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UNIFORM CIVIL CODE - SECULARISM AND PRACTICABILITY

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ABSTRACT

This paper intends to focus on the relationship of a possible Uniform Civil Code (UCC) and the secular character of the country. That is the first and most important question that needs answering with regards to such a law. The question of discriminating against the minority with such legislation has also been analysed. The first question is one that deals with the pure constitutional viability of a Uniform Civil Code and the second deals with whether such a law should be accepted by the minorities in the nation or would it be pure majoritarianism. The paper answers these questions by looking at justifications provided by members of the Constituent Assembly, both for and against, and by observing key Supreme court judgments that have called for a Uniform Civil Code. But other than diving into the legal aspects of a Uniform Civil Code, what has also been examined is the practicability. The UCC has been spoken about *ad infinitum* but not a single draft has been created, so it would be beneficial to device a few standards for a draft. The conclusion that the paper arrives at by looking at the historical justification for a UCC and practical reason to create one, is that a Uniform Civil code is a law that by all means should be implemented but through a procedure that would be the most amicable.

Keywords - *Secularism, personal law, constituent assembly debates, religion, draft*

REVIEW OF LITERATURE

Manooja (2000) goes through the history of the Uniform Civil Code in India right from the Mughal era in 1617 up to independence and beyond that. He observes every attempt that the Indian Government has made to either codify or secularise personal laws. In conclusion, he lists down the inequalities existing within the personal laws, especially those of the Muslim community.[1]

Seth (2005) writes about her experience as a part of the 15th Law Commission in India and the struggle that women have had to obtain gender justice. She writes about the shift in attitudes when it came to Hindu personal laws in India and the benefits that Hindu women gained through personal

[1] D.C. Manooja, *Uniform Civil Code: A Suggestion*, 42(2) JOURNAL OF THE INDIAN LAW INSTITUTE 448, (2000).

law reforms. But the fact was that benefit was not forwarded to Muslim women in the country. She points out the need for a Uniform Civil Code that would treat women the same as the law would treat men and says that religious fundamentalism, whether that is Hindu, Muslim, Christian; should not act as a hindrance to this progress.[2]

Ahmed & Ahmed (2006) speak of the need for a UCC but also the problems that have caused a hindrance in the process of creating a draft. The paper lays down the main arguments for and against a UCC. A great amount of focus is put on the apprehension that the Muslim community has with this policy. Acknowledging the importance of religion in India and the ways in which the government is involved in it, they press for the government to take swift action to create the law and not focus on short term political goals.[3]

Subramanian (2008) highlights the changes that have been implemented in Muslim personal law throughout the 20th century and into the 21st century. He lays down the sources from which personal laws are derived and utilized for adjudication and interpretation in India and looks at the changes that have taken place in unilateral male repudiation of marriage and alimony in Muslim personal law. An interesting element given light in the paper is the aspect of misinterpretation of the verdicts pronounced by the Supreme Court and the various opinions of the High Courts of the country. The High Courts have been given a lot of attention in order to show the varied opinions throughout the country when it comes to Muslim personal law. Throughout the paper, the power of the religious elite in deciding matters relating to personal laws shows how change (for better or worse) would generally in the hands of a small group of individuals and not the mass population. [4]

Sen (2004) talks about the aftermath of the John Vallamattom case[5] and the three ways that a possible UCC can be implemented. One option is of the 'optional code' which has a line of secular and religious laws so that people can pick the law that they want to be regulated by. The second method calls for 'incremental changes' where the Supreme court declares that a particular law is

[2] Leila Seth, *A Uniform Civil Code: towards gender justice*, 31(4) INDIA INTERNATIONAL CENTRE QUARTERLY 40 (2005).
[3] Shabbeer Ahmed & Shabeer Ahmed, *Uniform Civil Code (Article 44 of the Constitution) A Dead Letter*, 67 (3) INDIAN JOURNAL OF POLITICAL SCIENCE 545 (2006).
[4] Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631, 653 (2008).
[5] John Vallamattom v. Union of India, 2003 (5) SCALE 384, (2003).

unconstitutional and then the legislation acts accordingly dealing only with that law. The third is the most direct where a draft a created and opened for public scrutiny.[6]

Kumar (2003) analysis the John Vallamattom case which dealt with section 118 of the Indian Succession 1925[7]. The law spoke about the inability of a Christian with relatives to give out his property through his will unless certain conditions were fulfilled. The law didn't affect members of any other religious class and was seen to be arbitrary and hence not applicable. Strangely enough, the Britishers that had implemented the law in the land had revoked the law in 1960 itself. The analysis shows that all the three judges on the bench wanted a uniform civil code and it is not mere obiter dicta or advice in abstraction but the law itself. [8]

WHAT IS SECULAR?

Before diving into how a Uniform Civil Code is a legal instrument that abides by the rest of the Constitution, a very important aspect that should be investigated is; what is the difference between a secular and religious activity. This creates a premise for what will be discussed because as per the constitution the government can only legislate upon items that are considered secular in character. The letter of the law says, "regulating or restricting any economic, financial, political, or other secular activity which may be associated with religious practice."[9]

The interpretations of economic, financial and political activities are quite clear but what "other secular activities" means is still ambiguous at best.

The lines are often quite blurred with respect to Indian jurisprudence in this matter, but clarity can be found at times. In the *State of Bombay v. Narasu Appa Mali*,[10] the then Chief Justice of Bombay High Court, Justice Chagla quotes an American case from 1889 to shed light on the difference between religious practice and belief. This case was *Davis v. Beason* [11] where Justice Field

[6] Krishnayan Sen, *Uniform Civil Code*, 39 (37) EPW 4196 (2004).
[7] The Indian Succession Act, 1925, §118, No. 39, Acts of Parliament, 1925.
[8] Virendra Kumar, *Uniform Civil Code Revisited: A Juridical Analysis of "John Vallamattom"*, 45 (3) Journal of the Law Institute 315 (2003).
[9] INDIAN CONST. art. 25, cl. 2(a).
[10] State of Bombay v Narasu Appa Mali, (1951) 53 BOMLR 779, (Bombay HC).
[11] Davis v. Beason, 133 U.S. 637, 640 (1889).

pronounced a very well segmented explanation for the understanding of what religion is to the government.

> *The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect but is distinguishable from the latter.*

Justice Field then quotes another case whose verdict was given by Chief Justice Waite, to further qualify his line of argumentation (this relates to marriage as the case in question was dealing with bigamy in Mormon tradition in the U.S.)

> *Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it (sic) society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.* [12]

What is religious is often conflated with what is related to religion. But certain aspects of religion are part of the social institutions recognised by law. Praying to one's God is the practice of one's religious conscience that is protected by the Indian Constitution. Practicing one's religion to show their devotion to their god is protected as well but to the extent that it relates to God.

Religion is most cases is all-encompassing so what is considered secular in such a situation can be a perplexing or sometimes even hypocritical but an important rule of thumb that can be followed is that if the "religious" practice involves two or more individuals entering into an agreement then that agreement's terms should not be set on religious terms by should be set by the Government. What the relation people have with their God is not the business of the Government.

[12] Reynolds v. United States, 98 U.S. 145, 165 (1878).

PERSONAL LAW AND SECULARISM

When we talk about the Uniform civil code[13] in the Constitution we are essentially speaking of personal laws of the individual.

Personal laws are defined as,

The law that governs a person's family matters, usu. regardless of where the person goes.

- In common-law systems, personal law refers to the law of the person's domicile.
- In civil-law systems, it refers to the law of the individual's nationality (and so is sometimes called lex patriae). Cf. TERRITORIAL LAW.

  "The idea of the personal law is based on the conception of man as a social being, that those transactions of his daily life which affect him most closely in a personal sense, such as marriage, divorce, legitimacy, many kinds of capacity, and succession, may be governed universally by that system of law deemed most suitable and adequate for the purpose .... [Although the law of the domicile is the chief criterion adopted by English courts for the personal law, it lies within the power of any man of full age and capacity to establish his domicile in any country he chooses. and thereby automatically to make the law of that country his personal law." R.H. Graveson, Conflict of Laws, 188 (7th ed. 1974).[14]

It is a misconception that personal laws are intrinsic to one's religion. The concept of religion and personal laws being so intertwined in India stems from the fact that the laws created during the British era India, persisted after Independence. Those laws were mostly pertaining to subjects like crime, contract, trade, etc. Religion and personal law were topics left to the masses, with some restrictions since some things permeated into criminal law (E.g. human sacrifice, sati, etc.). The British were concerned with maintaining a degree of control that was enough to facilitate trade, agriculture and collection of taxes. Thus, they did feel that it was necessary to control places of worship (since those were the community centers of the country)[15].

[13] INDIAN CONST. art. 44.
[14] *Personal Law*, BLACK'S LAW DICTIONARY 1259 (9TH ED. BRYAN A. GARNER, 2009)
[15] The Madras Regulation VII (1817); The Bengal Regulation XIX (1810); The Religious Endowments Act, 1863, Central Act 20 of 1863, (1863).

Saying that the situation in India is unique and thus our personal laws are based on religion is also disingenuous. Personal laws governing Indians have been grossly incompetent in recognizing minority religions other than Islam, Christianity and Zoroastrianism. Hindu personal law encompasses Jains, Buddhists and Sikhs, who all have very different personal laws for their religion.[16] The next part of the paper also discusses how the existing diversity of personal laws among Hindu, Christians and Muslims had been ignored while creating legislation for communities.

Looking at what constitutes personal laws, we see that they are topics that deal with relationships that people have with each other. Relationships, that are immensely important to the building blocks of any society. Marriage, divorce, adoption, inheritance, legitimacy, are topics that create the basic norms for how our society functions at its primary level.

The categorization of what is secular and what is religious on the basis created in the previous part leads us to a logical conclusion that personal law is a subject that maintains a secular character.

THE CONSTITUENT ASSEMBLY ON THE UNIFORM CIVIL CODE

Why it is important to look at the constituent assembly debates is to find out the origin and motive behind the makers of the constitution to add article 44 in the Constitution and what were the demerits that were discussed at the time. The concept of a UCC can be fully qualified and deemed feasible only when the origins of it have been proven to be well debated and scrutinized.

During the constituent assembly debates, Mr. Mohammed Ismail Sahib had said, “Person law is part of the religion of a community or section of people which professes this law.” [17] So, if personal law is considered as a part of the religion then as per the tenets of article 25, it would never be possible to apply such legislation. Mahboob Ali Baig Sahib Bahadur also brought up the issue of protecting the rights of the minority to practice their personal law.

[16] The Hindu Marriage Act, 1955, §2 cl. 1(b), No. 25, Acts of Parliament, 1955.
The act in this subsection includes Sikhs, Jains and Buddhists within the definition of Hindu, thus ignoring their actual personal laws.

[17] 7 LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, Dec. 1, 1948 *speech by* Mohammed Ismail Sahib 722, http://loksabhaph.nic.in/Debates/cadebadvsearch.aspx (last visited on Aug. 16, 2020).

> *You know, Sir, in India, at least, people of several communities are governed by personal laws based on their religion. It is possible to legislate with regard to personal laws also. That would go against the claims that this government is going to be secular, which would not interfere with the religious rights of the people.* [18]

Mr. Hussain Imam also went on to say that, "...the personal law of the minorities should be safeguarded. The majority need not have the safeguard, because they are the majority, and nothing can be passed in the legislature without their full consent and concurrence ...." [19] The second half of his argument is based on the premise that the majority and minority in the country can only be based on religion and not ideas.

And it is not as though these points have been forgotten. While opposing a uniform civil code in the country, two allegations generally come up; one that it will be discriminatory against minorities and second that it would be against the idea of secularism.

If the constitution has provided that the secular activities within the religious practice can be regulated by the government then all there would be to prove is that items within personal law are exclusive enough from religion which is done in the previous part of this paper. But another argument that can be made to qualify personal laws being something that the State can freely regulate, is through a comparative analysis with criminal and other civil laws.

Items like marriage, divorce, inheritance are exclusively mentioned in religious scriptures like the Quran, Bible and Hindu codes like the Code of Manu. So, if we go by a definition of religion that is broader than just prayer and belief then they would ideally be protected by article 25 and wouldn't be considered as secular activities. The same can be said for criminal laws in the country.

Every religion has its criminal laws; it is very much visible in theocratic states like Iran and Saudi Arabia, it is only due to British rule that we have been following a common criminal code. All other substantive laws such as mercantile and public property law [20] and procedural laws have

[18] Ibid at Nov. 8, 1948 *speech by* Mahboob Ali Baig Sahib Bahadur 297, http://loksabhaph.nic.in/Debates/cadebadvsearch.aspx (last visited on Aug. 16, 2020).
[19] Ibid at Nov. 8, 1948 *speech by* Hussain Imam 303-304, http://loksabhaph.nic.in/Debates/cadebadvsearch.aspx (last visited on Aug. 16, 2020).
[20] Brinkley Messick, *Property and the Private in a Sharia System*, 70 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY 711 (2003). In Islamic law, private property, contracts, and other types of civil substantive laws exist as well.

been codified in India as well. Contract law,[21] property law and tax laws, apply to all individuals in the country no matter their religion.

The caste system in Hindu religion comes from the concept of *dharma* and is central to the Hindu religion, but due to it being oppressive and discriminatory, the constitution abolishes it. Similarly, Islamic jurisprudence prohibits homosexuality[22], apostasy[23] and adultery[24] and gives severe punishments for the same, but again, India has a common criminal code [25] that goes through common procedural law[26]. If those religious laws have been conceded to common codes in the country, then the personal laws should not be any different. If we were to say that it would be unsecular to create a uniform civil code, then even the Indian Penal Code should be considered unsecular. That would mean we allow the religious laws for crime to operate for every community; that would create absolute chaos.

The current system in which we are living, people have a degree of choice between secular law and a religious one. The Special Marriage Act[27] was created so that people belonging to different religions or castes could get married but then with the existence of the Sharia Act[28] people can choose under which law they would like to get married. An option like this does not exist for any law other than personal law. It would be like if there were two criminal codes, one would make theft illegal and the other would make it legal. A thief would always choose the criminal code that lets him go free.

And to the point that the Uniform civil code will be discriminatory against minorities, especially Muslims. That point is always brought up with a false premise, which is that the existing personal laws of Muslims in the country are satisfactory, but that isn't the case. And if we do need to protect the diversity and secularism of every individual in the country then even the existing personal laws are totalitarian because there are several religious denominations in all religions along with there being sects that have beliefs and practice which are derived from both Hindus and Muslims.

[21] The Indian Contract Act 1872, No. 2, Acts of Parliament, 1872.
[22] Holy Quran 7:80 – 84.
[23] Holy Quran 3:10-12; 9:66-69; 16:88.
[24] Holy Quran 24:2; Hadith 17:4191.
[25] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.
[26] The Code of Criminal Procedure, 1974, No. 2, Acts of Parliament, 1974.
[27] The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954.
[28] The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937.

Mr. K. M. Munshi in the Constituent assembly supported the Uniform Civil code passionately and in his speech for the application of that kind of legislation. He rejected the notion that a UCC would be the tyranny of the majority over the minority by speaking of the Khojas and Cutchi Memons who had been subjected to the Muslim Personal Law (Shariat) Application Act [29]. He also mentioned the fact that Hindus also had different customs in different parts of the country and that with a UCC, the majority would also give up their laws which are derived from the Code of Manu and the philosophy of Yagnavalkya.[30]

We see that there was disagreement between members regarding this issue but both the questions about the UCC were well answered by members supporting it. There was wide support for reform in personal laws and hence the Constituent Assembly passed the article, otherwise, this conversation wouldn't have existed today.

SUPREME COURT AND THE UNIFORM CIVIL CODE

The Supreme court being the authority on the interpretation of the Constitution, has been consistent on its views regarding the UCC, by supporting it and bolstering the notion of secularism in legislation. The question of a UCC has always come up when a dispute regarding personal law has reached the highest court of the land.

The first and most prominent case where the Supreme Court spoke out in the support of a UCC was in the verdict for *Mohd. Ahmed Khan v Shah Bano Begum*[31]. In it, Justice Y. V. Chandrachud makes an active effort to connect the Muslim world with a possible UCC by speaking of Dr. Tahir Mahmood's book 'Muslim Personal Law' where he states that, "In pursuance of the goal of secularism, the State must stop administering religion-based personal laws". [32]

The Hon'ble Judge then also goes on to cite a Resolution that was brought forth by a commission created by the Government of Pakistan that called for reform in Islamic law.

[29] Ibid.
[30] *Supra* note 17 at Nov. 23, 1948 *speech by* K. M. Munshi 546- 548, http://loksabhaph.nic.in/Debates/cadebadvsearch.aspx (last visited on Aug. 16, 2020).
[31] Mohd. Ahmed Khan v. Shah Bano Begum, 1985 (2) SCC 556.
[32] DR. SYED TAHIR MAHMOOD, MUSLIM PERSONAL LAW: ROLE OF THE STATE IN THE SUBCONTINENT, 200-202 (1977)

The main issue in the case was whether article 125 of the Code of Criminal Procedure[33] is violative of Muslim personal law. Justice Chandrachud repeatedly mentioned the fact that the provisions of the Code of Criminal Procedure were applicable to every religion no matter what that religion's personal law has to say about the subject matter. He referred to *Lnanak Chand vs Shri Chandra Kishore Agarwala*[34] where Justice Sikri had categorically mentioned that the provisions of article 488 (of the 1872 act, which later became the maintenance law of the 1974 act) applied to all sections of society, regardless of their religion.

Justification of the Shah Bano case was one that tried to remove the question of religious personal law from law in order to provide a secular perspective. But the verdict still justified the congruity between Muslim's personal law and the act.[35]

Justice Chandrachud quoted Tahir Mahmood again,

> *Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state legislative jurisdiction, the Muslim will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India.*[36]

Justice Chandrachud's intentions were to look at the UCC from an internal perspective[37] to create a harmonious link between Muslim personal law and a UCC.

In *Sarla Mugdal v Union of India*[38] the case verdict in fact begins with Justice Kuldip lamenting the fact that even after 41 years of Jawaharlal Nehru presenting the Hindu code for India, Article 44 had not been adopted. Does he state that the closest attempts to creating a UCC are bringing

[33] *Supra* note 26 at §125; is about maintenance for children, wives and parents.
[34] Lnanak Chand v. Shri Chandra Kishore Agarwala, 1970 SCR (1) 565, (1969).
[35] Mohd. Ahmed Khan, *supra* note 31;
"The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that 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."
[36] MAHMOOD, *supra* note 32.
[37] M. Mohsin Alam, *Constructing Secularism: Separating 'Religion' and 'State' under the Indian Constitution*, ASIAN LAW, 30 (2009).
[38] Sarla Mugdal v Union of India, 1995 SCC (3) 635.

the codified Hindu personal laws and goes on to say that if 80% of the population can be under a common code then why can't the country?

The perspective of looking at a UCC, in this case, was from an external environment.[39] The Hon'ble Judge was very much concerned with the fact that the governments had over the years ignored the Directive Principle and eluded to why that was. He wasn't as worried about the aspect of the religious right, as he was regarding the application of a law that is meant to create a more egalitarian society.

Another purpose of bringing at least some kind of codified law is to dissuade discrimination in society by eradicating the discrimination within the laws themselves. Personal laws like divorce and inheritance are very discriminatory (under Shariat Act the husband has an absolute right to divorce his wife without giving justification).[40]

The most recent case that brought up the question about a Uniform Civil Code is *Shayara Bano v. Union of India*[41] (Instant triple talaq case). The verdict went through the issues that came with a uniform civil code through quoting members of the Constituent Assembly but ultimately decided that it did not want to dive into dealing with the notion of a Uniform Civil Code as it was a matter of State legislation. But along with that, it said that in the future it would be open to discussing the issue of discrimination of women because of personal law through public interest litigation.

There have been other instances as well[42], where the Supreme court has asked the legislation to at least begin a process to create some sort of draft UCC, but it has mostly fallen on deaf ears.

IS CREATING A UNIFORM CIVIL CODE POSSIBLE?

No government has attempted to make a Uniform Civil code in India. It is not as though there aren't any political parties that wish to ignore the directive principle. The Bhartiya Janata Party (a right-wing party) has been an ardent advocate for a Uniform Civil code[43] in India but the Indian

[39] Alam, *supra* note 37.
[40] Law Commission of India, Consultation Paper on Family Law (2018).
[41] Shayara Bano v. Union of India, (2017) 9 SCC 1, (2017).
[42] Jorden Diengdeh v. S.S. Chopra, (1985) 3 SCC 62.
[43] Bharatiya Janata Party Sankalp Patra, Lok Sabha 2019, Cultural Heritage, 37; Article 44 of the Constitution of India lists Uniform Civil Code as one of the Directive Principles of State Policy. BJP believes that there cannot be gender

National Congress (a secular party) has been indifferent towards the directive principle even though it is the party that introduced the concept in India.

The problem is not just about overall political conviction but also political courage.[44] But for there to be a healthy and accepting transition what cannot be done is forcing down a piece of legislation. Here we can learn from the constituent assembly debates as well.

Mr. Mohamad Ismail Sahib had moved an amendment[45] to article 35 of the Draft Constitution (now article 44 of the Constitution) which said, "Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law."

The cause for concern of some Muslim members in the Constituent Assembly was that their personal laws would be eradicated by the majority without their consent. This amendment would have essentially created an easier transitioning phase for them into a uniform code. The lesson to be learned from here is that the drafting process needs to involve people who come from all religions in order to have a civil dialogue about the possibilities of incorporating the best aspects of all personal laws and create one unique uniform one.

Initiating this conversation with those that oppose the uniform civil code is difficult since the argument given is that a uniform civil code will destroy the plurality of the country. Even though the personal laws are not what maintains the plurality of the country.

The question of jurisdiction of legislative power exists here. It has been made apparent that this paper speaks about a piece of legislation coming from the Parliament and not the state governments. The letter of the law is clear, “The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.”[46] “The State” here takes the same meaning as given by Article 12 of the Constitution.[47] Additionally, the 5th point of the Concurrent List[48] in the 7th Schedule says, “Marriage and divorce; infants and minors; adoption; wills, intestacy and

equality till such time India adopts a Uniform Civil Code, which protects the rights of all women, and the BJP reiterates its stand to draft a Uniform Civil Code, drawing upon the best traditions and harmonizing them with the modern times.

[44] Sarla Mugdal, *supra* note 38.

[45] *Supra* note 17 at Nov. 23, 1948 *speech by* Mohamad Ismail Sahib 540-541, http://loksabhaph.nic.in/Debates/cadebadvsearch.aspx (last visited on Aug. 16, 2020).

[46] *Supra* note 13.

[47] INDIAN CONST. art 12; 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 States and all local or other authorities within the territory of India or under the control of the Government of India.

[48] INDIAN CONST. art 246.

succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." So, the Centre can create laws on this matter and bring a UCC. (the center has already brought laws like the Hindu Marriage Act[49], Hindu Succession Act[50], the Hindu Minority and Guardianship Act[51] etc.)

Moreover, if left to the states (that is the state governments), the whole aim of creating an equal for all law will be lost. Even if one state creates a uniform code remotely discriminatory, it can rest assured that people will abuse it.

SOME SUGGESTIONS FOR LEGISLATION

A distinct line must be drawn during this process of creating a bill with regards to what extent can the legislation peer into one's personal law. The principle used to determine what is secular can be used to determine what is not; the relationship between a person and his god.

Even Dr. Ambedkar had created a distinction between what is ritual and what is the law,

> *There is nothing which is not a religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion.*[52]

[49] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955.
[50] The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956.
[51] The Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956.
[52] *Supra* note 17 at Dec. 2, 1948 *speech by* B.R. Ambedkar 781- 783, http://loksabhaph.nic.in/Debates/cadebadvsearch.aspx (last visited on Aug. 16, 2020).

There exists a difference between freedom of conscience and freedom of practicing one's religion[53]. That difference boils down to the difference between prayer and belief, and social relation and obligation[54].

The following are some legislative inputs for a potential UCC

1. Age for marriage should be kept strictly at 18[55] for men and women along with the age of consent for sex. Marriages below the age of 18 should be considered as void ab initio. The whole purpose of setting the age of consent for minors is to ensure that they can get married when they have a reasonable level of maturity and know the consequences of sexual intercourse and marriage.[56] The laws pertaining to child marriage are at the moment very convoluted and contradictory as pointed out in Independent Though v. Union of India.[57] Although Prohibition of Child Marriage Act 2006[58] sets the ages for marriage at 18 for women and 21 for men; section 3 of the act mentions that child marriage is voidable at the option of the party that was a child at the time of marriage. It also punishes an adult male (male above the age of 18) for marrying a minor girl and puts a punishment which may extend to 2 years and a fine or both along with punishing anyone that abets or attends a child marriage.[59] The act does not explicitly make the marriage void but would punish the male. It is only in the state of Karnataka that child marriage is directly held as void ab initio.[60] In a situation where a male below the age of 18 or 21 gets married to an eligible female, there exists no penalization of the female. So, a minor boy can get married to an adult woman and will only be able to seek annulment; no punishment would be given to the woman or the abettors of such a marriage. The Independent Thought case read down the second exception of rape, but it only provides *obitur dicta* on the PMCA[61].

[53] Narasu Appa Mali, *supra* note 10.
[54] Davis, *supra* note 11.
[55] 205th Law Commission Report, Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other allied laws, 45 (2006).
[56] Ibid at 43.
[57] Independent Thought v. Union of India, (2017) 10 SCC 800 (2017).
[58] The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007.
[59] Ibid at § 9-11.
[60] The Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, § 2, No. 26, Acts of Karnataka State Assembly, 2017.
[61] Independent Thought, *supra* note 57 at 813-814.

The Hindu Marriage Act 1955[62] and Dissolution of Muslims Marriage Act[63] provide for a voidable marriage if the girl is between the age of 15 to 18. The judgment did specify that the PMCA was a secular law and would prevail over religious laws,[64] but it is unclear if that is the *ratio decidendi* is the case itself did don't directly deal with the PMCA and its relation with the personal laws. High Courts have also stated that the law is secular[65]. But the PMCA never explicitly mentions that it is a law that is meant for all communities hence the confusion and varied interpretation.

2. No legislation should be created to control the method of marriage (more specifically the rituals related to marriage should be untouched)
3. Polygamy should be banned. It exists only for Muslim marriage through the Muslim Personal Law (Shariat) Application Act[66].
4. Registration of marriage must be made mandatory[67]. The Supreme Court has opined that the registration of all marriages must be made mandatory in all states.[68] It has been considered as part of the vital statistic under schedule 7 list III of the Constitution. Only certain states[69] have made it mandatory to register marriages no matter what the religion of the parties may be. Some of the states have set punishments that range from simple fines to imprisonments for putting false information in marriage memorandums or not registering at all. But the marriage, if gone unregistered would not be deemed void.[70] There seems to be some incongruity in those laws that must be resolved. Mandating registration

[62] *Supra* note 49 at §13 subsec.(2) iv.
[63] The Dissolution of Muslim Marriage Act, 1939, § 2 vii, No. 8, Acts of Parliament, 1939.
[64] Independent Thought, *supra* note 57 at 862 ¶128.
[65] Jitender Kumar Sharma v. State, 2010 SCC OnLine Del 2705 (Delhi HC); T. Sivakumar v. The Inspector of Police, 2011 SCC OnLine Mad 1722 (Madras HC); Court on its own motion (Lajja Devi) v. State, 2012 SCC OnLine Del 3937 (Delhi HC).
[66] Supra note 20
[67] 205th Law Commission Report, Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other allied laws, 44 (2006).
[68] Smt. Seema v. Ashwani Kumar, (2006) 2 SCC 578.
[69] Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh
[70] The Maharashtra Regulation of Marriage Bureaus and Registration of Marriages Act, 1998, § 10, No. 20, Acts of Maharashtra State Assembly, 1999; The Karnataka marriages (Registration And Miscellaneous Provisions) Act, 1976, § 8, No. 2, Acts of Karnataka State Assembly, 1984; The Himachal Pradesh Registration of Marriages Act, 1996, § 12, No. 21, Acts of Himachal Pradesh State Assembly, 1997; The Telangana Compulsory Registration of Marriages Act, 2002, § 16, No. 15, Acts of Telangana State Assembly, 2002; The Andhra Pradesh Compulsory Registration of Marriages Act, 2002, § 16, No. 15, Acts of Andhra Pradesh State Assembly, 2002; The Gujarat Registration of Marriages Act, 2006, §13, No. 16, Acts of Gujarat State Assembly, 2006.

should also mean that the marriage would be held void if the registration is not done within a particular period. By doing so, the penalty of imprisonment can be removed.

5. An effort should also be made to allow homosexual marriage in order to abide by article 14 and 15.
6. All marriages should be given the status of a contract that is fully entered into when the registration of the marriage is complete. Giving the status of a contract to marriages would mean that a prenuptial agreement can be held valid in the court of law. So far only nikah Namas are considered valid marriage contracts in a Muslim marriage. The Indian Divorce Act 1869 puts a provision that allows High Courts to look into an antenuptial (prenuptial) or postnuptial agreement and give an order accordingly. But there exists no compulsion to follow the text of the contract.[71] In Hindu marriages, the concept of prenuptial is not legislatively recognised through any law. Since the matter is involving contracts, it would probably be beneficial to create an amendment within the Indian Contract Act 1860 itself.
7. Maintenance should be a gender-neutral law that is dependent on the incomes of the spouses and not just sex. The Special Marriage Act is a secular law which is the closest model to a gender-equal marriage law but in it, the alimony *pendente lite* and permanent alimony [72] are only available for wives and not husbands who might have no sustainable means of income compared to their wives. The law can be made gender-neutral without affecting the situation of divorced wives that need alimony (whichever religion they may belong to). The Code of Criminal Procedure 1973 would also have to be amended for this purpose to make the law gender-neutral.[73]
8. The rights of divorce must be kept gender-neutral. No party should have more of a right to divorce the other. In Shariat law, the husband need not provide any justification for divorcing his wife. The Supreme Court has laid down provisions for providing evidence of talaq delivered[74]but has not given any guidelines as to the limitations on a Muslim husband divorcing his wife. Due to the largely uncodified nature of the law, it is difficult to do so. Muslim women however can ask for a decree of dissolution of marriage only if any of the

[71] The Indian Divorce Act, 1869, § 40, No. 4, Acts of Parliament, 1869.
[72] *Supra* note 27 at § 36, 37.
[73] *Supra* note 26 at § 125.
[74] Shamim Ara v. State of U.P. A.I.R. 2002 S.C. 3551.

conditions in Dissolution of Muslim Marriage Act are fulfilled.[75] So by equal divorce rights, what is meant is that the conditions under which a divorce can be asked for, should be the same for both parties.

The Special Marriage Act itself can be adopted as a model. But there can be some improvements made.

In the Special Marriage Act, the wife has certain special grounds for divorce[76]. The reason for divorce as given in section 27 (1A) ii (maintenance) can be made gender-neutral as per the above-mentioned change in the maintenance law.

9. Adoption by a married couple should be allowed only with the consent of both the spouses.
10. Adoption by an unmarried person should be permitted only when the child is of the opposite gender to which the adoptee is attracted to. (for example, if an unmarried gay man wishes to adopt then he should be able to adopt a girl, not a boy).
11. In the case of a person dying intestate, the spouse should get half the property and the rest should be distributed equally among the children.

Post the creation of the draft legislation and its introduction in the Parliament, an ad hoc committee comprising of members of parliament of all religions (or at least members from the opposition) should be created for further consideration of the bill. This is important as Parliamentary committees are often made up of only members from the ruling parties.

CONCLUSION

To say that India is not ready for a Uniform Civil Code is to give up the hope of even trying. The excuse of the UCC being a directive principle is given whenever there is a call for action, but the fact is Directive Principles are not mere suggestions for the government. They are the ends to the means, the means given by the Fundamental Rights.[77]

Procrastination will only waste more time. An attempt needs to be made to create an environment for change right now, otherwise, article 44 will eventually be run into redundancy. It was also

[75] *Supra* note 63 at § 2.
[76] *Supra* note 27 at § 27 subsec. (1A).
[77] Minerva Mills v. Union of India, AIR 1980 SC 1789.

important that the UCC be implemented in order to eradicate systemic discrimination from the legal system. Dr. B. R. Ambedkar, while speaking about the uniform civil code said,

> *I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our, fundamental rights.*[78]

If the laws in the country are unequal, then there will always exist societal discrimination between demographics. The law needs to come first, then change will follow.

[78] *Supra* note 52.