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**HARMONIZING DIVERSITY:  
Challenges in Unifying Marriage and Divorce Laws in India**

*Alok Kumar & Namita Vashishtha*

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# HARMONIZING DIVERSITY: Challenges in Unifying Marriage and Divorce Laws in India

*Alok Kumar\* & Namita Vashishtha\*\**

*[Abstract: Implementing UCC is likely to face obstacles, primarily due to contradictory clauses and partially due to varying interpretations and overlapping jurisdictions. Notably, debates and legal scrutiny have arisen around divorce regulations applicable to Hindu and Muslim communities. Striking a delicate balance between preserving religious and cultural independence while promoting conformity proves to be a daunting task. This code must embody values of parity and impartiality while accommodating diverse traditions and customs. Inclusive dialogues and consultations with religious and cultural authorities play a pivotal role in addressing these challenges.]*

## I

### Introduction

The Indian society embodies extensive diversities, religious as well as cultural, characterised by harmonious synchronicity of several faiths owing to the vast array of religions and beliefs present, such as Hinduism, Islam, Christianity, Sikhism, Buddhism, and Jainism. Hinduism encompasses a plethora of local practices, rituals, and customs, while Islam features various schools that contribute to the differences in individual regulations and observances. This diversity is evident in the distinct religious communities that adhere to specific personal laws governing crucial matters like inheritance, adoption, marriage, and divorce. Legislative enactment or authoritative pronouncements do not provide legitimacy to these personal laws. Within the Indian jurisdiction, the foundational principles of Hindu and Islamic laws stem from their respective sacred scriptures.

Nevertheless, significant challenges arise when attempting to synchronise these diverse legal frameworks. To carry out the Uniform Civil Code (hereinafter called UCC or the Code)<sup>1</sup> may face obstacles due to contradictory clauses, varying

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<sup>1</sup> The Constitution of India, 1950, Art. 44.

interpretations, and overlapping jurisdictions. After the judgement of *Sarla Mudgal v. Union of India*<sup>2</sup> wherein the Court stressed the need for the implementation of Article 44, for one hand, the protection of the downtrodden section of the society, on the other hand, it promotes national integration. The Apex Court retreated the same theme in *Lily Thomas v. Union of India*<sup>3</sup> and *John Vallamattom v. Union of India*<sup>4</sup>. Although, earlier in *Mohd. Ahmed Khan v. Shah Bano Begum*<sup>5</sup> is an attempt by the Court to give relief to a Muslim woman in light of Article 44. The series of judgements advocating UCC sparks debates, and legal scrutiny has arisen around regulations applicable to Hindu and Muslim communities. Striking a delicate balance between preserving religious and cultural independence while promoting conformity proves to be a daunting task. These judgements pave the way for the UCC to embody principles of equality and justice while accommodating diverse traditions and customs.

Implementing UCC will likely face obstacles, primarily due to contradictory clauses and partially due to varying interpretations and overlapping jurisdictions. Notably, debates and legal scrutiny have arisen around divorce regulations applicable to Hindu and Muslim communities. Striking a delicate balance between preserving religious and cultural independence while promoting conformity proves to be a daunting task. This code must embody values of parity and impartiality while accommodating diverse traditions and customs. Inclusive dialogues and consultations with religious and cultural authorities play a pivotal role in addressing these challenges.

Its implementation necessitates the prioritisation of minority rights. India has historically embraced religious and cultural minorities. The Constitution safeguards the distinct personal laws and practices of minorities, ensuring their rights, including the freedom to observe and propagate their faith. Special provisions may be necessary to accommodate their unique needs and sensitivities within the framework of a uniform civil code. Fostering community cohesion is vital for successful enforcement. Past instances in India have demonstrated that attempts to enforce uniformity have encountered resistance and led to social unrest. For example, debates surrounding the *Shah Bano case*<sup>6</sup> and the uniform civil code underscore the challenge of balancing personal liberties with religious observances.

Engaging in open dialogues, promoting understanding, and facilitating inclusive conversations are imperative to surmount these obstacles. Cultivating mutual respect, addressing apprehensions, and dispelling misconceptions through

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<sup>2</sup> *Sarla Mudgal v. Union India*, (1995) 3 SCC 635 (India).

<sup>3</sup> *Lily Thomas v. Union of India*, (2000) 6 SCC 224 (India).

<sup>4</sup> *John Vallamattom v. Union of India*, (2003) 6 SCC 611 (India).

<sup>5</sup> *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 (India).

<sup>6</sup> *Shayara Bano v. Union of India and Ors.*, AIR 2017 SC 4609 (India).

transparent communication and public awareness initiatives are crucial. A well-designed Uniform Civil Code can promote equity and solidarity among the populace by recognising and embracing India's rich religious and cultural diversity while upholding principles of equality and justice.

## II

### Historical Perspective

Although diversity in Indian culture is essential, it is also crucial to ensure that specific societal groups, weaker sections, are not marginalised during this process. The key to this dilemma does not entail eradicating distinctions but focusing on addressing laws that exhibit discriminatory tendencies instead of promoting a standardised civil code deemed unnecessary and inappropriate. A trend observed globally is the increasing acknowledgement of diversity by nations, where the mere presence of differences does not equate to unfair treatment but rather signifies the asset of a democratic system.<sup>7</sup>

The apex court in the landmark case of *Sarla Mudgal*<sup>8</sup> underscored the significance of the UCC in the interpersonal relations of the citizens governed by law Indian citizens. The apex court has emphasised the crucial obligation of the Government of India to implement such a code for safeguarding the marginalised and fostering national unity and cohesion. It threw people off balance, especially among power-seeking political giants and religious extremists. Since the inauguration of the Constitution in 1950, none of the government at the central level has displayed the resolve to implement, in letter and spirit, the UCC as mandated by Article 44 of the Indian Constitution. It reads as:

“The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.”<sup>9</sup>

This provision falls within the non-legally binding directive principles of state policy; however, it is fundamentally important. One of the reasons for not fixing a timeline for the UCC was to allow national healing post-partition and to ensure the readiness for reform in personal laws. It was a thoughtful idea to gradually enact incremental uniform legislation in definite expanses of interpersonal issues like marriage, adoption, divorce, inheritance, etc. However, this concept and its need can only be understood after briefly introducing this idea since the Mughal period's

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<sup>7</sup> 22<sup>nd</sup> Law Commission of India, Consultation Paper on Reform of Family Law (August 2018), p. 7.

<sup>8</sup> *Sarla Mudgal v. Union of India*, AIR 1995 SC 1531 (India).

<sup>9</sup> *Supra* note 1.

transition into the British Period and how it developed through the constituent assembly and our current Constitution.

### ***Historical Background***

Prior to 1612, before the British era, India was under the rule of the Mughals. The administration of justice was overseen by Qazis, who applied their own personal law to Muslims, but there was a lack of similar certainty in legal matters involving Hindus. Concerning criminal law, the prevailing system was the uniform application of Muslim criminal law to all individuals.<sup>10</sup>

The Mughal justice system was largely upheld throughout the British colonial period until 1772. The judicial strategy proposed by Warren Hastings in 1772 established standardized courts of law for the indigenous population without any differentiation.<sup>11</sup> In terms of civil law application, the courts were instructed to adhere to the personal laws of distinct religious communities.<sup>12</sup> Muslim criminal law was uniformly applied to all, subject to periodic amendments. Company courts operated in rural areas, where legal training was not mandatory for judges' appointments. From 1781, the Supreme Court established in 1774 within the Calcutta Presidency, under the Regulating Act of 1773, was mandated to apply three specific legal systems - Hindu law, Muslim law, and English law. The Supreme Court applied Hindu law to Hindus, Muslim law to Muslims, and English law to other religious communities based on principles of justice, equity, and good conscience.<sup>13</sup>

In modern history, Warren Hasting's following regulation of 1772 is cited as the first example of state recognition of legal pluralism: "In all suits regarding marriage, caste, and other religious usages and institutions the law of the Koran with respect to the Mohammedans and of the Shaster with respect to the Gentoos shall be adhered to."<sup>14</sup> The regulations set forth by Warren Hastings in 1772 were succeeded by the regulations of 1781, which decreed that each community should be governed by its respective 'personal' law in matters pertaining to inheritance, marriage, religious customs, and institutions. Subsequently, the Muslim criminal law was replaced by the British law. Lord Cornwallis, the then Governor General of Calcutta, initiated reforms in 1790 to enhance the administration of criminal justice and implement remedial procedures in criminal law. By 1832, the criminal justice system

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<sup>10</sup> This was also applied by Qazis and Muftis under the Mughal Nawab.

<sup>11</sup> This was applicable in the rural areas of Bengal, Bihar, and Orissa adjacent to the Calcutta presidency.

<sup>12</sup> Hindu law for Hindus, Muslim law for Muslims, Christian law for Christians, Parsi law for Parsees, and Jewish law for Jews.

<sup>13</sup> D.C. Manooja, *Uniform Civil Code: A Suggestion*, 42 JILI 448 (2000).

<sup>14</sup> M.P. Singh, *On Uniform Civil Code, Legal Pluralism and the Constitution of India*, V JILI 9 (2015).

was the English common law. The enactment of the Indian Penal Code took place in 1860, in alignment with this overarching policy that persisted throughout British rule until independence, which saw India partitioned into two states on religious grounds. The First Law Commission, led by Lord Maccauley, was established in 1835. The Commission highlighted the absence of a universal law (*lex loci*) for non-Hindus and non-Muslims, noting that personal laws are entangled with their respective religions. Highlighting for legal uniformity, the Commission emphasized the lack of a universal law in India.<sup>15</sup>

### ***Constitutional Evolution: Contemplating Uniform Civil Code in the Constituent Assembly***

For the first time, the UCC was proposed to the Constituent Assembly in 1947. The subcommittee on fundamental rights advocated for its inclusion as a directive principle of state policy. Although clause 39 (now Art. 44) was part of the directive principles of state policy, it faced strong opposition. Concerns were raised regarding the violation of religious freedom guaranteed under Article 25 of the Indian Constitution and the potential oppression of minorities.<sup>16</sup> However, the argument that Article 44 would infringe upon religious freedom was deemed invalid, as Article 25(2) specifically protects secular activities linked to religious practices.

*After Independence:* Upon achieving independence, the first initiative was made to systematize Hindu law. Dr. Ambedkar advocated for the implementation of a comprehensive Hindu Code.<sup>17</sup> Pandit Jawaharlal Nehru presented the Hindu Code Bill in lieu of a uniform civil code to the Parliament in 1954, articulated the following:

“I do not think that at the present moment the time is ripe in India for me to try to push it through.”<sup>18</sup>

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<sup>15</sup> Sir Ernest John Trevelyan, *HINDU FAMILY LAW AS ADMINISTERED IN BRITISH INDIA* (1908). Prior to independence, Hindus were governed by Mitakshara and Dayabhaga laws, with variations leading to the emergence of four distinct sub-schools. Hindus adhered to separate personal laws, with different provinces and states creating their own Hindu laws. Similarly, Muslims were divided into Sunni and Shia sects. Despite both communities deriving their personal laws from the Quran, differences existed in the application of these laws.

<sup>16</sup> V.N.Shukla, *CONSTITUTION OF INDIA* 307 (2024).

<sup>17</sup> This led to the enactment of Hindu law through incremental legislation, including the Hindu Marriage Act 1955, Hindu Adoption and Maintenance Act 1956, Hindu Minority and Guardianship Act 1956, and Hindu Succession Act 1956. However, this was met by opposition by Dr. Rajendra Prasad and Dr. Ambedkar tendered his resignation as a law minister in the cabinet.

<sup>18</sup> N.R. Madhava Menon (ed.), *NATIONAL CONVENTION ON UNIFORM CIVIL CODE FOR ALL INDIANS* 1 (1986).



After attaining independence, a singular legislation was enacted by the Indian Parliament that pertained to familial connections of all Indian citizens regardless of their faith. This legislation, known as the Special Marriage Act of 1954, sanctioned individuals to wed without having to relinquish their religious beliefs. In matters concerning inheritance, the Indian Succession Act of 1925 was applicable. Despite the Special Marriage Act of 1954 not aligning with the marital and inheritance statutes of Hindus and Muslims, there were no objections raised and no exceptions requested.<sup>19</sup>

Nevertheless, the discourse on a UCC was reignited with the introduction of the Indian Adoption Bill in the Rajya Sabha in 1972. The opening remarks of the bill referred to it as *initial stride towards a uniform civil code*. Even though the bill allowed all Indians to adopt a child without considering the religious background of the child or the adopting parents, unfortunately, it failed to be enacted as a law. The Adoption Bill merely served as a facilitating legislation and did not mandate anyone to adopt a child. As far as the adoption of an Indian child by a foreigner is concerned, Indian legislation remains silent. In the case of *Laxmi Kant Pandey v. Union of India*<sup>20</sup>, the apex court provided guidelines regulating the adoption of a child irrespective of religious background. The court also established consistent standards and rules to be followed in cases of Indian children being adopted by foreign parents.<sup>21</sup>

Regrettably, the Code has become ingrained in the Indian psyche as being perpetually opposed by Muslims. It was astutely noted in the Constituent Assembly that not all Hindus favored UCC. The argument was that laws related to inheritance, succession, etc., were integral to their faith. If this were indeed the case, Indian women would perpetually remain unequal to men, which is contradicted by Article 14<sup>22</sup> of the Constitution. Article 15(1)<sup>23</sup> stipulates that the state shall refrain from any discrimination against any citizen based solely on religion, race, caste, sex, place of birth, or any combination thereof. A closer examination of Hindu law reveals gender discrimination prevalent throughout. If the personal laws of Hindus are considered religious tenets, gender equality can never be achieved. Religion ought to be confined to spiritual matters, while secular aspects linked to religion must be standardized, unified, and amended for a robust and united nation. The existing Muslim law has often been doubted to provide equality to Muslim women. To empower Indian women and ensure equality, India urgently requires a uniform civil code applicable to all its citizens.

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<sup>19</sup> *Id.*

<sup>20</sup> AIR 1984 SC 469, AIR 1986 SC 272, AIR 1987 SC 232 (India).

<sup>21</sup> D.C. Manooja, ADOPTION LAW AND PRACTICE 78-79 (2019).

<sup>22</sup> The Constitution of India, 1950, Art. 14.

<sup>23</sup> *Id.* A. 15(1).

There are apprehensions, both genuine and mischievous, that a uniform civil code entails imposing Hindu laws on minorities. However, the facts surrounding the partial codification of Hindu laws in 1955-56 dispel such fears. The amendment to the Hindu Marriage Act in 1976 introduced the principle of "option of puberty" from Muslim law, further underscoring the fallacy of such concerns.

### III

#### **Constitutional Challenges for Uniformity**

The issue of uniformity in marriage and divorce laws in India poses several constitutional challenges, particularly concerning the status of personal laws, fundamental rights, and the preservation of cultural diversity. Deliberations on these challenges within the framework of the Indian Constitution are as follows:

##### *Status of personal laws under Article 13*

The status of personal laws under Article 13 of the Indian Constitution has sparked debates, raising crucial inquiries about their alignment with fundamental rights. Article 13 acts as a protective measure against laws that oppose or weaken the fundamental rights laid down in the Constitution. Nonetheless, the interpretation of Article 13 concerning personal laws, rooted in religious customs and traditions, remains a topic of discussion.

In the significant case of *State of Bombay v. Narasu Appa Mali*<sup>24</sup>, the inquiry into whether personal laws are encompassed by Article 13 was brought forth. Personal laws, governing aspects like marriage, divorce, inheritance, and succession, are deeply embedded in religious convictions and cultural customs. Traditionally, these laws have been distinct from statutory laws formulated by the state legislature or Parliament. The ruling in *Narasu Appa Mali* reinforced this differentiation by asserting that personal laws are not subject to examination under Article 13. Instead, they are safeguarded by Articles 25-28 of the Constitution, ensuring religious freedom and related rights. These Articles secure individuals' entitlement to openly profess, practice, and propagate their religion, encompassing the observance of religious customs.

The exemption of personal laws from Article 13<sup>25</sup> is grounded in the concept of religious autonomy and diversity. India, with its diverse religious and cultural landscape, recognizes the uniqueness of each community's personal laws. Acknowledging the autonomy of these laws enables communities to maintain their

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<sup>24</sup> 1952 Bom 84 (India).

<sup>25</sup> The Constitution of India, 1950.

distinct identities and practices without external interference. Nevertheless, the extent to which personal laws can be regulated in cases of conflicting fundamental rights remains uncertain. Despite being shielded by Articles 25-28<sup>26</sup>, personal laws are not shielded from constitutional scrutiny if they violate fundamental rights like equality, non-discrimination, and freedom of conscience. This raises intricate legal and ethical quandaries, particularly concerning gender equality and women's rights. Certain practices within Muslim personal law, like triple talaq or Hindu personal law, like polygamy, have faced censure for their discriminatory effects on women. Legal challenges have emerged in recent times, citing violations of fundamental rights. Courts have grappled with balancing religious freedoms and gender equality, often delivering landmark rulings striving to harmonise religious autonomy with constitutional values.

The evolving interpretation of Article 13<sup>27</sup> of the Constitution of India concerning personal laws signifies a dynamic domain of law. While personal laws are rooted in religious customs, they must adapt to mirror shifting societal norms and values. The judiciary assumes a pivotal role in deciphering and enforcing constitutional principles to ensure that personal laws align with the fundamental rights afforded to all citizens. In conclusion, the status of personal laws under Article 13 raises important questions about the intersection of religious freedoms and fundamental rights. While personal laws are traditionally exempt from Article 13<sup>28</sup> of the Constitution of India, they are subject to constitutional scrutiny if they violate fundamental rights. Balancing religious autonomy with constitutional principles is essential to ensure justice, equality, and the protection of individual rights in a diverse and pluralistic society like India.

### ***Fundamental Rights and Personal Laws***

The recent Supreme Court decision in *Shayara Bano's* case highlighted a significant clash between personal laws and fundamental rights in India, particularly concerning gender equality and women's rights. This specific case revolved around triple talaq, where personal law permits a Muslim man to divorce his wife instantly by saying "talaq" (divorce) three times. It is an immediate divorce method in Islam, and its impact on Muslim women was devastating. The court's verdict banned triple talaq, representing a crucial moment in the legal sphere regarding this interface of personal laws and fundamental rights. The court's decision to prohibit triple talaq was influenced by various factors, including its negative impact on women's rights and its inconsistency with constitutional principles of equality and dignity.

Nevertheless, it is essential to highlight that the court's judgment primarily focused on the non-essential aspect of triple talaq in Islam rather than directly addressing

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<sup>26</sup> *Id.*

<sup>27</sup> *Supra* note 6.

<sup>28</sup> *Id.*

the broader conflict between personal laws and fundamental rights. Through emphasising the non-essential nature of triple talaq, the court aimed to differentiate between religious practices integral to the faith and those that are not. This ruling did not explicitly overturn the foundation of *Narasu Appa Mali*, a significant case that upheld the autonomy of personal laws and exempted them from scrutiny under Article 13 of the Indian Constitution, which established the principle that personal laws, guided by customs of religion and traditions, are safeguarded under Articles 25-28, which ensure religious freedom and rights related to religious matters.

The coexistence of the two presents intricate challenges, especially concerning gender equality and women's rights. While personal laws are deeply rooted in religious traditions and cultural norms, they must also comply with constitutional principles of equality, non-discrimination, and fairness. The judgment demonstrates the judiciary's effort to strike a balance between respecting religious liberties and upholding fundamental rights. By prohibiting triple talaq, the court acknowledged the necessity to safeguard the rights and dignity of Muslim women while also recognizing the wider implications for gender equality and constitutional values.<sup>29</sup>

However, the ruling also emphasizes the ongoing discourse regarding the status of personal laws and their compatibility with fundamental rights.

### ***Supremacy of Fundamental Rights***

In the context of Indian law, the question of which fundamental rights take precedence over personal laws when they clash with constitutional principles is intricate and important. The Indian Constitution provides its residents with a number of essential rights, such as non-discrimination, equality before the law, and freedom of religion. These rights, however, occasionally clash with religious customs that are subject to private legislation. The necessity to achieve a careful balance between upholding individual rights protection and religious freedoms is at the core of this problem. The freedom of religion is recognised and protected by the Constitution, but it is also understood to be subject to limitations and must be weighed against other fundamental rights and constitutional values. The courts are essential in addressing problems between personal laws and fundamental rights, especially when they involve topics like gender equality, women's rights, or individual autonomy. When evaluating religious practices, courts must carefully assess whether they are consistent with constitutional principles and larger community norms, such as public order, morality, health, and social welfare.

The courts have an obligation to put the rights and welfare of citizens ahead of religious concerns when religious customs or practices violate fundamental rights. This necessitates a comprehensive strategy that considers the background, significance, and rationale of the relevant religious practice. For example, because

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<sup>29</sup> *Supra* note 6.

of their discriminatory character and negative impacts on people, especially women, customs like polygamy in Hinduism and triple talaq in Islam have come under judicial investigation. These behaviors must be assessed in the context of the constitutional values of equality, fairness, and dignity, even though they may have their roots in religious traditions. Courts must carefully balance the conflicting interests involved, taking into account both the wider societal ramifications and the possible harm that may result from religious activities that violate fundamental rights. While doing this, they have to ensure everyone's freedoms and rights are respected, notwithstanding their different background.

When personal laws and core constitutional principles clash, the supremacy of fundamental rights acts as a compass. Religious liberties must be weighed against other rights and considerations, even though they are fundamental. In the end, the courts are essential to the interpretation and application of the Constitution, helping to guarantee the rights and liberties of every individual. In conclusion, weighing conflicting interests and values is crucial for deciding whether fundamental rights take precedence over personal rules. Religious freedoms are safeguarded but must be weighed against more general constitutional ideals, especially those pertaining to equality, dignity, and individual rights. In order to settle disputes and guarantee that every citizen's rights and freedoms, as outlined in the Constitution, are respected, the courts are essential.

### *Article 371 and Cultural Diversity*

Article 371 of the Indian Constitution and its interaction with cultural diversity emphasise a fragile equilibrium between preserving traditional practices and upholding constitutional rights, particularly in regions with indigenous populations. These stipulations aim to protect the distinct customs, traditions, and cultural identities of these societies. Furthermore, the Sixth Schedule grants certain states autonomy in family law matters, enabling local bodies such as panchayats to manage conflicts. The distinct provisions delineated in Article 371 acknowledge the historical marginalisation and socio-cultural uniqueness of indigenous communities in India. These communities often possess unique languages, social frameworks, and customary rituals that have developed over centuries. Article 371 endeavors to safeguard and maintain these cultural aspects by providing states with independence in legislative and administrative affairs. For instance, states like Nagaland, Mizoram, and Meghalaya have specific clauses under Article 371, permitting them to enact legislation in line with their traditional norms and customs.

Likewise, the Sixth Schedule of the Indian Constitution caters to the governance of tribal regions in various states, granting them a level of self-governance. This independence extends to issues such as land ownership, local governance, and the resolution of disputes through traditional methods like panchayats or tribal

councils. This system recognises the unique socio-cultural weave of these areas and aims to empower all in decision-making processes. Nevertheless, the implementation of these distinct provisions occasionally sparks concerns regarding their alignment with broader constitutional principles, especially those pertaining to the equality of genders. Numerous traditional practices prevalent in tribal communities, while integral to their cultural heritage, may also propagate gender bias and curtail women's independence. For instance, specific customary regulations may dictate inheritance rights, marriage customs, and resource access in a way that disadvantages women or reinforces patriarchal standards.

Maintaining a balance between cultural diversity and constitutional rights is crucial in such scenarios. While it is vital to honor and conserve cultural legacy, it is equally important to ensure that no individual or group faces discrimination or oppression due to outdated practices ingrained in these cultural traditions. This necessitates a sophisticated approach that acknowledges the importance of cultural diversity while championing fundamental rights and equality principles. One method to tackle this challenge is through legal adjustments and policy initiatives that aim to reconcile traditional practices with constitutional principles. For instance, endeavors can be made to reinterpret customary laws in a manner that aligns with gender equality principles without compromising cultural authenticity. This could involve promoting dialogue and cooperation between traditional and contemporary justice systems to guarantee the protection of women's rights within the framework of customary practices.

Furthermore, empowering women within Indigenous communities is vital for instigating substantial transformation. Offering access to education, healthcare, economic prospects, and legal aid can aid women in asserting their rights and challenging discriminatory practices. Additionally, sensitising community leaders, elders, and decision-makers about gender equality and human rights can cultivate a more comprehensive and fair approach to governance and conflict resolution. At the same time, it is imperative to recognize the autonomy and self-determination of indigenous communities in influencing their own trajectories of development. Rather than imposing external norms or interventions, efforts should be made to engage local communities in a participatory fashion, respecting their cultural values and choices. This involves supporting community-led initiatives that uplift marginalized groups, including women, and facilitate their active participation in decision-making processes.

In conclusion, Article 371 and the Sixth Schedule of the Indian Constitution provide specific measures to protect the cultural diversity and self-governance of areas with indigenous inhabitants. While these provisions are vital for preserving long-standing customs and identities, they also pose challenges in reconciling cultural practices with constitutional rights, especially concerning gender equality and women's rights. Balancing these competing interests requires a nuanced and

inclusive approach that respects cultural diversity while promoting key principles of equity, equality, and human rights. By promoting dialogue, collaboration, and empowerment within indigenous communities, India can address the complexities of cultural diversity while advancing social justice and holistic development.

## IV

### Challenges Under Personal Law

There are many challenges under personal laws in India, but a few of them are mentioned below:

- 1) The Muslim law allows polygamy, and other laws do not. In numerous legal frameworks, such as that of India, personal laws oversee aspects like marriage, divorce, and inheritance based on religious traditions and customs. An important issue stemming from this diversity is the discrepancy in regulations concerning polygamy. According to Muslim law, four wives are allowed concurrently, with specific conditions and limitations in place. This custom of polygamy is deeply rooted in religious texts and holds historical and cultural significance within the Muslim community.

The Hindu Marriage Act of 1955 explicitly outlaws polygamy among Hindus, making it unlawful for a Hindu man to marry another woman while his current marriage is valid. Similarly, Christian and Parsee laws uphold monogamy as the standard for marriage, prohibiting individuals from engaging in multiple simultaneous marriages. The permission of polygamy in Muslim law, while its prohibition in other personal laws, presents a notable challenge in the realm of personal law in India. This discrepancy in legal treatment based on religious identity raises concerns regarding equality before the law and gender equity. The complexity is accentuated in cases involving individuals from diverse religious backgrounds, shedding light on the intricate dynamics and tensions inherent in India's pluralistic society. Addressing these challenges requires a delicate balance between upholding religious freedoms and safeguarding fundamental rights and gender equality for all citizens.

- 2) The definition of marriage under Muslim law indicates that the female witness is not equivalent to a male witness. Within Islamic legal principles, the requirements and procedures for formalizing a marriage differ from those found in other personal laws, contributing to challenges related to gender equality and representation within the legal framework. As per

Muslim law, the validity of a marriage contract often hinges on witnesses, typically two male witnesses or one male and two female witnesses. This requirement reflects traditional interpretations of Islamic texts concerning testimony and legal competence. Nevertheless, the provision that two female witnesses are deemed equal to one male witness in matters of marriage highlights an inequality in the legal status and credibility assigned to women within the Muslim personal law system. While this provision may have historical and cultural origins, it gives rise to concerns about gender prejudice and unequal treatment under the law. Critics argue that such a provision perpetuates patriarchal norms and undermines the principle of gender equality enshrined in the Indian Constitution.

The differential treatment of male and female witnesses in Muslim marriage law presents challenges in ensuring equitable access to justice and representation for women within the legal system. It underscores broader issues of gender bias and exclusion within religious and cultural customs, necessitating a critical review of legal provisions to align them with constitutional principles of equality and non-discrimination.

- 3) In the realm of personal laws in India, the divergence in the conceptualizations of marriage presents challenges concerning legal categorization, entitlements, and responsibilities. Within the domain of Muslim law, marriage is perceived as a contractual agreement, primarily guided by contractual principles such as offer, acceptance, and consideration. This perspective underscores the contractual essence of the marital bond, where spouses possess rights and duties towards each other that can be delineated and altered through mutual consent.

Contrarily, in Hindu law, marriage traditionally embodies a sacramental union influenced by religious convictions and ceremonies. Despite advancements in legal interpretations, this sacramental outlook endures to some degree, especially within cultural and religious contexts. While legal reforms have been implemented, such as the introduction of contractual elements in the Hindu Marriage Act, 1955, the sacramental aspect of Hindu matrimony continues to impact perceptions and customs, leading to intricacies in legal classification and implementation.

- 4) A notable obstacle within the personal law systems in India is the discrepancy in divorce processes across various religious communities, particularly concerning the authority to dissolve a marital union. Under Muslim law, husbands retain the exclusive prerogative to issue divorce unilaterally, referred to as "talaq," without involving judicial proceedings. This practice, commonly known as "extra-judicial divorce," confers substantial power upon Muslim husbands to unilaterally end a marriage,



creating vulnerabilities for wives, particularly regarding aspects like financial maintenance and child custody.

Conversely, divorce protocols for Hindu, Christian, and Parsee individuals, both male and female, are governed by statutory regulations and necessitate legal intervention. These individuals are required to initiate divorce proceedings through the judicial system, adhering to specified legal protocols and grounds for divorce as outlined in their respective personal laws. This process entails judicial review, legal representation, and compliance with procedural safeguards, ensuring a more formal and regulated approach to marital dissolution.

The contrast in divorce mechanisms between Muslim and other religious communities gives rise to concerns regarding legal equality and gender equity. The one-sided nature of divorce under Muslim law compromises the independence and empowerment of wives, potentially exposing them to capricious or unjust divorce pronouncements. Addressing these challenges may involve reforms focused on standardizing divorce procedures across religious communities and promoting gender-inclusive strategies for marital dissolution within the realm of personal laws.

- 5) In various personal law systems prevalent in India, including those governing Muslim, Hindu, Christian, and Parsee communities, the procedure for divorce for women typically entails resorting to the judicial system and is subject to specific grounds and procedures stipulated by statutory enactments. Under Muslim jurisprudence, the prerogative to declare divorce (*talaq*) unilaterally rests with husbands, with wives lacking a similar prerogative. Conversely, Muslim women can pursue divorce through the legal procedure on designated grounds like cruelty, abandonment, or adultery, as delineated by the Dissolution of Muslim Marriages Act, 1939. This avenue provides women with a legal recourse to seek liberation from an undesirable marital union, albeit potentially involving procedural intricacies and societal censure.

Likewise, Hindu, Christian, and Parsee women endeavoring to obtain a divorce must approach the judiciary and substantiate grounds as mandated by the law, respectively<sup>30</sup>. These statutes specify reasons for divorce, such as cruelty, infidelity, or forsaking, with the legal process necessitating judicial scrutiny, legal advocacy, and compliance with procedural mandates.

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<sup>30</sup> Hindu Marriage Act, 1955, the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936.

Women from diverse backgrounds find it necessary to implore legal mechanisms for divorce, which accentuates the shared hurdles encountered by women in seeking justice and exercising agency within matrimonial alliances. While these legal provisions furnish women with an avenue to exit detrimental or unsustainable marriages, they may also present social, financial, and legal impediments that impinge on women's efficacy in navigating divorce proceedings. Mitigating these challenges could involve reforms geared towards bolstering women's access to legal assistance, ensuring gender-informed adjudication, and fostering awareness of legal entitlements and redresses among women in varied religious communities.

- 6) In the domain of personal law in India, the issue of religious conversion and apostasy presents distinctive challenges concerning marital unions within various religious groups. The dissolution of a Muslim marriage is automatically triggered by the husband's abandonment of Islam as prescribed by Muslim law. This rule highlights the significance of religious homogeneity within Muslim marital bonds. Conversely, the wife's apostasy does not yield the same outcome, suggesting a discrepancy based on gender in the repercussions of religious conversion within Muslim marriages.

Within Hindu and Parsee legal frameworks, when one partner embraces a different faith, the other partner is granted the right to initiate divorce proceedings. This provision underscores the importance of religious harmony within marital partnerships and offers the non-converting spouse the opportunity to end the marriage at their discretion.

Contrary to Muslim law, in Christianity, if an apostate husband enters into a new marriage, the wife is entitled to seek divorce, underscoring the potential ramifications of apostasy on marital integrity. The legal stipulations concerning apostasy and religious conversion present challenges in navigating the delicate balance between religious freedoms and marital entitlements. While striving to tackle the complexities arising from religious diversity within personal laws, they lead to disagreements and disparities, particularly concerning gender dynamics and individual autonomy within marital bonds. Addressing these challenges may entail reforms aimed at ensuring fair treatment and safeguarding the rights of all individuals involved, regardless of their religious beliefs.

- 7) Under Islamic jurisprudence, a divorced wife's entitlement to maintenance is narrowed down for the period of iddat period, a period of three lunar months post-divorce or until childbirth if pregnant. Once it lapses, the former husband bears no legal responsibility for providing maintenance to the previous wife. This provision reflects conventional interpretations of Islamic law concerning spousal upkeep and financial obligations.

Conversely, the Hindu, Christian, and Parsee legal systems allow divorced wives to seek maintenance from their former spouses until either their remarriage or demise. These legal frameworks acknowledge the sustained financial dependency of divorced wives and strive to ensure their financial security and welfare post-divorce. The court may grant maintenance based on various factors like the parties' earning capacities, their lifestyle, and the time of marriage.

The discrepancy in maintenance regulations among laws of different religions underscores broader concerns regarding gender parity and societal justice within personal law frameworks. While Hindu, Christian, and Parsee laws prioritize the financial well-being of divorced wives, the limited maintenance provision in Muslim law may render divorced Muslim women financially fragile, necessitating reliance on their families or communities for support. Responding to these matters involves reforms geared towards establishing fair maintenance provisions for all divorced individuals, regardless of their religious backgrounds, and advocating for gender-inclusive approaches to spousal maintenance within the personal law structure.

- 8) Under the purview of personal laws in India, the regulations pertaining to remarriage subsequent to divorce exhibit variations among different religious groups, reflecting a diversity of cultural and religious norms. The Islamic legal framework governs the concept of post-divorce remarriage through the doctrine of "halala." This doctrine mandates that if a husband issues a divorce (talaq) to his wife and they seek to reconcile and remarry, the wife must first contract a marriage with another man, consummate the union, and then receive a divorce from her second spouse before she can remarry her initial husband. This procedural requirement is designed to deter capricious and hastily made divorces by ensuring that remarriage post-divorce is a thoughtful and deliberate choice. Nevertheless, critics contend that this stipulation is susceptible to abuse and may expose vulnerable women to exploitation.

Conversely, the Hindu, Christian, and Parsee legal systems do not impose any such prerequisites on remarriage following a divorce. Individuals from these communities are at liberty to remarry after divorce without encountering any intermediary conditions or obligations. This approach signifies a more direct outlook towards remarriage, underscoring the independence and freedom of individuals in making decisions concerning their marital relationships.

The disparity in remarriage regulations among various religious laws gives rise to challenges relating to gender equality, individual autonomy, and

societal conventions. While the Islamic legal requirement of halala is intended to uphold the institution of marriage and deter impulsive divorces, it has been widely criticized for its potential to exploit women and perpetuate gender disparities. Addressing these challenges may entail reforms aimed at ensuring fair and gender-inclusive practices regarding remarriage within diverse religious communities while also upholding religious and cultural sensitivities.

## V

### **Possibility of Harmonization Under Personal Laws in India**

Clearly, it can be said that unifying the diverse laws and correcting the 'defects' of the code is surely an uphill task. However, it also leads to those areas where there is scope for harmonization. This way, we will gradually progress towards the UCC as envisioned by the Constitution.

- 1) **Adultery:** Adultery poses a significant challenge within personal laws in India, as different religious communities have varying perspectives and legal treatments of extramarital relationships.

In Hindu law, adultery is a ground for divorce.<sup>31</sup> If one spouse engages in adultery, the other spouse can petition the court for divorce on this ground. However, proving adultery can be challenging, as it requires concrete evidence and may lead to prolonged legal battles.

Similarly, under Christian law, adultery is recognized as a valid ground for divorce under the Indian Divorce Act, 1869. The cheated spouse can seek divorce on the basis of the same. Again, the burden of proof lies on the petitioner, and the legal process can be arduous. In contrast, adultery is treated differently under Muslim personal law. While extramarital relationships are condemned, they may not necessarily constitute grounds for divorce. Instead, Muslim law emphasizes the importance of marital reconciliation and may require mediation or arbitration to resolve marital disputes caused by adultery.

The disparity in the treatment of adultery across personal laws reflects broader challenges concerning gender dynamics, marital rights, and social norms. While Hindu and Christian laws provide avenues for seeking

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<sup>31</sup> Hindu Marriage Act, 1955. Adultery may be defined as voluntary sexual intercourse by a married person with someone other than their spouse, which leads to the breakdown of the marital relationship.

divorce on grounds of adultery, Muslim law's approach emphasizes reconciliation and may not always grant divorce solely on the basis of adultery. Efforts to address these challenges may involve reforms aimed at ensuring equitable treatment and protection of marital rights across religious communities while also promoting awareness and prevention of extramarital relationships.

- 2) **Compulsory Registration of Marriage:** The issue of compulsory registration of marriage presents a significant challenge within personal laws in India, particularly concerning the documentation and legal recognition of marital relationships.

In many personal law systems, including Hindu, Muslim, Christian, and Parsee laws, there is no mandatory requirement for the registration of marriages. While certain statutory laws, such as the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, provide for the voluntary registration of marriages, compliance with these provisions remains low, particularly in rural and remote areas where traditional customs and practices prevail.

The registration of marriages is not compulsory. It poses several challenges, including difficulties in establishing marital status for legal and administrative purposes, ensuring the rights and entitlements of spouses, and preventing fraudulent or unscrupulous practices such as bigamy or child marriage. Compulsory registration of marriages promotes equality, protects the rights of women, and combats social evils such as child marriage and polygamy. Registration provides legal evidence of the marital relationship, ensuring that spouses have access to legal remedies in cases of disputes or violations of their rights.

Efforts to address this challenge may involve legislative reforms aimed at making registration of marriages mandatory across all religious communities, with stringent enforcement mechanisms to ensure compliance. Additionally, awareness campaigns and community outreach programs can play a vital role in promoting the importance of marriage registration and dispelling misconceptions or cultural barriers surrounding the process. By ensuring universal registration of marriages, India can strengthen its legal framework, protect the rights of spouses, and promote social justice and equality within personal laws.

- 3) **Age of Consent For Marriage:** The issue of age of consent for marriage presents a significant challenge, particularly concerning the protection of minors from under-age and forced marriages. Under various personal laws, including Hindu, Muslim, Christian, and Parsee laws, there are different

provisions regarding the minimum age of marriage, often based on religious customs and traditions.

In Hindu law, the legal age of marriage is set at 18 years for brides and 21 years for grooms. However, child marriages are still prevalent in certain regions and communities despite legal prohibitions. Muslim law traditionally follows the concept of puberty as a determining factor rather than a specific age. While efforts are made to raise awareness about the importance of delaying marriage until adulthood, underage marriages continue to occur in some many communities. Under Christian law, the legal age of marriage is 18 years for both males and females. Similarly, the Parsee law specifies 21 years as the minimum age of marriage for both genders.

The disparity in the minimum age of marriage across personal laws reflects broader challenges concerning child rights, gender equality, and social norms. Despite legal provisions, underage marriages persist due to factors such as poverty, lack of education, and entrenched cultural practices. Efforts to address this challenge may involve stricter enforcement of existing laws, awareness campaigns targeting parents and communities, and providing support and resources to empower minors to resist forced and underage marriages.

- 4) Grounds for Divorce: These grounds vary significantly across different personal laws in India, posing challenges concerning marital dissolution, legal procedures, and access to justice.

In Hindu law, divorce can be sought on grounds including adultery, cruelty, desertion, conversion to another religion, mental illness, and incurable diseases. However, the burden of proof lies with the petitioner, and the legal process can be lengthy and complex. Similarly, under Christian law, adultery, cruelty, desertion, and conversion to another religion are the basis. The legal process involves filing a petition in court and presenting evidence to substantiate the grounds for divorce.

Muslim law allows divorce or Talaq on various grounds, including talaq (pronouncement of divorce by the husband), khula (divorce initiated by the wife), and judicial divorce on specified grounds such as cruelty or desertion. However, this procedure under Muslim law can be contentious and may lack procedural safeguards for women. The Parsee Marriage and Divorce Act, 1936 also provides grounds for divorce, including adultery, cruelty, desertion, and incurable diseases. Like other personal laws, the legal process involves filing a petition in court and presenting evidence to support these grounds.

The disparity in grounds for divorce across personal laws reflects broader challenges concerning gender equality, legal rights, and social norms. While legal provisions aim to provide avenues for marital dissolution in cases of irretrievable breakdown, the complexity and subjectivity of the grounds for divorce can result in prolonged legal battles and inadequate protection for spouses, particularly women. Efforts to address this challenge may involve reforms aimed at harmonizing grounds for divorce across personal laws, ensuring gender-sensitive adjudication, and promoting alternative dispute resolution mechanisms to expedite the resolution of marital disputes.

Encouraging a simplified procedure for divorce is imperative for sustaining a healthy perception of marriage which is free of any discrimination or violence. Simplifying the procedure for couples where no reconciliation is possible would also be beneficial in curbing the false allegations against parties, which are often made in order to hasten the process of divorce.

- 5) Irretrievable Breakdown of Marriage: The concept of irretrievable breakdown of marriage challenges the existing framework of personal laws in India, highlighting the need for reforms to simplify the divorce process and promote equitable and efficient resolution of marital disputes. Recognizing irretrievable breakdown as a ground for divorce is essential for sustaining a healthy perception of marriage, emphasizing the importance of mutual respect, compatibility, and emotional well-being within marital relationships. By acknowledging that some marriages may reach a point beyond repair, the legal system can provide a dignified exit route for couples, ensuring that they are not trapped in unhappy or dysfunctional marriages.

Simplifying the procedure for divorce in cases where no reconciliation is possible is crucial for reducing acrimony and promoting amicable dissolution of marriages. A streamlined process can expedite the resolution of marital disputes, minimize legal costs and delays, and alleviate the emotional burden on the parties involved. Moreover, simplifying the divorce procedure can help mitigate the risk of false allegations and manipulation of the legal system by parties seeking to expedite the divorce process. By providing clear and objective criteria for divorce, the legal system can ensure fairness, transparency, and accountability in the resolution of marital disputes.

Overall, encouraging a simplified procedure for divorce based on the irretrievable breakdown of marriage is essential for promoting marital harmony, protecting the rights and dignity of individuals, and fostering a legal framework that upholds principles of equality, justice, and human dignity within personal laws in India.

- 6) Community of Property upon Divorce and Maintenance: The absence of provisions for community of property upon divorce and maintenance in many personal laws in India contributes to the vulnerability of women, particularly concerning financial security and asset distribution post-divorce.

Under Muslim law, where immediate and unilateral divorce is allowed, women are often left in a precarious position, especially if they lack financial independence or have limited access to resources. The absence of provisions for community property means that women may not have a claim to assets acquired during the marriage, leaving them economically disadvantaged upon divorce.

Similarly, in other personal laws such as Hindu, Christian, and Parsee laws, the lack of provisions for community property can leave women at a disadvantage in terms of asset distribution post-divorce. While maintenance provisions may exist to provide financial support to divorced women, they may not always be adequate or enforceable, particularly in cases where spouses have limited financial means or refuse to comply with court orders.

Introducing provisions for the community of property upon divorce would ensure a more equitable distribution of assets between spouses, providing women with a measure of financial security and independence post-divorce. By treating all property acquired after marriage as a unit between the couple, the legal system can recognize the contributions of both spouses to the marital partnership and ensure that neither party is unfairly disadvantaged upon the dissolution of the marriage.

Efforts to address this challenge may involve legislative reforms aimed at introducing provisions for community of property upon divorce across all personal laws, with safeguards to protect the rights and interests of both spouses. By promoting equitable asset distribution and financial security for women, India can strengthen its legal framework and promote gender equality within personal laws.

- 7) Restitution of Conjugal Right: The concept of restitution of conjugal rights, which allows a spouse to petition the court for the restitution of marital cohabitation if the other spouse withdraws from the marital home without reasonable justification, poses challenges within personal laws in India.

In the *T Sareetha case*<sup>32</sup>, the Andhra High Court deemed Section 9 of the HMA unconstitutional, arguing that it violated the principles of personal

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<sup>32</sup> AIR 1983 AP 356 (India).



liberty and privacy. However, the Supreme Court's decision in *Saroj Rani v. Sudarshan Kumar Chaddha*<sup>33</sup> upheld the validity of Section 9, emphasizing the importance of preserving the institution of marriage and the obligations of spouses towards each other. While restitution of conjugal rights aims to encourage reconciliation and preserve marital harmony, critics argue that it can be misused to coerce spouses into unwanted or abusive relationships. The forced nature of cohabitation must be discouraged both socially and legally, reflecting evolving societal norms and values regarding individual autonomy and consent within marital relationships.

Efforts to address this challenge may involve reforms aimed at balancing the rights and obligations of spouses while also safeguarding against coercion or abuse. This may include revisiting the legal framework surrounding the restitution of conjugal rights and introducing safeguards to prevent its misuse, such as mandatory counselling or mediation, before resorting to legal action by promoting mutual respect and voluntary reconciliation within marriages.

## IV

### Way Forward

Whether or not personal laws' are laws under Article 13 of the Constitution of India or if indeed they are protected under Articles 25- 28 has been disputed in a range of cases, the most notable being *Narasu Appa Mali*.<sup>34</sup> In the absence of any consensus on a uniform civil code, the Commission felt that the best way forward may be to preserve the diversity of personal laws while at the same time ensuring that personal laws do not contradict fundamental rights guaranteed under the Constitution of India. In order to achieve this, it is desirable that all personal laws relating to matters of the family must first be codified to the greatest extent possible, and the inequalities that have crept into codified law should be remedied by amendment.

1. Any Personal law cannot be codified and enacted as being contradictory to the Constitution. An example can be the codification of a custom that is discriminatory and still accepted by the community. This requires thorough debate, and the Commission has only taken the first step in this direction. The underlying principle of equality under Article 14 is in itself a challenge for codification. Hence, the debate of first guaranteeing equality among men

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<sup>33</sup> 1985 SCR (1) 303 (India).

<sup>34</sup> *Supra* note 25.

and women rather than equality between communities. This shall preserve the meaningful differences within personal laws while at the same time weeding out inequality as hailed by the Constitution.

2. The judgement of Shayara Bano, which outlawed triple talaq, hailed as a remarkable step towards ending discriminatory personal laws, suggested that bad in theology cannot be good in law. However, this was not an essential practice of Islam. It is yet to be seen when and how the decision of Narasu Appa Mali is reversed to resolve the issue of conflict between personal laws and fundamental rights.
3. The sixth schedule of the Constitution of India provides certain protections to a number of states. While we attempt to codify laws, cultural diversity must not be overlooked.<sup>35</sup> Thus, while framing a law, it has to be borne in mind that cultural diversity cannot be ceded to the dangerous level of threatening the very thread of society.
4. Whether or not personal laws under Article 13 of the Constitution of India or if indeed they are protected under Articles 25- 28 has been disputed in a range of cases, the most notable being Narasu Appa Mali. To attain coherence, the Commission has suggested that personal laws relating to matters of the family must first be codified, as far as possible, and the inequalities that have crept into codified law should be remedied by amendment.
5. By virtue of being enacted as laws, codification of personal law cannot be in contradiction of the Constitution. Discriminatory customs cannot be codified even if they may be acceptable to the public at large. Thorough studies, consultations and rigorous debates are required to realize the goal. Codifying separate personal laws' is challenging as it may contradict Article 14. Therefore, it is urged that the legislature should first consider guaranteeing equality within communities between men and women rather than equality between communities. Meaningful differences can be preserved, and this shall help clear out the inequalities without absolute uniformity.

Nevertheless, a sharp distinction has to be pitched between the faith, belief and practices of the respective religions. The whole idea is to protect the integrity of the nation while unifying laws. What the State protects is religious faith and belief. Religious practices run counter to the ideals of public order and morality or social welfare, which is the basis of the State, so such practices should pave the way for the good of the people.

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<sup>35</sup> Some tribal laws in fact protect matriarchal systems of family organisations some of these also preserve provisions which are not in the interest of women. There are further provisions that allow for complete autonomy on matter of family law which can also be adjudicated by the local panchayats which once again, follow their own procedures.