Supreme Court in Lily Thomas tends to dilute this stimulus. This has been done at lest in two substantial respects. One is by circumscribing the ambit of the
decision in Sarla Mudgal. The bench led by Kuldip Singh, J., (R.M. Sahai, J., concurring) took the opportunity to make the state aware of the issue that could legitimately be resolved through the enactment of a uniform civil code. In the absence of such a code, the courts are unwittingly sent to search solutions by making a roving inquiry into the plethora of case, law. In limiting the ambit of Sarla Mudgal, Saghir Ahmad, J., drew support by citing the observation of the Supreme Court in Ahmedabad Women Action Group and Others v. Union of India,\textsuperscript{97} in which it was held that the question regarding the desirability of enacting a uniform civil code did not arise in that case.\textsuperscript{98} Likewise, the reading of Mr. Justice Sethi of Sarla Mudgal is that the Supreme Court in that case "has not issued any directions for the codification of the Common Civil Code and the judges constituting different Benches had only expressed their different views in the light of facts and circumstances of those cases."\textsuperscript{99} By implication all this-means that the issue of directing the state about the enactment of such a code did not arise directly as such, and therefore, whatever was said and done in that case was only obiter-somthing just said in the passing.

Here a short comment is in order. The issue of desirability of enacting a uniform civil code, or for that matter any code, is rarely, if ever, can arise before the court. Such a question arises only indirectly in a certain context. This, in fact, is a vital difference between purely legislative activity on the one hand

\textsuperscript{97} (1997) 3 SCC 573.
\textsuperscript{98} Supra note 1 at 190.
\textsuperscript{99} Id. at 201.
and judicial activity on the other. In the case in hand before the court the context was presented by the patent conflict of personal laws that could not be satisfactorily resolved except through an appropriate legislative action. It was this context that led the bench of the Supreme Court in Sarla Mudgal to remind the state of what is envisaged by the directive contained in Article 44 of the Constitution.

Another way of limiting Sarla Mudgal's impact was to attach crucial significance to the two affidavits filed on behalf of the Government of India before the Supreme Court. One affidavit was filed on 30th, of August, 1996, and the other supplementary affidavit on December 5, 1996. In these affidavits, "it has been stated that the government would take steps to make a uniform code only if the communities which desire such a code approach the government and take initiative in the matter." In support of the affidavits, the Government of India had also annexed a copy of the speech made by Dr. B.R. Ambedkar in the Constituent Assembly on December 2, 1948, while discussing the position of common civil code. Dr. Ambedkar is stated to have said:

I should also like to point out that all that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. It is only giving a power. Therefore, no one need be apprehensive of the fact that if the State has the power the State will immediately proceed to execute

100. Id. at 190, Per Saghir Ahmad, J.
101. Ibid.
or enforce that power in a manner that may found
to be objectionable by the Muslims or by the
Christians or by any other community in India.

Notwithstanding the position taken by the Government
through their affidavits, one may ask: 'Is this the role of the state
in the matters of social reforms?' 'Is this the endeavour of the
state to secure to its citizens a uniform civil code throughout the
territory of India? The legislative history of the Hindu Codes of
1955-56 is a refreshing history of the initiative taken by the state.
The state had not merely codified the hitherto uncodified law
but also reformed it in several significant respects. For
ameliorating the position of women, as if by stroke of a pen, it
introduced monogamy amongst all Hindus - the 'Hindu' being used
in a wider sense so as to include within its ambit not merely Hindus
in the traditional sense, that is those who believe in the Hindu
but also the Buddhists, Sikhs, Jains, Brahmosamjists, Aryasmajists,
and soon. Moreover, in a developing society like India, law is
being used as a powerful instrument of social change. State is
entrusted with the responsibility take initiative to fulfil
constitutional directives. Here again, the state is used a wider sense
that includes not only the Legislature and the Executive, but also
the Judiciary.

In the light of this background, we may ask: 'what does the
statement made by Dr. Ambedkas in the Constituent Assembly
(as abstracted above) mean? In our view, it simply implies that,
while exercising the power to legislate, the shall not act in haste
and pay due regard to religious susceptibilities of all the
communities in India. This it would do by attempting to 'reconcile'
their sentiments. Even otherwise too, by acting on the first principle of constitutionalism, the state, in the exercise of its legislative powers, is obliged to take into account all the relevant factors, and not just act on the basis of one isolated observation made in a judgement.\textsuperscript{102}

One of the critical questions to be raised, especially in view of certain statements made by the Supreme Court in Sarla Mudgal, is this, 'Whether the court is competent to draw attention of the state or otherwise issue any direction to the state to fulfil certain constitutional commitments? The bench of the court in Lily Thomas seems to be clearly of the view that the Supreme Court has "no power to give directions for the enforcement of directive principles of state policy as detailed in chapter IV (sic) of the Constitution which includes Article 44.\textsuperscript{103} In our view, however, this issue needs to be addressed particularly in relation to the very intrinsic nature of the directives contained in Part IV of the Constitution which, though "not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.\textsuperscript{104} This non-enforceability aspect of the directives in 'any court' should

\textsuperscript{102.} See, per Saghir Ahmad, J., When he, as also pointed out by Sethi, J., takes note of the statement made by ASG appearing for the respondent before the Supreme Court to the effect that "Govt. of India is not intend to take any action in this regard on the basis of that judgment alone." Id. at 190.

\textsuperscript{103.} Id. at 200, per Sethi, J.

\textsuperscript{104.} Constitution of India, art. 37.
not dilute their significance and status. Any comparison on this count with fundamental rights contained in part III of the Constitution is misplaced. Infact, a peep into the constitutional history of India would amply show that both fundamental rights and directive principles of state policy "proceed on the basis of human rights." Both have "developed as a common demand products of the national and social revolution of their almost inseparable intertwining, and of the character of Indian politics itself.  

Broadly speaking, enforceable rights include personal or individual rights, also termed as civil or political rights; whereas social and economic rights are classified as non-enforceable, because by their very nature such rights are not amenable to legal processes of the court. For example, an equal right of men and women to an adequate means of livelihood, the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure, and raising the level of health and nutrition are not matters for compliance with the writ of a court. This division of rights between enforceable and

105. Cf. Supra note 1 at 200, per Sethi, J. "This 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."


107. Ibid.

108. See, per Chandrachud, J. (as he then was) in Kesavananda Bharati, supra note 68, at 1991 (SCR).
non-enforceable "does not bear on their relative importance."\(^{109}\) Bhagwati, J. (dissenting) has very succinctly stated in Minerva Mill.\(^{110}\)

The law may provide mechanism for enforcement of the obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of the (legal) mechanism of enforcement.

We wish to carry this point a little further. The importance of enforceability provision cannot be denied, because it accentuates accountability, which, in turn, ensures implementation. From this standpoint, does it mean that 'directives' are placed in a deactivated position? To this the answer is clearly in the negative. For this there is a two-fold explanation. One, that the enforcement of the directives is left to the initiative of the state, so that, commensurate to the resources it could determine the order of its priorities both in time and space.\(^{111}\)

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109. Ibid.

110. Supra note 68, at 1849. In this he derives support from the observations of Professor A.L. Goodhart "I have always argued that if a principle is recognised as binding on the legislature then it can be correctly described as a legal rule even if there is no court that can enforce it. Thus, most of Dicey's book on the British Constitution is concerned with certain general principles which Parliament recognises as binding on it."

111. See, the observations made by the Planning Commission: "The non-justiciability clause only provides that the infant state shall not be immediately called upon to account for fulfilling the new obligations laid upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them." Cited in Minerva Mills, id. at 1846.
Two, that the voice of the state is, in fact, the culmination of the voice of the people who are an integral part of the politically organised society.\textsuperscript{112}

In this background, we now turn again to the issue of competency of the court to direct the state to fulfil the directive contained in article 44 of the constitution. In this respect, on one count we have already stated that the obligation of the state under article 44 also includes the obligation of the judiciary 'to secure a uniform civil code' for the citizen of India.\textsuperscript{113} On another count, it is again the duty of the Supreme Court to administer justice not only between the parties before it, but to go much beyond that as an ultimate repository of the Constitution. Under article 141 of the Constitution, the Supreme Court is obliged to declare 'the law'. But this declaration of the law is not an ordinary or a general judicial function at the level of the highest court of the land, It is a very special function, needing constantly the fuller and fuller exploration and exploitation of constitutional values.\textsuperscript{114} It is indeed erroneous to think that to promote constitutional values is the monopoly of the legislature and the executive. By virtue of the provision of article 141, the Supreme Court is equally


\textsuperscript{113} Ibid.

committed to the conservation and furtherance of constitutional values by expounding the Constitution creatively.\textsuperscript{115} By the Forty-second and Forty-fourth Amendments of the Constitution, whereby a new provision-article 139A - was added, the law declaring function of the Supreme Court received a further impetus.\textsuperscript{116} Now the Supreme Court even on its own motion, can take cognisance of all cases together which are pending before the Supreme Court and one or more High Courts, or before two or more High Court if it were of the opinion that they involved substantial question of law of general importance.

\textsuperscript{115} Cf. In \textit{Maharshi Avadhesh V. Union of India}, 1994 Supp. (I) SCC 713, the Supreme Court had specifically declined to issue a writ directing the respondents to consider the question of enacting a common civil code for all citizens of India holding that the issue raised being a matter of policy, it was for the legislature to take effective steps as the court cannot legislate. Cited with approval in Supra note I, per Sethi, J., at 199.

\textsuperscript{116} Under the cumulative effect of the two constitutional amendments, clause (1) of article 139A provides: "Where cases involving substantially the same questions of law are pending before the Supreme Court and one or more High Courts, or before two or more High Courts and the Supreme Court is satisfied on its own motion or on an application made by the Attorney-General of India, or by a party to any such case that such case that such questions are substantial questions of general importance, the Supreme Court may withdraw the case or cases pending before the High Court or the High Courts and dispose of all the cases itself." A proviso added to this clause requires that, after determining such a case, the Supreme Court is to return that withdrawn case along with its judgement to the High Court concerned.
The Supreme Court need not be apologetic and say that 'we do not make law, we merely interpret law.'\textsuperscript{117} If in the administration of justice in a certain given situation justice is not met squarely by the existing law the same is tended to be covered creatively by the court through the exercise, of its interpretative power. The effect of this exercise results into, what is termed, and accepted as 'judicial legislation'. However, in certain other situations, where through interpretative process, it is either too difficult to mould the existing provisions of law, or it is not possible to break new grounds to meet the ends of justice, it may very well direct the state to make law in order to give effect to the desired values enshrined in the Constitution.

It is now more than a decade and a half ago, the apex court emphasised the 'compulsive need' for enacting a unified civil code.\textsuperscript{118} It did so for three main reasons: one, "the totally unsatisfactory state of affairs" to deal with the situation created by sham conversions;\textsuperscript{119} two, the "piecemeal attempts:" by the courts are no substitute for the comprehensive code because justice to all is far more satisfactory way of dispensing justice than justice

\textsuperscript{117} Cf. Supra note 1 at 196, per Sethi, J., ".....It is settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgement because concededly the Court does not legislate but only give an interpretation to an existing law. We do not agree with the argument that the second marriage by a convert male Muslim has been made offence only by judicial pronouncement. The judgement has only interpreted the existing law after taking into consideration various aspects argued at length before the Bench which pronounced the judgement."

\textsuperscript{118} Supra note 2 at 653.

from case to case\textsuperscript{120} three a unified code is considered necessary in bringing about "national integration.\textsuperscript{121}

In Sarla Mudgal, the bench of the Supreme Court tried to awaken the government to make a move towards the realisation of the constitutional directive relating to the enactment of a common code. It did not say that the time was not yet ripe to take up this issue. Rather lamentingly, the court observed that "the, pattern of debate even today is the same as was voiced forcefully by the members of the minority community in the Constituent Assembly.\textsuperscript{122} On the one hand it is argued that implementation of the directive contained in article 44 of the Constitution would cause "dissatisfaction and disintegration" the force of this plea is counteracted on the other hand by saying that its non-implementation "amounts to grave failure of Indian democracy.\textsuperscript{123} The same pattern of debate is carried forward in Lily Thomas when it is state that "enactment of a uniform code though desirable, may be counter productive."\textsuperscript{124} Although what is considered desirable cannot be termed counter-productive, else that would cease to be desirable. But why do the courts continue to subscribe to this viewpoint? Perhaps on grounds of religious susceptibilities? It is precisely to meet such a social phenomenon.

\begin{itemize}
  \item \textsuperscript{120} See, \textit{Jordan Diengdeh v. S.S. Chopra} (1985) 3 SCC 62, per Chinnappa Reddy, J.
  \item \textsuperscript{121} See, Supra note 2 at 652.
  \item \textsuperscript{122} Id. at 651 per Sahai, J. (concurring).
  \item \textsuperscript{123} Ibid.
  \item \textsuperscript{124} Supra note 1 at 190, per Saghir Ahmad, J. citing \textit{Pannalal Bansilal Pitti Ors. v. State of A.P.}
\end{itemize}
Sarla Mudgal suggests a strategy in terms of starting reform through the process of rationalisation. Abolition of polygamy by emphasising the value of monogamy is the first count where attention is urgently needed. The second count relates to restraining the unrestricted unilateral power of the Muslim husband to divorce his wife. Such a suggestion of reforming the Muslim personal law from within is not likely to be resented on grounds of religious sentiments, because such like changes have already been initiated in very many Islamic countries. Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the former Soviet Union are, for instance, some of the Muslim countries where the practice of polygamy has been either totally prohibited or severely restricted. Sethi, J., in Lily Thomas traces the genesis of the "progressive outlook" relating to monogamy in the interstices of Islamic law itself.

The concept of Muslim Law is based upon the edifice of Shariat Muslim law as traditionally interpreted and applied in India permits more than one marriage during the subsistence of one and another through capacity to do justice between co-wives in law is condition precedent. Even under the Muslim Law plurality of marriages is not unconditionally conferred upon the

125. Supra note 2 at 652.

126. Such a reformatory measure is in line with the development that has already taken place in personal law of other communities, including the Christians, Parsees, and Hindus. For bigamous marriage has been made punishable amongst the Christians by the Act (XV 372 of Parsees by the Act (III of 1936), and Hindus, Sikhs, Buddhists and Jains by the Act (XXV of 855).

127. Supra note 1 at 197.
husband. It would, therefore, be doing injustice to Islamic Law to urge that the convert is entitled to practice bigamy notwithstanding the continuance of his marriage under the law to which he belonged before conversion.

Otherwise also, reforms in the realm of personal laws in India through, statutory intervention has a fairly long history. The Supreme Court in Sarla Mudgal has even attempted to outline the sequence of events showing how gradually the principles of personal law based on the tenets of various religions were superseded and streamlined. In the realm of Muslim personal law particularly, for instance, apostasy from Islam of either party to a marriage once operated as a complete and immediate dissolution of marriage. But since the enactment of the Dissolution of Muslim Marriage Act (VIII of 1939), renunciation of Islam by a married Muslim woman, or her conversion to a faith other than Islam, does not by itself operate to dissolve her marriage. Commenting upon this development, Chagla, J. (as he then was), in Robasa Khanum categorically observed.

This is very clear and emphatic indication that the Indian legislature has departed from the rigor of the ancient Muslim law and has taken the more modern view that there is nothing to prevent a happy marriage notwithstanding the fact that the two parties to it professed different religions.

128. Supra note 2 at 652, per Sahai, J.
129. See, S.4 of the Act of 1939
130. See, Supra note 15.
Chagla, J. (as he then was) also unfolded the liberalised approach of the Shariat Act (XXVI of 1937) when he pointed out that the rule of decision in various cases enumerated in section 2 of the said Act, which includes marriage and dissolution of marriage, shall be that the Muslim personal law apply only where the parties are Mulims. In other words, according to the enlightened judge, the Act does not stipulate that the Muslim personal law shall necessarily apply when only one of the parties is a Muslim.\textsuperscript{131}

Thus, for doing substantial justice according to the clear rule of law in all such cases as are posted before the Supreme Court, it is indeed imperative to have a common civil code. In Sarla Mudgal, if on the one hand Sahai J. "considering the sensitivity and magnitude of the problem, both on the desirability of a uniform or common civil code and its feasibility,"\textsuperscript{132} suggests a strategy of rationalisation coupled with a mediate measure of Conversion of Religion Act, Kuldip Singh, J., on the other hand builds up a case for moving in that direction without any more delay by having "a fresh look" at Article 44 for its implementation. It is in the context of realising this objective, he seems' to have adopted a precipitative approach, directing the government to "file an affidavit" by the stipulated date, letting the court know the steps taken and efforts made towards moving in the direction of securing the uniform civil code for all its citizens. The present analysis finds that the bench of the Supreme Court in Lily Thomas tends to

\textsuperscript{131} Ibid.

\textsuperscript{132} Supra note 2 at 651.
dilute this emphasis by treating all such observations as if those were "incidentally made."\textsuperscript{133}

In 2003 in \textit{JOHN VALLAMATTOM AND Another}\textsuperscript{134} the then Chief Justice V.N. Khare J. took a very bold step towards U.C.C. Another two judges Mr. Justice S.B. Shinha and Mr. Justice Dr. A. R. Lakshmanan totally agreed with him in this context. The learned Chief J. observed, before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid perovision 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. Article 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 Article 25 and 26 of the Constitution. Any legislatin which brings succession and the like matters of secular character within the ambit of Article 25 and 26 is a suspect legislation, though it is doubtful whether the Americal doctrine of suspect legislation is followed in this country. In \textit{Sarla Mudgal v. Union of India}\textsuperscript{135} it was held that marriage succession

\textsuperscript{133} Id. at 200, per Sethi, J., by relying upon the observations made by the Supreme Courts in \textit{Maharshi Avadhesh v. Union of India}, 1994 Supp. (1) SCC 713 and \textit{Ahmedabad Women Action Group and others v. Union of India}, 1997 (3) SCC 573.

\textsuperscript{134} (2003) 6 SCC 611.

\textsuperscript{135} (1995) 3 SCC 635 : 1995 SCC (Cri.) 569.
and like matters of secular character cannot be brought within the gurantee 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 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 integratin by removing the contradictions based on ideologies. He held that Section 118 of the Act being unreasonable is arbitrary and discriminatory and, therefore, violative of Article 14 of the Constituion.

Elaborating the concept of uniformity in Personal Laws his lordship opined that India being a signatory to the Declaration on the Right to Development adopted by the World Conference on Human Rights and Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, the impugned provision may be judged on the basis thereof, Article I of the aforementioned Declaration reads thus:

"The right to development is and inalienable human right by virtue of which every human person and all people are entitled to participate in contribute to; and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedom can be fully realized.

The human right to development also implies the full realization of the right of people to self-determination, which includes subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."
Article 18 of the United Nations Covenant on Civil and Political Rights, 1966 provides as follows:

"Everyone shall have the right to freedom of thought, conscience and religion. The right shall include freedom to have or adopt a religion belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief or belief in worship, observance, practice and teaching.

Freedom to manifest ones' own religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.

The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process.

Albert Campus stated: "'The wheel turns, history changes.' Stability and change are the two sides of the same law-coin. In their pure form they are antagonistic poles; without stability the law becomes not a chart of conduct, but a game of chance: With only stability the law is as the still waters in which there is only stagnation and death.

Prof. Virendra Kumar is quite right when he says that in terms of legal propounding, in the author's respectful submission the Supreme Court's call for uniform civil code is not just an 'obiter' or an 'advice in abstraction', but a 'law in itself.' The author's justification for calling it as "the law" may be spelled out as under"
a) The call is not hypothetical. It is born out of a real-life situation. John Vallamattom shows that the absence of a uniform civil code has made the Christians suffer discrimination for more than fifty years. Jurisprudentially, the call emanating from the Supreme Court may be described as a 'byproduct of the administration of justice.' The core concern of the court was to do justice. In the process of doing justice, however, certain ideas, norms or directions came to be evolved that merit consideration for the resolution of conflict problems that are likely to follow in future. Such ideas, directions or norms ipso facto become 'the law'. In the instant case, it is evident from the fact that the call for uniform civil code is contained nowhere else in the entire judgement of Khare, CJI, but only in his concluding paragraph, which opens with the statement: "Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." [emphasis added] In the Indian context, the value of such a law can hardly be overemphasized.

b) The Supreme Court's call for a uniform civil code is born out of its dynamism. The determination of constitutionality of an impugned statute is indeed a dynamic process, Khare, CJI, demonstrates this dynamism when he says in the context of section 118 of the Act of 1925 that "the constitutionality of the impugned legislation is required to be considered [under article 13(1) of the Constitution] on the basis of laws existing on 26th January 1950, but while doing so the court is not precluded from talking into consideration the
subsequent events which have taken place thereafter.\textsuperscript{136} The approach is further expounded by adding "that the law although may be Constitutional when enacted but with the passage of time the same may be held to be unconstitutional in view of the changed situation."\textsuperscript{137} Accordingly, it is held that the mode of disposition of property as circumscribed by the conditions laid down in section 118 seems to be archaic and lost its preeminence. "The constitutionality of a provision will have to be judged keeping in view of interpretive changes of the statute effected by passage of time."\textsuperscript{138}

Khare, CJI, confirms and fortifies this approach by abstracting a statement from Justice Benjamin Cardozo that the "old order may change yielding place to new," albeit "the transition is not an easy process."\textsuperscript{139} To the same effect is cited Albert Campus that "stability and change are the two sides of the same law-coin."\textsuperscript{140} Bearing this dynamism in mind, Khare, CJI, evaluates the provision of section 118 of the Act of 1925 in the light of the Declaration on the Right to Development adopted by the World Conference on Human Rights, which prescribes that human right to development, inter alia, implies "the exercise of inalienable right to full sovereignty over their natural wealth and resources,"\textsuperscript{141} In his evaluation he also takes note of Article 18

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\bibitem{136} Supra note 1 at 395-96 (Para 33).
\bibitem{137} id at 396 (Para 33).
\bibitem{138} id at 395 (Para 28).
\bibitem{139} id. at 396 (Para 34).
\bibitem{140} Ibid (Para 35).
\bibitem{141} id at 395 (Para 30) abstracted from Article 1 of the declaration.
\end{thebibliography}
of the United Nations Covenant on Civil and Political Rights, 1966, which provides: 142

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief or belief in worship, observance, practice and teaching.

Freedom to manifest ones own religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect safety, order, health, or morals or the fundamental rights and freedom of others.

The thrust of the whole approach is that when the world is witnessing "a sea change" in social relations on grounds of equality, 143 the Supreme Court, while considering constitutionality of section 118 of the Act of 1925, "is entitled to take those facts into consideration." 144

142. id. at 395 (Para 31).
143. Khare, C.J.I., Specifically alludes to the right of equality of women Vis-a-Vis their male counterpart. Which is accepted all over the world. It would be immoral to discriminate a women on the ground of sex. In fact in India women's right to derive interest in a property by way of inheritance gift or bequeath is statutorily accepted by reason of Hindu succession Act. 1956 and other enactments. id. at 396 (Para 36).
144. Ibid.
c) The Supreme Court's call for a uniform civil code is apolitical in character. It is detached, dispassionate and impartial. It is not motivated by any such considerations as are usually associated with any particular religion, race, caste, sex, etc. It is born out of the issue of determining constitutionality of the provision of pre-constitutional statute on the touchstone of fundamental rights. In its examination, the court finds that the impugned provision has caused violent injury to the principle of equality as articulated under article 14 of the Constitution. It is arbitrary and unreasonable to treat Christians differently from the members belonging to other communities. It is out of this concern that the court has emerged the idea of prompting the state to enact a uniform civil code as already conceived by the Constitution under Article 44.

d) Constitutionally, the Supreme Court's call for a uniform civil code falls within the ambit of article 141 of the Constitution, because the function of the apex court is not just to decide a lis between the parties before it but to go beyond that as an ultimate repository of the Constitution. It is a very special function, at the level of the highest court of the land, needing constantly the fuller and fuller exploration and exploitation of constitutional values in accordance with the directives of the Constitution.145

e) The Supreme Court's call for a uniform civil code strengthens the rule of law. It is trite to say that dispensation of justice to all through the enactment of a uniform civil code would indeed be far more satisfactory way of doing justice than doing justice from case to case.

Thus, in the author's view, since the Supreme Court's call for a uniform civil code is conceived as 'a byproduct of the administration of justice', it squarely falls within the ambit of article 141 of the Constitution. Once this is realized, then under the doctrine of constitutionalism to which 'we, the people of India' are wedded, both the executive and the legislature are duty bound to take a due note of what the Supreme Court says or recommends. It is commonplace to state and remind that for all intents and puropses, the Constitution is - what the Supreme Court says it is!

It is therefore not correct to say that Supreme Court's opinion in John Vallamattom "is more ir. the nature of an advice than a command."\(^{146}\) It is "at best obiter dicta," that is, "an opinion entirely unnecessary for the decision of the case."\(^{147}\)

It is the command of the master of the Constitution and must be obeyed; respected and given effect to on every court. The judicial Padyatra clearly shows that in its New 'Awatar' of a Judicial Activism, the Judiciary has shown its, willingness to take the step from which the other two branches of the Government have refrained

\(^{147}\) Ibid.
from taking. This bold and inspiring Padyatra of Judiciary is the signal-Post from which every organ of the Government must sail its boat towards reaching the destination of UCC.

The activist role of Judiciary, will, nodoubt usher in the new thinking in the approach of the people of our country. We must not forget that our constitution is replica of modernity but the people how worke it are traditional in the nature our society has not freed it self from the clutches of the semi Feudalism. In the semi feudalsociety religon has a powerful hold on peopleminds. We have seen that religion has become the un-uniting force in our country. The politician or not in the society based on the dividing forces like religon and cost. Here the role of the master of the constitution, becomes very crucial in the nation building process. The opinion of the chief Justice of TamilNadu High Court Mr. Justice Markandey Katju is very much relevant here. The learned C.J. writes:

In modern times sociological jurisprudence permits an activist approach by the judiciary. Since all countries are facing tremendous social and economic problems it is only the activist approach which is acceptable today. It must be remembered that ultimately all organs of the State, the legislature, executive and judiciary, are servants of the people. Hence if they do not serve the people have the right to show them the door.

In the coming days the judiciary will have to play a crucial role in the people’s march to progress. This is because the higher judiciary is objectively so placed in the constitutional scheme that it is in a position to throw up modern scientific ideas. Due
to their independent constitutional status the judges can take a more panoramic and long-term view than other authorities. They do not have to face the next election, or worry about their vote banks, or the next law and order problem. 'Hence they are in a position to fearlessly put forward modern, progressive ideas which will be of great help to the people in their struggle for social and economic uplift.

This does not mean to say that the judges by themselves can bring about great social changes. It is the people alone who can do that. But the people need guidance and encouragement from intellectuals, and in the prevailing situation the intellectuals whose voice carries the greatest weight in society are the members of the higher judiciary, not because they are more intelligent than others but because of their status. Hence, a heavy responsibility lies on the shoulders of the higher judiciary to show the people the way out of their problems.

"It may be objected that the task of the judiciary is merely to decide cases, and not to act as statesmen. However, this is an outdated view belonging to the 19th century positivist jurisprudence of Bentham and Austin. Modern sociological jurisprudence permits judicial activism and calls on the judges to shoulder the responsibility of giving guidance to the nation, particularly if the political leadership becomes ineffective. The classic example of this is the historic decision of the U.S. Supreme Court in Brown v. Board of Education. 1954. Here what the U.S. Supreme Court did (in establishing racial equality) was what the U.S. Congress should really have done.
Another example is the legalization of contraception in Catholic Ireland by the Judiciary. Strictly speaking contraception should have been legalized there by the legislature, but the reality was that for any politician in Ireland to have supported such legalization of contraception, even in the most restricted circumstances, would have resulted in his political suicide. The Catholic Church would have exercised its enormous influence to oppose the move and condemn the politicians concerned.

Perhaps reform on this issue would never have come except for the famous decision of the Irish Supreme Court in Mary McGee v. The Attorney General and Revenue Commissioners (1974) LR. 284. Mrs. McGee had four children and was told by her doctors that another pregnancy would be risky for her life. She ordered some contraceptive jelly from England, but it was seized by the customs authorities on arrival from England. She challenged the law prohibiting import and use of contraception, and by a 4 to 1 majority the Irish Supreme Court declared the law unconstitutional.

The decision created a furore at that time, but as Justice Walsh subsequently said -It was seen by everybody, including the politicians, as having got the politicians off the hook."

In the last 20 years or so the Indian Supreme Court has been responsibly discharging its obligation to the nation by playing an activist role, and by squarely addressing itself to the social problems of the people. The vast expansion of the scope of Article 14 (the right to equality), Article 19, (the right to freedom) and Article 21 (the right to personal liberty) particularly
after Maneka Gandhi's case (AIR 1978 SC 597) is clear proof of this. To a poor country the judiciary too, must make a contribution in solving the country's problems, otherwise it will be living in an ivory tower unconnected with reality.

The judiciary must encourage scientific thinking and oppose unscientific and reactionary trends. In a vast country with people of different faiths, castes, etc., the judiciary must oppose attempts to divide the people on the basis of religion, caste, language, ethnic groups, etc., and must uphold secularism. Communalism and casteism weaken the nation and divert the attention of the people from the real problems which are basically economic.

In the author's opinion the judiciary should take the following steps:

1. It should declare backward, undemocratic and unscientific laws as unconstitutional on the ground that they are unreasonable or arbitrary.

2. In view of the fact that sociological jurisprudence permits a certain amount of legislative activity by the judiciary (see in this connection the Constitution Bench decision of the Indian Supreme Court in Sarojini Rarmaswamy v. Union of India. AIR 1992 SC 2219, in which in para 92 the observation of Lord Reid that the view that judges do not make law is a fairy tale, is quoted), the judiciary should make modern scientific and rational laws within the permissible limits.
(3) Where such modern legislation by the judiciary is not possible, the judiciary should make recommendations to the Legislature for enacting modern laws. Even if these recommendations are not accepted they will be widely publicized, and thus give encouragement and guidance to the people.