



LAW ET JUSTITIA LAW REVIEW
VOLUME 2 ISSUE 1

E-MAIL: contact@lawetjusticia.com

WEBSITE: www.lawetjusticia.com

DISCLAIMER

(1) The opinions and views in the articles and research papers published on this website are personal and independent opinions of the author. The website and the journal are not responsible for them.

(2) No part of this work may be produced and stored in a retrieved system or transmitted in any form or by any means, electronic, mechanical, photocopying recording or otherwise without written permission from the publisher.

(3) Our policies are subject to change. We, at Law et Justicia, advise you to periodically view this page in order to take notice of any changes. We will notify you of any changes by posting the new policies on this website. The changes will be effective as soon as they are posted.

PUBLISHER DETAILS

NAME: Shrisha Gautam

ADDRESS: 3/4476, New Bhagat Singh Colony, Bajoria Marg, Saharanpur, Uttar Pradesh, India. PIN: 247001

PHONE: +91 8449591799

E-MAIL: contact@lawetjusticia.com

OFFICE HOURS: 5 PM – 7PM

COPYRIGHT POLICY

All copyrights associated with the manuscript are reserved with the author. The author shall be deemed to have transferred to *Law et Justicia Law Review*, an irrevocable, non-exclusive, royalty-free right along with a transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or any other form or media, retrieval systems and other formats now or hereafter known.

No part of the Journal may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except in the case of strict educational uses by providing due credits and acknowledgment for the same.

To seek permission for non-educational usage, an individual is required to mail with the subject “**Permission Required**”, name of the article as displayed on the website (www.lawetjusticia.com) along with the volume number and the issue number in bold to contact@lawetjusticia.com. After receiving and evaluating the email, Law et Justicia shall provide with other procedures for furnishing the request.

Law et Justicia reserves the right to decline any permission request on any ground deemed fit by the core team. The decision of Law et Justicia shall be final and binding.

**“RELIGIOUS PERSONAL LAWS AND GENDER INEQUALITY – REVISTING
ARTICLE 44 OF THE CONSTITUTION OF INDIA TO ASSURE GENDER
JUSTICE IN THE MULTICULTURAL SOCIETY OF INDIA”**

AUTHOR: SHIVAM MISHRA, Student,
RML National Law University, Lucknow

Link to paper: <https://lawetjusticia.com/religious-personal-laws-and-gender-inequality-revisting-article-44-of-the-constitution-of-india-to-assure-gender-justice-in-the-multicultural-society-of-india/>

Link to Volume 2 Issue 1: <https://lawetjusticia.com/volume-2-issue-1/>

ABSTRACT

India being a multicultural society consists of populace belonging to different religions, communities and beliefs. People associate themselves with different religions and are governed by their own respective religious laws for personal matters. This practice was adopted by Brits during pre-independence India in order to preserve their own socio-economic interests but colonial backlog has driven us to continue this exercise till today without any reasonable justification apart from reluctance of the religious leaders to adapt and modernize. While prevalence of these religious laws has paved the platform for applicability of different laws for different persons, many of these religious practices are also predominantly discriminatory in nature and violate the touchstones of equality enshrined under the Article 14 of the Constitution of India. Religious leaders which support such practices seek to justify them by virtue of the immunity of Right to religion conferred by the Article 25 and 26 of the Constitution of India. While the debate between Article 14 and Article 25-26 is unending, it calls for an appropriate balance between the two provisions. This paper is an attempt to carve out the proper balance between the right to religion and the right to equality. This paper is divided into three parts.

The first one commences from the historical evolution of the religious personal laws to evaluating as to how these religious practices turned discriminatory in nature. This is followed by discussion on the validity of these religious practices in terms of the constitution of India and in terms of the International Law. In the second part of the paper, Author claims the Uniform Civil Code as the solution of the tussle between the right to religion and the right to equality of women and in the final part the author has provided some practical suggestions to implement the Uniform Civil Code in India.

"The idea that God is behind discrimination is unacceptable."

-Fernando Henrique Cardoso

INTRODUCTION

A multicultural society is now a reality in almost every nation across the globe¹ and India is not an exception to this. Contemporary India is also a multicultural society, where people with different diverse religions, faith, and beliefs reside harmoniously.² While globally multicultural society is a reflection of recent immigration activities, India has a history of diversity. Recognizing this diversity, drafters of our constitution endeavoured to adopt an absolute secular approach³ and freedom of religion provided under the constitution is a reflection of this. In India, everyone has a right to practice his/her religion under Article 25 and 26 and minority communities are given further protection under Article 29 of the constitution.⁴

However, such freedom seldom stands in a conflict of women's right to equality provided by the constitution under Article 14 of the constitution. In India, the liberty of women is often shaped by customs and traditions prevailing in the respective religion.⁵ Defence of religion is

¹ SATVINDER JUSS, INTERNATIONAL MIGRATION AND GLOBAL JUSTICE, 1 (2006).

² M. P. Singh, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, 5 J. Indian L. & Soc'y (2014).

³ INDIA CONST. The Preamble- WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC

⁴ INDIA CONST. art. 25- Freedom of conscience and free profession, practice and propagation of religion.

INDIA CONST. art. 26- Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right.

INDIA CONST. art. 26- Protection of interests of minorities

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

⁵ HELEN IRVING, GENDER AND THE CONSTITUTION, (Cambridge University Press, 2008).

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

used by the orthodox leaders to impose limitations on women while restricting their sphere only to domestic work. From burning the bride after the death of husband⁶ to paying fewer female employees for work⁷ or from restricting the entry of women in temples⁸ to the practice of female genital mutilation⁹ India has a history of a social context where women have been treated as secondary citizens. Very often it is the religion that paves the way for such practices; much literature even sees religion as the basic cause of the violation of women's rights which unfortunately is true to a great extent.¹⁰

Religion, as interpreted today, does violate the rights of women in many instances.¹¹ It is not because of the traditional practices in religion which prima facie seem to be discriminatory, it is however, because they are interpreted in such a skewed manner. Cultural norms are the reflection of male values since most of the norms have been continuing since the time when women did not have such a right to equality. Such norms always impose male superiority upon women in oppressing fashion. Also, religion and culture in today's world are the centres of people's struggle not only for political power but also struggle for creating their distinct identity amidst this multicultural society.¹² This has led to the formation of rigid religious and cultural practices. While religious leaders now perceive any changes in their religion as a significant change in their identity, the state sees such changes as political uproar which can go against their vote bank politics. Therefore, even the State allows such discriminatory practices under the veil of freedom of religion.

⁶ Correspondent, *The abolished 'Sati Pratha': Lesser-known facts on the banned practice*, India Today (Dec.4 2018), <https://www.indiatoday.in/education-today/gk-current-affairs/story/sati-pratha-facts-275586-2015-12-04>.

⁷ Richa Bhatyacharya, *Gender pay gap high in India: Men get paid Rs 242 every hour, women earn Rs 46 less*, The Economic Times (March 07, 2019), <https://economictimes.indiatimes.com/magazines/panache/gender-pay-gap-still-high-women-in-india-earn-19-pc-less-than-men-report/articleshow/68302223.cms?from=mdr>.

⁸ Correspondent, *Sabarimala verdict: A timeline of temple entry issue ahead of SC verdict today*, The Economic Times (14 Nov, 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/sabarimala-verdict-a-timeline-of-temple-entry-issue-ahead-of-sc-verdict-today/articleshow/72049026.cms>; Correspondent, *Sabarimala temple: India's top court revokes ban on women* (Sep. 28, 2018) <https://www.bbc.com/news/world-asia-india-45652182>.

⁹ Somya Abrol, *Yes, Female Genital Mutilation happens in India; here's everything you need to know* India Today (Feb.6, 2018) <https://www.indiatoday.in/lifestyle/people/story/female-genital-mutilation-india-clitoris-pleasure-muslim-bohra-community-1162510-2018-02-06s>

¹⁰ Jimmy Carter, *Religious and traditional practices discriminate against women and girls*, The Elders, (July 2, 2009), <https://theelders.org/news/religious-and-traditional-practices-discriminate-against-women-and-girls>.

¹¹ Vrinda Narain, *Women's Rights and the Accommodation of Difference: Muslim Women in India*, 8 Cal. Rev. L. & Women's Stud. 43 (1998).

¹² Zoya Hasan, *Minority Identity, State Policy and Political Process*, FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE 59, 60-63 (Valentine Moghadam ed., 1994).

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

This has led to the tussle between the right to equality and freedom of religion. Traditional leaders claim that any interference with their religion will be the violation of Article 25, 26 and 29 of the constitution and liberals claim that continuing with such practices is violation of women's right to equality.

Being a multicultural nation India has plural religious personal laws (hereinafter as RLPs) which are governed by the religious laws of the community. In India, while there is one criminal law that applies over the whole country¹³ and several other civil codes also which are the same for each and every person of the country¹⁴RLPs are different for every community.¹⁵ RLPs regulate the realm of marriage-divorce, guardianship, inheritance, maintenance, adoption and are largely tied-up with the religion and religious practices.¹⁶ These are sometimes fraught with outdated practices which end up being discriminatory to women.

The discussion on RLPs becomes significant on two grounds- firstly, it regulates the so-called private domain of the society, i.e., marriage- divorce where women experience the sharpest discrimination, secondly, while religious practices can be checked on the touchstone of Part III of the constitution under which women claim their right to equality, RLPs are claimed to be not the subject of any interference not even fundamental rights granted by the constitution.

The Author in this article has discussed the RLPs broadly and has made an attempt to provide the proper balance between the right to religion and the right to equality. The Article has been divided in three-parts, first part discusses RLPs in a comprehensive manner which starts with the evolution of RLPs and then proceeds towards establishments of its discriminatory nature against women, the author in this part has also denied the claim of RLPs being immune from the touchstone of Part III of the constitution.

In its second part the Author claims Uniform Civil Code as the solution of the tussle between the right to religion and the right to equality of women. In the final part the author has provided some practical suggestions to implement the Uniform Civil Code in India.

¹³ India Penal Code, 1860.

¹⁴ Indian Contract Act 1872, Transfer of Property act 1885 and many other civil codes which apply to everyone equally.

¹⁵ Vibhuti Patel, *All personal laws in India are discriminatory*, livemint (Aug. 22, 2017) <https://www.livemint.com/Opinion/Cn69qE9pQCImtQzzvw1oVP/All-personal-laws-in-India-are-discriminatory.html>; Rohit De, *Personal laws: A reality check*, frontline (Sept. 06, 2013) <https://frontline.thehindu.com/cover-story/personal-laws-a-reality-check/article5037670.ece>.

¹⁶ Virendra Kumar, *UNIFORM CIVIL CODE REVISITED: A JURIDICAL ANALYSIS OF "JOHN VALLAMATTOM"* 45 ILI 315, (2003).

RELIGIOUS PERSONAL LAWS AND WOMEN DISCRIMINATION

Personal laws recognize the difference between natural and family characteristics to another which provides them a unique identity, it entails a legal effect on these characteristics.¹⁷ Personal laws regulate the realm of family laws, which include marriage- divorce, inheritance, maintenance, adoption, guardianship etc. Traditional leaders claim this sphere as their private domain where the state has no right to interfere. RLPs are also claimed to be signifiers of their distinct identities which otherwise will be lost in this prevalence of multicultural nations. However, such claims and identities are the reflections of only patriarchal norms that are discriminatory in nature. An example of this is the Shah Bano controversy where religious fundamentalist in Islamic religion denied equality rights to women by using justification of personal laws. The Supreme Court however, struck down such discriminatory customs and prevailed equal rights over traditional practices. Justice K.S.Hegde in his obiter once said that personal laws are a medieval times concept, therefore, are ought to be completely alien concepts in today's time. Until we will not give up the orthodox practices of our personal laws, we cannot achieve the homogenous society which is the ultimate goal of our constitution.¹⁸

HISTORICAL BACKGROUND

The concept of Personal laws was introduced by the 'Warren Hastings' Judicial Plan' of 1781. It was this plan which stated that- In all suits regarding marriage, caste, and other religious usages and institutions the law of the Koran with respect to the Mohammedans and of the Shaster with respect to the Gentoos shall be adhered to." With this exception, everyone was governed by the state law applicable to all.¹⁹ It does not seem wrong to infer that it was this different community approach by the Brits between Hindu and Muslim that sowed the seed of partition. Brits chose not to update RLP's with the modern outlook of society because their interest lay only in economic and social stability. It was noted by many members of the

¹⁷Brenda Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, Hastings Women's L.J. 65 (2006).

¹⁸ K.S. Hedge, *ISLAMIC LAW IN MODERN INDIA* (Ed. Tahir Mahmood) ,3 (1972)

¹⁹ *Supra* note 2.

constitution assembly including Rajkumari Amrit Kaur, Hansa Mehta and Minoo Masani²⁰ that Brits continued this practice of different personal laws as it was within their strategy to divide and rule.²¹ A system (of personal laws) that was started without any structure during the Mughal regime continued by the Britishers with the aim of divide and rule cannot be held as an inseparable part of the society.

Further, it is also noteworthy that it was not religion that formed the basis of personal laws in matters of marriage-divorce; it was legislation introduced by Warren Hastings in 1781 that laid down this foundation.²² Personal laws are nothing but the results of the colonial experiments of law that they practiced in India and we have been strangely continuing it even till today.²³

DISCRIMINATORY PRACTICES UNDER THE PERSONAL LAW

There are many discriminatory practices in these religious laws which are clearly biased against women in general. According to the dissolution of the Muslim Marriages Act 1939 a husband while divorcing his wife does not need to give any reasons for divorce. However, a wife is allowed to divorce her husband only under one of the stipulated grounds mentioned in the act.²⁴

Moreover, under the Muslim law a male heir and a female heir of the same degree don't get the equal property share in the ancestral property. In fact, male heirs are entitled to get twice the share of the property as their female counterpart.²⁵ Also, Muslim wives after the death of their husband get only one-fourth property of the husband regardless of the number of wives they are man and if they have any child, the share of the widows will be reduced further. However, contrary to this, the husband gets one-fourth property of each wife after their

²⁰JUSTICE RATNSAPARKHI, UNIFORM CIVIL CODE- AN IGNORED CONSTITUTIONAL IMPERATIVE, (1997). Justice Ratnaparkhi referring the constitutional assembly debate in her book stated the argument of Minoo Manshi, Raj Kumari Amrit Kaur and Hansa Mehta..

²¹ D. C. Manooja, *UNIFORM CIVIL CODE: A SUGGESTION* , 42 Journal of the Indian Law Institute 448, (2000).

²² *Id.*

²³ ERIC STOKES, *ENGLISH UTILITATIANS AND INDIA*_(Oxford university press, 1959).

²⁴ Karishma Assudani, *GENDER EQUALITY VIS-A`-VIS PERSONAL LAWS*, 3 International Journal of Law and Legal Jurisprudence Studies 398.

²⁵ ARCHANA PARAS`HAR, *WOMEN AND FAMILY LAW REFORM IN INDIA*, 46 (1992).

Muslim law is a combination of pre-Islamic customary law and Koranic law. The shares of Koranic heirs are specified and the remainder of the estate is divided among the customary heirs. Wives and daughters are Koranic heirs. Islamic law remedied the situation under customary law whereby females were excluded from inheritance.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

respective deaths notwithstanding the presence of son(s).²⁶ In Muslim law, a mother can claim physical custody of the children²⁷ but cannot claim the legal guardianship which always remains with the father. Even after the death of the father, it will not be the mother but grandfather or executor of the father who will get the legal guardianship of the child.²⁸ Physical custody can also be provided only for the stipulated time. While a Muslim man can marry a non-Muslim woman, Muslim woman cannot marry a non-Muslim man. Inter-religious marriage of a Muslim woman is void ab-initio.²⁹

Muslim males are allowed to seek divorce not only through formal judicial process but also through various extra-judicial processes. Muslim women are adversely suffering by such provision as this makes them more vulnerable in comparison to Muslim men and women of other religions. It becomes worst owing to the fact that Muslim men are even allowed for polygamy under which they can have four wives at a moment.³⁰ Further, under the Muslim law apostasy of a Muslim man results in the dissolution of his marriage while apostasy of a Muslim woman does not. In Hindu law, Parsi law and Christian law such apostasy of the husband doesn't result in the dissolution of marriage but in the right to sue for divorce.³¹

In other religions, a divorced wife can marry her previous husband any time without any condition. In Muslim law after divorce with her husband, if she wishes to marry her previous husband again, she will need to follow a process whereby she will have to marry another person, consummate the marriage with him and then either the divorce with the new husband or his natural death will entitle her to marry her previous husband again.³² It is a discrimination which is based on religion but what's more important here is to realize the question of why women? Is this the requirement of the religion or of the male dominated society?

²⁶ *Id.*

²⁷ *Id.*

²⁸ DAVID PEARL, A TEXT BOOK ON MUSLIM PERSONAL LAW 27 (1979); John H. Mansfield, The Personal Laws or a Uniform Civil Code?, in RELIGION AND LAW IN INDEPENDENT INDIA 145-47 (Robert D. Baird, ed., 1993).

²⁹ PARAS DIWAN, FAMILY LAW 43 (1991).

³⁰ Linda Serck, *Polygamy in Islam: The women victims of multiple marriage*, BBC (June 1, 2012) <https://www.bbc.com/news/uk-england-berkshire-18252958>, Werner F. Menski, *The Reform of Islamic Family Law and a Uniform Civil Code in India*, ISLAMIC FAMILY LAW 253, 281 (Chibli Mallat & Jane Connors eds., 1990).

³¹ *Supra* note 19.

³² Radhika iyenger, *What is Nikah halala, how it was established and where it stands in modern India*, The Indian express (26 March 2018), <https://indianexpress.com/article/what-is/what-is-nikah-halala-how-it-was-established-and-where-it-stands-in-modern-india-triple-talaq-4618415/>.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

Muslim women are allowed to seek divorce through a process known as Khula but this deprives them of their right to maintenance and right to residence from their husbands.³³ This also isn't an individual choice of a wife to seek divorce, her offer of divorce is contingent upon the acceptance of her husband who may /may not accept. This again puts women in a great disadvantage and violates their right to equality.³⁴

Under the Hindu Succession Act 1956, provisions of a male's succession are provided from Section 8 to Section 13 HSA. In case of females, section 14 to section 16 is applicable. The presence of separate rules for succession is itself against the concept of gender equality. Also, amongst Hindus while delineating the property rights, the source of acquisition of a Male's property is not relevant for him to claim his right; it is however, a matter of great relevance for females when they claim their right over the property. This practice again puts them on a vulnerable side and violates the touchstones of equality.³⁵

Section 125 of Criminal Procedure (CrPC) is a secular provision which provides inter-alia women the right to seek maintenance from their husband irrespective of religion.³⁶ However, Section 5 of the Muslim Women (Protection of Right to Divorce) Act 1986 specifies that the prior consent of the husband is necessary for Muslim women to claim their right even under this section³⁷. Personal laws' provisions seem to have extended their ambit to general laws of the country as well, giving overriding effect to welfare laws of the country such as Section 125 CrPC.

Women, in many instances, have also been deprived of their hereditary right to succeed as a Pujari of a temple. There are hardly any Supreme court rulings where such restrictions were declared unconstitutional.³⁸ These practices are still prevailing in our society unfettered.

³³ A.S.Parveen Akthar v. The Union Of India (MANU/TN/2472/2002).

³⁴Correspondent, *Personal laws exempt from fundamental rights: Indian Union Muslim League* ,The Times of India (Feb. 21, 2014), <https://timesofindia.indiatimes.com/city/kochi/Personal-laws-exempt-from-fundamental-rights-Indian-Union-Muslim-League/articleshow/30761616.cms>.

³⁵ Om Prakash v. Radha Charanthe (2009)15 SCC 66 - When the wife was thrown out of the matrimonial home after unfortunate death of her husband by her in-laws, she acquired considerable wealth through her job and lived along with her parents. Later she died intestate. Her mother and her in-laws filed for grant of a succession certificate under S.372, Indian Succession Act. The Supreme Court held that in case the intestate women dies issueless, the heirs of her husband would be given preference over her parents in the light of section 15 of the Hindu Succession Act 1956.

³⁶The Code of Criminal Procedure, 1973, § 125, Acts of Parliament, 1973 (India).

³⁷The Muslim Women (Protection of Right to Divorce) Act ,1986, , § 5, Acts of Parliament, 1986 (India).

³⁸Raj Kali Kuer v. Ram Rattan Pandey, (1955) 2 SCR 186..

Though, in recent years there is recognition of women's rights such as women now can become a coparcenary of a Joint Hindu Family³⁹, abolishment of talaq-e-bidat. However, there are still abound of loopholes that exist in different RLPs that consistently tie women with ropes of inequality and their hopes of getting released is abating day by day.

PATRIARCHAL APPROACH OF RLPS

Simone de Beauvoir observed that religious laws have codified the customs which are a reflection of male power and authority. These laws are now sanctioned as divine rights in the society.⁴⁰ The continuation of such laws in the society has made them an indispensable part of the society. All India Muslim Personal Law Board [AIMPLB] which is always generally resists modernization of RLPs has been heavily criticized by the Muslim women groups for their retrograded views about women.⁴¹ AIMPLB claims that their practices are based on the interpretation of the Holy Quran and they cannot be given up since everything related to/derived from the Quran is fundamental to their religion. However, the problem seems to lie in their modus operandi while interpreting the Quran as they always interpret it with a biased patriarchal presumption rather than having a gender-neutral perspective.

AIMPLB justifies polygamy as their customary practice since Prophet Mohammed himself was married to more than 1 woman. However, what they omit to consider is the different background and circumstances existing back then. He was married to only one woman for half of his life. It was only after her death and owing to the consequences of the battle of Oudh that he married again. The male population of the Muslim community was reduced massively and the war-widows were left with no options but to get married to already married persons. These were the circumstances where he allowed and justified the practice of Polygamy with a sole objective of benefitting women. Women's welfare was the sole object behind the introduction of such practices. But today this practice has become a tool to be used against women. Quran

³⁹The Hindu Succession (Amendment) Act, 2005, § 6, Acts of Parliament, 1955 (India).
Shayara Bano v. Union of India (2017) 9 SCC 1.

⁴⁰ SIMONE DE BEAUVOIR, *THE SECOND SEX* 621 (1949).

⁴¹ Nayantara, *Inside Islam: Dialogues and Debates, Challenging Misconceptions, Illuminating Diversity* "A Collaboration of the UW-Madison's National Resource Centers and WPR's Here on Earth: Radio without Borders, Inside Islam (12 June 2012) <http://insideislam.wisc.edu/2012/06/muslim-women-in-india-seek-equal-rights-under-personal-law/>.

under the verse 30:21⁴² has given great importance to monogamy, it allows a second marriage only in the case of necessity and with several conditions. Only when you can treat all your wives equally and fairly, you can marry another woman⁴³. The Quran itself unambiguously states that when a husband cannot treat his wives equally with dignity.⁴⁴ Such practices result in injustice to women and must be discouraged.⁴⁵ However, due to skewed interpretation of the holy book, the requisites/conditions to be satisfied for a re-marriage have been diluted over the course of time and polygamy has become a widespread practice amongst Muslims.

RLPS AND ARTICLE 13

The validity of a law in India depends on the criteria given under the Article 13 of the constitution which states that laws made by the state if found to be inconsistent or derogatory to the Part III of the constitution would be void.⁴⁶

It was claimed that personal laws are not subject to Article 13 in cases such as Narasu Appa Mali⁴⁷ case whereby even the Court provided immunity to personal laws from the ambit of Article 13. Therefore, the question of gender inequality which stems from Article 14 [Part-III of the Constitution] itself ceased to arise. However, in the same case few other important observations were made. Justice Chagla said that even if the practices of marriage – divorce, etc. are according to religious practices, the right of the state to regulate them cannot be disputed. Justice Gajendragadkar stressed that our constitution drafters have put the personal laws outside the purview of part III of the constitution but they were also aware that reforms are needed in personal laws and that's why they have put the provision of UCC in the constitution.⁴⁸ In precise, the court indicated that personal laws are outside part III because perhaps our founding fathers did not want to continue with personal laws but with the UCC. In later years, the Supreme court overruled Narasu Appa Mali case in several further rulings such

⁴² “From His (Allah) signs is that He has created for you spouses from yourselves so that you may get peace and tranquillity through them; and He placed between you love and mercy. In these are signs for the people who reflect.”

⁴³ Surah an-Nisaa, 4:3- “ But if you fear that you will not do justice (between them), then (marry) only one...”

⁴⁴ Surah an-Nisaa, 4:129)- “And you do not have the ability to do justice between the wives, even though you may wish (to do so)...”

⁴⁵ A.S.Parveen Akthar vs. The Union Of India (MANU/TN/2472/2002)

⁴⁶ INDIA CONST. art.13.

⁴⁷ The State of Bombay v. Narasu Appa Mali AIR 1952 Bom 84.

⁴⁸ *Id.*

as Mary v. the State of Kerala⁴⁹, Ammini EJ v. Union of India.⁵⁰ In these cases the Supreme Court scrutinized the validity of the personal laws in the light of fundamental rights granted by the Constitution inevitably leading to the inference that Personal laws are also subjected to Part-III of the Constitution. In C. Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil⁵¹ the court stated that-

“Article 14, 15 and 21 eliminate all the kinds of gender discrimination. These provisions constitute ‘the trinity of justice, equality, and dignity’. The personal laws conferring inferior status on women is anathema to equality. 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.”

VIOLATIVE OF INTERNATIONAL COVENANTS-

RLPs governed by religious laws violate not only the rights provided under the Constitution of India but also violate some rights which are guaranteed by the international covenants. Gender discrimination is specifically prohibited under the United Nations Charter and Under Universal Declaration of Human Rights (UDHR).⁵² Concern about women discrimination has been elaborately dealt in the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW)⁵³ and in the International Convention on Civil and Political Rights

⁴⁹ 2014 (14) SCC 272.

⁵⁰ AIR 1995 Ker 252.

⁵¹ (1996) 8 SCC 525.

⁵² Universal Declaration of Human Rights, 1948. art. 2- Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

art. 7- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

art. 16- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

⁵³ Convention on the declaration Elimination of all Forms of Discrimination Against Women, 1979, art.2- States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

art. 3- States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with me

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

(ICCPR).⁵⁴ India is a signatory of CEDAW and ICCPR and other aforementioned conventions (UDHR and UN Charter) are recognised as International Customary law therefore, all of them have binding value over India.

CEDAW requires all the ratifying states to ensure gender equality in matters of Marriage-divorce and family relations as well as in social life.⁵⁵ International Mechanism Committee on the Elimination of Discrimination against Women monitors whether or not the state parties are following the compliances as prescribed under the treaty. India in its periodic review to the committee, itself has accepted that the government is maintaining its policy of non-interference in personal law governing marriage- divorce, adoption, etc.⁵⁶ The Committee, in its review, has stated that the Indian government has failed to take any steps to reform the religious practice which is resulting in continuous violation of women's rights in the name of religion.⁵⁷ Further, it recommended India to reform personal laws of different communities along with bringing Uniform Civil Code as soon as culturally and socially possible.

The Human Rights Committee is an international mechanism for monitoring the compliance of ICCPR by the state parties. While considering India's periodic report in 2019 it reiterated its statement of 30 July 1997 that India has yet not itself freed from discriminatory religion-based laws continuingly violating the equality rights of women.⁵⁸ It also suggested India to reform its personal laws and make them compatible with the covenant.⁵⁹

However, despite these suggestions India as a state is still maintaining its policy of non-interference in religious matters. International covenants provide goals, objects, and purposes which a state should fulfil by ratifying the provisions provided under them. Gender equality

⁵⁴ International Convention on Civil and Political Rights , 1966, art. 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

⁵⁵ Convention on the declaration Elimination of all Forms of Discrimination Against Women, 1979, art.16- States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women

⁵⁶ United Nations, Report of the Committee on the Elimination of Discrimination Against Women , Supp. No. 38, A/55/38, 22nd Session 17 Jan-4 Feb 2000 and 23rd Session 12-30 June 2000, General Assembly Official Records.

⁵⁷ *Id.*

⁵⁸ India's Third Periodic Report (CCPR/C/76/Add.6) considered at its 1603rd to 1606th meetings on 24 and 25 July 1997 and subsequently adopted at 1612th meeting (sixtieth session) of the Human Rights Committee <http://www1.umn.edu/humanrts/hrcommittee/india1997.html>

⁵⁹ *Id.*

has been expressly provided in Article 3 of ICCPR⁶⁰ and Article 1 of CEDEW⁶¹ but despite passage of many years India has failed to implement these principles in toto. Supreme Court has also recognized the importance of these covenants in several cases such as Vishaka v State of Rajasthan⁶² and PUCL v Union of India⁶³ where the Court unambiguously held that if international covenants are not against the object of the constitution, then they shall be mandatorily followed by the government. Such covenants have also recognized the right to religion, however in both individualistic and collective terms⁶⁴ while RLPs contribute only to group rights by ignoring the individual rights of women.

UCC AND GENDER JUSTICE

The above discussions pondered upon the discriminatory nature of RLP's and their integration with the identities of people associating with particular religions. Such complexities have reached to the extent where even the Apex court seems unable to settle them peacefully.⁶⁵ However, in the light of equality of women it is indispensable to address these issues sooner or later.

Article 44 is a Directive Principles of State Policy (hereinafter as 'DPSP') enshrined under part IV of the constitution which is non-justiciable in nature. It states that the State shall endeavour to adopt a Uniform Civil Code throughout the territory of India.⁶⁶

Uniform civil code aims to govern the realm of RLPs of all communities across India by a uniform set of laws based on the principles of gender justice and other human rights. Uniform laws are the guarantor of justice, liberalism, equality and fairness which will help to formulate modern India with social and economic stability.⁶⁷ Implementation of uniform laws becomes

⁶⁰ *Supra* note 54.

⁶¹ *Supra* note 53.

⁶² Vishaka v. State of Rajasthan, (1997) 6 SCC 241

⁶³ (1997) 1 SCC 301.

⁶⁴ HENRY J. STEINER & PHILIP ALSTON, Comment on Autonomy Regimes, in INTERNATIONAL HUMAN RIGHTS IN CoNTEXT: LAW, POLITICS, MORALS 992-93 (Henry J. Steiner & Philip Alston eds., 1st ed. 1996).

⁶⁵ Brian Grim, *Religion holds women back. Or does it?*, World Economic Forum (Nov.17, 2015) <https://www.weforum.org/agenda/2015/11/religion-holds-women-back-or-does-it/>.

⁶⁶ INDIA CONST. art. 44.

⁶⁷ IAN WARD, "THE POLITICS OF POSITIVISM," INTRODUCTION TO CRITICAL LEGAL THEORY, 2nd ed. (London: Cavendish Publishing, 2004); BRIAN BIX, "H.L.A. HART AND LEGAL," JURISPENDANCE: THEORY AND CONTEXT, 2nd ed. (London: Sweet & Maxwell, 1999).

all the more important in a multicultural nation such as India because many of the prevailing personal laws are based on customary practices which are possessing outdated characteristics and are un-amended with the changing society. UCC will separate law from the web of religion, and will ensure that individual rights guaranteed by the Constitution are not compromised on the pretext of religious practices. In further discussion, the paper encompasses how UCC not only provides individual rights but also provides harmony between the groups' rights [Religion and Customs] and individual rights.

UCC- THE CONSTITUTIONAL ASSEMBLY'S STAND

The Constitution Assembly debate of draft Article 35 which now is enshrined in Article 44 of the Constitution is necessary to discuss as it provides the proper focus and setting behind the introduction of UCC as a DPSP. UCC was introduced in the assembly, with the main objective of providing civil equality to all the citizens irrespective of their religion through codification of all the RLPs.⁶⁸ It was opposed by the Minority set of members including all the five Muslim members who participated in the debate of UCC. While all other Muslim male members were absolutely against UCC, one of them- "Hussain Imam" supported the UCC with the condition that it should be introduced later when we achieve mass literacy and become little advance.⁶⁹ All female members present in the discussion- Minoo Masani (Parsi), Raj Kumari Amrit Kaur (Christian) and Hansa Mehta (Hindu) vehemently supported the UCC and suggested for its implementation either immediately or within next five-ten years.

Amidst, these extreme stands Dr. Ambedkar and K.M.Munshi took the middle approach and suggested that we all have equal rights, benefits and securities under the constitution and such equality shall not be taken away based on the customs or usages prevailing in any community⁷⁰. It was further remarked by the Constitution assembly – "While India already has one criminal law applicable to everyone and there are at least eleven civil laws which apply over everyone such as Indian Contract Act 1872, Transfer of Property Act 1885 etc. It is worth surprising to hear that we have failed to agree to have one civil code for personal laws".⁷¹ Munshi felt that for a Secular country UCC is essential. He added that it is the time when we need to stand

⁶⁸ M. P. Singh, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, 5J. Indian L. & Soc'y V (2014).

⁶⁹ Constituent Assembly Debates, Vol.VII, p.546.

⁷⁰ B.SHIVA RAO, *THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS*

⁷¹ Constituent Assembly Debates, Vol.VII,p.550-551..

united and consolidate our country. If religious practices are construed in such a manner, then we will have to classify each trivial civil matter within the realm of religious and secular domains and it won't take long for this to open floodgates to the doors of Courts apart from rampant conflicts in the country. It was this moment when assembly replied in negative on the question whether the practices of such as marriage, divorce, etc. are religious in nature.⁷² Assembly rather classified them as secular practices not bound by religion. The Assembly also noted that in many Islamic countries the personal laws of minorities are duly recognised, however, they have not been considered sacrosanct so as to prevent the enactment of a uniform civil code.⁷³

Few other changes were suggested in the proposed draft clause of UCC. Mohammed Ismail wanted to add the following proviso to draft Article 35 - no community will be obliged to give up its personal law in favour of UCC⁷⁴. Mohammed Ali Beg proposed that the following proviso should be added- such Uniform law will not affect the personal laws of any community.⁷⁵ Rejection of both the proposals clarifies the intention of the assembly that they didn't want to make it an optional code.

Felt it as a matter of a sensitive political issue and considering the event of partition violence founding fathers settled UCC under the DPSP, however, this in no way reduces the importance of UCC as the above-discussed excerpts of the assembly debate also suggest this.

III.II. Constitutional Justification of UCC Implementation

India is a secular country⁷⁶ and any discrimination based on religion violates the fundamental principles of secularism and Article 14. To avoid this, Article 44 was enshrined in our constitution which is based on the anticipation that all the laws in India will be secular in nature. Former Chief Justice of India V. N. Khare in the case of John Vallamattom case⁷⁷ stated that the basic premises of Article 44 are to denote that religion and personal laws have no connection in the laws of a civilized society so that in this multi-religious, multilingual nation we can all unite together without any barrier based on the religion. The court has also held that concepts such as Marriage/divorce are based on the social relations of individuals and are not

⁷² *Id*, p.574.

⁷³ *Id*, p.547.

⁷⁴ *Id*, p.540

⁷⁵ *Id*, p.541

⁷⁶ *Supra* note 3.

⁷⁷ John Vallamattom v. Union of India (2003) 6 SCC 611.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

the components of religious affairs. Hence, no argument based on Article 25 and Article 26 should be used to justify their discriminatory characteristics.⁷⁸

Even if we assume that RLPs are included under the Article 25⁷⁹ and 26, they will still be subjected to Article 14 and other regulations made by the Govt. Article 25 itself provides under its sub-clause 2(a) that religious practices can be subjected to regulations, while sub-clause 2(b) allows the state to interfere in personal laws for social reforms and social welfare. Therefore, implementation of UCC can also be done through Article 25(2)(b) of the constitution since it aims to reform the religion-based discriminatory practices which constitute both social welfare and social reforms.

It was also argued by the minorities that they have freedom of religion under Article 26(2), which as per the Constitution is not the subject to any regulation or part III of the Constitution but only to the subject of public order, health, and morality. Therefore, there should not be any interference in their religious practices in the form of UCC. However, in its landmark judgment of *India young lawyers association v. the State of Kerala*,⁸⁰ the Supreme Court recently held that Article 26 is subjected to Constitutional morality which as stated by the court includes the whole text of the constitution including part III of the constitution.⁸¹ Therefore, Article 26 is also subjected to Part III of the Constitution which includes the right to equality enshrined in Article 14 of the Constitution. Personal laws therefore, which are violative of the right to equality are liable to be struck down.

Article 29(1) provides minorities with the right to preserve their culture. It is sometimes argued that UCC will violate this right of the minorities. It is, however, noteworthy that UCC is not intended to interfere in the cultural practices of any minority. It only attempts to bring uniformity in secular matters such as Marriage, Divorce etc. Further, it is noted that such a right

⁷⁸ *Sarla Mudgal v. Union of India* (1995) 3 SCC 635.

⁷⁹ INDIA CONST. art. 25, cl. (2)(a)- Nothing in this article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.

art.25, cl. (2)(b)- Nothing in this article shall affect the operation of any existing law or prevent the state from making any law.

providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

⁸⁰ (2017)10 SCC 689.

⁸¹ *Shayara Bano and Union of India* (2017) 9 SCC 1.

was given to the minorities to enable them to join the mainstream society without any hesitation or fear of oppression by the majorities but not to remain isolated from the society and its laws.⁸²

DIVERSE UNITY

Different RLPs practices' of different communities result in the discrimination of the women and UCC aims to eliminate all these differences. Though Hindu codified law been has framed, there is still different law applicable in Goa, Daman and Diu where old Hindus usages decrees of 19th century are the law of the land, Hindus of Pondicherry are being governed by the French Civil Code, Uttar Pradesh and Tamil Nadu have made several amendments in their laws, Andhra Pradesh and Kerala have passed some special Hindu laws in supplement of Country wide Hindu codified laws, Karnataka, Kerala, Tamil Nadu, and Andhra Pradesh have matriarchal families and are governed by different customs altogether. North Eastern states such as Assam, Meghalaya, Mizoram, etc also have their local customs prevailing over the Codified Hindu laws. Nagaland has got special protection through Article 371A in terms of usages and local customs.⁸³ In matters of coparceners, partition and Joint families classical Hindu law based on Mitakshara and Dayabhaga⁸⁴ is still applicable. There are multiple sub-schools of Mitakshara which have contrasting differences in their provisions and practices.

With the presence of a myriad of castes, sub-castes and sects even amongst Muslims practices are remarkably different, varying from one sect to another.⁸⁵ Even after the introduction of Hindu Code law, differences in law still exist, which again urges the need to have UCC to make this country a place where people identify themselves as Indians and not members of different communities.

JUDICIAL OBSERVATIONS OF UCC

The Supreme Court of India, unlike government, has not ignored the women's right of equality in the name of religion and the apex court's decision of Sabrimala temple where it allowed

⁸² V.Sudhish Pai, *Uniform Civil Code- A Constitutional Goal*, 2 SCC j 40,(2016).

⁸³ Shakeel A. Samdani, *Uniform Civil Code: Myth and Reality*, 23 ALJ 92, (2015-16).

⁸⁴ *Id*; The Hindu Succession (Amendment) Act, 2005, § 6, Acts of Parliament, 1955 (India)..

⁸⁵ Correspondent, *Why the government must now hasten to enact a Uniform Civil Code*, The Economic Times (Aug.27, 2017), <https://economictimes.indiatimes.com/news/politics-and-nation/why-the-government-must-now-hasten-to-enact-a-uniform-civil-code/articleshow/60238970.cms>.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

entry of women in the temple despite huge opposition by the followers⁸⁶. Practice of talaq-e-bidat was recently declared unconstitutional by the Court on the ground that it violates the right to equality of women. The Supreme Court categorically held that no such infringement shall be excused on the pretext of religion.⁸⁷

There are many cases in which the judiciary has discussed the concept of Uniform Civil Code. Surprisingly in most of these cases, no separate request/prayer was made by the lawyers for UCC. Infact, the judiciary itself recognized the complexities and injustices happening with women thereby realizing the need for the implementation of UCC.

The first such case is, Shah Bano case⁸⁸ where Supreme Court was deciding upon the question of Muslim women's right to maintenance. The court first discussed the importance of UCC and confessed that- It is a matter of regret that despite having the clear constitutional instructions for UCC implementation we have failed to imply it for long. The thrust of UCC was discussed more elaborately in the case of Sarla Mudgal v. Union of India⁸⁹ where justice Kuldeep Singh made some serious concerns over UCC and opined that when 80 percent of the citizens could be covered under codified laws within the span of four and five years then why are the rest of the citizens kept in abeyance. He emphasized that it is high time to implement the uniform civil code throughout the territory of India. He further contested the denial from particular communities which refuse to accept such code by saying that "During the partition, people who decided to stay in India were aware that we don't believe in two-nations theory. We are one country with one nation community, one citizenship and national integrity is our prime goal and for this implementation of UCC is much necessary." Justice R.M.Sahai in his concurring judgment said that- religious practices that are resulting in violation of human rights and dignity cannot be allowed as a part of religious freedom or religious autonomy since this will count as suppression of such rights by religion.

In John Vallamatom's case⁹⁰, the court observed that-

"Where Article 25 gives religious freedom, Article 44 separates religion from personal laws and social religions; the court observes that marriage-divorce, adoption- inheritance, etc are the secular practices which cannot be protected under Article 25 and 26. Further, the court

⁸⁶ Indian young lawyers association v State of Kerala, (2017)10 SCC 689.

⁸⁷Shayara Bano v. Union of India (2017) 9 SCC 1.

⁸⁸ Mohd. Ahmed v. Shah Bano (1985) 2 SCC 556

⁸⁹ Sarla Mudgal v. Union of India, (1995)3 SCC 635.

⁹⁰ John Vallamatom v. Union of India, (2003) 6 SCC 611.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

reiterated what was said in Sarla Mudgal's case that - it is regretful that we haven't given effect to Article 44 with parliament still to step in, UCC can help in national integration by removing the different communities' different ideologies."

However, the court took a bit reserved approach in Ahmedabad Women's Action Group (AWAG) v. Union of India⁹¹ where it stated that- keeping gender discrimination away from personal laws is a matter of state policies on which the court will not ordinarily take concern. Despite this case, earlier statements of the court cannot be ignored where they clearly observed the need for UCC particularly in reference to gender discrimination.

In addition to stressing upon the need of UCC, judiciary has been consistently modifying the provisions of personal laws which are the potential threats to human rights. Such as, in Shabnam Hashmi v. Union of India⁹² The court held that any person can adopt the child under the Juvenile Justice Act 2000 and no personal laws can restrict them from doing so. In Shamina Farqui v Shahid Khan it held that every woman will have the right to maintenance under section 125 CrPC irrespective of religion notwithstanding personal laws. In ABC v State (NCT of Delhi)⁹³ The Court held that an unwed mother can get the guardianship of her child. In the case of Pragati Verghese and etc. v. Cyril George Verghese and etc.⁹⁴ The Court struck down section 10 of the Indian divorce act which deals with the Christian community on the ground of violation of the right to equality. The common thread between all these discussed cases is that the Supreme Court has given preference to UCC and gender justice over personal laws. Despite such a grateful approach by the Apex court, UCC in India is still a reverie.

DPSP AND FR HARMONIOUS FINDING

Part III of the Constitution enshrines the Fundamental Rights [FR] of an individual while Part IV consists of the DPSPs which are the instructions given to the state for moving towards certain aims, goals and objectives that our constitutional drafters wanted to achieve. People tend to evaluate DPSP and FR in terms of their justiciability. This led to a common mis-belief

⁹¹(1997) 3 SCC 573.

⁹² (2014) 4 SCC 1.

⁹³ 2015 SCC OnLine SC 609.

⁹⁴ AIR 1997 Bom 349.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

that FRs are superior to DPSPs, as they are justiciable but DPSPs are not.⁹⁵ The same incorrect argument is also invoked against the implementation of UCC, whereby many suggest that FR's conferred under Article 25 and Article 26 of the Constitution cannot be traded off for a DPSP provision on account of justiciability test. This position has been disapproved by the Supreme Court⁹⁶, Juristic writings⁹⁷, and constitutional changes as well.⁹⁸

In the *Minerva Mills* case the court held that maintaining the balance between FRs and DPSPs is the basic structure of the constitution which can never be ignored or changed.⁹⁹ Giving preference to Article 25 over UCC on the account of justiciability is clearly against this balance which we are enduring for seventy years. Also, the ground that a provision is not justiciable cannot be a ground of ignorance as there are several other provisions in the constitution which are not enforceable in the courts¹⁰⁰. Even some FRs are not enforceable per se, they cannot be enforced without any statutory backup¹⁰¹. Similar is the paradigm for DPSPs since they can also not be enforced unless the state has made some law making them justiciable. However, this does not mean that they will be considered as a provision of less value or will be subject to ignorance in light of other provisions of the constitution. In fact, in the realm of International law, it is the Programmatic approach which is considered superior to judicial remedies in case of human rights enforcement.¹⁰² Therefore only on account of justiciability, such a conclusion cannot be drawn.

Austin observed with respect to India that the core commitment of the social revolution in the country lies in the Part III and IV of the constitution, therefore, an appropriate balance is necessary between them.¹⁰³ Constitution drafters envisioned a society which can be evidenced from the preamble of the constitution.¹⁰⁴ Goals of Equality, Secularism, Fraternity and

⁹⁵ INDIA CONST. art.37- Application of the principles contained in this Part The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

⁹⁶ *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

⁹⁷ P.K.Tripathi, *Directives Principle of State policy: The Lawyer's Approach to Them Hitherto, Parochial, Injurious and Unconstitutional*, 17 SCJ 7, (1954).

⁹⁸ The Constitution (First Amendment) Act, 1951, § 2.

⁹⁹ *Supra* note 101.

¹⁰⁰ INDIA CONST. art. 74. cl.74(2); 122, 163(2), 212, 329, 350, 350-A, 350-B, 351& 363.

¹⁰¹ INDIA CONST. art. 17 & 23. The articles could never be invoked until the supportive laws made.

¹⁰² H.J.STEINER and P. ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, 311(Clarendon University press, Oxford, 1996).

¹⁰³ G.AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION*, (Oxford University Press, 1966)

¹⁰⁴ INDIA CONST. The Preamble- WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

Integrity enshrined in the Preamble are ought to be given prime importance. It is important to understand that DPSPs and FRs are nothing but comprehensive-elaborate mentioning of the same goals. While through FRs they tend to instruct an individual to claim his right, through DPSPs they tend to instruct the state to work for the vision they wanted for the nation.¹⁰⁵ Achieving equality for the people of India was one of the visions that they had carried and Article 44 was an instruction to the state to complete this agenda of the founding fathers of the constitution.

When the constitution was formed it was not possible to achieve all the socio-economic visions given under Part IV of the constitution and constitution drafters were aware of this. Also, after the partition, India faced a communal violence which apparently made implementation of UCC not possible for next few years, possibly this is why they didn't make it justiciable during that time and left it upon the future govt's to implement it¹⁰⁶

The Supreme Court has also mentioned in a plethora of cases that both Fundamental rights and DPSP are equal, in fact in many cases it has given higher weightage to DPSPs as compared to FR's.¹⁰⁷ Justice Chagla in one of his articles emphatically mentioned that DPSPs are binding on government as well as on every section and community, they cannot be treated on lesser scales as compared to the Fundamental Rights.¹⁰⁸ International Organisations have also rejected such negative and positive right theory.¹⁰⁹

SUGGESTIONS

In light of the aforementioned whole discussion, we believe that it is perhaps the high time to accomplish the vision of our founding fathers by forming a society where everyone is subjected to the same laws. UCC is an essential step also to realise the goals and ideals enshrined in the

JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation.

¹⁰⁵ Mahendra P. Singh, *Statics And Dyanamics of Fundamental Rights and Directive Principles- A Human Rights Perspective*, Liberty, Equality and Justice: Struggles for a New Social Order, ILS Law College Platinum Jubilee Commemoration, (2003).

¹⁰⁶ *Id.*

¹⁰⁷ AIR 1958 SC 731..

¹⁰⁸ M.C. Chagla, article " *Plea for a Uniform Civil Code*", Weekly Round tables 25-3-1973..

¹⁰⁹ Statement to the World Conference on Human Rights on behalf of the committee on Economic, Social and Cultural Rights, UN Doc. E/1993/22, Annex. III cited in H.J.STEINER and .and p. ALSTON, INTERNATIONAL HUMAN RIGHT IN CONTEXT, (Clarendon Press, Oxford, 1966): for the purpose of international law, debate over whether economic rights are really rights was settled long ago.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

Preamble of the Constitution. Here are a few suggestions that could help in the smooth implementation of UCC.

1. Justice Krishna mentioned that the implications of the Uniform civil code should be done gradually. As UCC aims for a progressive society, Muslim jurists should be first asked to draft a progressive Islamic Code, prominent jurists of other communities should also be asked to do suit. During this process judiciary and legislature need to work simultaneously. Whenever any such is found unfair, unreasonable or unjust; it should be struck down as unconstitutional and legislation should immediately substitute it with a codified law with little modifications. This exercise will not only do away with unequal practices but simultaneously will pave the platform for new law to be drafted which shall be applicable across people of all communities.
2. Another method to implement the UCC is that firstly a modern codified law should be created for one community which shall be prepared by an expert committee addressing all the lacunas in the RLPs of that community. Then Gradually, it should start including the good provisions of other communities e.g. As per the Hindu succession Act, a father can give his all property to a stranger through a testamentary document, which in many instances has been found to be problematic and detrimental to family structure, but under Muslim law a person cannot devolve whole of his property through a testamentary instrument but has to mandatorily reserve a share for his legal heirs. This provision of Muslim law can perhaps be considered to be incorporated in aforementioned codified law. Such exercise will gradually make this code a reflection of all good laws of every community and as a consequence will form the basis of UCC.¹¹⁰
3. Thirdly, Parliament may frame an optional civil code that may be adopted by a community at its option within the limited time period. Post exhaustion of the specified time, it shall be declared a binding one on all the communities. This would help to seek the public opinion and suggestion during that optional period for its continuous reforms and will also make people accustomed to it. We have already used this exercise at the time of the introduction of the Indian Succession act 1925 which turned out to be an

¹¹⁰ Preetha Nair, *One Nation, One Legislation: After Article 370, Uniform Civil Code BJP's Next? How It Will Impact You*, Outlook (9 sept. 9, 2019) <https://www.outlookindia.com/magazine/story/india-news-one-nation-one-legislation-after-article-370-uniform-civil-code-bjps-next-how-it-will-impact-you/302079>.

LAW ET JUSTICIA LAW REVIEW
VOLUME 2 ISSUE 1

effective and successful practice. Therefore, we can use this strategy for the implementation of UCC as well.¹¹¹

However, as obviously there will be conflicts during practice of such implementation with respect to what practice should Muslim jurists or Hindu jurists exclude, include or improve. Another range of disputes pertaining to which practices of which religion should be the part of optional code. Such disputes can be solved by following three following tests-

1. Social Subversive Test-

This test was originated in the US in case of Reynolds v. United States¹¹² where it was said by the court that any practices that are against the society's conscience cannot be held valid only on the basis of being part of religious conduct. This test can be applied to include only those practices in the unified code which are not against society conscience.

2. Suspect Legislation-

This doctrine was also founded in American jurisprudence. This doctrine states that freedom of religion cannot be the basis of opposing regulations in the sphere of secular matters such as Marriage-Divorce, adoption-inheritance. This doctrine can be used to answer the resistance presented by a few Communities against legislations intending to regulate their personal matters such as marriage, Divorce etc.

3. Solution Formula-

This formula was founded in the South Africa Constitution, it states - that in case if any religious practice or custom is found against the principles of gender equality then irrespective of its immunity under the right to religion, priority will be given to gender equality over religious practice.¹¹³

With the help of these tests, those practices can easily be thrown out which create gender inequality or are immoral or violate the interests of the public. A gender just and fair Uniform Civil Code can be achieved. However, it will also require the support of all the communities, their endurance towards such steps for better and gender-just society.

¹¹¹ Krishnayan Sen, *Uniform Civil Code*, 39 Economic and Political Weekly 4196, (2004).

¹¹² 98 U.S. 145 (1879).

¹¹³ *Supra* note 5.

CONCLUSION

In February 2019, Bhawana Kanth becomes first female IAF pilot to fly a fighter jet solo¹¹⁴, in May, six female crew members of the Indian Navy became first to circumnavigate the globe.¹¹⁵ The list does not end here as there are innumerable achievements that Indian women are succeeding by breaking the fetter imposed on them in the name of religion. It is true that Indian women have now got significant rights in the process of women empowerment, though, led by only a few people.

The above discussion portrayed the darkened side of the society where women are treated no better than being the property of men. To the worst, religious personal laws of different communities do facilitate such treatment to women. Traditional and orthodox laws are being continued with no regards to changing and modern outlook of the society. In light of multiple lacunas in the RLP's of various communities, it seems to be the high time to turn an eye towards women's rights which have been consistently compromised on the pretext of religion. It is the time to generate a sense of national identity where everyone is subjected to the same laws without anyone being subdued by any traditional customs or religious practices.

Uniform Civil Code, based on the above discussions, aptly seems to be a sole instrument that can eliminate the gender injustice practiced under the garb of Religious personal laws. However, as Mahatma Gandhi once stated- "Law by itself could only be a pointer and a guide", we as the People of India also need to strive towards creating a society where women have equal rights as men. Without the efforts of people, UCC can never become a reality. It will rather be lost in one of the layers of this multicultural nation where religion has always been prioritised over women's right to equality. It is very unfortunate that in a nation where religious history witnessed male gods as incomplete without their female consorts, religious practices today propagate and proliferate obnoxious gender-based discrimination.

¹¹⁴ Shaurya Karanbir Gurung, *Bhawana Kanth becomes 1st fighter pilot to qualify to undertake combat missions*, The Economic Times (May 22, 2019) <https://economictimes.indiatimes.com/news/defence/bhawana-kanth-becomes-1st-fighter-pilot-to-qualify-to-undertake-combat-missions/articleshow/69448041.cms?from=mdr>

¹¹⁵ Correspondent, *All-women Indian Navy crew returns to Goa after historic circumnavigation*, Times of India (May 21, 2018) <https://timesofindia.indiatimes.com/india/indian-navys-all-women-crew-in-go-after-circumnavigating-the-globe/articleshow/64260943.cms>.

