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Challenges between Personal Laws & Uniform Civil Code

Aditi Tiwari & Vinayak Tiwari

ABSTRACT

The aim of this research paper is to gain a deeper understanding into the legal standing of the various personal laws that co-exist in this country, whether or not they promote subjugation of certain members that follow those laws considering the major critique of personal laws is that they are highly oppressive towards women. The paper also delves into some of the major landmark judgements that have paved the long trail of ambiguity with regards to constitutional protection of personal laws by somewhat granting them immunity from the fundamental rights test. The paper also dives into the question of a Uniform Civil Code, studying whether the current socio-political conditions are conducive to implement it thus debating its practicality along with studying the problems a potential UCC would pose for the minority communities and whether it would truly tackle the long standing question of gender injustice within existing personal laws.

Keywords: fundamental rights, gender injustice, legality, minorities, subjugation, UCC

INTRODUCTION

Personal Laws are those set of laws or rules governing a specific group or community, largely based on religious precepts/ beliefs of that particular community. While historically personal laws dealt with all spheres as religion was the guiding force behind rules relating to crime, punishment, trade and commerce, etc, with the advent of the British Empire and their policy of 'non-interference' with matters they considered to be deeply interwoven with religion, they granted legislative immunity to certain matters (marriage, inheritance, among other traditional laws) and left the Hindu and Muslim communities to regulate their own affairs with religious texts personal to them. The private realm of household was protected from the colonial state. This is also construed through some major administrative policies of the British when looked at in retrospect over their time of rule in India- the Cornwallis code, establishment of mayor's court which distinguished jurisdiction and again left the Indians at their free will to settle their own disputes, among other policies.

The non-interference policy continued even after independence, with the Hindu and Mohammedan laws largely being retained. Demands started to echo for a Uniform Civil Code at the Constituent Assembly. Probably what seemed like a far-fetched political reality at the time, the UCC could only became a non-enforceable clause of the Constitution, putting a DPSP place in the form of Article 44 which puts 'a positive obligation' on the state to guarantee a UCC to its citizens. One step closer to uniformity for the reformation of the Hindu Laws in the form of the Hindu Code Bill, which resulted into multiple individual acts governing private matters like marriage, divorce, guardianship, adoption, etc., for the Hindu community and thus codified their laws. The laws also extended to certain other religious communities. What was felt at the time was that if the process of codifying the laws of Hindus succeeded, the other communities would follow and ask for a reconsideration of their own laws. But that did not manifest into reality. Over time, the tensions between religious groups only rose and they became unreceptive to any sort of reform, becoming rather protective of their identity as they felt it was under siege by state action.

OBJECTIVES

1) Understanding how personal laws promote subjugation and are inherently discriminatory,
2) Understanding the tussle between the legal and constitutional status of personal laws and Article 13,
3) Whether a Uniform Civil Code is the way forward- challenges before considering a nationwide UCC.

RESEARCH METHODOLOGY

The paper primarily relies on secondary data through an extensive review of journal articles, newspaper articles, law journals, reports- the Law commission 207th report on Hindu intestate succession and its consultation paper on Family Law reforms from the year 2018, where they recommended that a UCC was neither necessary nor desirable at the present state. The paper has also referred to various case laws on the topic to gain a better understanding of the legality of personal laws along with certain central legislations regarding Hindu and Mohammedan law.

ANALYSIS

PERSONAL LAWS PROMOTE SUBJUGATION

1. Hindu Personal Laws are laws governing marriage, divorce, adoption, inheritance and parcenery rights among the Hindu religious community. The major sources that form the base of Hindu Laws are the ancient religious texts-the Vedas, Manusmriti, the Upanishads, among other texts. Another major source where Hindu law has largely derived its authority from and has evolved is the concept of Dharma, which essentially means adherence to one's duty. As a concept, it is highly religious and morally subjective having different connotations to different people at different points in time. Evidently, the law has evolved through centuries because Hinduism in itself is the oldest active religion in the world. It would not be surprising to say the least that by the virtue of it being a religion that goes back so many years, many regressive customs and traditions have come to become a part of it which now remain an inseparable part of the Hindu personal law, both in form of codified rules and uncodified customs that all its members seem to observe unequivocally. It would also be fair to say that many key aspects of the law may not have been sanctioned by the religious texts at all, rather it would have been sanctioned by the patriarchal norms conveniently made by the elite Brahminical men in power at the time, due to the problematic social hierarchy again brought into existence, only this time those were

endorsed in the ancient texts (Vedic scriptures), to be transformed over the years by ruling elites. Coming specifically to the codified aspect of the law, there are several smaller acts each dealing with a specific domain of private law, that were passed in succession of one another as opposed to a larger one single comprehensive act covering all facets of private affairs between individuals. The Hindu Personal Laws not only apply to Hindus, but also to those Sikhs, Jains, Buddhists, among other communities, as defined in the various acts. The first major flaw that comes across is that there is no specific definition of who is a Hindu, either from the religious texts or the statutes itself. This leads to a negative definition of the term Hindu that is the personal law will not apply to anyone who is a Christian, Muslim, Jew, or Parsi, since they are governed by their own laws.

The Hindu Succession Act, 1956, deals with succession relating to intestate or unwilled property among the Hindus as defined by the law. Although the act was amended in 2005 to bring parity between male and female successors, giving daughters equal rights as the sons of the deceased in the joint family property, some problems still persist. There is a significant difference between the way the property of a male Hindu's who dies intestate is distributed as opposed to a female Hindu who dies intestate. **Sections 15 and 16** of the act deals with female intestate succession and define the order in which property of the deceased shall be distributed by making a hierarchy of the rightful heirs, dividing them into 2 classes of heirs. It also distinguishes between the kinds of property, the first being self-acquired ones and the other being the ones inherited from the husband, mother or father, etc. Sec 15 deals with succession of self-acquired property, stipulating that the property shall first go the children of the deceased, if the children are pre deceased then the children of such predeceased sons/daughter, the husband and then his heirs, then lastly heirs of the father and then heirs of the mother. This differs from the male intestate succession rule as it first passes on the property to the children, then the widow, then the mother, and then grandchildren.

To truly understand the discriminatory nature of the provision, the case of **Omprakash & Ors vs Radhacharan & Ors** [1]comes to mind. The case deals with the dispute of succession of property of one Narayani Devi who was a widow and died intestate. The woman was widowed within three months of her marriage and was thrown out of her matrimonial home. Neither did they lend any support to her nor enquired about her for 42 years. She was eventually educated by her parents and gained a well-paid job.

[1] Arising out of Special Leave Petition (Civil) No. 460 of 2008

Ramkishori, mother of Narayani, filed an application for grant of succession certificate in terms of Section 372 of the Indian Succession Act to get succession of her self-acquired property. Respondents (brothers of the deceased's husband) also filed a similar application. The judges held that sentiments and sympathy cannot be a guiding principle to determine the interpretation of law and it should not be interpreted in a manner that was not envisaged by the legislature. The Supreme Court ruled that the HSA specifically mentioned that the self- acquired properties will pass on to the husband's heirs if the deceased did not have any children and husband.

It is argued by many that the court did not attempt to understand what the legislature had intended, which was to send the property back to the source, considering all the money was spent by the deceased's family to educate her and therefore they were the rightful heirs of the property. The succession laws are about not only who should be entitled to the property, but also who should be disentitled. [2]The entire line of succession in Hindu law is discriminatory, considering the property of a deceased woman in absence of other heirs goes to the heirs of husband rather than the parents of the woman or the siblings. The property inherited from her father or mother shall devolve upon the heirs of the father first, and in their absence, the heirs of the mother (not even taking into account a possible situation of a separation or divorce between the parents)[3]. The provisions reek of subtle sexism, are insensitive, and leave a lot to be desired. Although the Bombay HC tried to challenge this decision of the court in a 2012 case of **Mamta Dinesh Vakil vs Bansi S. Wadhwa,** where it declared Section 15 as discriminatory and *ultra vires* the constitution[4], since it is violative of Article 15 as it again discriminates on grounds of gender, but the legislature has yet passed any other law repealing the provision, despite recommendations from the Law commission (207th report).

Section 27 of the **Hindu Marriage Act, 1955** deals with the disposal of property at the time of the divorce which belong jointly to the husband and wife at the time of marriage. A cursory reading of the section would give the basic idea that it is extremely narrow, and many times there have been conflicting decisions of the High Courts in this regard as to how a property would be divided or what properties a woman would be entitled to considering the property would be in one party's name (the husband's) and the section makes no consideration for such a recurring situation. This problem is especially peculiar

[2] Ayushi Singhal, *Female Intestate Succession under Hindu Law*, Economic & Political Weekly March 12, 2016 vol lI no 11

[3] https://thewire.in/gender/personal-law-reform-gender

[4] Bom 1685: (2012) 6 Bom CR 767

to a country like India, considering after marriage, the assets may be purchased in the name of the husband with the wife making either an economic contribution to it or otherwise-sacrificing her career to look after the household, etc. Thus, it is yet another discriminatory narrow provision although there have been some attempts to read this provision widely to benefit women. But again, there are no attempts made by the legislature to repeal this provision or render it non-operational.

Under the **Hindu Minority and Guardianship Act of 1956, Section 6** of the act states that in case of a Hindu minor, who is a legitimate child, the natural guardianship vests with the father and then the mother, and unless the minor has completed five years of age, he/she shall stay with the mother. The clause (b) of the section states that only in case the child born is an illegitimate child, the natural guardian would first be the mother. Needless to say, the section clearly violates Article 14 as it confers natural guardianship on the child's father disregarding the mother. The provision needs to be made gender neutral as both parents must have an equal say in the matters of their child's welfare. This again highlights the patriarchal nature of the society where men evidently have a dominant position and the position of women is regarded as a 'caregiver' rather than a 'decision maker'.

2. The entire subject of the personal laws regarding Muslims pose a lot of unique challenges and difficulties seeing the current socio-political climate of the country with more and more voices raised for women empowerment and equal right. Muslim Personal Laws, in essence, are the provisions laid down by the **Muslim Personal Law (Shariat) Application Act,1937** with some important subjects under **Dissolution of Muslim Marriage Act, 1939**. Unlike, for example, Hindu Succession Act, 1926 which is for Hindus, Sikhs, Jains and Buddhists, the Shariat Act is exclusive to Muslims. Shariat is a form of un-codified guidelines primarily introduced by tribes in Arab regions before Islam was a religion was recognized. Overtime it went a lot of changes with dynasties and authorities making modifications to it to make it as suitable as the then-existing societies. It governs inheritance, marriage, charity and successions among Muslims. The furthest there has been any record of the rule of Muslim laws in Indian peninsula was in 1206, until and from this period in history, there had been multiple invasions of Muslim leaders and the rise of Muslim ruled Dynasties, like the Slave Dynasty, The Khilji Dynasty, The Lodi Dynasty and the Sur dynasty. In all of them the court of Shariat was in practise with the assistance of Muftis. The more influential, Mughal, the precedence of those law was followed until Aurangzeb ordered for a compilation and to codify the Muslim Laws. With the Regulating Act of 1772, the East India Company followed those codified laws of the

Quran with respect to Mohammedan Principles in cases involving Muslims, unless when Muslims wish that their case has to be heard and be decided according to Hindu Shastras. In 1937, the British Government passed the Shariat Act that had to be followed in all matters related to marriage, divorce, succession and inheritance among Muslims. The post-independence India was expected to bring some important changes due to the inclusion of features like The Fundamental Rights that guarantee there has to be no discrimination among the citizens, though the Shariat Act (Muslim Personal Laws) of 1937 passes and introduced by the British still prevailed in Indian Society.[5]

In more modern context, it is argued that the Act including Muslim Personal Laws are highly discriminating against women. Recently, majority of the debates are in favour of abolishing existing legal system. Financial independence and self- sustainability are important determinants when it comes to gender equality. Shariat Act provides that if there's a case where the parties are Muslims then the rules and guidelines for decision shall be Muslim Law provided the case involves one or more of the following matters: Intestate succession, special property of the females, Marriage, Dissolution of marriage, Maintenance, Dower, Guardianship, Gift, Trust and trust properties and Wakf.[6]

The Muslim law of succession and inheritance has driven its principles from four principal sources of Islamic Law viz. the holy Quran , the Sunna that is the practice of the Prophet Mohammad, the Qiya, an analogical deduction of what is good or bad in a certain situation according to principles laid down by God, Ijma, which is a consensus of learned men of a community deciding on a certain matter. The Shariat Act (MPL) of 1937 is applicable in both testamentary, where will is present, the Law is applied for the proper distribution of properties and non- testamentary succession, i.e. absence of any will. When a man dies, both son and daughter receive the share in property. However, the share of the daughter is generally half of the male. The reason being *Mehr,* which is an obligatory money or property received by a woman upon her *Nikah* or marriage. and can be received at both at the time of marriage or after dissolution of marriage or death of the husband. A wife without no child is entitled to receive a quarter share of property of her deceased husband, though with children, they are entitled to one-eighth the share of the husband's total property. In a case when there is more than one wife, the share may further diminish. In a more realistic sense, women holding properties was not widely acceptable in a rather-more

[5] Rahiman, Abdul, K.K. *"History of the Evolution of Muslim Personal Law in India"(*PDF). Journal of Dharma; Accessed on May 1 2020

[6] "A Muslim Woman's Right to Property in Islamic Law". Makaan. Accessed on May 1 2020

patriarchal society of India, and according to a research conducted by Faculty of Law, Jamia Milia Islamia in collaboration with National Commission of Women on *Discriminative and Derogatory Practices against women by Khap Panchayats, Shailashi Adalats and Kangaroo Courts in India: An Empirical Study in the States of Haryana, Uttar Pradesh (West), West Bengal & Rajasthan*, women are still expected and told to transfer or hand-over their rightful property to the male members of their families prior to their marriage.[7] The one crucial thing highlighted by this report was that, in rural Northern- India which was the epicentre of the research, either Muslim women were totally unaware of the inheritance right granted to them by Shariat Act or even if they knew, they would give up their rights due to the fear of souring relationship within their family. Patriarchal forces in the society were and still in-fact are far too powerful which when becomes a utility for the fundamentalist authorities in the society, suppress the voice of women not just because it potentially boosts their inflated male- egos but also to control the property rights. If we compared this current state of Muslim women to that during the life of the Prophet, the difference is appalling. There used to be much active participation of women in nascent Muslim society. Business women, jurists, religious leaders and even warriors. The contemporary perception of Muslim women mainly in India, being restricted to just household chores, is nothing but disheartening.[8]

Another very important talking point was the abolishment of Triple Talaq by the Indian Parliament in July, 2019 when it was made illegal. One of the two kinds of divorces in Islam is Talaq-e-Biddat, which in literal sense 'set free' and only the husbands could do it. It was put in by the British in Dissolution of Muslim Marriage Act of 1939, where they attempted to uplift the rights of Muslim women. This act contained, in detail, the provision for divorce and Triple Talaq was included, therefore it was among Muslims in India to dissolve their marriage through Triple Talaq. In **Marium vs. Md. Shamsi Alam, (1979)**[9], the husband uttered the word 'talaq' thrice and divorced her wife because she left him for his ignorance towards her health and well-being. However, he soon realised his mistake and revoked the divorce during iddat period. The Allahabad High Court judgement said that since the husband uttered the term 'thrice' in one breath, it would be considered to have been pronounced just once and that it was in 'ahsan' form it was revocable and also that since he already expressly revoked his divorce in time during iddat period, he mustn't

[7] Saadiya Suleman. "Muslim Personal Law and Gender Equality Concerns in India", "Advances in Social Science, Education and Humanities Research, Volume 162, International Conference on Law and Justice (ICLJ 2017)"; Accessed on April 30th 2020

[8] ibid

[9] AIR 1979 All 257

be serious about the divorce. So, the marriage wasn't ruled dissolved and the wife had to go live with him. This case highlighted that the court has wilfully interpreted the rules of the Muslim law liberally in order to not encourage instances where divorces are hasty and unconsidered. In **Rahmat Ullah vs. State of UP**[10]**,** Allahabad High Court clearly stated that a form of irrevocable divorce like Triple Talaq is unlawful this kind of talaq is not only in contradiction with the dictates of the holy Quran but is also violative of the provisions in the Constitution of India. In the famous case of **Shamim Ara v. state of U.P. & A.N.R. (2002)**[11] the apex Court of the country declared Triple-Talaq banned. The problem is not the talaq but of men not honouring the rights of women. Banning it would not change the reality of Muslim women at bit. However, the challenges which Muslim women face are not a result of talaq (triple or otherwise) but of the un- Islamic customs. Triple Talaq in itself is in contrary to the Shariah, therefore it is forbidden.

Dowry is also prohibited by Islam; it is demanded and is paid. The Woman and her family accept and incur the expenses of the marriage even when Islam put the responsibility on the head on the man. Islam prohibits any kind of harassment, mental or physical, at the time of divorce if that becomes absolutely necessary but women have to go through the opposite.[12]

PERSONAL LAWS V. ARTICLE 13

There evidently are far more discriminatory provisions than the ones mentioned above. Also, these form part of only the codified aspect of the personal law. There are far more regressive practices which have been disguised under the veil of customs and traditions used to enforce the same patriarchal norms which again people seem to be bound by unquestioned.

Article 13-judgements- There has been a long-standing tussle between the status of personal laws and the language of Article 13 of the constitution. The main question which is still somewhat open to interpretation is whether personal laws can fall within the ambit of 'laws in force' as given under Article 13. The judiciary has had varying stances over this question, which results into an additional point of debate- whether personal laws can be made subject to the part III test of the constitution, i.e., rendering them non-operational in case of violation of fundamental rights. The language of Article 13 is as follows-

[10] II (1994) DMC 64
[11] Appeal (crl.) 465 of 1996
[12] Supra note 7

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368

The judgement that started the long trail of ambiguity and opened a pandora's box with regards to the applicability of personal laws in Article 13 is the landmark 1952 judgement of the Bombay High Court in the case of **The State of Bombay vs Narasu Appa Mali.** [13]The case deals with the Bombay Prevention of Bigamous Hindu Marriages Act, 1946 which sought to render bigamous marriages void as well as criminalize the offence of bigamy. The petitioner challenged the validity of the said act on the grounds that it violated his Right to profess and practice any religion considering Hinduism sanctioned bigamy or polygamy, secondly it violates Article 14 because the act applies to Hindus alone and not to Muslims, even though Muslim personal laws permits polygamy and section 494 of the IPC which deals with this offence is not applicable to Muslims. Also, the impugned act made the offence of bigamy a non-compoundable cognizable offence and prescribed harsher punishment than Sec 494 which was applicable to Parsis and Christians. In this regard, the court held that it cannot possibly violate Article 25 since it is not an absolute, unlimited right and is subject to restrictions, one of them being that state can make any law that provides for a social reform and welfare- A25(2). What the state legislature had attempted to do was reform Hindu personal law considering marriage is looked at as a sacrament in the religion with it being indissoluble. As to why the law was not applicable to Mohammedan personal law was under the ambit of the legislature and thus a political argument, but the state was certainly wrong in marking a distinction between the two therefore violating A14. While the judgement dealt with many other such appeals, the only interesting thing worth noting for now is the exclusion of personal laws

13 AIR 1952 Bom 84

from the expression 'laws in force' from A13(1). The question actually emerged when it was contended that insofar both personal laws are considered in respect of polygamy, they would be void to the extent to which their provisions are inconsistent with the fundamental rights guaranteed by Part III, considering Muslim polygamy is void as it violates A15 on grounds of sex as it does not confer the same rights on a Muslim man and woman who are married. Prior to determining whether Muslim polygamy is unconstitutional, the court had to answer the question of whether it is law in the first place. The court ultimately decided that firstly personal laws differ from customs and could not include in the ambit of Article 13. It reasoned that firstly, the expression 'laws in force' only meant statutory laws, and for that it further takes the help of Article 372, which is the president's power to modify or adapt laws in order to bring it to parity with part III of the constitution, which could not have intended for personal laws to be in its ambit. Secondly, the court reasoned that personal laws derive their validity from their respective scriptural texts and not from the Legislature or other such competent authority. 'Laws' as defined under A 13(3) does not mean the same as 'laws in force' and customs and usages differ from personal laws. Surely, customs are principal sources in both Hindu and Mohammedan law, but majority of Hindu Law is largely covered by scriptural texts and to hold that it is based on customs and thus include it within Article 13 is an untenable position. Also, customs and usages cannot be equated to personal laws because the meaning of custom and usages as per definition of law under clause 3, if applied to clause 2 is not possible as state itself cannot make any custom or usage. Since customs and usage in personal laws are not enacted by the Legislature or other such competent authority, it is beyond the purview of Article 13.

The whole reasoning seems erroneous and untenable. It is an undeniable fact that to a large extent our personal laws are based on age old customs and traditions, some that have made their way to the religious texts, some which managed to become a part of it otherwise as a widely accepted practice among a community. Even if custom and usages differ from personal laws in their definitional technicalities, the basic points of argument remain the same- there are a large number of patriarchal, sexist, discriminatory practices that remain sanctioned either by the personal law, or the existing customs that remain unchallenged and are violative [14]of the most basic articles of the constitution-14, 15, 21, and should have been ideally been struck down. The basis of granting it immunity from judicial review on some technical incapacity of the legal definitions is abhorrent to say the least.

[14] *Reversing the Option Civil Codes and Personal Laws,* Economic and Political Weekly, May 18, 1996

This view of the Bombay High Court was further upheld in the case of **Sri Krishna Singh vs Mathura Ahir And Ors,** by the Supreme Court where they opined that Part III of the constitution does not touch upon the personal laws except in cases where it is altered or modified by a custom or abrogated by a statute.[15]

A case which turned out to be a mini victory in terms of doing away with regressive traditional practices was the 1996 judgement of **C. Masilamani Mudaliar & Ors vs The Idol of Sri**[16], where it was held that personal laws though derived from religious scriptures must be consistent with the constitution unless they become void within the meaning of Article 13, if they violate fundamental rights.

What seems like a short-lived achievement, the Supreme Court in the very next year in the case of **Ahmedabad Women Action Group ... vs Union of India** [17]. In this case, a number of different provisions across different personal laws were challenged on grounds of being discriminatory in nature. The court again upheld the Narasu judgement and opined that such contentions are best to be dealt with by the legislature, while giving no reasons as to why personal laws could not be subjected to the part III test.

The judgement of the Supreme Court in the case of **Shayara Bano v. Union of India[18],** which outlawed the discriminatory practice of triple talaq on the sole ground that it was not something which was essential to Islamic religion is a commendable step towards reforming personal laws but the court still did not dive into the question of conflict between personal laws and fundamental rights.

The most recent case in this regard that reopened the whole line of debate which the court has ducked for too long was the landmark 2018 Sabrimala judgement- **Indian Young Lawyers Association vs The State of Kerala**[19]**,** where the constitutional bench in a majority judgement of 4:1 essentially struck down the age old patriarchal custom sanctioned in the name of religious practices forbidding women between the ages of 10-50 from worshipping at the Sabrimala shrine on the grounds of it being unconstitutional as it was violative of right to freedom of religion as under Article 25 and it cannot be deemed to be an essential religious practice to exclude women from entering the temple. Also, it was held that the worshippers of Lord Ayyappa, the main deity of the shrine, are Hindus and do not constitute a separate religious denomination and are therefore

[15] 1980 AIR 707
[16] 1996 AIR 1697
[17] WRIT PETITION (CIVIL) NO. 196 OF 1996
[18] AIR 2017 SC 609
[19] WRIT PETITION (CIVIL) NO. 373 OF 2006

subject to Article 25(2)- being subject to the state's social reform, even when considering the temple's denominational freedom under Article 26. Leaving aside the rationale for the judgement, what is rather noteworthy is Justice Chandrachud's observation on the Narasu judgement, where it was covertly overruled on the point of customs and usages being immune from judicial review, where he stated it rather takes away the primacy of the constitution, and detracts it from the transformative nature of the constitution as the judgement is based on false premises. Irrespective of the source from which a practice originally emerged, it is the court's duty to deny it protection if it takes away equality in any shape or form. The judgement held that there was no difference between 'laws', 'laws in force' and consequently personal laws do come under both these categories; also, it would be difficult to ascertain the difference between a custom and personal law since they are so intrinsically mixed up.

Clearly, the Supreme court has had varying stances on the same point of law which fly in the face of the Constitution. Not only is the 68-year-old judgement of the Bombay HC still judicially valid and upheld, it's been concurred with by various other HC's as well along with the apex court, giving regressive practices legal protection in the guise of customs and religions. Should denotational technicalities really be taken into consideration while deciding on more pressing issues of law? Have the courts not considered once that customs, even that indispensable to religion are void if they undermine equality? For all the cries and hoots of our constitution being a transformative one capable of mending itself with the changing times bring us closer to moral justice, the decisions of the courts in this regard are clearly a kick against it and remind us as to why people are still bound by the retrogressive conventions and why it took so long to reach judgements like the triple talaq or Sabrimala. If our goal is to truly reach equality before law, it is pertinent that judgements like Narasu are explicitly overruled so that those who still back these practices that curtail gender rights to say the least do not take refuge any longer. But at least the Sabrimala judgement is a step closer to that. Here's hoping there is still a redemptive potential for change, where the question is finally settled for once and all.

CHALLENEGES OF A UNIFORM CIVIL CODE

1. **Absence of consensus**- Article 44 of the Constitution, being an unenforceable directive principle that it is, puts a positive obligation on the state to provide for a Uniform Civil Code. After over six decades of deliberation, the code has neither been developed nor implemented. Even a rough blueprint for a probable UCC has never been considered to be made. The status quo remains largely due to the fact that there an absolute lack of consensus because there is no concrete conception of what a model UCC should contain.

Neither the constitution provides for a timeframe for A44 to be implemented nor it contains any such procedure for it to be drafted. It does not even have mentions of UCC apart from Article 44 and Article 372, previously mentioned, which talks about President's power to repeal/modify laws made by a competent authority, is not intended to include personal laws within its realm. The 6th schedule of the constitution also vests some exclusive law-making powers with the north-eastern states with regards to subjects like customs and family matters [20](divorce, marriage, etc). Articles 371a and g, which deals with special provisions for states of Nagaland and Mizoram explicitly prohibit any parliamentary interference on their customary laws and procedure, excluding them from applicability of a central legislative act which could possibly be a UCC in the future, since there are constitutional provisions granting them protection. All these provisions clearly point to the fact that even a potential UCC shall not be made applicable country wide.

2. **Uniformity not a promise for gender justice-** Since there is no ideal conception of what a UCC should contain, the proponents pushing for its implementation do it on the grounds that it will bring in greater gender justice, something which the current personal laws fail to account for. Again, this idealistic notion stems from the fact that a potential UCC could just be a modified version of Hindu personal law because it does not have discriminatory practices on the surface of it at least-those such as polygamy, and because historically also only Hindu personal laws have ever been modified with other personal laws of different communities remaining untouched by reform. It is a rather far-fetched assumption that a potential UCC would only borrow the positive aspects from all personal laws combining them together and it would not be ridden with any flaws-any blatantly sexist practices and thus remove any inequalities between men and women. Over the years, the narrative of the personal law debate has also shifted from that of injustice within communities to one of tensions between the majority and minority groups[21]. The current political climate has also contributed to this phenomenon, validating ideals of one religious' community over the others. Thus, it is not surprising considering that minority groups feel threatened that their identity is under siege and are therefore vehemently protesting the idea of UCC. The focus has shifted from inequalities within the personal laws to correcting the difference among different personal laws.

[20] Alok Prasanna Kumar, *Uniform Civil Code A Heedless Quest?* Economic & Political Weekly, June 18, Vol II no 25
[21] Shalina A Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code*, Indiana Law Journal, Vol 83:695

Taking some lessons from the Goa model, their uniform law system is again not completely free of flaws. The Portuguese civil code continues to apply to date, remaining largely unamended and unrepealed. For example, marriage laws differ for Catholics and people of other religions, divorce also differs depending under what law people were married under, for there is no separation of church from the state. [22]Thus, the law does offer some concession to one religious community-in this case the Catholics. The code also recognizes customs and usages of the Hindus, thus allowing limited polygamy. Also, there is one such discriminatory provision which is gender biased and equally applicable among all communities- one of owning matrimonial property. While the provision on the face of it seems gender neutral because it provides for the options of either jointly or individually holding whatever properties they both acquire before or after marriage, as decided between the parties, it actually gives the decision making power in the hands of the husband due to unequal power relations within a marriage[23]. Also, despite this seemingly progressive provision, it has made almost no impact on the cases of domestic violence.

Also, while personal laws are gender unjust, they are not gender unjust in the same way. Hindu Laws prohibit polygamy, therefore providing for no legal obligation for any monetary benefit or otherwise, because marriage is viewed as a sacrament; while Muslim laws consider marriage a contract and do recognize polygamy and provide for equality with regards to finances, maintenance and equal love and respect. That's just one example of how personal laws differ even in inherently private matters like marriage. Then how can one decide on a common ground and determine which provisions are to be retained and which ones to let go of when deciding upon a uniform code. It is a far better call to weed out discriminatory provisions from each personal law rather than advocating for uniformity of laws applicable across all religions, which are equally unjust. [24]

3. **Socio-political conditions not conducive to a UCC-** The people who demand that the state forms enforce the civil code to fight the prejudice of various forms of discrimination that has been allowed by the personal laws since the constitution and its Part III came into being. So, to ask this question, is UCC the solution to everything the personal laws can't or not let solved, a number of things and factors are needed to look upon.

   Uniformity Does Not Guarantee Equality

   Proponents of the Uniform Civil Code often argue that since most of the civil laws are uniform in nature and there is a uniform criminal code, personal laws shouldn't be a thing

[22] https://thewire.in/law/goas-uniform-civil-code-is-not-the-greatest-model-to-follow
[23] Ibid.
[24] Supra note 20.

since the abundance of patriarchal and gender discriminatory provisions in them are directly inconsistent to the part III of the constitution of India. The the word 'uniform civil code' is tossed around, in a certain way that it presents an interpretation of uniformity, the same as equality. Laws can be uniformly applicable to all either in respecting women's rights or they can also be uniformly applicable to all communities in disregarding women's rights. There can be uniformity in discrimination too.

Interference in 'Personal' Matters by the Government

The constitution with Article 25 and Article 26 gave the citizens the autonomy to profess, practice and propagate their own religion with a condition that public order, health and morality should be kept in mind in doing so. Now when the state comes up with a civil code and it any way with compulsion attempts to put the freedom of religion in jeopardy, that would be deemed unconstitutional. The context is simple and crucial. India cannot afford to go through a crisis of democracy since it is already way behind many powerful democracies in terms of political freedom. In a slightly controversial point of view, the UCC can be looked up as a tool by a Hindu Political party to remove the privileges the minority-men have with their patriarchal and discriminating laws. But is the majority law or Hindu law uniform? Back in 1955, Hindu Marriage Act and other laws related to succession, inheritance, etc. were passed. So, have such laws brought the much seeking uniformity among Hindus? That unfortunately is not what happened. These laws recognised different ethnic groups and castes of the religion and the considered regional factor and made provisions for communities living in different geographical regions, well, different. For example, how can one apply UCC in situations where in certain communities in Southern -India, marriages between an uncle and a niece is allowed and are a much preferable unions however, on the other hand, marriages like such are frowned upon and are viewed as a taboo by Hindus in Northern-India.[25]

Also, if one looks upon the inheritance laws, there is non-unifomrity there too. An example is that of Mitakshara & Dayabhaga which are the two distinctive methods provided by the Hindu Inheritance Law. Hindus can choose either of the two to bestow their inheritance. But the Mitakshara Law doesn't apply in the North-Eastern regions like Assam and West-Bengal. The seemingly popular notion that only Muslims are in the opposition of UCC is quite redundant. Not only for the other minorities but also to some of the Hindu castes, UCC is detrimental. Hindus will not welcome their cultural identity

[25] Shriya Iyer, Shareen Joshi. "*The Economics of Consanguineous Marriages"* , "World Bank Policy Research Working Paper 4085, December 2006"; Accessed on May 1st 2020

and customary laws being annulled and therefore it could lead to a rise of internal-conflicts among Hindus. The Christian Catholics who strictly adhere to the Canon Law which is the personal law for marriage for the Catholics in India would surely not accept UCC either if it threatens the ongoing practice of the Canon Law[26].

Earlier Response UCC Received

After the famous Shah Bano case, protection of rights to religion and the position of personal laws became a hot topic of discussion. The 1984 anti-Sikh riots, sparked a feeling of insecurity that there could be an attack on their cultural identity and religious status and felt the need to protect it. Accusations like the encouraging and promoting Hindu dominance on every Indian irrespective of their own religious identity and preference of laws they follow. Not only the centre but the judiciary was also said to be promoting and imposing Hindu values over every citizen by recommending UCC, possibly because of the tensions in the extremist groups of fundamentalists in the two religion, arguing that the Hindu Code that is well established in the country, could be used as a tool of superimposition of the values and provisions on over the minorities. Nullifying the Supreme Court's judgment, the Muslim Women (Protection of Rights in Divorce) Act, 1986, was enacted by the Government of Rajiv Gandhi which later succumbed because it was seen as an attempt to impose dominance of Hindu Code.[27]

Possibility of a Hidden Agenda

On paper, UCC appears to have positive effects and can bring about social reforms which were needed. Another problem with that – the reason why it is so hard to support UCC in today's India is that the ruling party- the BJP seems to be transforming India into a "de facto ethnic state".

An ethnic state is where one's ethnicity is the deciding factor of one's rights and obligation in the state. There is a formal and an informal way to measure this. To measure this, formally, it has to be checked if the laws in Constitution favours the cultural ethnicity of the majority. In this case we do not see such a case because India is a secular state with equal recognition of all the religions and ethnicities, though a formally secular and one which is oriented to universal individual rights state can in fact be something a lot different – that is what the comparison of Hungary and Netherlands (the individual's rights and reforms focused on them are of more concern in the Netherlands than in Hungary despite their similarities in demographic preferences and secular approach) is.

[26] Indian Christian Marriage Act, 1872.

[27] C.K. Matthew, "*Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach*" Issue Brief No.10, on The Hindu Centre; Accessed on May 3, 2020

In India, the BJP is trying hard to enforce the UCC with features depicting a more universal character. In parallel, the BJP along with its supporting organisations, for example, the Sangh parivar, is trying to impose a dominance in civil and administrative systems of the society. It is more that visible that the BJP has actively tried and is still trying to create a 'Hindu Rashtra' by dismantling 'disloyal' civil-society organisations - among which there have been many that were crucial for safeguarding democratic principles and protecting minorities. So, whether the current government in India i.e. the BJP can be trusted to institute a universally acceptable and respectable UCC which aims for equality and universal recognition to all- 'no'. Given the ideological base of the BJP and a very clear resentment for the Muslims and other minorities in India which potentially can inspire the provisions in the code that come up, it is obvious that its pursuit of a UCC might not be driven by 'progressive' and 'altruistic' values or concerns about gender equality. The UCC which would be created could strip away what the minorities perceive as crucial constitutional protections and securities– granted, even that some of the provisions in their personal laws are archaic and misogynist in nature. A uniform civil code, in its true spirit, must be brought about by borrowing from different personal laws, considering their values to each of the religions and cultures, making slight changes in each of them, assuring gender equality and after acknowledging that how a community can benefit and stay secured from others while introducing interpretations on marriage, maintenance, adoption, and succession. Even though this would be demanding task in very demanding times, the law-makers must be sensitive and keep an unbiased sense of responsibility while coding the laws otherwise one wrong step can lead to situations as bad as communal violence across the country.

CONCLUSION

India has managed without a common civil code for more than seven decades. The personal laws which are considered very patriarchal and discriminatory, no matter if it is related to marriages, divorce or even maintenance must be within the ambit of the Part III of the constitution. All such laws need reform. The Constitution of India protects the rights of every religion and minorities in part III so is UCC the only possible solution? Not exactly, because a Uniform Civil Code is nothing but a utopia and arguably too ideal to be enforced. Challenges like achieving consensus, inter-caste conflicts and a potential rise of communal riots will always stand in the way of formation of such a code. The personal laws and a common civil code like that of Special Marriages Act, 1956 can co-exist as the perfect execution of a reform with universal and un-biased reproach is near impossible. As the history has taught us, the legislature will always make laws that would appease the majority and this instills the fear in the minority of their cultural identity being stripped away if something like UCC happens and if this fear does not wither away, India will never be a 'free' democracy.