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Uniform Civil Code

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It is axiomatic that for the survival of a people, unity as well as collaboration and cohesiveness are essential and that 'if a house be divided against itself, that house cannot stand'[1] . Divisiveness engendered by religious sentiment is perhaps the single most potent force to destroy that unity. The recent pronouncements particularly where politicians in power vociferously support a Hindu theocratic state is akin to the 16th century principle *cuius regio, eius religio* (which literally means "Whose region his religion") which was then being followed in most countries in Europe. "Under that principle, freedom of religion [was] only granted to heads of state. If the Prince …chose… to be Protestant, his Catholic subjects …[had to] choose between leaving the country and converting"[2]. This was in stark contrast to Ancient India where identification of religion with political power was absent and it was home to several faiths, some indigenous namely Hinduism, Sikhism, Jainism and Buddhism. Some religions like Islam and Judaism were carried to India initially by traders. Christians came as missionaries and others, like the Zoroastrians, as a result of religious persecution. Muinnudin Chishti who is said to have come to India about a thousand years ago is reputed to have said "that India is perhaps the source of the idea of tolerance towards different ways of worshipping the mysterious"[3]. At present India has 29 States and 7 Union Territories, of which two have a majority of Muslims[4] , three have a majority of Christians[5], one has a majority of

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[1] Gospel of St. Mark: Ch.3 verse 25 (King James Version).

[2] Law as a Precondition for Religious Freedom: Christoph Engel.

[3] The Book of Muinnudin Chishti: Mehru Jaffer.

[4] Jammu & Kashmir, Lakshadveep.

[5] Mizoram, Nagaland and Meghalaya.

Sikhs[6] and the rest have a majority of Hindus. India has chosen to have no official religion and the Constitution guarantees that Parliament would not promote any religion and that the individual would have the right to religious freedom.

The individual's freedom to profess, propagate and practice religion is preserved as a fundamental right under Article 25 of the Constitution. Although nothing is as divisive as religion, in keeping with India's history and tradition of tolerance, Article 25 *allows* different communities to practise their religion and thus incidentally also to have their different personal laws because in this country, as said by Dr. Ambedkar[7]: "The profession of a particular religion carries with it the personal law of the person". Having allowed such differences in the personal laws, the framers apparently contrarily provided under Article 44 that "The State shall endeavour to secure for the citizen a uniform civil code".

Several issues arise from this seeming contradiction: First- Can the Directive Principle of Article 44 take away from the fundamental right to have one's own personal law? Second what does uniformity mean? Third: who is to endeavour bring about this uniformity? and depending on the answer to this- is the final question: how is the endeavour to take place particularly when Article 44 is only a Directive Principle?

Does Article 44 take away from the freedom to have the fundamental right to have one's own personal law? The short answer is –No- because the fundamental right under Article 25 is not absolute in the sense that it in terms allows the State to modify personal laws as it retains, in article 25(1) and (2) (b), the right to interfere in the personal law of any community in the interest of public order, morality and health, for providing social welfare and reform as well as to restrict any economic, financial, political or other secular activity associated with religious practice. Even the right under Article 26 which allows every religious denomination to "manage its own affairs in matters of religion" is subject to statutory regulation under Article 25 (2)(b)[8]. Of course this does not mean that the State has the right to "to 'reform' a religion out of existence or identity" thus "eviscerating the guarantee under

[6] Punjab.

[7] During the Parliamentary debates relating to the Hindu Code Bill while defending the Bill against the charge of being discriminatory against Hindus.

[8] These powers to enact, amend, alter or repeal parts or whole of the personal laws are concurrently available to both Parliament and the State Legislatures under Item 5 of List III of Schedule 7 of the Constitution.

Article 25(1) and rendering the protection to profess one's own religion illusory"[9] . Courts have therefore drawn a distinction between what is an essential part of a religion which cannot be taken away by statutory enactment and what are merely secular practices associated with religion which can be statutorily modified. While legislatures cannot touch the core of any religion without offending Article 25(1), laws relating to marriage, succession, adoption etc have been held *not* to be the core or an essential or an integral part of any religion[10] and have consequently been the subject matter of legislation both at the Central and State levels generally (except for certain notable exceptions[11]) for the purposes of social welfare and reform within each religion. It was in exercise of these powers that the various statutes governing personal laws such as the Hindu Marriage Act, 1955 was enacted and The Parsee Marriage Act, 1936, the Dissolution of Muslim Marriages Act, 1939 have been amended from time to time. The recent very welcome amendments in 2001 to the Divorce Act, 1869 which meet the long standing demands of Christians for gender equitable laws of divorce is also illustrative of this approach.

On the other hand in the case of Jehovah's Witnesses[12] the Supreme Court of India set aside the expulsion of children from school because they did not sing the national anthem the children saying that they could not be compelled to sing the National Anthem if their religion forbade them to do so. "The question" the Supreme Court said "is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion"[13]. But the extent of the right which needs protection is often unclear as practices, religious and secular, are inextricably mixed up, and 'what is religion to one is superstition to another'. To avoid the almost inevitable intrusion of subjective values of the deciding judges in determining what is or is not an essential or inessential part of a religion, Section 234 in the South African Constitution, created the possibility for the creation of a charter of religious rights in which

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[9] Per Rajagopala Ayyangar, J: Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 Supp (2) SCR 496.

[10] As held by the Supreme Court in Javed v. State "a bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise".

[11] For example the Muslim Women (Protection of Rights on Divorce) Act, 1986.

[12] Bijoe Emmanuel v. State of Kerala, (1986) 3 SCC 615.

[13] Ibid at page 628. The Court relied on cases with similar facts from Australia, Canada and the USA.

the content of the right is spelled out fully in a single charter. The Charter was eventually signed at a public meeting on October 21, 2010

There are two other impediments to any statutory modification of existing personal laws: 1) the enactment must comply with the Constitutional objectives mentioned in Article 25(2) namely public order, morality, health and for providing social welfare and reform and 2) it must also be in keeping with the other fundamental rights such as Articles 14, 15 and 16 protecting equality under the Constitution.

Having a uniform civil code must be taken as crossing the first bar of being in keeping with Constitutional objectives because Article 44 is a Directive Principle and Directive Principles are according to the Constitution "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"[14]. Clearly the framers thought that a uniform civil code was necessary for social reform. But then what does the "uniformity" in Article 44 mean?

Although the Constituent Assembly Debates may appear to support the view that the framers of the Constitution used the word" uniform in Article 44 in the sense of a single code, my firm view, which I will try to justify today, is that the word "uniform" in Article 44 can and should be construed as meaning "equality" in the sense of sameness, the "sameness" being achieved not necessarily by a single Code. Such an interpretation would be in keeping with Article 25 which *allows* different communities to practise their religion and thus incidentally also to have their different personal laws. Besides as some scholars have said and I agree with them, the phrase used in Article 44 is "uniform civil code" and not "*common* civil code"[15]. The emphasis is on uniformity, the word "uniform" implying "retaining the diversity in detail but ensuring uniformity in base values. All communities have their own customary diversities, which should be retained, but we need to provide a uniform base of constitutional values…"[16] .

Courts and some jurists have however assumed that the words "uniform code" in Article 44 means a single law or the same law without referring to Article 25 at all. The Supreme

[14] Article 37.

[15] Razia Patel: Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice :October 31, 2009 Vol. xliv no 44 EPW Economic & Political Weekly.

[16] Ibid.

Court at least has proceeded on the basis that Article 44 means a *single* or *common* (as opposed to a uniform) code. Chief Justice Chandrachud speaking for a unanimous five-Judge Bench in *Shah Bano Begum*[17] has observed that "a *common* Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies". In *Sarla Mudgal*[18] also, a Uniform Personal Law in the sense of one law, has been regarded as "a decisive step towards national consolidation" and it has been observed that "a Uniform Code is imperative for promotion of national *unity* and *solidarity*".

But a sense of national unity and integrity or solidarity is something to come from within and cannot be imposed by law just as Article 17 abolishing untouchability and the various statutes framed under that Article have certainly not stopped the practice. And if we have not been able to develop such a mental frame of national integration, no Constitution, no Law, no Court of Law can inculcate or inoculate the same in our mind. If we do not have it, we cannot have it under the pressure of or as a gift from any Organ of the State, whether the Legislature, the Executive or the Judiciary. It is true that we have Uniform Civil Codes in the sense of single codes in respect of all important matters except only in matters like Marriage, Succession etc. which are covered by our Personal Laws and which are to be made “uniform”. But for more than a hundred years we have had common civil laws governing contracts, partnerships, transfer of property and testamentary succession. If those have not been able to unite and integrate us, then just another Civil Code in respect of the various Personal Laws cannot unite and integrate us any more[19]. There is no unifying magic in legal oneness.

On the other hand, as I have said, it would be more in keeping with rights granted to different religious communities under Article 25 to interpret the word “uniform” in article 44 as merely requiring that the rights conferred by the Constitution shall be *equally* available and applicable to all, to each individual. Article 44 does not mandate that this must be done by one law although it may (but not necessarily) be.

The second impediment to statutory modification of personal laws is that like other laws they cannot take away or abridge any of the fundamental rights. The States’ powers of

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[17] AIR 1985 SC 945.

[18] (1995)3 SCC 635: JT 1995(4) SC 331.

[19] A.M.Bhattacharjee’s: Constitutionality of Matrimonial Laws (1st edn).

legislation are also subject to the Constitution particularly Part III which includes Articles 14 which prescribes and protects equality and more importantly Article 15 which prohibits the State from discriminating against any citizen on grounds *only* of religion, race, caste, sex, place of birth or any of them. If each system of personal law is judged against constitutional principles, corrective measures can be taken *within* such system either by way of amendment or by way of judicial review.

An extreme view has been expressed by some that Article 15 by itself provides the complete answer by leveling out all differences in personal laws based on religion - providing a short cut as it were to a single Civil Code. According to them, because Article 15 invalidates all discriminations on the ground of *only* religion, "we cannot continue to have different discriminatory Personal Laws nor can we, in view of that Article, proceed to enact such different Personal Laws for the different religious communities, as we have done, for example, in the case of the Hindus by the Hindu Law Acts of 1955-1956, or in the case of the Muslims by the Muslim Women (Protection of Rights on Divorce) Act 1986". The reasoning would apply to differences in all other aspects of Personal Laws including succession, adoption etc.

The argument is flawed because it overlooks Article 25. In framing the Constitution, Dr. Ambedkar stressed "… [t]he Constitution *permits* us to treat different communities differently, and if we treat them differently nobody can charge the Government with practising discrimination…". Since the practices associated with different religions is Constitutionally permissible under Article 25, it logically follows that the State may legislate with regard to each of such practices differently without the State facing a challenge of operating in a discriminatory manner against other religions under Article 15.

However although Article 15 in so far as it prohibits discrimination only on the ground of religion, cannot apply to those laws protected under Article 25, the prohibition of all other forms of discrimination mentioned under Article 15 would apply to personal laws because Article 25 only protects *inter*-religious differences and not *intra*- religious based practices. Article 15 also prohibits discrimination merely on the ground of gender and would apply with full vigour to personal laws so that men and women within a particular community would be equally entitled or subjected to the same provisions of law. Consider for example two differences in the personal laws governing three different religious communities. (1)The Muslims are polygamous, but the Hindus, the Christians and the Parsis are monogamous. (2)A

wife married under the Muslim Law can be divorced by the husband at any time and without any reason; but parties married under the Hindu, the Christian or the Parsi Law can be divorced by the husband only on certain grounds specified in those laws and, that too, only through Court.

The differences specified are clearly unconstitutional not because of discrimination *between* different religions but because of differences based on gender *within* the community. If polygamy is allowed for Muslim men then constitutionally Muslim women should be allowed to be polyandrous or alternatively the practice of having multiple spouses should be forbidden for both. Since under Article 25 (2) the State may legislate in respect of personal laws inter alia for "social welfare and reform", and the word "reform" implies "betterment" or "cure", a socially and constitutionally regressive measure such as polygamy or polyandry cannot be countenanced.

So also in the matter of divorce. The Dissolution of Muslim Marriages Act, 1939 provides that all Muslim women irrespective of the school of Islam followed specified grounds for divorce for which they have to go to court. It discriminates against women because men can divorce their wives on unlimited grounds and can do so without going to Court. Instances are galore when triple talaq has been given by letter, orally, over the telephone etc. The discrimination between the two sexes is *only* on the ground of sex without being founded on any intelligible differentia having a rational relationship with the object sought to be achieved and is unjust and unfair and thus contrary to Articles 14 and 15. To avoid unconstitutionality, the Act should be amended as suggested by Prof. Tahir Mahmood, by including the word "men" then "we can get rid of the talaq issue and make the law equal for all"[20].

The next question is - Who is responsible for effecting this uniformity? Although the word "State" in Article 44 would cover all branches of Governance, viz. the Legislative, Executive and the Judicial, courts have up till now shied away from assuming the responsibility. Thus when in *Sarla Mudgal* [21] the Court had directed the Government of India, "to have a fresh look at Article 44 of the Constitution of India" and "endeavour to secure for the citizens a uniform civil code throughout the territory of India" and further directed the Government to

[20] 'No Government Interested in Codifying Muslim Personal law': India Legal [October 31, 2015].

[21] (1995) 3 SCC 635, at page 651.

file an affidavit indicating the steps taken and efforts made, by the Government towards securing a "uniform civil code" for the citizens of India the decision appeared to almost compel the Executive to frame one uniform code. It was almost immediately 'explained' by the Supreme Court by several later decisions which said that "the observations on the desirability of enacting the Uniform Civil Code were incidentally made" and that "the remedy lies somewhere else and not by knocking at the doors of the courts"[22]. The "somewhere else" of course is the legislature- whether Parliament or the State Legislatures because Entry 5 in the Concurrent List of Schedule VII to the Constitution allows both the Centre and the States to make laws in respect of, insert inter alia, marriage and divorce.

That personal laws need to be "remedied" is undoubted and legislative bodies can adopt any one of three approaches to effect the cure. The first is the one-go approach which would mean the immediate enactment of a single law applicable to all Indians irrespective of creed in respect of those aspects of personal law not yet uniform. This approach is unacceptable for the reasons I have already mentioned.

Besides the Supreme Court in another case appears to have differed with the observations in *Shah Bano* and *Sarla Mudgal* calling for a single code when it said : *"A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation"*[23]. We must recognise and accept that opposition to a Uniform Civil Code in the sense of a single law- stems from the fear in the minorities of disempowerment and–worse-- a loss of identity as personal laws are seen not only as preservation but also as an assertion of identity.

The second path open to legislatures is the alternative approach which would mean the enactment of a single uniform law covering personal laws with an option given to individuals to abide by its provisions. A beginning was made in this direction in 1954 by the Special Marriage Act which gives parties of whichever religion to voluntarily submit to its provisions. This approach was in fact proposed by Ambedkar as a compromise when he said that a beginning could be made "that the code shall apply only to those who made a declaration that they are prepared to be bound by it, so that in the initial stage the application of the

[22] Ahmedabad Women Action Group (AWAG) v. Union of India, (1997) 3 SCC 573 at page 575; see also Pannalal Bansilal Pitti v. State of A.P., (1996) 2 SCC 498, Lily Thomas v. Union of India, (2000) 6 SCC 224.

[23] Pannalal Bansilal Pitti v. State of A.P., (1996) 2 SCC 498, at page 510.

code may be purely voluntary"[24]. This would also eliminate the element of compulsion inherent in all laws which is seen by the minorities as objectionable and which, they say, sits ill with the freedom to profess, practice and propagate their religion as guaranteed under Art. 25 (1).

The third legislative approach towards uniformity is the stage-wise approach which may be either direct-which I support- or indirect- which is the approach adopted by legislative bodies till now. This approach was advised by the Supreme Court in *Pannalal Bansilal Pitti*[25] when it said:*"It would … be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at* (sic) *stages"*[26].

Legislatures have brought about stage-wise uniformity in some matrimonial matters as well as in matters incidental to matrimony, in a sense indirectly or collaterally through enactment of secular laws—the word "secular" being used in the sense of applying to all irrespective of creed or religion. These laws which are both civil and criminal not only fulfill the positive constitutional mandate of non-discrimination on the ground of gender under Article 15(1), but have been enacted in exercise of the enabling provision under Article 15 (3) which allows the State to make special provision for women and children. For example Parliament introduced some penal provisions to enforce the right of every woman irrespective of religion to live with dignity under section 125 of the Criminal Procedure Code. But it has also enacted other laws making concessions to personal laws as was the case in the Dowry Prohibition Act, 1961 which exempts Muslims from its application. More recently introduced penal provisions such as section 498A in the Penal Code in 1983 however apply to all women across the board irrespective of religion.

Another example of Parliament achieving a unifying effect by a secular law is the Prohibition of Child Marriage Act, 2006. Under the Hindu Law, the *wife alone* has the right to repudiate her marriage, even though consummated, if the marriage was solemnised before she attained the age of fifteen years and the repudiation has been made after but before attaining the age of eighteen years. Under the Muslim Law, both the wife and the husband

[24] Ibid at p. 552.

[25] Pannalal Bansilal Pitti v. State of A.P., (1996) 2 SCC 498.

[26] Pannalal Bansilal Pitti v. State of A.P., (1996) 2 SCC 498, at page 510.

have such right, but the right is extinguished on consummation of the marriage. The Christian Law of marriage does not grant any such right at all and an under-age marriage is void under the Parsi Marriage Act, 1936. Now, by virtue of The Prohibition of Child Marriage Act, 2006 which applies to *all* citizens, *every* child marriage, whether solemnised before or after the commencement of the Act, is voidable at the option of the contracting party who was a child at the time of the marriage.

As far as civil laws are concerned The Protection of Women from Domestic Violence Act, 2005 is another secular measure taken by Parliament to try and right the gender imbalance in keeping with the Constitution mandate. It has been enacted with the avowed object of providing "more effective protection of the rights of women… who are victims of violence of any kind occurring within the family…" irrespective of personal laws.

More recently rights of adoption have been given even to persons whose personal laws do not so provide under the Juvenile Justice (Care and Protection of Children) Act, 2000. Granting the right to a single Muslim woman to adopt a daughter, the Supreme Court in *Shabnam Hashmi*[27] said "the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute". Earlier Justice K.Chandru of the Madras High Court in *R.R.George Christopher*[28] held that although adoption has not been recognised in India among Christians, this would not stand in the way of the right of a Christian couple to adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2000 saying that the Act is the first secular law in India providing for adoption and was not restricted to persons belonging to a particular religion alone.

On occasions even State Legislatures have although perhaps not intentionally brought about some uniformity in personal laws. An instance of this is the Haryana Panchayati Raj Act, 1994 which disqualifies persons having more than two children standing for election to panchayats. This was challenged in *Javed v.State*[29] on the ground that it restricted the right of Muslim men to have four wives and procreate children by each of the four wives. The submission was rejected by the Supreme Court saying that such a practice can be "regulated

[27] Shabnam Hashmi v. Union of India, (2014) 4 SCC 1.

[28] (2009) 8 MLJ 309.

[29] (2003) 8 SCC 369, 390.

or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does". The Court also noted several Service Rules including Rule 21 of the Central Civil Services (Conduct) Rules, 1964 which restrain any Government servant having a living spouse from entering into or contracting another marriage. A similar provision in Rule 29(1) of the U.P. Government Servant's Conduct Rules, 1956 was upheld as not offending Article 25(1) of the Constitution.[30] Such statutory provisions requiring monogamy are, to a limited extent, serving to bring about a practical uniformity in matrimonial laws.

Such a peripheral impact does not absolve the Legislatures from enacting gender just personal laws where none exist.

Additionally, reformative measures must be taken within each system of personal law to effect a constitutional uniformity by amending the provisions incompatible with constitutional norms of equality under Articles 14 and 15 and the right to live with dignity as provided under Article 21 while maintaining the multi-culturalism of Indian Society[31]. This constitutional equality is mandatory irrespective of the source of the practice. As has been aptly put by K. RamaswamyJ.-"Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights".[32]

Except for Muslim Personal law every system has codified all personal laws. Muslim personal laws must be codified so that not only will the members of the community be aware of their rights and obligations clearly and with certainty but they will also not be faced with contradictory opinions based on different interpretations of the sacred texts. Even a judicial opinion on a customary practice may not put a quietus to matters. In 2002 that the Supreme Court in *Shamim Ara*[33] approved Justice Baharul Islam's opinion expressed as early as 1981 [34] that (*i*) that "talaq" must be for a reasonable cause; and (*ii*) that it must be preceded by an

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[30] Khursheed Ahmad Khan v. State of U.P.: (2015) 8 SCC 439.

[31] See in this connection Prtibha Jain: Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India, 23, Berkeley J.Int'l Law. 201 (2005).

[32] C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil, (1996) 8 SCC 525, at page 533.

[33] Shamim Ara v. State of U.P., (2002) 7 SCC 518, at page 524.

[34] Sitting singly Jiauddin Ahmed v. Anwara Begum[(1981) 1 Gauhati LR 358 and as part of a Division Bench in Rukia Khatun v. Abdul Khalique Laskar[(1981) 1 Gauhati LR 375.

attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "*talaq*" may be effected. It is doubtful whether the members of the community are at all aware of this or whether this has been enforced at the ground level. It would more effective with a legislative endorsement of this judicially authoritative view of the applicable law.

But all such internal reformative measures should be taken in consultation with the particular community involved. A dramatic illustration of how this relates to section 10 of the Indian Divorce Act, 1869 which is applicable to all Christians. Section 10 allowed the husband to divorce his wife only on the ground of adultery. As far as the wife was concerned she had to allege and prove that the husband's adultery was coupled with some other ground such as cruelty, desertion, etc. The Christian community including religious bodies such as The Catholic Bishops' Conference of India supported the need for amending section 10 of the 1869 Act. In 1983 the Law Commission under the Chairmanship of Justice K.K.Matthew, took up the question of revision of Section 10 of the Indian Divorce Act, 1869, suo motu. The report stated in no uncertain terms that section 10 of the Indian Divorce Act, 1869 was "blatantly discriminatory against Christian women" and would "seem to violate Article 15(1)". Recommending amendment of section 10 the Commission said: "If Parliament does not remove the discrimination, the Courts, in exercise of their jurisdiction to remedy violation of fundamental rights, are bound, some day, to declare the section as void". The recommendation proved to be prophetic. Needless to say, the recommendation was not acted upon by Parliament and in 1995 a Special Bench of the Kerala High Court in *Ammini E.J.& Ors v. Union of India*[35] held section 10 of the Divorce Act, 1869 to be violative of Articles 14, 15 and 21 of the Constitution and struck down those portions of the section which were discriminatory against women. The judicial condemnation of the discriminatory provisions grew apace with several High Courts striking down section 10 as unconstitutional[36]. Ultimately, pushed by a barrage of judicial decisions, by the 2001 Amendment, section 10 of the Act was substantially altered by Parliament. Grounds for divorce as available under other statutory Matrimonial Laws are now equally available to all Christians, both husband and wife.

[35] AIR 1995 Ker 252.

[36] Judgment dated 7th September 2001 a Special Bench of the Delhi High Court applied the section as judicially 'amended' by Ammini in Indu Bala Toppo v. Francis Xavier Toppo . AIR 2002 Delhi 54.

As far as Muslims are concerned Khalid, J. speaking for of the Kerala High Court on the triple talaq reflected on the need for the community to push for change saying –"Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed.[37]" At least [Muslim] "[w]omen …have sought to create a space for themselves by forming organizations that challenged the mindless orthodoxy of Muslim conservatives and the AIMPLB (All India Muslim Personal Law Board) by invoking the inherently individual rights bestowed on Muslims irrespective of gender to make their case[38]". As of today the Supreme Court is due to hear the issues of gender discrimination against Muslim women in matrimonial matters[39]. The petitions before the Supreme Court, challenge polygamy as well as the practices of talaq-e-bidat (instantaneous triple-talaq), nikah halala (bar against remarriage with divorced husband without an intervening consummated marriage with another man)[40].

However the view that "so long as such a consensus is not reached, any attempt to realise the goal of uniform civil code will not only remain unsuccessful, it will also be inconsistent with the Constitution"[41] appears to overstate the case. There has never been nor is there any consensus even today on the interpretation of religious texts and to defer reform till consensus is achieved is an impractical if not an impossible pre-condition. Besides the reluctance of minorities to have a uniform civil code is a reflection of the need for a separate identity and of the fear of being culturally swamped by the majority but given the constitutional imperatives there can be no legal opposition to constitutional uniformity within the different systems of Personal Laws[42]. Therefore different sets of laws, amendatory or otherwise, but constitutionally similar in substance should be good enough to make our discriminatory personal laws to be in accord with and to satisfy the mandate under the Directive Principle contained in Article 44 of the Constitution.

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[37] Pathayi v. Moideen: 1968 KLC 763.

[38] Shaida Lateef: From Shah Bano to Sachar (2008).

[39] The matter is numbered as Suo Motu WP(C) 2/2015: In re Muslim Women's Quest for Equality.

[40] Shayara Bano v. Union of India & Ors.: (WP (C) No. 118/2016). By order dated 29/2/2016 both these Writ Petitions have been directed to be tagged.

[41] M.P.Singh: On Uniform Civil Code, Legal Pluralism and the Constitution of India: JILS Vol V: Special Editorial Note.

[42] See in this connection Furqan Ahmad: Understanding Islamic Law in India: 57 JILI (2015) 307.

In any event Constitutional uniformity in the sense of equality for women is no longer just an aspiration expressed in Article 44, it is a political necessity given India's commitment at the international level to introduce gender justice laws. India is a signatory to the Convention for Elimination of all forms of Discrimination against Women (CEDAW). Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice including "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women"[43]. It was said by the Supreme Court as early as 1973 in *Kesavananda Bharati v. State of Kerala*[44] that: "[I]n view of Article 51 of the Directive Principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and solemn declaration subscribed to by India." Having committed to a particular course of action internationally, India cannot be allowed to take an inconsistent stand on the issue domestically.

Notwithstanding the role that Legislatures can play and are playing, can the Courts cast the burden of constitutional reform solely on the shoulders of the Legislatures? Although the Directive Principles are not judicially *enforceable*, the State's powers of legislation are subject to judicial review. If every system of personal law is judged against constitutional principles, corrective measures can be taken by the judiciary within such system. In allowing a non-Brahmin to perform the ritual worship in the temple which was normally performed by a particular sub-sect of Brahmins the Supreme Court said*"Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament".*[45]

However, in the matter of unconstitutionality of personal laws, the Supreme Court has not been very forthcoming. Thus in *Githa Hariharan*'s[46] case it failed to apply Constitutional norms to Section 6 of the Hindu Minority and Guardianship Act, 1956 which had been challenged on the ground of an irrational discrimination in the matter of legal guardianship

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[43] See Article 2(f); also Article 5(a) of the Convention.

[44](1973) 4 SCC 225 at para 151; see also Kuldip Nayar v. Union of India, (2006) 7 SCC 1, at page 131 [para 394].

[45] N. Adithayan v. Travancore Devaswom Board,(2002) 8 SCC 106, at page 115.

[46] (1999) 2 SCC 228.

against the mother of a child. It also failed to read down section 15 of the Hindu Succession Act, 1956 in keeping with Constitutional norms so as to give parity in the matter of succession between women and men dying intestate in *Omprakash v. Radhacharan*[47]. The judicial reluctance to bring about Constitutional uniformity in personal laws is, to say the least, unfortunate because Governments are "too busy with politics, foreign affairs, finance, administration, and social legislation to have much time for the reform of the ordinary law, except in a desultory way. Some of the outstanding abuses get remedied from time to time, largely by private member's bills; but no legislative body exists for keeping under review the body of law as a whole. Even the [Law Commissions are] limited to matters specifically entrusted to [them]. In short, if reform is not effected by the courts it will often not be effected by anybody"[48].

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[47] (2009) 15 SCC 66.

[48]Paraphrased from Salmond on Jurisprudence (11th edn. P. 183).