

INDIA'S QUEST FOR SECULAR IDENTITY AND FEASIBILITY OF A UNIFORM CIVIL CODE

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I Introduction

AT A time when recrudescence of communal violence keeps on rocking the body politic of India every now and then, it is important to understand secularism in its pristine form as advocated by Pandit Jawaharlal Nehru, one of the primary architects of the modern Indian state and the builder of India's secular, democratic polity. As the question of secularism today has aroused a lot of controversy and in the name of nationalism many of our leaders support policies that in practice boil down to communalism and appeasement of the communalists, it seems very essential to go back to the Nehruvian model of secularism and to re-examine at the level of research, India's quest for secular identity.

The need to study the secular ideal becomes all the more important considering the raging contemporary debate about proscribing triple *talaq* and polygamy and the unflinching

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commitment and determination of the new political dispensation at the Centre to adopt a Uniform Civil Code (UCC) for the country.

The argument advanced in support of a UCC is that it will further strengthen Indian nationalism and shall also make a great impact in addressing gender inequality, which is very often considered to be the product of archaic personal laws prevailing in the country. The proponents of UCC argue that it will not encroach upon the religious freedoms of the communities but shall only curb those religious practices and customs which are violative of human rights and dignity of individuals. However the opponents argue that adopting a UCC would lead to tyranny of the religious majority, by unnecessarily imposing an alien law on the minorities. They view the imposition of UCC as a ‘cultural genocide’¹ which has a great propensity to create communal flare-ups across the country. They argue that a more effective way to assure national unity is by reassuring the religious and ethnic groups that their personal laws will not be diluted and shall be respected. They argue against the illusion created by the proponents of UCC that there is a logical contradiction between the idea of a nation- state and a system of different personal laws.²

Since the current debate about adopting a UCC is more emotive than reasoned and rationalised, there is a pressing need for consultation amongst various religious communities and their leaders. Any forcible imposition of UCC would not only be against the secular ethos of our Constitution, but would also mar all the gains we have made so far as a nation state. Leadership, both at intellectual and political level, should try to evolve a consensus on the issue and the leaders of the minority community should take the initiative in arriving at a consensus, so that UCC is not viewed as an imposition by the majority community.

¹ Neera Chandhoke, ‘Re- presenting the Secular Agenda for India’ in Mushirul Hasan (ed.) *Will Secular India Survive?* (Imprint One, New Delhi, 2004).

² Gary Jacobsohn Jeffrey, *The Wheel of Law: India’s Secularism in a Comparative Constitutional Context* (Oxford University Press, New Delhi, 2003).

The paper first attempts to study the true nature of Indian secularism and what it is about *i.e.*, is Indian secularism about erecting a wall of separation between the state and religion, thereby devaluing religion; or is it about the state treating all religions as equal and thus validating religious identities or is it about binding minority rights into the concept of secularism? The article then studies the historical evolution of secularism in India, and attempts to evaluate the variations of models of secularism to be adopted *i.e.* the historical tug of war between '*Sarva Dharma Sambhav*' or '*Dharma Nirpekhshta*' models of secularism. As the secularism debate has been dogged by sharp and often acerbic polemics, the author shall also study the appropriateness of secularism in the Indian context because of the religious catholicity that is so pervasive in India. The author has shall also endeavored to study the correlation between secularism and secularization and how the ambiguity about the true contours and meaning of secularism has often hampered the realisation of the secular ideal. Attempt has also been made to briefly study the approach of the Indian judiciary towards the secular goal enshrined in our Constitution. Having thus studied the fundamentals of the secular ideal in India, the author has discussed the desirability of having a UCC *vis- a- vis* the desirability of retaining cultural pluralism along with religious legal pluralism.

II Secularism- Concept and its various forms

At the outset, it is to be realised that India is a unique country, having geographic, religious, social and cultural diversity. The Constitution of India makes repeated efforts to recognize and protect the diversity of social scenario and re-emphasizes unity in diversity.

It recognises pluralism of religions and convictions³ Unfortunately however this ideal has been subject to recurrent attacks made by nationalists/ chauvinists and the religious fundamentalists belonging to all religions. Religion has been a dominating factor in the Indian society. On one hand, religion has contributed to spiritual upliftment of the masses, while on the other hand wrong interpretation of religious edicts has perpetuated many social evils⁴. The religion and custom based personal laws of different communities have been a major cause of this discrimination. In order to combat these social maladies, our Constitution framers adopted secularism as one of the constitutional goals, which became a separate Preambular goal later on.⁵ Secularism isn't just a normal constitutional goal but a

³ Report of the Liberhan Ayodhya Commission of Inquiry, *available at*: <http://mha.nic.in/LAC> (last visited on Dec. 20, 2016). The Liberhan Commission (Liberhan Ayodhya Commission of Inquiry) was a long-running inquiry commissioned by the Government of India to investigate the destruction of the disputed structure Babri Masjid in Ayodhya in 1992. Led by retired high court M. S. Liberhan J, it was formed on Dec. 16, 1992 by an order of the Indian Home Union Ministry after the demolition of the Babri Masjid in Ayodhya on Dec. 6 and the subsequent riots there. The Commission was originally mandated to submit its report within three months. Extensions were given 48 times, and after a delay of 17 years, the one-man commission submitted the report to Prime Minister Manmohan Singh on June 30, 2009. In November 2009, a day after a newspaper published the allegedly leaked contents of the report, the report was tabled in Parliament by the Home Minister P. Chidambaram. The terms of reference were as follows:

To make an inquiry with respect to the following matters:

- i. The sequence of events leading to, and all the facts and circumstances relating to, the occurrences in the Ram Janma Bhoomi-Babri Masjid complex at Ayodhya on Dec. 6, 1992 involving the destruction of the Ram Janma Bhoomi-Babri Masjid structure;
- ii. The role played by the Chief Minister, Members of the Council of Ministers, officials of the Government of Uttar Pradesh and by the individuals, concerned organisations and agencies in, or in connection with, the destruction of the Ram Janma Bhoomi-Babri Masjid structure;
- iii. The deficiencies in security measures and other arrangements as prescribed or operated in practice by Government of Uttar Pradesh which might have contributed to the events that took place in the Ram Janma Bhoomi-Babri Masjid complex, Ayodhya town and Faizabad on Dec. 6, 1992;
- iv. The sequence of events leading to, and all the facts and circumstances relating to, the assault on media persons at Ayodhya on Dec. 6, 1992; and
- v. Any other matters related to the subject of Inquiry.

⁴ Devadasi, suttee, untouchability are a few examples.

⁵ Notwithstanding the fact that the words 'Socialist', and 'Secular' were added in the Preamble of the Constitution in 1976 by the 42nd Amendment, the concept of Secularism was very much embedded in our Constitutional philosophy. The term 'secular' has advisedly not been defined presumably because it is a very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment what was implicit was made explicit.

basic feature of the Constitution, an integral pillar to realize the grandiloquent vision of promoting fraternity amongst the entire citizenry of India.⁶ It is true that the Indian Constitution does not use the word "secularism" in any of its provisions, other than in the Preamble, but its material provisions are inspired by the concept of secularism.⁷ When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole, the ideal of a welfare state.⁸ And the concept of welfare is purely secular and not based on any considerations of religion. The essential basis of the Indian Constitution is that all citizens are equal, and this basic

⁶ Rajeev Bhargava, Amiya Kumar Bagchi and R. Sudarshan (eds.), *Multiculturalism, Liberalism and Democracy*, (Oxford University Press, New Delhi, 2010).

⁷ Constitution of India, 1950, art. 25 guarantees to all persons equally the freedom of conscience and the right freely to profess, practice and propagate religion subject to public order, morality and health and subject to the other Fundamental Rights and the State's power to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. Art. 26 guarantees every religious denomination or any section thereof the right [a] to establish and maintain institutions for religious and charitable purposes, [b] to manage its own affairs in matters of religion, [c] to own and acquire movable and immovable property and [d] to administer such property in accordance with law. Art. 27 declares that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Art. 28(1) decrees that no religious instruction shall be provided in any educational institution wholly maintained out of the State funds while Art. 28(3) says that no person attending an educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious worship conducted in such institution, except with his or his guardian's (in the case of a minor) consent. Art. 29 guarantees every section of the citizens its distinct culture, among others. Art. 30 provides that all minorities based on religion shall have the right to establish and administer educational institutions of their choice. It prohibits the state from making any discrimination in granting aid to an educational institution managed by a religious minority. Under art. 14, 15 and 16, the Constitution prohibits discrimination against any citizen on the ground of his religion and guarantees equal protection of law and equal opportunity of public employment. Art. 44 enjoins upon the State to endeavour to secure to its citizens a uniform civil code. Art. 51A casts a duty on every citizen of India, among others, [a] to abide by the Constitution and respect its ideals and institutions, [b] to promote harmony and the spirit of common brotherhood, among all the people of India, transcending, among others, religious and sectional diversities, [c] to value and preserve the rich heritage of our composite culture, [d] to develop scientific temper, humanism and the spirit of inquiry and reform; and [e] to safeguard public property and to abjure violence. These provisions by implication prohibit the establishment of a theocratic State and prevent the State either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations.

⁸ A welfare state is a concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. The sociologist T.H. Marshall identified the welfare state as a distinctive combination of democracy, welfare, and capitalism. (available at: http://en.wikipedia.org/wiki/Welfare_state; last visited on Nov. 4, 2014).

equality (guaranteed by article 14) obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights.⁹

With this backdrop in mind, we should now try and understand what secularism means and what its contours are. Secularism is an elastic term subject to varying interpretations across different polities. Generally secularism may be defined as the neutrality of the state in matters relating to religion or creed. All secular states have one thing in common: they are neither theocratic nor do they establish a religion.¹⁰ It may also be understood as 'non-patronizing attitude of the state to any one religion'.¹¹ In a secular state, there is no state religion and every citizen is free to preach, practice and propagate any religion. Thus, secularism defines the way the people of a country carry on their individual affairs as also their behaviour towards others. According to Encyclopedia Britannica it means: 'Non spiritual, having no concern with religious or spiritual matters... anything which is distinct, opposed to, or not connected with religion'.¹² Thus, in the western sense of the term a secular state is one, which is not connected with and not devoted to religion. It means separation of religion and state *i.e.*, state shall not get involved in any religious activity.

Secularism is first and foremost a normative doctrine that opposes all such forms of inter-religious domination and is opposed to all forms of institutionalised religious domination.¹³ An equally important dimension of secularism is its opposition to intra-

⁹ *SR Bommai v. Union of India*, [1994] 2 SCR 644; AIR 1994 SC 1918.

¹⁰ Neera Chandhoke, 'Secularism' in *The Oxford Companion to Politics in India*, eds. Niraja Gopal Jayal and Pratap Bhanu Mehta (Oxford University Press, New Delhi, 2010).

¹¹ Arthur Mayhew, Faber & Gwyer, 'Christianity and the Government of India' 5(1) *Bulletin of the School of Oriental and African Studies* (Oct.1929).

¹² Britannica Encyclopedia; Secularism is any movement in society directed away from otherworldliness to life on earth. In the European Middle Ages there was a strong tendency for religious persons to despise human affairs and to meditate on God and the afterlife. As a reaction to this medieval tendency, secularism, at the time of the Renaissance, exhibited itself in the development of humanism, when people began to show more interest in human cultural achievements and the possibilities of their fulfillment in this world. The movement toward secularism has been in progress during the entire course of modern history and has often been viewed as being anti-Christian and antireligious, available at: <http://www.britannica.com/EBchecked/topic/532006/secularism> (last visited on Dec. 11, 2016).

¹³ Gary Jacobsohn Jeffrey, *The Wheel of Law: India's Secularism in a Comparative Constitutional Context* (Oxford University Press, New Delhi, 2003).

religious domination. Put positively, it promotes freedom within religions, and equality between, as well as within, religions. To be truly secular, a state must not only refuse to be theocratic but also have no formal, legal alliance with any religion. The state should not identify itself with any particular religion. The pluralism of society requires that there be some kind of neutrality, or "principled distance," to use Rajeev Bhargava's term.¹⁴

A secular state must be committed to principles and goals which are at least partly derived from non-religious sources. These ends should include peace, religious freedom, freedom from religiously grounded oppressions, discrimination and exclusions, as also inter-religious and intra-religious equality. To promote these ends the state must be separated from organized religion and its institutions for the sake of some of these values. However, there is no reason to suggest that this separation should take a particular form. In fact the nature and extent of separation may take different forms, depending upon the specific values it is meant to promote and the way in which these values are spelt out. One pertinent point to be noted about secularism as noted by Charles Taylor¹⁵ is that: ¹⁶

it involves in fact a complex requirement. If we can single out three, which we can classify in the categories of the French Revolution trinity: liberty, equality, fraternity. First, no one must be forced in the domain of religion, or basic belief. This is what is often defined as religious liberty, including of course, the freedom not to believe. This is what is also described as the "free exercise" of religion, in the terms of the US First Amendment. Second, there must be equality between

¹⁴ Rajeev Bhargava, "What is Secularism for?" *Secularism and its Critics*, Rajeev Bhargava (ed.) 486-520, see especially, 493-64 and 520 for "principled distance" (New Delhi, Oxford University Press, 1998); and Rajeev Bhargava, "The Distinctiveness of Indian Secularism" *The Future of Secularism*, T. N. Srinivasan (ed.) 206-58, especially 39-64 (New Delhi, Oxford University Press, 2007).

¹⁵ Charles Taylor, "The Meaning of Secularism" 12(3) *The Hedgehog Review* (Fall 2010); This essay is adapted from Charles Taylor, "The Polysemy of the Secular" 76.4 *Social Research* 1,143-61,166 (Winter 2009); and Charles Taylor, "Foreword. What is Secularism?" *Secularism, Religion and Multicultural Citizenship*, Geoffrey Brahm Levey and Tariq Modood (ed.) xi-xxii (Cambridge: Cambridge University Press, 2009), available at: http://www.iasc-culture.org/THR/THR_article_2010_Fall_Taylor.php#endnotes; (last visited on Dec. 11, 2016).

¹⁶ The First Amendment (Amendment I) to the United States Constitution prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion, abridging the freedom of speech, infringing on the freedom of the press, interfering with the right to peaceably assemble or prohibiting the petitioning for a governmental redress of grievances. It was adopted on Dec. 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

people of different faiths or basic beliefs; no religious outlook or (religious or a religious) *Weltanschauung*¹⁷ can enjoy a privileged status, let alone be adopted as the official view of the State. Third, all spiritual families must be heard, included in the ongoing process of determining what the society is about (its political identity) and how it is going to realize these goals (the exact regime of rights and privileges).

This description fits perfectly in the Indian constitutional mould, which also endeavors to promote liberty, equality and fraternity and ensure the existence of a secular society. Herein under are discussed three variants of secularism.

Western model of secularism

Western secularism can briefly be described as one wherein there is complete segregation between religion and state activities. Such an insulated treatment meted out to religion in such states arose primarily because of the long conflict between the nobility and the ecclesiastical classes to monopolise political power. When the nobility succeeded in its quest for power, it thought it best to segregate religion from political life of a nation.

Western model of secularism is generally associated with the American model of secularism and it envisages mutual exclusivity of religion and state *i.e.*, the state will not intervene in the affairs of religion and, in the same manner, religion will not interfere in the affairs of the state. State policies cannot have an exclusively religious rationale and no religious classification can be the basis of any public policy. Anything to the contrary will be deemed to be an illegitimate intrusion of religion in the state.¹⁸ Similarly, the state can neither patronize, sponsor and aid any religious institution nor can it give financial support to educational institutions run by them. The segregation is so complete that state intervention is not permissible even on grounds of social reformation.¹⁹ Western secularism has a rather

¹⁷ *Weltanschauung* is the fundamental cognitive orientation of an individual or society encompassing the entirety of the individual or society's knowledge and point of view. A world view can include natural philosophy; fundamental, existential, and normative postulates; or themes, values, emotions, and ethics.

¹⁸ *Democratic Politics- II*, NCERT Textbook on Political Science for Class 10, (edn. March, 2007).

¹⁹ This form of mainstream secularism has no place for the idea of state supported religious reform. For *e.g.*, if a religious institution forbids a woman from becoming a priest, then the state can do little about it. If a religious community excommunicates its dissenters, the state can only be a silent witness. If a particular religion forbids the

individualistic orientation²⁰ and religion continues to be a private matter, not a matter of state policy or law.

Indian model of secularism

Indian secularism isn't an exact replica of western model of secularism; rather it is a variant of western secularism.²¹ Indian secularism has western and non-western origins. Unlike the underlying rationale of the Church - state separation in the west, in India, the ideas of peaceful co-existence of different religious communities have been the central idea behind adoption of secularism as a goal.

Indian secularism is subject to variegated interpretations and its complexity cannot be captured by the phrase "equal respect for all religions". Secularism is much more than mere peaceful coexistence or toleration. Nehru's concept of Secular State was one that "protects all religions, but does not favour one at the expense of others and does not itself adopt any religion as the State religion."²² Secularism for him didn't mean hostility to religion. Nehru was not in favour of a complete separation between religion and state.²³ Nehru's idea of secularism was that all religious groups shall enjoy the same constitutional protection without any favor or discrimination.²⁴ The Supreme Court elaborating the secular character

entry of some of its members in the sanctum of its temple, then the state has no option but to let the matter rest exactly where it is.

²⁰ This common conception interprets freedom and equality in an individualist manner. Liberty is the liberty of individuals. Equality is equality between individuals. There is no scope for the idea that a community has the liberty to follow practices of its own choosing. There is little scope for community-based rights or minority rights.

²¹ It is not just an implant from the west on Indian soil

²² Nehru; quote taken from Chapter titled "SECULARISM IN EDUCATION", available at: <http://www.ncte-india.org/pub/human/chap9.htm> (last visited on Nov. 30, 2016).

²³ Robert Baird, "Religion and the Legitimation of Nehru's concept of Secular state" in B.L. Smith (ed.), *Religion and the Legitimation of Power in South Asia* (Leiden: E.J. Brill).

²⁴ Radhakrishnan, *Secularism in India*, V.K.Sinha (ed.) 127 (1968); Dr. Radhakrishnan said that "the religious impartiality of the Indian State is not to be confused with secularism or atheism." In his book *Recovery of Faith* 202 (Harper Brothers, New York, 1955). S. Radhakrishnan further said, "When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that Secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role

of the Indian Constitution said that Indian secularism is neither anti God nor pro- God, it treats alike the devout, the antagonistic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion and it emphasizes the ancient doctrine in India that the State shall protect all religion but interfere with none.²⁵ Chinnappa Reddy J has observed that, "...Indian constitutional secularism is not supportive of religion at all but has adopted what may be termed as permissive attitude towards religion out of respect for individual conscience and dignity. There, even while recognizing the right to profess and practice religion etc., it has excluded all secular activities from the purview of religion and also of practices which are repugnant to public order, morality and health and are abhorrent to human rights and dignity, as embodied in the other fundamental rights guaranteed by the Constitution."²⁶

Superficially Indian secularism may appear to many as an imitation of Western secularism and hence an Occidental value. A careful reading of our Constitution however would show that it is not so in entirety. Indian secularism is fundamentally different from Western secularism as regards a few things.

Firstly, Indian secularism does not focus only on Church- state separation and the idea of inter-religious equality is crucial to the Indian conception of secularism. The advent of Western education in India highlighted hitherto neglected and marginalized notions of equality in Indian thought.²⁷ Western education brought into focus intra- community equality and also ushered in the ideas of inter-community equality to replace the notion of caste and religious hierarchy.²⁸ The Indian Constitution does not envisage an irreligious or

to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all like should be free to share to the fullest degree in the common life. This is the basic principle involved in the separation of Church and State.

²⁵ *St. Xavier's College v. State of Gujarat*, AIR 1974 SC 1389.

²⁶ Ambedkar Memorial lecture on 'Indian Constitution and Secularism' quoted in *SR Bommai v. Union of India*, AIR 1994 SC

²⁷ "Democratic Politics- II", NCERT Textbook on Political Science for Class 10, (edn. March, 2007).

²⁸ Indian secularism equally opposed the oppression of *dalits* and women within Hinduism, the discrimination against women within Indian Islam or Christianity, and the possible threats that a majority community might pose to the rights of the minority religious communities.

non-religious state. It only tells that all religions shall be treated equally and there shall be no discrimination among the citizens 'only' on the basis of their religion in any form or manner (article 15). The difference lies, therefore, in the fact that whereas in the case of western states the discrimination by state is absolutely banned, the Constitution of India permits discrimination on condition that the religious ground is accompanied by another reasonable ground. By virtue of this, the State is empowered to legislate different laws applicable to different communities. This further means that the State can accord legal recognition to its people not only as citizens but also as members of different communities *i.e.*, as Hindus, Muslims, *etc.*

Secondly, Indian secularism deals with both religious freedom of individuals and also with religious freedom of minority communities.²⁹ Thirdly, Indian secularism has made room for and is compatible with the idea of State-supported religious reform.³⁰ The secular character of the Indian state is established by virtue of the fact that it is neither theocratic nor has it established any one or multiple religions. Indian model of secularism is in fact a manifestation of a very sophisticated policy in pursuit of religious equality, which allows the State to either disengage with religion in American style, or engage with it when required.³¹ Indian secularism permits 'principled State intervention in all religions' Such intervention may come at the cost of 'disrespect to some aspects of every religion' The secular state of India treats all religions alike and at the same time 'displays benevolence towards them in a way more suited to the Indian environment and climate than that of a truly secular State' 'a State which creates complete separation between religion and the State'.³²

Having thus studied the above two forms of secularism, it can be said 'Western dictionaries define secularism as absence of religion but Indian secularism does not mean irreligiousness.

²⁹ Within it, an individual has the right to profess the religion of his or her choice. Likewise, religious minorities also have a right to exist and to maintain their own culture and educational institutions.

³⁰ Laws can be made regulating the secular affairs of Temples, Mosques and other places of worship; and maths. (See *S.P. Mittal v. Union of India*: [1983]1SCR729.) The power of the Parliament to reform and rationalise the personal laws is unquestioned.

³¹ Ban on untouchability, sati *etc.*

³² *SR Bommai v. Union of India*, AIR 1994 SC

It means profusion of religions.³³ Indian secularism doesn't conform to the idea of *Dharma Nirpekshata*,³⁴ it rather adopts the idea of *Sarva Dhamma Sambhava*.³⁵

Reactionary form of secularism practised across other nations like Turkey

A rather unique form of secularism was practiced in Turkey in the first half of the twentieth century. This secularism was in stark contrast to the general nature of secularism which adopts a principled distance from organised religion. It involved active intervention in and suppression of religion. This version of secularism was propounded and practiced by Mustafa Kemal Ataturk,³⁶ who had come to power after the First World War. Ataturk was convinced that only a clear break with traditional thinking and expressions could elevate Turkey and was hence determined to put an end to the institution of *Khalifa*³⁷ in the public life. He set out in an aggressive manner to modernise and secularize Turkey. Ataturk changed his own name from Mustafa Kemal Pasha to Kemal Ataturk. The *Fez*, a traditional cap worn by Muslims, was banned. Western clothing was encouraged for men and women. Such reactionary form of secularism has been practiced in a few other countries as well, which have tried to break free of parochialism of their religious tenets. In practicing such form of secularism, the wall segregating state and religion often crumbles down and the State adopting an activist stance transcends into the religious sphere.

III Secularism versus secularization

³³ Shashi Tharoor, *The Elephant, The Tiger, and the Cellphone: India, the Emerging 21st-Century* (Penguin UK, 2007).

³⁴ Nirpekshata means neutrality towards all religions and non- interference with religions.

³⁵ Sarva Dharma Sama Bhava is an Indian concept embodying the equality of all religions. The concept was embraced by Ramakrishna and Vivekenanda, as well as Gandhi and Nehru. Although commonly thought to be among the ancient Hindu Vedas, the phrase is actually attributed to Gandhi, having been used first in September 1930 in his communications to his followers to quell divisions that had begun to develop between Hindus and Muslims toward the end of the British Raj. The concept is one of the key tenets of secularism in India, wherein there is not a separation of church and state, but an attempt by the state to embrace all religions.

³⁶ Mustafa Kemal Ataturk was a Turkish army officer, reformist statesman, and the first President of Turkey. He is credited with being the founder of the Republic of Turkey. Atatürk embarked upon a program of political, economic, and cultural reforms, seeking to transform the former Ottoman Empire into a modern and secular nation-state. Under his leadership, thousands of new schools were built, primary education was made free and compulsory, and women were given equal civil and political rights, while the burden of taxation on peasants was reduced. His government also carried out an extensive policy of Turkification. (http://en.wikipedia.org/wiki/Mustafa_Kemal_Ataturk; last visited on 4th November, 2014).

³⁷ Caliph or khalifa is a title used for Islamic rulers who are considered politic-religious leaders of the Islamic community of believers, and who rule in accordance with Islamic law. A state ruled by a caliph is a caliphate.

Any debate about secularism would be incomplete without understanding the nuances of the process of secularisation and how can it be contradistinguished from secularism as a concept. Secularism is a value whereas secularization is a means to achieve the objective of having a secular nation. Secularization is the transformation of a society from close identification with religious values and institutions toward nonreligious (or irreligious) values and secular institutions.

As societies progress, particularly through modernization and rationalization, religion loses its authority in all aspects of social life and governance. Secularization refers to the historical process in which religion loses social and cultural significance. As a result of secularization the role of religion in modern societies becomes restricted. In secularized societies, faith lacks cultural authority; religious organizations have little social power. There is a decline in levels of religiosity. The dream of a secular India necessarily rests on the process of secularization, which has to go along simultaneously and continuously. Societal perception towards religious has to change; there has to be a differentiation in various aspects of social, economic, political and legal life, as each of them becomes more and more specialized. Secularization can also denote the transformation of a religious into a secular institution.³⁸ Secularization can also manifest itself in another form where there is a transfer of activities from religious to secular institutions, such as a shift in provision of social services from temples, mosques and Churches to the government. Secularization also requires a change in mentalities of the people inhabiting a State. Individuals should focus on moderating their behavior in response to more immediately applicable consequences rather than out of concern for post-mortem consequences, as is usually seen in societies which are preponderantly religious.³⁹

³⁸ Aligarh Muslim University and Osmania University were initially designed to train Muslims for government service in India and prepare them for advanced training in British universities. Now these universities are open to all irrespective of caste, creed, religion or gender.

³⁹ John Somerville outlined six uses of the term secularization in the scientific literature; Somerville, C. J. "Secular Society Religious Population: Our Tacit Rules for Using the Term Secularization", *Journal for the Scientific Study of Religion* (37 (2):249-53 (1998)).

Going by the above indicia for determining whether secularization is taking place in India, one realizes that a lot has been achieved on this front. Despite this, there is still a long way to go if India's trust with secular ethos has to be a fruitful and happy one. It should also be realized that we need to appreciate the secular ethos in a proper and wholesome manner. A piecemeal approach would not suffice. Indian Republic's secularism should be characterized by genuine religious freedom; celebratory neutrality and reformatory justice.⁴⁰

Having thus discussed the idea of secularism and how it's related to the process of secularization, it is time we discussed the arguments advanced in favour of Uniform Civil Code and also the grounds for assailing the same.

IV Debate surrounding uniform civil code

Arguments in favor of uniform civil code

The debate surrounding personal religious laws and the need for a UCC constitute a key concern in any discussion regarding the concept of secularism and religious freedom in India. Though few domains of social life are now governed by secular laws⁴¹ based on the principles of 'justice, equity and good conscience' personal religious laws continue to operate without any significant changes. The colonial masters feared antagonism and local backlash and hence thought it fit to not interfere in the 'religious matters of the natives'. They did, however, bring about certain enactments in the name of 'reform' to bring an end to certain reprehensible practices like *sati*.⁴² Certain personal laws, especially of the Hindus, have been codified accompanied by certain amendments in light of the compulsions of modern times, while others continue to apply to the respective religious groups in their long-established, traditional forms. As result of the wary approach adopted by the successive governments too, India has a complex system of personal laws governing inter-personal relationships despite a

⁴⁰ Mukul Kesavan quotes Rajee Bhargava in his book *Secular Common Cause*, (Penguin Books India, 2001).

⁴¹ Substantive Criminal laws, commercial laws, transfer of property act etc.

⁴² Available at: <http://centreright.in/2011/10/need-for-uniform-civil-code-in-india-a-human-rights-perspective/#.VFPdnXvuEdo>; (last visited June. 11, 2017).

constitutional directive to the legislature to enact a uniform civil code applicable to all religious groups which should govern all family relationships such as marriage and divorce, maintenance, custody of children, guardianship of children, inheritance and succession, adoption and the like. This constitutional directive has not been acted upon in more than six decades since independence.

The term 'Uniform Civil Code' means the same set of secular civil laws shall govern all persons residing in a country irrespective of their religion, caste and tribe. The main areas covered under the ambit of UCC are the laws related to marriage, divorce, adoption, and Inheritance and acquisition and administration of property. The concept of UCC is thus confined to having uniform family code for members of all communities living in India, not merely for the sake of uniformity but also for securing social justice for weaker sections in different communities in the spheres of marriage, divorce, inheritance, maintenance and adoption. In the Indian context, UCC is a mandate upon the State under article 44⁴³ of the Constitution and should be conceived as part of secularization of personal laws without shedding religious identities.

In the beginning strident efforts were made to put the provision for a Uniform Civil Code in the Fundamental Rights chapter⁴⁴. But in view of the conflicting opinions⁴⁵ of the various members of the Constituent Assembly and with a view to assuage the insecurity of the religious minorities, provision for UCC was incorporated in chapter IV pertaining to directive principles of state policy, which are not justiciable but still fundamental in the

⁴³ Art. 44, which deals with the Uniform Civil Code states: "The State shall endeavor to secure for the citizens, a uniform civil code throughout the territory of India".

⁴⁴ Chapter III. Art. 35 in the draft constitution

⁴⁵ While the founding father of our constitution and Chairman of the Constitution Draft Committee, Dr. B.R. Ambedkar, supported by eminent nationalists like Gopal Swamy Iyenger, Anantasayam Iyengar, KM Munshiji, Alladi Krishnaswamy Iyer and others favored the implementation of the Uniform Civil Code; it was strongly opposed by Muslim fundamentalists like Pocker Saheb and members from other religions. On Nov. 23, 1948 a Muslim member, in Parliament, gave an open challenge that India would never be the same again if it tried to bring in Uniform Civil code and interfere with Muslim personal law. Earlier, the Congress had given an assurance that it would allow Muslims to practice Islamic personal Law and the architects of the Constitution, therefore, found a compromise by including the enactment of a UCC under the Directive Principles of State Policy in art.44.

governance of India.⁴⁶ The arguments advanced in favor of the adoption of a UCC are manifold. Herein under are a few arguments advanced in favour of UCC.

V Promotes national integration

India's trust with destiny which began on August 15, 1947, was clouded by concerns regarding unity and integrity of the infant nation. After the tragic partition of India, our founding fathers left no stone unturned to secure the unity of Indian nation. The goal of national integration was so dear to them that they adopted several innovative methods to secure national unity.⁴⁷ It is believed that UCC shall strengthen India's integrity and there is a growing clamor for implementing UCC from national integrationists. K.M. Munshi during the Constituent Assembly Debates⁴⁸ had at the very outset said:⁴⁹

Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors - and important factors - which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say. 'Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation.

Even Alladi Krishnaswami Ayyar said that a Uniform Civil Code "actually aims at amity. It does not destroy amity."⁵⁰ He said it was wrong to say that communities cannot live in harmony if there was to be a Uniform Civil Code. The Uniform Civil Code was also

⁴⁶ Constitution of India, 1950, art.37.

⁴⁷ They adopted a unique form of federalism and used the term "Union" instead of "federation"

⁴⁸ VII C. A. D, at 548.

⁴⁹ *Ibid.*

⁵⁰ C. A. D., Vol. VII, at 549.

supported by other members of Constituent Assembly like Rajkumari Amrit Kaur, Hansa Mehta and Minoo Masani, who in their note of dissent attached to the Report of Sub-Committee on Fundamental Rights argued for adoption of a Uniform Civil Code. If we study the role of civil codes in other countries like Germany and France, we find that civil codes have played a positive role in national integration and consolidation. Justice Tulzapurkar once said: ⁵¹

In the context of fighting the poison of communalism, the relevance of Uniform Civil Code cannot be disputed; in fact it will provide a juristic solution to the communal problem by striking at its root cause, and it will foster secular forces so essential in achieving social justice and common nationality.

Chandrachud J in Shah Bano case said: ⁵²

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 this country and unquestionably it has the legislative competence to do so.

The spirit of the nation demands that the law should be the same for all citizens. One characteristic of a true nation state, it was thought, was that it had a unified substantive law. The existence of different laws, whose applicability depended upon religion or ethnicity, was seen as a badge of inferiority; it suggested a political entity prone to disintegration, one that would have little influence in the world.⁵³ Further UCC shall act as a safeguard against political domination by means of minority fundamentalism and shall thus act as a harbinger of genuine democracy, by preventing encouragement of communalism to achieve political ends.

⁵¹ Justice Tulzapurkar, "Uniform Civil Code", AIR 1987 SC 17.

⁵² *Mohd. Ahmad Khan v. Shah Bano Begum*, AIR 1985 SC 954.

⁵³ John H. Mansfield, "Personal Laws or a Uniform Civil Code?" *Sociology of Law*, edited by Indra Deva, (Oxford University Press, New Delhi, 2005).

VI Promotion of gender equality

Promotion of gender equity is another avowed objective of those favoring UCC. The proponents of UCC say that it is a known fact that in the personal laws of all the communities, gender injustice is inbuilt. This is supposed to be the result of the socio-economic conditions under which they evolved. The supporters of UCC sincerely believe that a UCC shall ensure religious reformation by securing equality between men and women. Personal laws have invariably been biased against the women. As a result women have undergone many difficulties in matters concerning their marriage, divorce and inheritance.⁵⁴ While one's religion determines which law will apply to him or her regarding marriage, divorce, maintenance, guardianship, adoption, inheritance, and succession, a common thread woven through all of India's religious personal law systems is the patriarchal dominance of men and the unequal treatment of women.⁵⁵

Herein under are mentioned a few instances which go a long way in proving the highly skewed and adverse impact of religious laws on women.

- i. The right of all men and women of certain age to marry through free consent and with complete freedom in the choice of a spouse is recognized internationally. However, in India personal laws are found wanting in this aspect. Muslim law appears to recognize the right of a guardian to contract his minor ward into marriage. There is a remedy in the form of option of puberty (right to repudiate marriage on attaining puberty) but it is restricted for as far as women are concerned. Under Hindu law (Hindu Marriage Act, 1955) too, it is not the mere absence of consent but the obtaining of consent by *fraud* or *force* or vitiation of consent by proved unsoundness of mind that renders the marriage void.
- ii. *Polygamy* is another contentious issue in contemporary world where monogamy, fidelity and family welfare are the norm. Modern legislation like The Hindu Marriage Act, 1955 prohibits bigamy (covering both polygamy and polyandry) and the Indian Penal Code

⁵⁴ Polygamy, desertion, triple divorces are just a few examples to show the possibilities of harassing women.

⁵⁵ Laura Dudley Jenkins, "Personal Law and Reservations: Volition and Religion in Contemporary India", *Religion and Personal Law In Secular India*.

makes it an offence.⁵⁶ However, Muslim personal law recognizes and permits the institution of polygamy. It is humbly submitted that polygamy is largely an anachronism from patriarchal times, and it is high time that such a practice is disallowed across all religions. Allowing polygamy as a prerogative of a select few belonging to a certain religious community or tribe can create fissures and religious tensions in society.⁵⁷

- iii. The most preposterous and discriminatory feature of Islamic law of divorce is the recognition of the concept of unilateral divorce. Accordingly the husband can divorce his wife unilaterally, without any cause, without assigning any reason, even in a jest or in a state of intoxication, and without recourse to the court and even in the absence of the wife, by simply pronouncing the formula of repudiation. On one hand the husbands have a tyrannical power to exercise their rights of divorce, which is practically unfettered by any major restriction, the Muslim women's right to divorce are circumscribed by important limitations. Post the passage of Dissolution of Muslim Marriages Act, 1939, a Muslim wife can obtain a divorce through the intervention of a judge, before whom she must establish one of a limited number of acceptable bases for divorce. The fact that on a moral plane, divorce is reprehensible in Islam and has been denounced by Prophet does not provide relief to women as unilateral divorce continues to be an accepted practice in many countries including India.
- iv. Even provisions relating to maintenance reveal a kind of inherent gender discriminatory attitude. Under Hindu law, a wife has a right to be maintained during her lifetime as per the provisions of the Hindu Adoptions and Maintenance Act, 1956. However even in this progressive legislation an attempt has been made to reinforce the conservative idea of a Hindu wife and accordingly an 'unchaste' wife is not entitled to separate residence and maintenance. As far as Muslim law is concerned, many interpretations of the *sharia* do not grant divorced women a right to maintenance from their former husband beyond the three

⁵⁶ IPC, 1860, s.494 and 495.

⁵⁷ There have been many instances in the past of abuse of this practice as permitted under Islam. Often, non-Muslims convert to Islam in order to marry more than once and while courts examine the intention behind such conversions to decide on the question of validity of second marriages, such a phenomenon generates strife and also affects rights of the parties involved.

month long *iddat*.⁵⁸ In India, the Dissolution of Muslim Marriages Act, 1939 denies divorced Muslim women the right to claim maintenance. In the famous *Shah Bano*⁵⁹ judgment, the judiciary attempted to get rid of this anomaly by explicitly bringing such Muslim women under the purview of the secular Code of Criminal Procedure, 1973 (wherein a wife is entitled to claim maintenance against the husband on the ground of the husband's neglect or refusal to maintain her). *Shah Bano*⁶⁰ case was a classic conflict situation between the secular criminal code and religious personal law. In this case, an old Muslim woman had been divorced by her husband who invoked the Muslim personal law to deny maintenance to his wife. The Supreme Court, however, applied and interpreted the secular law, the Criminal Procedure Code, 1973 to grant maintenance. The judiciary is to be commended for giving a humane and holistic meaning while applying the relevant provisions. However, the deliberate use of *Quran* and the endeavors to interpret it in a particular manner evoked the wrath of the Muslim conservatives, who stressed community fears of the loss of freedom of religious practice. Finally, the Government, yielded to pressure from the orthodox members of the Muslim community and, without any consultation, passed the Muslim Women's (Protection of Rights in Divorce) Act, 1986, in spite of protest from progressive Muslims and feminists. This Act ostensible protects women but in reality protects the husband by not requiring him to pay maintenance. It is highly discriminatory towards Muslim women in that they are now precluded from the purview of section 125 of the Criminal Procedure Code, 1973 which had originally protected Shah Bano. Specific requirements of the new Act also make it much more likely that a Muslim woman will be required to conduct a court case in order to obtain any maintenance at all. By indulging in vote bank politics, the government of the day hastily drafted this piece of legislation so as to confirm to the conservative and traditional view of the Muslim law governing maintenance of divorced women.

⁵⁸ Iddat is the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man. Its purpose is to ensure that the male parent of any offspring produced after the cessation of a nikah (marriage) would be known. The length of iddah varies according to a number of circumstances.

⁵⁹ *Mohd. Ahmed Khan v. Shah Bano Begum* 1985 SCR (3) 844.

⁶⁰ *Ibid.*

- v. *Inheritance laws were largely regressive and anti- women in posture.* Under the Hindu law, the *Mitakshara* branch of law⁶¹ denied to a Hindu daughter a right by birth in the joint family estate and this flowed logically from the fact that her place in the paternal family was only temporary as she was belonged to her husband's family on marriage. Modern day amendments to Hindu law of succession gave Hindu widows the right of succession her husband's estate. Till recently, Hindu law was still discriminatory in that the Hindu Succession Act, 1956 excluded the daughter from coparcenary ownership of ancestral property. In 2005 the Parliament, by an amendment, took a radical but much-awaited step towards ensuring equality between Hindu men and women as far as succession is concerned, and conferred upon daughters the status of coparceners in the family of their birth, thereby bringing an end to the centuries-old rules of Hindu inheritance that have lost their relevance and justifications.⁶² Islamic law prescribes that generally a man's share of the inheritance is double that of a woman in the same degree of relationship to the deceased. This aspect of Islamic rules is most vehemently criticized for its discrimination against women, as it is a manifest sample of unequal treatment. However, it is important to observe here that the Islamic law was more benevolent towards women than its Hindu counterpart.
- vi. Mothers have generally been assigned a statutorily subservient position in the matter of guardianship and custody of her children. The father is designated the first natural and legal guardian of his minor; the mother is the natural guardian only *after* the father. Under Muslim law, the father is the sole guardian of the person and property of his minor child. Adoption is another area in family relations where a female suffers discrimination based purely on her marital status. Need for reforms are felt even in this regard.

⁶¹ Mitakshara is a *viviti* (legal commentary) on the *Yajnavalkya Smriti* best known for its theory of "inheritance by birth." It was written by *Vijñāneśvara*, a scholar in the Western Chalukya court in the late eleventh and early twelfth century. Along with the *Dāyabhāga*, it was considered one of the main authorities on Hindu Law from the time the British began administering laws in India. The entire *Mitakshara*, along with the text of the *Yajñavalkya-smriti*, is approximately 492 closely printed pages.

⁶² Though the full extent of implications of this amendment are yet to be observed, it is nonetheless a commendable and desired step in the effort to check in-built biases against women in personal laws of this country. More importantly, this radical amendment was brought by the Parliament without facing any resistance or impediment on the part of the Hindu community.

- vii. Likewise, under Christian law, a man may obtain a divorce when his wife has committed adultery, while a Christian woman seeking divorce is required to prove at least two offenses by her husband, such as adultery with cruelty or adultery with desertion.

In the name of protecting the rights of religious communities, Parliament has thus far skirted its responsibilities to some of the most vulnerable individuals within those communities—the women. State neutrality in religious affairs should not come at the cost of women's rights. Religious reforms should not freeze in the name of protecting minority rights. Indian women were granted formal equality by the Constitution which conferred on them political rights.⁶³ But due to the different personal laws, women experience inequality, deprivation and violence. Within the family, their position is pitiable. The personal laws are archaic and anachronistic in a modern democratic society, where individual choices are given primacy. These laws treat women as chattel and are designed to keep women forever under the control of men. A uniform civil code is, therefore, foremost a matter of gender justice. One of the biggest criticisms working against personal laws is that these antiquated provisions are discriminatory towards women and seek to undermine their position within the private domain.⁶⁴ Personal religious laws need to be tested for their conformity with principles of egalitarianism that are the touchstones of our Constitution as well as international declarations/agreements to which India is a party. Having a UCC is the surest way to ensure gender equality. S. P. Sathe from Pune who has been working on drafting a Gender Equal Family Code once said: "Personal laws were never considered a part of freedom of religion." In his view, the freedom of religion, a fundamental right guaranteed under Article 25 of the

⁶³ Gender equality is a facet of equality and it is one of the basic principles of the Constitution. Moreover, the doctrine of equality as enshrined in art.14 of the Constitution of India is not merely formal equality before the law but embodies the concept of *real* and *substantive* equality which strikes at all the inequalities arising on account of vast historical, socio-economic and customary differentiation. Thus, we see that art. 15(3) of the Constitution empowers the State to make special provisions for protection of women and children. Art. (2) mandate that social reform and welfare can be provided irrespective of the right to freedom of religion. art .44 would ensure substantive equality too.

⁶⁴ Martha C. Nussbaum, "India: Implementing Sex Equality through Law" 2 *Cambridge Journal of International Law* (2001), says that "All of India's religious personal law systems suffer from gross sex inequalities. Their shelter, thus far, from real constitutional scrutiny makes a mockery of India's constitutional commitment to equality and fails to provide women with the protection they deserve."

Indian Constitution, is not absolute and has been, carefully drafted to subject it to prevailing notions of public order, morality and health. Having thus discussed the two most convincing arguments for adopting UCC, it would be pertinent to revert back to a statement made by R. M. Sahai J in his concurring judgment in *Sarla Mudgal v. Union of India*,⁶⁵ where he said: ⁶⁶

Freedom of religion is the core of our culture. Even the slightest deviation from it shakes the social fibre. But religious practices which are violative of human rights and dignity and involve sacerdotal suffocation of essentially civil and material freedoms, are to be deprecated. Therefore, a uniform code is imperative both for protection of the oppressed and for promotion of national unity and solidarity.

Even academicians like Professor Lotika Sarkar, Professor Vasudha Dhagamvar, Professor CC Desai,⁶⁷ Archana Parashar,⁶⁸ John H. Mansfield⁶⁹ etc. support adoption of Uniform Civil Code.

Tahir Mahmood, an authority on the Islamic Law, in his book *Muslim Personal Law*⁷⁰ has also made a powerful plea for framing a Uniform Civil Code for all citizens of India. He says: "In pursuance of the goal of secularism, the State must stop administering religion based personal laws.⁷⁰ He says, "Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state legislative jurisdiction, the Muslims will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India." At a Seminar held on October 18, 1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies, New Delhi, he

⁶⁵ *Sarla Mudgal, President, Kalyani v. Union of India* 1995 SCC (3) 635.

⁶⁶ (1995) 35 SC.

⁶⁷ C.C. Desai, "Need for UCC for India", 3 *Journal of Constitutional and Parliamentary Studies*, 1969.

⁶⁸ Archana Parashar, *Women And Family Law Reform In India: Uniform Civil Code And Gender Equality*, 158 (1992).

⁶⁹ John H. Mansfield, "Personal Laws or a Uniform Civil Code?", *Sociology of Law*, edited by Indra Deva, (Oxford University Press, New Delhi, 2005).

⁷⁰ Shah Bano, available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=9303> (last visited on May 25, 2017)

also made an appeal to the Muslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce.⁷¹

VII Uniform civil code as a means to achieve clarity, simplicity and intelligibility in personal laws

It is a matter of common knowledge and experience that a legal system cannot achieve the sublime goal of justice dispensation without simplicity and clarity of its laws. The history of codification tells us that one of the primary reasons behind codification was to achieve stability and certainty. Multifarious laws can create conflicting positions and thus lead to ambiguity. Lon Fuller's inner morality of law requires certainty of laws as the desideratum for any legal system. He says that contradictions in the law weaken the efficacy of legal system. The same can be said about the multifariousness of personal laws in India too. Conflicting provisions lead to confusion and ambiguity in civil relationship of the citizens. Though at times it is argued that Special Marriage Act has successfully resolved this crisis, one must realize that so long as it remains one of the many laws in application in India, its efficacy is bound to be diluted. Further, very few people, generally those belonging to the educated class, resort to Special Marriage Act, 1956.

Arguments against uniform civil code

Mainly the objections to the enactment of UCC have all along been raised by the largest minority community in the country, *i.e.* the Muslim community. Not only has the formulation of UCC been opposed all along, even progressive reforms in the personal laws of the communities, (which are believed to be ordained by religion) have been opposed. *Moulvis* and *Ullemas* have vociferously opposed any attempt to tamper with the personal laws, no matter how inequalitarian, inequitable and anachronistic they may patently be. The idea of UCC is subject to a four pronged attack which are as follows:

In the name of religion under article 25

⁷¹ *Islam and Comparative Law Quarterly*, 146 (April-June, 1981).

Opponents of UCC say that their personal laws are an inseparable and integral part of their religion. Any tampering with that law will necessarily mean interference with the religion of a person. This kind of an interference is constitutionally barred. However one must note that the above argument ignores an important aspect of right to profess, practice and propagate religion. The right under article 25 is subject to public order, health and morality. Also, the State can intervene to bring about social reform when such reforms are needed for societal welfare. In the guise of religion, a practice which is socially reprehensible cannot be allowed to continue. Also one must note that article 25 guarantees right to religion and not right to application of archaic personal laws.

Lessons can be learnt from European nations too, where everyone including minorities are subject to the same set of laws. No objections are raised and no exceptions are made. Over there, common laws in civil matters are not considered to be tyrannical by the minorities. In India, UCC has been opposed on the frivolous ground that it would be an imposition of Hindu religion on the minorities. One objection raised by the Muslim community to the enactment of a uniform civil code is the fear that it would be influenced by a Hindu perspective presented as neutral and secular.⁷² Though this fear of minorities must be addressed at the earliest, the idea of having a UCC should not be given up.

In the name of culture under article 29

Article 29 of the Constitution guarantees every section of the citizenry, the right to conserve its language, script and culture. Accordingly, any interference with their personal laws would be an affront to their culture and thus in derogation of this prized fundamental right. Interference with personal laws would tamper with the religious identity of the minorities and this according to them is an unnecessary and unwarranted intrusion into their religion and culture. Mr. Mohammed Ismail Saheb once said during the Constitutional Assembly Debates that:⁷³

í ..the right to follow personal law is part of the way of life of those people who are following such laws it is part of their religion and part of their culture. If

⁷² Vrinda Narain, "Women's Rights and the Accommodation of 'Difference' Muslim Women in India", 8 **S. CAL. Rev. L. & WOMEN'S STUD.** 43, 62 (1999).

⁷³ CAD, Vol. VII, 540. B. Pocker Saheb, Shri Nizaruddin Ahmad and Shri Mahboob Ali Baig had similar reasons to oppose UCC.

anything is done affecting their personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages.

Though the concept of culture is rather elastic and not subject to a straightjacket definition, one must realize that even cultures evolve and change over time. Culture never remains static and invariably responds to changing conditions and dynamic forces which shape culture accordingly. Thus, in modern progressive societies, the antiquated personal laws need drastic overhauling and if that is not possible then such laws should be buried. A uniform civil code would perform the reformatory role.

In the name of immutability of religious laws ordained by god and the prophet

Minority spokespersons advanced the argument of religious immutability in order to assert their point that personal laws are beyond the reach of a civil code. The crux of their argument was that the laws regulating minority community in family relations are based on their religion, hence they are unalterable, immutable and permanent. They can thus not be subject to re- interpretation.⁷⁴

But this argument in the opinion of the researcher is highly irrational and betrays a lack of historical knowledge and perspective. There is nothing divine about any personal law. To say that Muslim personal law is immutable, because it is ordained by God and the Prophet seems quite medieval and naïve. Muslim law has undergone drastic changes in several countries which have a preponderantly Muslim population. For instance, polygamy has been completely prohibited in Tunisia⁷⁵ and has been curbed in Syria, Morocco, Egypt, Iran, Pakistan and Jordan by making it permissible subject to certain conditions such as obtaining permission of the courts before taking a second wife.⁷⁶ Similarly the right of

⁷⁴ C.A.D. Vol. VII, Speakers include B Pocker Sahib Bahadur, Nazinuddin Ahmad and Mahboob Ali Baig Sahib Bahadur etc.

⁷⁵ Tunisian Law of Personal Status, s. 18

⁷⁶ Muslim countries like Egypt, Turkey and even Pakistan have reformed their laws. Terence Farias, in his chapter "The Development of Islamic Law" points out that the 1961 Muslim Family Law Ordinance of Pakistan "makes it obligatory for a man who desires to take a second wife to obtain a written permission from a government appointed Arbitration Council." The interesting point regarding Pakistan is that until 1947 both India and Pakistan had governed Muslims under the Shariat Act of 1937. However, by 1961 Pakistan, a Muslim country had actually reformed its Muslim Law more than India had and this remains true today. There is no reason why India should

Muslim husband to unilaterally pronounce *talaq* has also been curbed in many countries. India too saw a change in 1937 when the Dissolution of Muslim Marriage Act was passed which gave women the right to seek divorce on certain grounds. These examples shatter the theory of immutability of personal laws. Opponents of UCC also say that while Hindus are governed by diverse *Shastras* and largely by customs, other religious communities like Muslims, Christians and Parsis are children of one monolithic religion with one prophet and one holy book. Thus, for them the personal laws are definitely immutable. However even this argument suffers from a vital infirmity. Even Muslim law is not homogenous. There are several variations across the distinct schools of Islam i.e. between the laws applicable to *Shias and Sunnis*. The difference aren't just restricted to *Shia and Sunni* sects, but are found within the various sub- sects like *Hanafis; Malikis, Ithana Asharis* etc. The argument of immutability of personal laws is primarily atheological one, but it lacks rationality. Thus, it should not blindly be accepted.

Another ground for attacking uniform civil code is that it is not going to promote national integration

Academicians like Paras Diwan disagree with the proposition that Uniform Civil Code will lead to national integration. He says: ⁷⁷

The Uniform Civil Code has nothing to do with 'Indianization' or 'national integration' or interfering with the religion of one community or the other. It is simply a question of equal facility of laws to all sections of our people. All people of India in all matters .. except the matter coming under protective discrimination should be governed by one set of laws.

continue with vastly discriminatory personal laws. In fact, the reforms meted out in Tunisia and Turkey helped abolish Polygamy. Polygamy has also been either banned or severely restricted in Syria, Egypt, Turkey, Morocco, Iran and even in Pakistan. Besides Muslims who live in U.S.A., Australia, U.K. and other parts of Europe readily accepted the civil laws applicable uniformly to all citizens in the respective countries but do not feel insecure on that account. So, then, why, in India should there be such a feeling? Iran, South Yemen, and Singapore all reformed their Muslim laws in the 1970s. (available at: <http://www.legalservicesindia.com/article/article/should-india-have-a-uniform-civil-code-394-1.html>; last visited Dec.28, 2016).

⁷⁷ Paras Diwan, 'The Uniform Civil Code: A projection of equality'; *Minorities and the law*, ed. Immam Mohammed, (1972).

Teesta Setalvad says that "It is feared that commonality in personal laws will promote Brahmanical cultural hegemony, not national integration.

The anti-secularist nationalist critique has been developed by scholars like Ashis Nandy, T.N. Madan and T.K. Oommen. They believe that the goal of a single national culture was a mistake and was not required. According to them such a culture isn't required for national unity. They believe that cultural pluralism in India necessitates the recognition and operation of legal pluralism.⁷⁸

Polarisation in the society along religious lines is still very much alive in our country. The destruction of mosques and temples, communal riots are clear pointers towards the fact that India is yet to achieve the level of a stable and mature secular democracy. If the Uniform Civil Code is introduced in such a society, it may lead to further complications and communal conflagrations. Moreover, for Indians, religion is not just a casual part of their personal life. Here religion plays a primary role in the lives of most of the people. Therefore the introduction of the civil code should be a well-thought out and careful process and till the time a national consensus is not reached the idea of UCC should not be tinkered with.

One should also realize that UCC should not just ensure commonality of laws across all religions but should also ensure commonality across different sects practicing same religion. If UCC is to be adopted across all religions, then even customary law should undergo the process of homogenization.⁷⁹

In the opinion of the researcher each of the above arguments suffer from the vice of irrationality and are patently fallacious and untenable. Though UCC is a difficult idea to implement but no one can deny the desirability and necessity of having one in India.

Judiciary's approach towards a uniform civil code

The Supreme Court has on umpteen occasions directed the government to realize the directive principle enshrined in article 44 of our Constitution. It is disheartening to see that

⁷⁸Donald Eugene Smith, "Religion, Law and Secularism", *Sociology of Law*, edited by Indra Deva, (Oxford University Press, New Delhi, 2005); excerpted from Donald Eugene Smith, *India as a Secular State*, (Princeton University Press, Princeton, New Jersey, 1967).

⁷⁹At present, despite the Hindu Marriage Act, customary law still works as far as divorce is concerned. Tribals who form 8 per cent of the population are governed by customary tribal law: Among the Santhal and Bhil tribals, women cannot hold property. It is only now that they have started demanding protection against polygamy.

legislative will is absent when it comes to enforcing such an important progressive legislative change, which will ensure gender equity as well as put an end to obscurantist practices and beliefs and simultaneously promote the ideal of national integration. But all is not lost, as the judiciary has made concerted efforts to ensure that the idea of a common civil code is not lost in oblivion.

Herein under are enlisted a few progressive judgments authored by high courts and the Supreme Court, which highlight the need for adoption of a UCC .

In *Narasu Appa Mali v. State of Bombay*,⁸⁰ the Bombay High Court observed that:⁸¹

Article 44 of the Constitution is í .very important ... This article says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. In other words, this article by necessary implication recognises the existence of different codes applicable to the Hindus and Mohammedans in matters of personal law and permits their continuance until the State succeeds in its endeavour to secure for all the citizens a uniform civil code. The personal laws prevailing in this country owe their origin to scriptural texts. In several respects their provisions are mixed up with and are based on considerations of religion and culture; so that the task of evolving a Uniform Civil Code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour most hereafter be to secure a Uniform Civil Code throughout She territory of India. It is not difficult to imagine that some of the members of the Constituent Assembly may have felt impatient to achieve this ideal immediately; but as Article 44 shows this impatience was tempered by considerations of practical difficulties in the way, that is why the Constitution contents itself with laying down the directive principle in this article.

In *Mohd. Ahmad Khan v. Shah Bano Begum*,⁸² the Supreme Court held that:⁸³

⁸⁰ AIR 1952 Bom 84, judgment delivered by Justice Gajendragadkar and Justice MC Chagla.

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It is also a matter of regret that Article 44 of our Constitution has remained a dead letter.⁸² There is no evidence of any official activity for framing a common civil code for the country.⁸³ 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 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.⁸⁴ A beginning has however to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

In *Sarla Mudgal, President, Kalyani v. Union of India*,⁸⁴ the Supreme Court observed that:⁸⁵

The Governments which have come and gone have so far failed to make any substantial effort towards "unified personal law for all Indians". The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.⁸⁵ The

⁸² AIR 1985 SC 954; Judgment available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=9303>; (last visited on Nov.29, 2016).

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⁸⁴ 1995 SCC (3) 635; Judgment available on <http://judis.nic.in/supremecourt/imgs1.aspx?filename=10742>; (last visited Nov.30, 2016).

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Successive Governments till-date have been wholly re-miss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India. 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".⁸⁶

In a catena of other cases like *John Vallatammom v. State of Kerala*⁸⁷ and *Shabnam Hashmi v. Union of India*,⁸⁸ to name a few, the Supreme Court has recognised the need for a Common Civil Code. However one disconcerting aspect about judiciary's approach so far on religious issues is that it has been steadfast on its view of keeping personal laws outside the scope of article 13.⁸⁹ Such a parochial approach has given the personal laws a kind of immunity from constitutional scrutiny and these personal laws continue to violate fundamental rights with impunity many a times. It is high time the judiciary shed off its circumspect approach towards personal laws so as to escape popular backlash. What is constitutionally unsound must be struck down at the earliest, as the judiciary is not a protector of public morality and religiosity but a defender of constitutional morality.

VIII Conclusion and suggested manner in which UCC should be enforced

Contemporary debates over a UCC appear hopelessly divided along both political and religious lines. There are fewer debates centered on the concept of UCC and more debates are rooted in concerns over the process and who controls that process of implementing UCC. A UCC drafted and imposed by a majority Hindu Parliament will not be accepted as legitimate among minority groups, no matter how fairly it may be drafted.

⁸⁶ AIR 2003 SC 2902.

⁸⁷ Judgment available on <http://judis.nic.in/supremecourt/imgs1.aspx?filename=19152>; (last visited 4th November, 2014).

⁸⁸ Judgment available on <http://supremecourtindia.nic.in/outtoday/wp4702005.pdf>; (last visited 4th November, 2014).

⁸⁹ In a catena of cases the same has been held. The first case in which this proposition was laid down was *Narasu Appa Mali v. State of Bombay*, AIR 1952 Bom 84. Recently the same of reiterated in *Ahmedabad Women Action Group v. Union Of India*; judgment available on <http://judis.nic.in/supremecourt/imgs1.aspx?filename=14318>; (last visited Nov. 4, 2014).

The answer, then, lies with promoting a process that brings all concerned voices to the table: men and women of all religious communities must be included. Since this project is so ambitious, it becomes all the more imperative that the government should proceed in stages that will keep religious groups involved in the process.⁹⁰ By involving both men and women of the different religious groups in the discussion and final outcome, legitimacy of such a code would enhance considerably and also its subsequent efficacy. Adopting such an approach would considerably reduce the focus on majority- minority tensions. On one hand, it would make each religious accountable for its own reform and on the other it would equally engage all religious groups in the deliberations, thereby assuaging their fears of being unrepresented/ underrepresented.

To be successful, a UCC needs to reflect India's diversity as well as its commitment to equality. UCC should incorporate progressive features of all religions and should not just be a majoritarian imposition. It can be an eclectic mixture of progressive provisions in different personal laws. Further, one must also realize that a UCC need not entirely obliterate all personal laws. Ways have to be explored in which their innocuous provisions may still be retained for those who wish to adhere to them. Some suggest that there should be a UCC but one should be free to opt out of it. Certain other ways could be thought of too.⁹¹ Such matters should not be rushed with. Sociological investigation and research are needed before reaching any reliable solution. In an effort to secure gender equality, Pratibha Jain suggests amending the Constitution as an alternative to the UCC . Her suggested amendment would make "the rights to practice religion and conserve culture subject to ensuring the right of equality between men and women," definitively making all personal laws subject to the Constitution.⁹² Though, this suggestion appears to be a rational one, this author is of the view that before the constitution is tinkered with, by way of an

⁹⁰ SHALINA A. CHIBBER, "Charting a New Path towards Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code," *INDIANA LAW JOURNAL*, pg 695, Volume 3, 2008, available at: http://ilj.law.indiana.edu/articles/83/83_2_Chibber.pdf; last visited Nov. 21, 2016).

⁹¹ *Sociology of Law*, edited by Indra Deva, (Oxford University Press, New Delhi, 2005).

⁹² Pratibha Jain, "Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India," 23 *Berkeley J. Int. Law* 201(2005).

amendment, there is a pressing need to evolve a national consensus on the given issue, failing which the implementation of UCC would prove to be counterproductive and a highly incendiary topic, with the potential to rupture the diligently woven national fabric.