Uniform Civil Code: An Overview

Introduction

India is a cradle and a habitat of a wider variety of religious faiths, like Hinduism, Islam, Christianity, Buddhism, Jainism, Sikhism, Zoroastrianism, Tribal beliefs etc. Perhaps, there is no other society that is as multi-religious as Indian society. The co-existence of variety of faiths, quite different from one another, has been an edifying example of religious pluralism. In respect of governing both religious and secular sphere of its people, every religion has embodied personal laws, which are rooted in its own religious scripture, tenets and cultural moorings.

Regarding the catholic Christian community, in respect of ecclesiastical and spiritual matters, we are governed by the Code of Canon Law, 1983, of the Catholic Church. Regarding other Christians, the Canon Law does not apply. The Eastern Code applies to the respective denominations within the Catholic Church. However, in respect of secular areas of life, we are fully governed by the laws of the country or the Municipal law, wherever we are citizens or domiciled. The Canon No. 22 provides for the application of civil laws to Catholic Christians as follows:

> *"When the law of the Church remits some issue to the Civil Law, the latter is to be observed with the same effects in Canon Law, in so far as it is not contrary to Divine Law; and provided it is not otherwise stipulated in Canon Law."*

Therefore, we Catholics are positively permitted and encouraged by the Church, in subjecting ourselves to Civil Law of the country, unless otherwise it is against our Divine Law, and not otherwise stipulated strictly to observe Canon Law.

While being so, now there is an endeavour by the BJP Government, to introduce a Uniform Civil Code (UCC) throughout India, that may be applicable to all the citizens, irrespective of their religious affinity. It is one of their three basic promises in the election manifesto, for many decades. With the abrogation of Art.370 in Jammu and Kashmir, and construction of Ayodhya Ram Mandir, the two promises have been honoured. Havingbrutal majority in the Parliament, they consider it an appropriate time to promulgate the UCC, as a third promise.

Earlier in 2016, the 21st Law Commission of India was, headed by Hon'ble Justice Chauhan, a former judge of the Supreme Court. The Commission had made an appeal to the general public, including the various communities and political parties, to respond to a set of 16 questions, as related to the introduction of Uniform Civil Code. Many stakeholders, including the Catholic Community in Tamil Nadu-Pondicherry responded to the same. For this purpose, we had a meeting at St. Paul's Seminary, Trichy, on 05.11.2016, with the bishops, canonists and civil lawyers. We submitted a comprehensive Memorandum before the 21st Law Commission on behalf of TNBC.

1. The Report of the 21st Law Commission of India

The said the 21st Law Commission submitted its report on 31.08.2018, under the title of , "Consultation Paper on Reform of Family Law." In the penultimate finding the said commission stated as follows:

> *"1.15. While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy."*
>
> *……..*
>
> *"1.21. The term secularism only has meaning if it can also assure that the expression of any form of _difference', not just religious but also regional does not get subsumed under the louder voice of the majority; and at the same time no discriminatory practice hides behind the cloak of _religion' to gain legitimacy. No religion defends discrimination or permits deliberate distortion."*
>
> *……..*
>
> *"1.39. The Commission through this consultation paper suggests a series of amendments to personal laws and further codification of certain other laws, particularly with respect to succession and inheritance. The suggestions are not limited to religious personal laws alone but also significantly address the lacunae in general secular laws such as the Special Marriage Act, 1954, Guardians and Wards Act 1869 among others."*

From the above finding, it is very clear that the Law Commission has rejected the introduction of UCC, based on best practices of pluralism and secularism, recognizing the identity of culture, whether major or minor throughout the world. When it is a reasoned finding, there is no reason for the current establishment, to override the same. But, the BJP Government wants to reopen the pandora's box of UCC for political mileage, and

polarisation of vote bank on communal lines. Therefore, the action suffers from malafide and antecedents from its divisive politics.

2. The Public Notice of 22nd Law Commission

Subsequently, the 22ndLaw Commission of India had issued a *Public Notice*, dated 14.06.2023, eliciting public opinion and that of the stakeholders, close on the heels of the Parliamentary Elections, 2024. From the church of Tamilnadu, we have sufficiently responded. After a well attended conference, held at St. Paul's Seminary, Trichy, on 29.06.2023, every institution, diocese, congregation has submitted a Memorandum, prepared by us. That apart, individuals have sent short messages, monitored by a special committee. Thousands of people and institutions were involved. Individuals can have differing opinions on UCC, but as a religious denomination in the Country, the Catholic Church has to take a collective position after considering the *pros and cons* of the proposal, in the light of the common good of our community and our identity to strengthen secular and pluralistic fibre of the country. For that purpose it will be our effort to gain a holistic understanding of the issue, taking into consideration the overall and current political and the legal fallouts.

3. Understanding Personal Laws

Before going into the issue, there is a need to understand, what is meant by personal law. Personal laws are a set of laws, which govern and regulate relations arising out of certain factors, connecting two persons or more than two persons. The influencing factors are marriage, blood and affinity to any belief, which is personal. These personal factors are spelt out in marriage, divorce, maintenance, minority, guardianship, adoption, succession and inheritance. In other words, these are all laws pertaining to family and culture from birth to death. By the efflux of time, these customs or scriptural norms were given statutory recognition in the respective area of governance, or totally replaced or abolished, if it was not in conformity with *'justice, equity and good conscience'*. The customs, social usage and religious interpretations by these communities, orchestrate not only the personal life of the members of the said community, but also interaction with the wider society. Collaterally, it also results in conflict of the various systems of jurisprudence. In the Indian context, these laws can be broadly categorised as that of applying to Hindus, Muslims, Christians, Sikhs,

Buddhists, Parsis, Jains and other Tribal Communities. In Tamil Nadu, there are rationalists, who follow their own customs in marriages.

a) The Evolution of Personal Laws in India

i) Ancient Period

The personal laws are not created overnight. It takes a long period for formation into a tenet or a norm. The basic principles in Hindu law are drawn from Vedic texts, Puranas and Epics like *Ramayana, Mahabharata and Bagavad Gita.* This can be divided into *Shruti* (revelation / texts) and *Smriti* (traditions or what is remembered). The *Brahminic Hinduism* codified the same in *Manu Smriti and Dharma Sutras*. Both the king and the subjects were equally governed by these laws. There was no kingship by divine right in India. In other word, the king was required to scrupulously respect the established laws and customs, shortly called *Dharma.* These customs widely varied from community to community depending on the caste affinities within the Hindu fold. There was no effort to unify the same till independence. But there were some endeavours within Hindu religion, to reform certain practices like sati, child marriage, widow remarriage etc.

ii) Medieval Period

During the Medieval period, Muslim jurisprudence came into picture, which equated law with religion. "Islamic thought is the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."[1] They believe that, *Quran* consists of the very word of God, revealed to Prophet Mohammed. The tradition holds that *Quran i*s a transcript of a tablet preserved in heaven and therefore beyond the scope of interference by any power on earth. This Islamic law called *Shariat*(the infallible law of God) from the beginning had a well-defined demarcation between Public Law and Private Law. The public administration and the criminal law came under the former, while the family life came under the later.

The Muslim rulers applied Muslim Public Law to all their subjects, irrespective of religion. But the Islamic Private law was applied only to Muslims. In other words, in respect of the domain of Muslim Private Law, non-Muslims were left free, to follow their own religious laws and customs. Emperor Akbar was the pioneer of such a pluralism in India. The principle of non-interference into religious laws and customs of the non-Muslims has ensured the continuance of Hindu religious laws and customs in the country, even during

[1] J. Sachcht, *An Introduction to Islamic Law,* p.1 (1964)

the mighty Mughal Empire. There is no uniformity even among Muslim laws, due to various interpretations and sectarian way of life. The Muslim concept of pluralism or *ikhtilaf or* "tolerated diversity of opinion."

This legacy of the Indian rulers, respecting the *lex locis* or territorial law led to legal pluralism in India, from time immemorial and which was continued by the British. The initial and primary motive of the British was to develop trade and commerce and therefore they desisted from in anyway interfering with other personal laws. However, in course of time, from the 18th century, they started introducing their won system of Public law to deal with the contractual and criminal matters for effective governance. They respected the distinct laws of Hindus and Muslims in respect of their private/community life, as they were gentiles.

Their attitude towards Hindu and Muslim Laws appear to reflect, the original Christian doctrine of two distinct spheres of life the temporal and the spiritual, the first being under the control of the State and the second being under the control of the Church. Thus, 'to each religious community, to its own personal law,' was a principle, which came to be established in India, following the Muslim rulers. In short, they followed the principle of, "laws of *Quran* to Muslims and laws of *Shastras* to Hindus."As they themselves were Christians, they were emboldened to enact Christian personal law applicable only to Christians.

The trace of acceptance of this policy is reflected in the Charter of King George -II, granted in 1753. Lord Warren Hastings in his judicial plan of 1772 provided for this dualism in legal domain in India. This was followed by Lord Carnwallis till the end of the 18thcentury. The position was confirmed in the 1st Law Commission of India, headed by Lord John Macauley in 1833. This policy was again echoed in the British Parliament, while approving the Report of the 2nd Law Commission of India in 1855 in the following words:

> *"The Hindu law and Mohammadan law derive their authority respectively from the Hindu and Mohammadan religion. It follows that, as British legislature cannot make Mohammadan or Hindu religion, so neither it can make Mohammadan or Hindu law. A code of Mohammadan or a digest of any part of that law, if it were enacted as such by the legislative council of India, would not be entitled to be regarded by Mohammadans as very law itself but merely as an exposition of law, which possibly might be incorrect. We think it clear that it is not advisable to make any enactment which would stand on such a footing"*

b) Secular Laws

After having established their regime, the British slowly introduced new enactments, when it came to general governance of secular areas. For example the following laws can be referred to as General Law:

- Slavery (Abolition) Act, 1843,
- CasteDisabilities Removal Act, 1850,
- Madras District Police Act, 1859,
- Societies' Registration Act, 1860
- Indian Penal Code, 1860
- Indian Police Act, 1861
- Religious Endowments Act,1863
- Pensions Act, 1871
- Indian Evidence Act, 1872
- Indian Contract Act, 1872
- Special Marriage Act, 1872
- Dramatic Performances Act, 1876
- Religious Societies Act, 1880
- Negotiable Instruments Act, 1881
- Indian Trusts Act, 1882
- Transfer of Property Act, 1882
- Indian Easements Act, 1882
- Powers-of-Attorney Act, 1882
- Charitable Endowments Act, 1890
- Code of Civil Procedure, 1908
- Charitable &Religious Trusts Act,1920
- Cochin Civil Marriage Act, 1920
- Official Secrets Act,1923
- Indian Succession Act,1925
- Criminal Procedure Code, 1882

c) Codification of Personal Laws

But as a vast area was governed by personal laws, there was a necessity to codify the personal laws, by collating the customs and norms. This was done by the British through Hindu Pandits and Muslim Moulis respectively. By doing so, the British achieved the dual purpose of non-interference in personal laws and bring them under the control of the Government, by conferring statutory force on the already prevalent *lex locis.*The following can be referred to as the British codified Personal laws:

- Hindu Widows' Remarriage Act, 1856
- Converts'Marriage Dissolution Act, 1866
- Indian Divorce Act, 1869
- Indian Christian Marriage Act, 1872
- Married Women's Property Act, 1874
- Kazis Act, 1880
- Births, Deaths and Marriages Registration Act, 1886
- Guardians and Wards Act, 1890
- Marriages Validation Act, 1892
- Anand Marriage Act,1909
- Hindu Disposition of Property Act,1916
- Mussalman Wakf Act,1923
- Hindu Inheritance (Removal of Disabilities) Act, 1928
- Child Marriage Restraint Act, 1929

- Mussalman Wakf Validating Act, 1930
- Parsi Marriage and Divorce Act, 1936
- Bangalore Marriages Validating Act, 1936
- Arya Marriage Validation Act,1937
- Muslim Personal Law (Shariat) Application Act, 1937
- Dissolution of Muslim Marriages Act, 1939

Thus, during 700 years of Muslim rule and 150 years of British rule,the position was the same. The personal laws were immune to state legislation, subject only to codification. Thus, the British adopted a policy of neutrality while dealing with the personal matters of Hindus and Muslims. This approach of the Mughals and the British was almost adopted in the Indian Constitution, except for certain exemptions.

4. Constituent Assembly Debates on Personal Laws

After independence, the Constituent Assembly debates reflect the critical nature of the issue of personal laws. The erstwhile provision under Art.35, that finally became Art. 44 in the Indian Constitution was taken up for discussion in the Constituent Assembly, and it reads as follows:

"The State shall endeavour to secure for the citizens
a uniform civil code throughout the territory of India."

These two lines, triggered lot of emotions and opposition from the Muslim members only, on the ground that their laws of succession, inheritance, marriage and divorce are completely dependent on their religion and therefore the State cannot interfere into the same. They proposed many amendments. One of the amendments was to provide for a prior approval of the relevant community itself, before introducing UCC, in the place of personal laws. The said amendment was rejected.

On the other hand, members like Mr.K.M.Munshi, with a Hindutva bent of mind, objected to the amendment to this provision stating that *"the advanced Muslim countries like Turkey or Egypt do not permit the personal laws for the minorities. This attitude of mind that personal law is part of religion has been foisted by the British and by the British courts. We must therefore outgrow it."* These Hindu members also moved an amendment that the said provision must be brought under Part III of Fundamental Rights. This amendment was also rejected.

Finally, Dr. Ambedkar as the Chairman of the Drafting Committee, in the historical concluding remark on the discussion, clarified as follows:

"I quite realise their feelings (Muslims) in the matter. I think they have read rather too much into Art.35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the code is framed, the State shall enforce it upon all citizens, merely because they are citizens. It is perfectly possible, that the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage, the application of the code may be purely voluntary. It will be perfectly possible for Parliament to introduce a provision of that sort, so that the fear which my friends have expressed here will be altogether nullified."

Ultimately, the Constituent Assembly passed this provision (Art. 35) without any Amendment as Art. 44, under the Directive Principles of State Policy under Chapter IV and not under Chapter III of the Fundamental Rights. That means, it will be an ideal and not a mandate. It will be a recommendation, but not enforceable. It will be an aspiration, but not an entitlement. Therefore it is non-judiciable. This was settled in the context of pluralism in the Indian society and respect for all religions. Thus the Principle of *'legal pluralism'* in personal laws was confirmed in historical continuity.

5. The Constitutional Foundation of Personal Laws

In this regard three Articles of the Constitution Arts. 25, 26(b) and 29 have to be interpreted for understanding religious rights, which form the foundation for personal laws,

Art.25 reads as follows:

1. *All persons are entitled to freedom of conscience and the right to freely profess, practice and propagate religion, subject to public order, morality and health and other provisions of Chapter III of the Constitution.*
2. *Nothing in this provision 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 activities, which may associate with religious practice. Similarly, the social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus should not be affected by the abovesaid freedom of religion.*

Art.26 reads as follows:

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion; Freedom to manage religious affairs...."

Art.29 reads as follows:

> *29. (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.*

Art. 25 deals with the right of the of an individual in religious matters that can be interfered only on four grounds: Public order, morality, health and the fundamental rights. Otherwise, there is no other reason to interfere or to abridge the religious rights of an individual. Secondly, in Art. 26, the State can interfere into the internal management of religion only on three grounds: Public order, morality, health. That apart, Art. 29 gives a guarantee to the minorities that any section of citizens are entitled to protect their *culture.* Actually, all the personal laws fall under the domain of culture, customs and religion.

A cumulative understanding of these three Articles will explain the constitutional protection given to the personal laws. The government cannot interfere into the same, unless it violates any of the above referred grounds, but not otherwise. If any of the practice under personal law violates the fundamental rights, the Government can interfere into personal laws. The ***Shirur Mutt case- 1954 AIR 282 - defines religion as follows:***

> *"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a Vide Davie v. Benson 133 U.S 333 at 342., doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."*

It is a matter for internal reform of religion, which may call for conformity to constitutional norms. The question of constitutional compliance alone can be gone into by either the State or judiciary, and not the practice of personal law.

6. Judicial Observations in Favour of Art. 44

This provision, Art. 44 came for consideration by the Hon'ble Apex Court either directly or indirectly in certain cases. The Hon'ble Apex Court, has made certain observations called *Obiter Dicta,* which has no binding nature, in respect of UCC in the following cases:

a) Shah Bano Begum case: (1985) 2 SCC 556**,**

For the first time, while deciding the maintenance for a Muslim divorced woman under Sec.125 of Cr.P.C. in *Shah Bano Begum case,* the Hon'ble Supreme Court exhorted the Central Government to enact a Uniform Civil Code. The relevant portion reads as follows:

> *"32. It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning."*

The Court upheld the applicability Sec.125 Cr.P.C, to grant maintenance to divorced wife, which led to great uproar from the Muslim community.

b) *Jorden Diengdeh case:* (1985) 3 SCC 62

After *Shah Bano case*, the Hon'ble Supreme Court while deciding the divorce of a marriage, between a Christian woman and a Sikh man in *Jorden Diengdehcase* held that all these problems arose for the want of UCC. The Hon'ble Supreme Court states as follows:

> ***"7.** It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. ... We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take."*

c) *Sarla Mudgal case*: (1995) 3 SCC 635

The Hon'ble Supreme Court in the popularly known *Sarla Mudgal case,*again had an opportunity to look into the question of UCC. Actually it was a case of polygamy of a Hindu

man converting to Islam for the purpose of justifying his bigamy. He has to be prosecuted u/s.494 I.P.C. The interest of women would have been protected by holding that the said criminal provision will apply in the case. But the Court went beyond the case and digressed upon the question of UCC. A portion of the judgment reads as follows:

> *"This broad policy*(personal law) *continued throughout the British regime until independence and the territory of India was partitioned by the British Rulers into two States on the basis of religion. Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one nation — Indian nation — and no community could claim to remain a separate entity on the basis of religion. ... The Legislation — not religion — being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplemented by introducing a uniform civil code. In this view of the matter no community can oppose the introduction of uniform civil code for all the citizens in the territory of India.*
>
> *36. The successive Governments till date have been wholly remiss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.*
>
> *37. We, therefore, request the Government of India through the Prime Minister of the country 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".*
>
> *38. We further direct the Government of India through Secretary, Ministry of Law and Justice to file an affidavit of a responsible officer in this Court in August 1996 indicating therein the steps taken and efforts made, by the Government of India, towards securing a "uniform civil code" for the citizens of India..."*

In the concurring judgment of Justice Sahai, he observed

> ***"**45. ... To check the misuse many Islamic countries have codified the personal law, "wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context"). But ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. "But religious practices violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression." Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about a comprehensive legislation in keeping with modern day concept of human rights for women."*

Exactly this judgment pertains to the abuse of Muslim law, bigamy and gender justice. But as a remedy, it proposes a complete UCC and not only the prohibition of bigamy. Therefore the question of UCC has not been comprehensively considered here. In the majority judgment, there is also an observation that because the Hindu law has been already modified in respect of marriage, succession and inheritance, as early as 1955-1956, the Muslims cannot have justification for continuing their personal law. This argument is fallacious.

d) *Review of Sarla Mudgal Case/Lilly Thomas Case:* (2000) 6 SCC 224

The Jamat – e- Ulema filed a Review petition in *Sarla Mudgal case*. In the said review in *Lilly Thomas case, (2000) 6 SCC 224,* the Hon'ble Supreme Court observed as follows:

> *"Learned counsel appearing on behalf of the Jamat-e-Ulema Hind and learned counsel appearing on behalf of the Muslim Personal Law Board have rightly argued that this Court has no power to give directions for the enforcement of the Directive Principles of State Policy as detailed in Chapter IV of the Constitution which includes Article 44. This Court has time and again reiterated the position that directives, as detailed in Part IV of the Constitution are not enforceable in courts as they do not create any justiciable rights in favour of any person...*
>
> *In this case* (Sarla Mudgal)*also no directions appeared to have been issued by this Court for the purpose of having a uniform civil code within the meaning of Article 44 of the Constitution. Kuldip Singh, J. in his judgment only requested the Government to have a fresh look at Article 44 of the Constitution in the light of the words used in that article. In that context direction was issued to the Government for filing an affidavit to indicate the steps taken and efforts made in that behalf. Sahai, J. in his concurrent but separate judgment only suggested the ways and means, if deemed proper, for implementation of the aforesaid directives. ... The apprehension expressed on behalf of the Jamat-e-Ulema Hind and the Muslim Personal Law Board is unfounded but in order to allay all apprehensions we deem it proper to reiterate that this Court had not issued any directions for the codification of a common civil code and the Judges constituting the different Benches had only expressed their views in the facts and circumstances of those cases. .. The learned Solicitor General has submitted that the Government of India did not intent to take action in this regard on the basis of the judgment alone."*

Thus the observations already given in *Sarla Mudgal*, was diluted in its review in *Lilly Thomas,*stating that the Court has not given any direction to introduce UCC.

e) *Danial Latiffi Case:* (2001) 7 SCC 740

To get over the judgment of Shah Bano case, the Rajiv Gandhi Government enacted Muslim Women (Protection of Rights on Divorce) Act, 1986, exempting Muslim women from the coverage of Sec.125 Cr.P.C., and to strike a balance in favour of the affected Muslim women and granting them relief. Some scholars feel that the protection given under 1986 Act is

much better than the relief under 125 Cr.P.C. The Muslims who protested against the judgment in *Shah Bano case,* had mutely accepted the 1986 Act.

The validity of the said Act has been upheld in *Danial Latiffi* case, by the Hon'ble Supreme Court in 2001. The judgment was delivered a few weeks after the demolition of twin towers in New York. In the said case, the Hon'ble Supreme Court held that it was perfectly legitimate for Indian law to make a reasonable classification between citizens by promulgating a separate Act for Muslims only. Thus the effect of *Shah Bano case,* which was a corrective to personal law in pursuance of UCC, ultimately resulted in another personal law under Indian Jurisprudence.

f) *Fr. John Vallamattom Case:* (2003) 6 SCC 611

In above case, the constitutionality of Sec.118 of the Indian Succession Act, 1925 was challenged by a Catholic priest on the ground that he was practically prevented from bequeathing the property for religious and charitable purpose. While deciding the said issue, ultimately the Supreme Court struck down Sec.118 as violative of Art.14, observed as follows:

> *"44. Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Sarla Mudgal v. Union of India[7] it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."*

This is regarding the law of succession in which the Hon'ble Supreme Court made strong observation on the introduction of UCC, in order to avoid contradiction based on ideologies.

g) ***ABC case:*** **(2015) 10 SCC 1**

Again,in another case filed by an unwed mother for the appointment as guardian of her child, without notification to the putative father, who is already married to another person, the Hon'ble Supreme Court elaborately dealt with child custody laws in U.K, U.S.A, Ireland, Philippines, New Zealand and South Africa, and observed as follows:

> "*Furthermore, Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers. It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation...."*

The Hon'ble Supreme Court while dealing with a question of law on the natural guardian of illegitimate children, made a passing reference to UCC. The Supreme Court whenever there is a problem arising from a particular personal law, takes it an opportunity to admonish the Government to realize the vision of UCC as a constitutional expectation. But at the maximum, it is only an admonition and never a mandate. A three-Judge Bench of the Supreme Court in the case of *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* (1996 8 SCC 525) has taken a view and has held that personal laws to the extent that they are in violation of the fundamental rights are void.

h) ***Shayara Bano Case:*** **(2017) 9 SCC 1**

> *200. Based on the above submissions, it was contented, that though matters of religion have periodically come before courts in India, and the issues have been decided in the context of Articles 25 and 26 of the Constitution. Raising concerns over issues of empowerment of all citizens and gender justice, it was submitted, had increased the demand on courts to respond to new challenges. The present slew of cases, it was pointed out, was a part of that trend. It was submitted that the Supreme Court could not refuse to engage itself, on the ground that the issues involved have political overtones or motives, and also because, they might pertain to a narrow constitutional permissibility. It was contended, that to refuse an invitation to examine broader issues such as whether "Personal Laws" were part of "laws in force" under Article 13, and therefore, subject to judicial review, or whether uniform civil code should be enforced, would not be appreciated. It was submitted, if the immediate concern about Triple Talaq could be addressed, by endorsing a more acceptable alternate interpretation, based on a pluralistic reading of the source of Islam i.e. by taking a holistic view of the Quran and the "hadith" as indicated by various schools of thought (not just the Hanafi School), it would be sufficient for the purpose of ensuring justice to the petitioners, and others similarly positioned as them.*

392. In view of the position expressed above, we are satisfied that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We, therefore, hereby, direct the Union of India to consider appropriate legislation, particularly with reference to "Talaq-e-Biddat". We hope and expect that the contemplated legislation will also take into consideration advances in Muslim Personal Law – "Shariat", as have been corrected by legislation the world over, even by theocratic Islamic States. When the British Rulers in India provided succour to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denomination, even in India, but not for the Muslims. We would, therefore, implore the legislature to bestow its thoughtful consideration to this issue of paramount importance. We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation.

The practice of triple talaq, has been held to be ultra vires of the constitution in Shayara Bano case, referred supra. In a similar vein, polygamy or absence of coparcenary rights for women under Hindu Undivided Family, could be declared as void in case if they are discriminatory against women. Otherwise, there is no necessity or compelling reason to introduce Uniform Civil Law. Even this interference, if at all warranted, can pertain only to non-essential areas of religion but not to the essentials or the core of religion, forming part of the doctrine or dogma.

7. The Judicial Observations not in favour of Art. 44

Over the years, the Supreme Court has taken differing views while dealing with personal laws. In number of cases it has held that personal laws of parties are not susceptible to Part III of the Constitution dealing with fundamental rights and therefore they cannot be challenged. There are also observations of the Supreme Court, running contrary to the above directions. The following case laws can be of useful reference:

(a) *Krishna Singh v. Mathura Ahir:* AIR 1980 SC 707

In the said case the Supreme Court considered whether the Supreme Court considered the question whether a *shudra* can become a *sanyasi*. The High Court allowed the writ petition. But the Supreme Court reversed the order as follows:

" In our opinion, the learned judge failed to appreciate that part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he (the High Court judge) could not introduce his own concepts of modern times

but should have enforced the law as derived from recognised and authoritative sources of Hindu laws, i.e. Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or abrogated by statute."

b) *Maharshi Avdhesh v. Union of India* - (1994) Supp (1) SCC 713

In this case the petition challenged the validity of Muslim Women Protection of Rights on Divorce Act, 1986 and prayed for direction for enforcing Shariat Act. The Supreme Court simply dismissed the petition at the stage of admission itself stating that it is the matter for the legislature and the court cannot take the exercise of testing the codified law as against fundamental rights. The following is the two-line order:

"*These are all matters for legislature. The Court cannot legislate in these matters. The writ petition is dismissed."*

However, subsequently in 2001, it did the same and went into the veracity of the Act in *Daniale Latifi.*

c) *Pannalal Bansilal Pitti Case* - (1996) 2 SCC 498

This case dealt with the validity of provisions of A.P. HR& CE Act, praying for uniform applicability of law to charitable trust of all religions.

In a pluralist society like India in which people have faith in their respective religions, beliefs or tenets propounded by different religions or their off- shoots, the founding fathers, while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different Languages and dialects in different regions and provided secular Constitution to integrate all sections of the society as a united Bharat. The directive principles of the Constitution visualise diversity and attempted to foster uniformity among people of different faiths. A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, 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 stages.

(d) *Ahmedabad Women Action Group &Ors. v. Union of India* –(1997) 3 SCC 573

In this case, various discriminatory aspects of personal laws in different religions were challenged from the perspective of gender justice. Without adducing any reason, the Supreme Court dismissed the petition, stating that it is the work of the legislature and the court will not interfere.

This only reflects that the Supreme Court is not very consistent in dealing with personal law, whether it is codified or uncodified. There is no uniformity of decisions. Therefore, we are required to go beyond Art. 44 and rely upon other provisions for a *harmonious reading* of the constitutional principles to decide the question on personal laws.

9. UCC and connected Questions

- The State protects the Hindu Undivided Family and coparcenary system of inheritance of Hindus, whereas there is no Christian Undivided Family or Muslim Undivided Family. Will this special treatment to HUF will be undone in UCC or applied to all?

- The State has prohibited cow-slaughter in the name of sacred cow culture by special law. Will UCC lift this embargo because of the right to life and food of the poor who eat beef?

- Even in Government secular functions, for commencing construction, they are performing *poojas* according to Hindu culture. Will this practice be given up in the name of UCC?

- The disposal of dead bodies as per Hindu customs abounds mostly around rivers and water-bodies, leading to severe environmental pollution. Similarly, many Hindu rituals and festivals like *kumbhmelas* result in degradation of rivers. Can the UCC interfere into these practices, restoring the pristine purity of rivers?

- The Hindu culture does not permit *Dalit* as *Archakas*. Will the UCC confer uniform rights on all castes?

- The State has permitted the use of *kirpans* for the *Sikhs, even in the air-crafts, by a special concession. What will be the position under UCC?* Similarly, the attire of turban is permitted even in defence services, schools, while prohibiting hijabs in schools. Will there be any uniformity?

- Various tribal laws in respect of the North-Eastern States have been granted constitutional protection under Art. 371, as a condition of accession to Indian state. Can it be undone by UCC? Land holding is protected for scheduled areas throughout India. What will be its future?
- As regards national integration, it may be achieved only through federal governance, that provides for 66 entries in the State List and 47 entries in the Concurrent List, reflecting democratic pluralism. Many of the personal laws fall under the State List. Is the federal structure sought to be subverted in the name of UCC?

- Is it a ploy of the BJP government, for communal polarisation to advance their agenda of cultural nationalism?

- The other directives in Part IV are unrealised till date and why such a priority treatment to Art.44?

10. Our Response with reference to Catholic marriages and UCC

The Catholic Christian community has limited personal law, in the form of The Indian Christian Marriage Act, 1872 and The Divorce Act, 1869. In respect of all other matters of Maintenance, Adoption, Succession and Inheritance, we are governed by the common laws of the country.

On Marriage and Divorce

i. The blessing of the Christian marriage in the Church in accordance with the precepts of Canon Law under Canon No. 1055 to 1165 and Canon No 1671 to 1707 is fully incorporated under Section 4 and 5 of the Indian Christian Marriage Act, 1872. Similarly, the person to bless the marriage, under Canon 1108 and the registration of the marriage under Canon 1121 – 1122, are recognized under Sec. 7, 30, 33 & 43 of the Indian Christian Marriage Act, 1872. All the Church records in respect of Christian marriages are well maintained and periodically filed before the statutory authorities as per Sec. 33 and 43 of the Indian Christian Marriage Act, 1872. There is no complaint from any quarter.

ii. Thus, there is a dual advantage for the Christian Community. On the one hand, we are permitted to follow our religious precepts under Canon Law and at the same time, we are able to comply with the codified statutory personal law, as dutiful citizens of India. Thus, a valid canonical marriage of Christians simultaneously becomes a marriage under civil law and is duly registered in the Church. There is no

need of separate registration, one for the Church and another for the Government, in the present arrangement. The extract of the Registration is submitted to the competent authorities in the prescribed format. This is in vogue from the year 1872. Now the process has been modernised qua the online Registration of the scanned copy of the Marriage Format to the competent authorities in Tamil Nadu.

iii. We do not have Divorce under Canon Law, but only a declaration of nullity of marriage. But this canonical declaration of nullity by the Church Tribunal is not recognized by the statutory law of the country and therefore, we the Christians are amenable to The Divorce Act, 1869 as amended by the Central Act of 51 of 2001. This practice is also followed by Christians from 1869. There is no conflict in this regard with the constitutional norms and we are fully amenable to the Fundamental Rights under Part III of the Indian Constitution.

iv. Our Canon law does not provide for maintenance of wife or child custody or adoption. As apex canonical body, whether this Canonist body can contribute constructively in this regard!

11. A Summary

i. As we understand, the Uniform Civil Code, visualized by the Constitution, under Art. 44 in Part IV, is an ideal to be endeavoured and need not be imposed by the State. Even in the Constituent Assembly debates, Dr. Ambedkar, in his concluding remarks, has stated that UCC may be introduced at a later point of time, with an '*optional clause'* for its binding force, leaving the choice to those who desire to be governed by the same, as an alternative to personal laws. This aspect has to be considered by the Hon'ble Commission.

ii. Indian secularism, which forms part of the basic-structure of the Constitution, as held in *Keshavanda Bharathi case and S.R. Bommai case* and elucidated in *TMA Pai Foundation case*, does not contemplate an absolute wall of separation between the State and religion, as in some other countries. Rather, it is an equi-distance from all religions, permitting each religious community to follow its own religion, not only its doctrine, but also its ethical rules, observances, ceremonies and modes of worship, which may even extend to matters of food and dress as held in *Shirur Mutt case*.

iii. Similarly, Article 25(1) ensures the freedom of conscience and the right of the persons to profess, practice and propagate one's own religion or belief. These rights are subject only to public order, morality and health and other provisions of Part III.

As a natural corollary, Article 26(b) provides for freedom to manage its own affairs in matters of religion, to every religious denomination, subject only to public order, morality and health. There is no other ground for interference in matters of religion. This is the legal position, as held in *Shirur Mutt case* and *Dr. Subramania Swamy case.*

iv. The Marriage under Family Law falls under the domain of culture specific religious observance, subject only to the abovementioned grounds of interference by the Executive or Judiciary. Therefore, India being a highly pluralistic country, the culture-specific family law can be permitted to be governed by personal laws, and made amenable to Part III of the Constitution.

v. In case, if the Hon'ble Law Commission, has reasons to believe that certain aspects of personal laws are not in compliance with Part –III of the Constitution, it can initiate the process of ensuring compliance in respect of that particular practice or the provisions in the personal law of the particular denomination, by whatever means open, under the Constitution, as recommended by the 21st Law Commission.

vi. When the waiting period being two years, after separation of the Christian spouses, before filing a petition for consented Divorce, it is only just one year in respect of all others. This discrimination can be amended under the Divorce Act, 1869.

vii. Indian State cannot be compared with European Nation-states, which have very little need or scope for pluralism and cultural diversity. India is a sub-continent and home for all the religions in the world and various cultures. India is a commonwealth of communities and all the sections of the communities are free to subscribe to each of their ideals, without contravening the Constitution.

viii. The Indian secularism is different from European Secularism. The wall of separation was absolute in Europe between the Church and the State, which amounted to negation of religion in public life. But Indian secularism is nothing but an equi-distance of the State from all religions. There is no clear cut division of law and religion. The Constitution recognises the pluralistic and holistic inter connection between law and religion, especially to the minorities, in a Hindu-dominated State. If in Europe, for example the legal systems can increasingly accept the non-traditional forms of marriage, as legally recognized unions, there is no compelling reason as to why other diversity–conscious arrangements in India could not be accepted.

ix. If national integration has to be achieved, a common feeling of being without losing one's identity is of paramount consideration. There are so many methods available to check the constitutional compliance of various codes and enactments. Uniform Civil Code cannot be the touching stone for other laws. Infact, an intricate process of gradual harmonisation of all Indian personal laws have taken place slowly, under the available constitutional provisions and criminal statutes. We admit that personal law always requires reform and perfection. It is an ongoing process. For that reason, no law is fully perfect, including our Christian laws. We are amenable to correction. Indian constitutional pluralism also provides for legal pluralism. This legal pluralism is in practice, during all the regimes in India, including that of the Mughals and of the British, for thousands of years. This legal pluralism internalized by Indians and integrated into our constitutional democracy, need not be dismantled or replaced, because it will unnecessarily create unwarranted tensions and apprehensions in the society. Introduction of Uniform Civil Code will be only counter-productive. We have learnt to peacefully coexist, with mutual respect for other cultures and religions and legal systems.

12.Concluding Remarks

One wonders, while the State is immune to all these diverse practices, why it targets only the minority practices in the name of UCC. When all these are permissible for various political reasons, they cannot impose UCC in the name of equality and justice. The Constitution strikes a balance between uniformity and diversity, centrality and localism. In this context, the BJP Government in its agenda for uni-culture nationalism, is trying to get rid of all other cultures, under the pretext of national integration. But in fact, national integration need not be tested against UCC, but rather against constitutional secularism and pluralism of the country.

There is no need of state regimentation in the matters of personal law. The family law is more cultural with ethnic diversity. If they are repugnant to the constitutional rights, the State has a role to play. But the State in the name of UCC cannot be allowed to take control of the matters pertaining to family and culture. This kind of positivism in the name of national integration is uncalled for. India's strength is in cultural diversity rather than in the state controlled uniformity. Actually, Dr. Ambedkar

argued for UCC as a secularising device, only with a view to get rid of Hindu law and traditions all together, as opined by Granville Austin. The BJP is trying to do the opposite under the pretext of UCC. No Draft UCC has been published by the Government or the Law Commission till date.

As the personal laws are culture specific to a large extent, a uniform family law might be totally unworkable in the Indian context, in a highly pluralistic society. It will deprive the social space for the minorities and in the long run result in decimating their identity, as a separate religious-cultural entity, usuring in a Hindutva packaged UCC.The BJP Government looks for one nation, one language, one culture, one education, one taxation (GST), etc. This is another area of Hindutva consolidation at the cost of democratic pluralism and the identity of minority cultures. We have to conscientize our community and ourselves, to brace up for any eventuality and to facilitate a collective stand of our community, in the teeth of communal polarization in the country. We are for Secularism, but not for selective pseudo secularism.

Dr. Fr. A. Xavier Arulraj
Senior Advocate, Secretary, Legal Cell-TNBC

(Submitted in Canon Law Society of India, XXXVI Annual Conference @ Cochin, on 18.10.2023)