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CHAPTER III

Approaches to Uniform Civil Code

3.1 Introduction

There are different views on uniform civil codes: some support it; some others oppose it; some under the garb of uniform civil code want to create cultural hegemony or cultural domination of majority over minority. Some believe it is as per humanitarian principle; some others claim it is strict way of interference in religion. Some want to implement it forthwith; and some want to implement it after full development of society, some others want to implement it after consensus of all communities. Lloyd and Susanne Rudolph came closest to this conclusion when they argued that the uniform code had at least five distinct, identifiable meanings, for different groups:

1) The British, and later the postcolonial state, viewed it as uniform rules and regulations to ease administration;
2) Secular nationalists viewed it as modern, rational means to diminish differences and promote national integration;
3) Civil rights activists viewed it as a way to ensure enhanced rights for oppressed groups;
4) Religious minorities viewed it as a means to erase their cultural identity and survival; and
5) Hindu nationalists viewed it as a way to eliminate special minority privileges.\(^1\)

Thus there is no uniformity in the approaches to uniform civil code. In order to comprehend the complexities of the problem let us first analyze the historical background.

### 3.2 Historical Development

Indian legal system has history of five thousand years of its existence. Hindu social structure is based upon *Varna, ashram, dharma*. In *Vedic* literature, society is classified into four *Vernas*: *Brahman, Kshatriya, Vaishya and Sudra*. This classification is correlated with the duties of each *Verna*. In Vedic period the class system and occupations of persons belonging to the four *Vernas* were not rigid. An individual was free to engage himself in any occupation irrespective of the class to which he belonged. There were no regulations of food and drink for classes. There were also no restrictions on inter-class marriages. One was placed in a *Verna* not necessarily because he was born in that class but in accordance with innate qualities and the work in which he was engaged.\(^2\) Hindu religion has passed through many phases in the course of five thousand years of its existence. Several times dissension; new ideas and thoughts and practices have come into existence, sometimes diametrically opposite to each other. It has been able to absorb all thoughts, ideas, dissensions practices and professions in its fold and retain its basic unity. The most remarkable feature of Hinduism is that it has always permitted religious innovations, and thus time and again new dimensions are added to Hindu religion. Movements after movements have taken place sometimes discarding some old practices and rituals, sometimes reviving some old professed to purify Hindu religion and some have claimed to enrich it. Prominent among the modern developments are, *Brahmos, Arya Samajists, Radhaswamis, Satsangis, Swayamariyathais*. By and large these movements represent a revolt against the orthodox practices of Hindus, particularly the ceremonial and ritual aspect of Hinduism, or against the rigidity of class system. All these movements support free Hinduism from the supposed or real degeneration and profess to resurrect it. And for this very reason followers of these movements and sects are nothing but Hindus.\(^3\)

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\(^1\) Rina Verma Williams, postcolonial Political and Personal Laws Colonial Legal Legacies and the Indian State, Oxford University press, New Delhi 2006, P 57  
\(^3\) Ibid, P 8-9
The followers of Jainism, Buddhism, and Sikhism were governed by Hindu law even before the Codified Hindu law as modified by custom prevailing amongst them. The codified law also includes them under the term Hindu.

Muslims, Christians, Parsis and the Jews are having their own respective personal laws. In India one has to belong to some community. One has to be a Hindu, Muslim, Christian, Parsi or Jew. One cannot be just an Indian. In personal matters one has to be governed by his personal law, which may be Hindu law, Muslim law, Christian law, Parsi law, or Jewish law. In personal matters there is nothing like an Indian law. May be, one wants to marry outside his personal law or one wants to marry in non-religious form. One can then take recourse to the Special Marriage Act, and can marry in civil marriage form, entailing the consequence that if it is an interpersonal law marriage, parties will be governed in matters of succession by the Indian Succession Act, 1925, but parties remain Hindus, Muslims, Parsis, Christians, or Jews, which they were before marriage. Although each of these communities is a religious community, yet it is not necessary that their personal law is essentially religious law. It is also not necessary for the application of the personal law that members of the community should be ardent believers or followers of that religion. In most of the cases if he is a member of the community by birth or conversion, that will suffice, even though in actual persuasion he may be atheistic, non-religious, non-conformist, anti-religious, or he may even decry his faith. So long as he does not give up his faith and embrace another religion (among some communities, mere denunciation of faith is not sufficient) he will continue to be governed by the personal law of the community to which he belongs.4

3.2.1. Codification of Some Personal Laws

During colonial period several personal laws have been codified. In 1921 K. J. Bagde and Law member Shri Tej Bahadur Sapru moved resolution in central Provinces that all the various branches of the Hindu law should be properly codified. In central assembly also question was raised by shri Ganganath Jha; when the codification of Hindu law takes place.5 T.B. Sapru, the

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4 Shailendra Jain and Peeyushi Diwan Dr. Paras Diwan on Hindu Law, Orient Publishing Company, New Delhi, Second Edition 2002 P 3-4
government’s Law Member, held that more piecemeal legislation needed to accumulate before codification could profitably be initiated. The official government position was that ‘the task of codifying the entire personal law of the Hindus was too stupendous to be undertaken and…. The best course was to do the work piecemeal. The government did pledge to try to determine what opinion actually was among Hindus, at least among the more important persons and institutions in the country. Sapru stated: …what I propose to do on behalf of the Government in a matter like this is, that we shall address the Local Government and the various High Courts, various learned bodies, Bar libraries and legal associations, and ask them to advise us as to whether in their opinion in the first place the time has arrived when a serious and organized effort should be made to codify the whole of the Hindu law or any portion of it and, if so, on what lines we should proceed. We shall further ask them… what should be the composition of any Commit or Commission that we may appoint… when we have [done so] I shall give the matter my best consideration resurveying the whole situation and then allow my further steps to be guided by the opinions so expressed as so obtained. I hope this reply will be considered to be satisfactory [and] I sincerely hope and trust [the move] will not press his resolution to a vote.\(^6\)

### 3.2.2 Shariat bill

Shariat Bill, 1937, it was Private Bill. Mr. Jinna was an in charge of that Bill. Shri AnanthasayamanAyyangar raised question about applicability of the bill to the Khoja community. Mr. Jinnah had given an absolutely categorical answered that not only the bill compulsory but even the option given to the Khojas would be taken away.\(^7\) Thus the shariat bill will over ride to the local and community custom.

### 3.2.3 Demand to Hindu Law Codification

There was demand for Hindu law codification. The Government appointed a Hindu Law Committee of four members on 25 January 1941 under the chairmanship of B. N. Rau. The best brain of erstwhile India was included in the committee. The other three members, were a former Calcutta High Court judge, D. N. Mitter, Poona Law College Principal, J. R. Gharpure and a

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\(^6\) Rina Verma Williams, postcolonial Political and Personal Laws Colonial Legal Legacies and the Indian State, Oxford University press, New Delhi 2006, P 77

\(^7\) Ibid, P 1164.
lawyer from Baroda, V. V. Joshi. The Committee was given task to draft two bills, one dealing with intestate succession and the other with marriage. The Rau Committee was revived on 24 January 1944, to formulate a code of Hindu Law, which should be as complete as possible, dealing with succession, maintenance, marriage and divorce, minority and guardianship, and adoption.

The committee would hold interviews with select lawyers, bar associations, and interested individuals. However, this project of a comprehensive Hindu code soon ran into serious opposition to the provision for divorce and the provision for daughter’s share in her father’s property. In 1947 the Rau committee submitted their report it recommended reforms to Hindu law on various important points, signifying that the major policy aim was an improvement of the legal status of women.

However, while the committee was clearly in favour of comprehensive codification, the emerging opposition to this strategy led to the suggestion that piecemeal reforms might, after all, be more palatable to the people of India than a comprehensive code of Hindu law.8

3.2.4 Demand for Uniform Civil Code

In 1940, Indian women also demanded uniform civil code for every person. Sharreefa Humid Ali wrote her article: A Civil Code for India. She wrote, Indian women belonging to every caste and creed, it is necessary to bring all the laws governing marriage, divorce, inheritance, dowry etc. up-to-date we are now will have to be modified, until such time when a common Indian code of personal law will be evolved, and accepted by the nation, putting aside all the personal laws.9

3. 3. Approaches: Focus of Discussion

This chapter analyses the various approaches that may suggest ideas in framing Uniform Civil Code. For the sake of convenience they have been grouped as: (1) Approaches as collected from the Constitutional debates; (2) Approaches as collected from the Constitutional provisions (3)

8 Werner F. Menski, Hindu Law Beyond Tradition and Modernity, Oxford University Press, New Delhi India 2003, pp 205 to 208
Approaches from comparative study of various family laws of other countries (4) Approaches towards family law as gathered from the provisions of International conventions, Charters, Declarations, Protocols, Guidelines, etc. and (5) Legislation relevant to Uniform Civil Code

In the first group various views expressed on matters related to Uniform Civil Code, opinions for and against it, reservations, during the Constitutional debates have been analysed. In the second group the various approaches that are found in the provisions of the Constitution have been analysed. A few among the documents discussed are: The United Nations Charter, 1945; Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966 among others and in the last group is the Legislation relevant to Uniform Civil Code has been analyzed.

3.4. Approaches As Collected From Constituional Debates

Uniform Civil Code is the product of constituent assembly. In the debate held on uniform civil code in constituent assembly, it was divided into two groups - one group was opposing the concept of uniform civil code and the other group was supporting it.

3.4.1. The person who opposed to Uniform Civil Code

Mr. Mohamad Ismail Sahib (Madras: Muslim)\textsuperscript{10}

He moved to add proviso to article 35: “Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law”. Further he says; the 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 anything is done affecting the personal laws, it will tantamount to interference with the way of life of those people who have been observing these laws for generation and ages. This secular state which we are trying to interfere with way of life and religion of the people. He has moved his amendment in the interest of social harmony.

Mr. Naziruddin Ahmad : (West Bengal)\textsuperscript{11}

\textsuperscript{10} Constituent Assembly Debates, Volume VII, p 540-541
\textsuperscript{11} Constituent Assembly Debates, Volume VII, p 541.
He also moved to add the provisonamely:- “Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law”.

He further said the inconvenience is not only caused to the Muslim community but also to each community, each religious community. Each community has certain civil laws inseparable connected with religious beliefs and practices. He further believed that in framing a uniform draft code these religious laws or Semi-religious laws should be kept out of its way.

*Mahboob Ali Baig Sahib Bahadur: (Madras: Muslim)*

He moved following proviso for addition, “provided that nothing in this article shall affect the personal law of the citizen”.

He further said, that people seem to have very strange ideas about secular State. People seem to think that under a secular State, there must be a common law observed by its citizens in all matters including matters of their daily life, their language, their culture, and their personal laws. That is not the correct way to look at this secular state. In a secular state, citizens belonging to different communities must have the freedom to practice their own religion, observe their own life and their personal laws should be applied to them.

*Poker Sahib Bahadur: (Madras: Muslim)*

He supported the amendment moved by Mr. Mohamed Ismail Sahib: “Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law”. He said it is very moderate and reasonable amendment to the Article.

*For Benefit of all communities*: He further submitted that the amendment was not from the point of view of the Muslim community alone, but from the point of various communities that existed in the country, following various codes of law, with reference to inheritance, marriage, succession, divorce, endowments and so many other matters. In various provinces different personal laws were in existence and practice. But if it is intended that the aspiration of the state should override all the provisions and have uniformity of law to be imposed upon the whole

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12Ibid. p 543

13Constituent Assembly Debates, Volume VII, p 544-545.
people on these matters, it was a tyrannous provision which ought not to be tolerated. He has further shown the pamphlets of various organizations of Hindu community; which were asking the question: who are the members of this Constituent Assembly who are contemplating to interfere with the religious rights and practices? Were they returned there on the issue as to whether they have got this right or not? Have they been returned by various legislatures, the elections to which were fought out on these issues? He further said it is antagonistic to the provisions of Fundamental Rights.

The argument shows that the Constituent Assembly was aware of various complexities existing in the society then. All the above amendments suggested were not accepted by the Constituent Assembly.

**Mr. Hussain Imam (Bihar: Muslim)**

*Diversity.* He said that India is too big a country with large population so diverse that it is almost impossible to stamp them with one kind of anything. He said that in the north, India had extreme cold, in south extreme heat. In Assam rains touched four hundred inches whereas in Rajputana it was a desert. He questioned whether in such a diverse country whether it was possible to have uniformity in civil law. He further highlighted that the personal law is having concurrent jurisdiction to the provinces as well as to the Center. He questioned how it was possible to have uniformity when there were eleven or twelve legislative bodies ready to legislate on a subject according to the requirements of their own people and their own circumstances. He brought to their notice the protection they had given to the backward classes. Their property was safeguarded in a manner in which other properties were not safeguarded. In the Scheduled areas - of Jharkhand and Santhalparganasthey had given special protection to the aboriginal population.

He further pointed out that some part of the country was very much developed and some part was very backward. He pointed at the Assam tribes; and questioned what was their condition? He argued whether they could have same kind of law for them as the advanced people of Bombay. He suggested that it was very desirable thing to have a uniform law, but at a very distant date. He argued that we had to wait for illiteracy to be removed, when people have advanced, when their economic conditions were better, when each man was able to stand on his own legs and fight his
own battle. Then, one could have uniform laws. Thus the opposition views were insisting to religious freedom as a fundamental right which were no to be violated by the state under the garb of Uniform Civil Code.

3.4.2. Supporters of Uniform Civil Code

*K. M. Munshi (Bombay: General)*

He said this particular clause which was before the House was not brought for discussion for the first time. It had been discussed in several committees and at several places before it came to the House. The ground that was put forward against it were firstly that it infringed the Fundamental Right mentioned in article 19; and secondly, it was tyrannous to the minority. He further submitted that article 19 permitted legislation on secular activities. The whole object of the article was when the majority in the Parliament thought then an attempt could be made to unify the personal law of the country.

He further argued that the enactment of a Civil Code would be tyrannical to minorities. Nowhere in advanced Muslim countries has the personal law of each minority been recognized as so sacrosanct as to prevent the enactment of a Civil Code. He gave examples of Turkey or Egypt. No minority in these countries is permitted to have such rights. But he went further. When the Shariat Act was passed or when certain laws were passed in the Central Legislature in the old regime, the Khojas and Cutchi Memons were highly dissatisfied.

*Shariat Act imposed:* Some Muslims followed certain Hindu customs; for generations since they became converts they had done so. They did not want to conform to the Shariat; and yet by a legislation of the Central Legislature containing Muslim members felt that Shariat law should be enforced upon the whole community and they carried their point. The Khojas and Cutchi Memons most unwillingly had to submit to it. He questioned as to where be the rights of minority then. He argued that when one wanted to consolidate a community, one has to take into consideration the benefit which may accrue to the whole community and not to the customs of the majority. He further said that we were in a stage where we had to unify and consolidate the

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14 Constituent Assembly Debates, Volume VII, p 546
nation by every means without interfering with religious practices. If however the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. This is what was emphasized by the present Article.

*Some Hindus did not like Uniform Civil Code.* He further pointed out that similarly there were many among Hindus who did not like a Uniform Civil Code. They felt that the personal law of inheritance, succession, etc. were really a part of their religion. If that were so, one could never give, for instance, equality to women. But they have already passed a Fundamental Right to that effect and they have an article which lies down that there should be no discrimination against sex. Look at Hindu Law; you get any amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, one cannot pass a single law which would elevate the position of Hindu women to that of men. Therefore, there is no reason why there should not be a civil code throughout the territory of India. The researcher submits that a lot of reforms have been made today in Hindu law.

*Isolationist outlook of life.* He has further suggested to Muslim friends that if they forget the isolationist outlook on life, it will be better for the country. Religion must be restricted to spheres which legitimately pertain to religion, and the rest of life must be regulated, unified in such a manner that we may evolve, as early as possible, a strong and consolidated nation. Our first problem and 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”. He further said the Muslim friends will not feel that this is an attempt to exercise tyranny over a minority; it is much more tyrannous to the
majority.\textsuperscript{15} It is to be observed that Munshi’s philosophy stressed in national consolidation with unification in secular sphere.

\textit{Shri Alladi Krishnaswami Ayyangar (Madras: General)\textsuperscript{16}}

A step ahead of British rule: He argued that the civil code was in all field of life; therefore the step towards Uniform Civil Code was one step ahead than British rule. The second objection was religion was in danger. That community cannot live in amity if there is to be a uniform civil code. The article actually aims at amity. It does not destroy amity. He further pointed out that when there was impact between two civilizations or between two cultures, each culture must be influenced and influences the other culture. If there is a determined opposition, or if there is strong opposition by any section of the community, it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.

\textit{Dr. B. R. Ambedkar\textsuperscript{17}}

Uniform Civil Laws in India Dr. Ambedkar in reference to Mr. Hussain Imam noted that in India we already has a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, we have the law of Transfer of Property, which dealt with property relation and which was operative throughout the country. Then there was the Negotiable Instruments Acts: and he claimed that he could cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. As per him the only province the Civil Law which was not invaded so far was Marriage and Succession.

Coming to the amendments, he made only two observations. His first observation would be to state that members who put forth these amendments say that the Muslim personal law, so far as this country was concerned, was immutable and uniform through the whole of India, Dr.

\textsuperscript{15}Constituent Assembly Debates, Volume VII, p 547-548
\textsuperscript{16}Ibid. p 549
\textsuperscript{17}Ibid. P.550-551
Ambedkarchallenged that statement. He felt that most of those who spoke on this amendment had forgotten that up to 1935 the North-West Frontier Province was not subject to the Shariat Law. It followed the Hindu Law in the matter of succession and in other matters, so much so that it was in 1939 that the Central Legislature had to come into the field and to abrogate the application of the Hindu Law to the Muslims of the North –West Frontier Province and to apply the Shariat Law to them.

*Marumkkathayam Law*: He said that he was informed by, Shri Karunakaran Menon, that in North Malabar the Marumakkathayam Law was applicable to all- not only to Hindus but also to Muslims.*Marumkkathayam Law* is a Matriarchal form of law and not a Patriarchal form of law.

The Mussulmans, therefore, in *North Malabar* were up to now following the *Murumakkathayam law*. It is, therefore, no use making a categorical statement that the Muslim law has been an immutable law which they have been following from ancient times. That law as such was not applicable in certain parts and it has been made applicable ten years ago. Therefore if it has found citizens irrespective of their religion, certain portions of the Hindu law, not because they were contained in Hindu law but because they were found to be the most suitable, were incorporated into the new civil code projected by article 35,. So he was quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community.

His second observation was to give an assurance. Ambedkar said that he quiterealized their feelings in the matter, but he thought that they had read rather too much into article 35, which merely proposed that the state had to endeavour to secure a civil code for the citizens of the country. It did not say that after the Code is framed for the citizens of the country that after the Code was framed the state would enforce it upon all citizens merely because they are citizens. It was perfectly possible that the future parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that at the initial stage the application of the Code could be purely voluntary. This method was adopted in the Shariat Act of 1937 when applied to territories other than the North-West Frontier Province.
The law said that here is a Shariat law which should be applied to Mussulmans provided a Mussulman who wanted that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law would bind him and his successors. It would be perfectly possible for parliament to introduce a provision of that sort. Therefore he submitted that there was no substance in those amendments.

Thus the supporter of Uniform Civil Code wanted to consolidate unity of nation, advance secularism and wanted to bring gender justice. It was idea of one nation one law.

3.4.3 Debate on Hindu Code Bill

After independence, first Prime Minister Nehru sent the second Rau Committee’s draft Hindu code- abandoned by the British colonial government in 1944- to the Ministry of law for consideration and revision. From there, it was referred to a Select Committee under the chairmanship of Ambedkar in April 1948. The Ambedkar Committee submitted its Report and a revised version of the code in August 1948.\(^\text{18}\)

Initially, the Ambedkar Committee’s code consisted of eight major parts.\(^\text{19}\) Part I defined who was a Hindu and abolished the caste system. It stated that the Hindu code would apply to anyone who was not a Muslim, Parsi, Christian, or Jew, and established one personal law applicable to all Hindus so defined. Part II of the code dealt with marriage; Part III with adoption; Part IV with guardianship; and Part V, perhaps the most controversial part, with joint family property. Part VI of the code concerned women’s property; and Parts VII and Part VIII dealt with succession and maintenance, respectively. The Ambedkar Committee’s draft code departed from the classical Hindu personal law in four main ways. First, it provided for separation or dissolution of a Hindu marriage, previously unknown in Hindu personal law (although commonly practiced custom among lower castes). Second, it established one joint family system of property ownership for all Hindus. Third, it gave a share of inheritance to daughters; and fourth, it gave


widows absolute rather than restricted property rights. Thus in patriarchal multi-ethnic society
the Ambedkar Committee show the uniform,s gender just future course to future family law
reforms in India.

The Constitutional Assembly alsso workedas parliament of India.Itstarted debate on Hindu Code
Bill. The issues which were come before parliament are also important to understand the idea of
Uniform Civil Code.

**Dr. B. R. Ambedkar**

*Constitution as Ideas for source of Hindu Law Reform* There was question raised about source of
idea of Hindu law reform.Dr. Ambedkar claimed that theideas were derived from the constitution
that theyhad lay down. The Preamble of the constitution spoke of liberty, equality and
fraternity.Therefore they werebound to examine every social Institution, that existed in the
country and see whether it satisfied the principles laid down in the constitution.Now, so far as
thesacramental marriage was concerned he was convinced that no man who examined that
institution in a honest and liberal spirit can conclude that the sacramental marriage satisfiedeither
the ideal of liberty or of equality.He questioned as to what was the sacramental ideal of
marriage.He concluded that Sacramental ideal of marriage described in few words as possible
was polygamy for the man and perpetual slavery for the women.

The last remark may be an exaggerated manner of making the argument.

**ShriRaj Bahadur**

*Sanctity of marriage - One sided?* He argued if the sanctity of marriage was there, it had to befor
both man and woman. If a woman was expected to be pure, chaste and faithful to the husband,
then was it not necessary for the man toto bind himself by the same obligations.He questioned
why it had to be one-sided. He further submitted that unfortunately it wasa fact that we
regarded woman as a liability, as something which is below ourselves. The common man’s
conception of a woman is that she is like the shoes on hisfeet. If they are torn onecan throw them

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20 Vasant Moon Edited, Dr. Ambedkar and the Hindu Code Bill, Dr. Babasaheb Ambedkar Writing and
Speeches Vol. 14 Part Two, Education Department Government of Maharashtra, 1995, P 1161
21 Ibid, 945
away and take new. He further said that: so far as inheritance was concerned he was not in favour of allowing the daughter any share after her marriage in the father’s property but if she was unmarried she must be allowed the same as her brother. The point to be noted here, he was not totally supporting share to the females.

**Shri Brijeshwars Prasad (Bihar)**

*Abolish distinction between legitimate and illegitimate* - He extended his unqualified support to clause 2 of the Hindu Code Bill. But he suggested that he wanted the state to abolish the distinction between legitimate and illegitimate children. He opinioned that the stigma of illegitimacy dwarfed the personality of the child. It was inhuman and barbarous that millions of people in this country should suffer from psychological and social handicaps throughout their lives for no fault of their own. It may be urged that the institution of marriage will be weakened if the distinction between legitimate and illegitimate children is obliterated. He submitted that the Heavens would not fall if the institution of marriage was weakened in any way whatsoever.

**Dr. S. P. Mookerjee**

*Monogamy good for all:* So far as monogamy was concerned, he supported it with one reservation i.e, to make it applicable to all the citizens of India. It is not a question that monogamy is good for the Hindus and monogamy is not good for others. He called on them to stand for one social doctrine.

**Dr. B. R. Ambedkar**

He answered in reference to the change in Hindu society. Whatever else Hindu Society may adopt, it will never give up its social structure for the enslavement of the Sudra and the enslavement of women. It is for this reason that law must come to their rescue in order that society may move on.

**Shrimati Jayshri**

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23 Ibid. 1000
24 Ibid. 1160
Making an Exemplary ideal Hindu Code. She said that the Women’s Conferences had always asked for a common Code, they were also in favour of a Common Code. She said that they were not asking that as special privileges to be given to only Hindu women. She claimed at present women are suffering and are backward. Parsi, Christian and Muslim women are far ahead of Hindu Women in this respect and that is why at present they were supporting this Hindu Code. She opined that, if they made the Hindu Code an ideal one, the other communities also would have no objection in accepting the Code.

**Dr. B.R. Ambedkar**

Explanation as to grouping of Sikhs Jains and Buddhist under Hindu: Ambedkar said that with regard to the question whether the Bill should apply to persons or communities other than Hindus in the strict sense of the word, he felt it desirable to have some general idea about the matter. The first thing that he emphasized was that members of Parliament have to bear in mind, that from a sociological point of view the variety of religions that we have are in India or elsewhere seemed to fall into two categories. Some religion has only creed or relation of man to the god. They are nothing to do with the family structure, social structure and political system. When Buddha differed from the Vedic Brahmins; his difference was limited to matters of creed. Buddha did not propound a separate legal system for his own followers; he left the system as it was. It may be that the legal system that then prevailed was a good system; that it had no blemishes and no faults. So he did not direct his attention to making any changes in the legal system in consequence of the changes that he introduced in certain religious notions. In the same way, when Mahavir founded his own religion he did not create a new legal system for the Jains. He allowed the legal system to continue. He also requested Sardar Hukam Singh to correct him if he was wrong when he states that none of the ten Gurus ever created a law book as such for the Sikhs. So whether good fortune or misfortune - the fact was that, in this country, although religions have changed, the law has remained one. That is why the Sikhs follow the law.

Application of the Hindu Law to Buddhists, Jains and Sikhs is a historical development. Ambedkar clarifying further said that the application of the Hindu Law and the Hindu Code to Buddhists, Jains and Sikhs is a historical development to which either they or he could not now...

25 Ibid. 1027
give any answer. All that they could do is to say that the thing has gone wrong and change it, reform it or make it more equitable and this is what they were doing. So far as the Sikhs were concerned, he found from the judgments of the Privy Council that this question was debated much earlier than even 1830, when the decision was taken that the Sikhs were Hindus so far as law is concerned. So from 1830 to 1950 for so many years they have been regarded as Hindu for legal purposes.

**Dr. B. R. Ambedkar**

Ambedkar on Monogamy to Hindus and Polygamy to Muslims? Dr. Mookerjee raised objection of monogamy to Hindu and polygamy to Muslim as discriminatory. With that respect Dr. Ambedkar replied that article 25 of the Constitution, said:

“Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right free to profess practice and propagate religion.”

Ambedkar drew attention of Members to the words “the right freely to profess and practice their religion. He was not concerned for the moment about propagation of religion.

He said that in this country, fortunately or unfortunately, the profession of a particular religion carries with it the personal law of the person. In view of the fact that the constitution allowed different communities to practice their religion and incidentally also to have their personal law, there was nothing discriminatory in allowing one community to have their own law or to modify it in the way they like and to treat the law of the other community in a different way or to modify it.

He further said that the constitution permitted to treat different communities differently and if one treated them differently nobody can charge the Government with practicing discrimination. He further claimed that article 25 is an article of great importance, for this reason all throughout the history of Europe there has been a great contest between the Church and the State. The Statesaid

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that Church shall not interfere in religion and that the state is supreme over Church. The Church on the other hand said that the State is subordinate to the Church, it’s only when the Church permits that the State can enact. That has been the general position. In this constitution we adopted a middle course; the course that we have adopted, that while we would permit people to practice and profess their religion and, incidentally, to have their personal law because the personal law is so embedded in their religion, yet the State has retained all along in article 25 the right to interfere in the personal law of any community in this country. The only question is the time, the occasion and the circumstances.

Parliament’s Right to modify Personal Laws. Ambedkar asserted that this parliament was absolutely supreme and it can deal with any community so far as their personal law is concerned apart from their religion. So he concluded that no community be in a state of mind that they are immune from the sovereign authority of this Parliament.

Shri Jawaharlal Nehru (Prime Minister)27

He said that he did not attach any importance to this Hindu Code Bill because of any particular clause or anything, but because of the basic approach to these vast problems, economic and social. He brought to their notice that we had achieved political freedom in this country, political independence that is a stage in the journey and there are other stages, economic, social and others and if society was to advance, there must be integrated advance on all fronts. Advance on one front and being kept back on other fronts means functioning imperfectly and also mean that the first advance also in danger. It means the revolution will fear of anti-revelation or the fruit of the advancement will not reach to the root of the society. Therefore, we have to consider this matter in this spirit, how we could advance on all fronts, always keeping in view, of course, that the advance is co-ordinate and meets with the approval of the great majority of the population. We function as democratic assembly answerable to the people of India, and we must carry them with us. Keeping that in view it was not good enough for us and for this House merely to be led. We had to give the lead and carry others, so he proposed to lead and in giving that lead we had to carry others with us, and we propose to give the lead in this and in other matters, but always

27 Vasant Moon Edited, Dr. Ambedkar and the Hindu Code Bill, Dr. Babasaheb Ambedkar Writing and Speeches Vol. 14 Part One, Education Department, Government of Maharashtra, 1995, P 763
carrying others with us. Thus the ultimate goal of Hindu Code Bill was to enact a uniform civil code for Hindus. But Parliament failed to pass the Hindu Code Bill. It was very good attempt by the first Independent Government of India. It has given blueprint to Uniform Civil Code in general and Hindu law in particular. Later on the subsequent Parliament passed piecemeal legislation on Hindu Law.

Thus the constitutional assembly which was working as a first parliament of Independent India had adopted aggressive secularist model for the Hindu law reform.

3.4.4 Report of the Fourth Law Commission on Codification of Law

The Fourth law commission submitted their report on the 18\textsuperscript{th} November 1879 and given recamendations that the process of codification comprised of two stages: One codifying the law relating to specific heads, which means an orderly and systematic arrangement of the rules relating to some well-marked department of the field of rural rights and duties. The second stage comprised of competing all these Acts into one general code. No attempt had yet been made in India towards achieving a general code, and also the time for the realization of the concept of general code had not yet arrived.

The Commission suggested that the work of final consolidation and arrangement so as to prepare a general code could be deferred for the time being till the effects of the special laws already enacted had been ascertained by their persistence under varying circumstances and the general principles became established. In the meantime; the process of codifying particular and well-marked divisions of the civil law would continue with the idea of eventual combination and coordination of those divisions as part of a single and general code, but for the time being the ultimate scientific consideration and arrangement might be deferred to some other opportune time. Although in the circumstances existing in India, the commission proposed that the preparation of a general code be deferred for some time and that piecemeal legislation be undertaken in the meantime, yet it emphasized that while dealing with the several branches of the law by separate Acts, “The ultimate design of framing these Acts into a general code ought never to be lost sight of”.

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This implied that the piecemeal legislation was not to be haphazard or un-coordinated. Every statute, if it is to be self-consistent and duly proportioned, must be framed with reference to some central group of ideas which dominate the whole work. In constructing a system of laws the same principle should prevail”. If this Idea were of many evils being produced, unless a co-coordinating influence was allowed to operate, “the development of the law and the social growth of the community proceed irregularly and disproportionately.  

3.4.5 Constitutional Goal and Uniform Civil Code

3.4.6 Study of Legal system

The legal system of a country at a given time is not the creation of one man or of one day; it represents the cumulative fruit of the endeavour, experience, thoughtful planning and patient labour of a large number of people through generations. 29 If therefore law is not to be studied merely as a body of rules laid down by certain organs, if law is to be studied not merely as a collection of doctrines, dogmas and concepts, or as a static entity, but as an organic growth, a living and breathing machismo keeping pace with the social changes, then there is no escape from a study of legal history. 30

3.4.7. Legal History

Before 1858 British government was sympathetic to social reforms. Raja Ram Mohan Roy demanded Sati Prohibition Act; the Bengal Sati Regulation Act, 1829, was passed by the British Government. After passing this Act, society realized the bad consequences of the Act, the widow problem was faced by the society. Therefore Ishwar Chandra Viday Sagar demanded Widow Remarriage Act, British government passed The Hindu Widow Remarriage Act, 1856. After Revolt of 1857 British policy was changed in social reforms. Government decided not to interfere in the personal and religious matters of the Indian people. In 1885 the all India Congress was established. This organization submitted the Indian demands to the British Government. Thereafter the Congress party started demand for more political reforms. In 1906

29 Ibid, p 1
Bal Gangadhar Tilak had demanded Swaraj i.e. self-rule. In 1916 Annie Beasant and Bal Gangadhar Tilak had started Home Rule movement. The Indians aspirations were to get dominion status to Indian colony.

The Government of India Act, 1919 was passed; Indian people were dissatisfied with that Act. People started protesting against the government. British Government sent the Indian Statutory Commission which is commonly known as Simon Commission. Indians were boycotted to the commission. Then Government asked the Indian people to frame their demand. In response to government proposal Congress party constituted a committee under the chairmanship of Motilal Nehru. The Nehru Committee Report, 1928, was biased on the principle of Dominion Status with full responsible government on the parliamentary pattern. It contained an explanation of its draft Constitution that the main concern of the Indians was to secure the fundamental rights which had been denied to them and which are not to be withdrawn under any circumstances

The fundamental rights which were based on European, an American constitution, like right to liberty, right to equality, right to freedom of religion etc. This Provision of fundamental rights gave moral support to the future political demand.

3.4.8 The Round Table Conference

The three sessions were hold; in first round Table Conference N.M. Joshi emphasized the need for incorporation of fundamental rights. Dr. B.R. Ambedkar also drew attention of the British Government towards the urgency of incorporating adequate provisions for the enforcement of fundamental rights in the Constitution. He pleaded that these rights also include a right of redress for the violation of any fundamental right. Again in the Third Round Table Conference Dr. Ambedkar wanted to include an additional rider in the form Instrument of the important to note because the same idea was expressed by him in the Constituent Assembly while justifying the inclusion of directives in the constitution of India

3.4.9 Fundamental Rights (Sapru Committee)

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In 1945, Tej Bahadur Sapru was appointed as a chairman of fundamental right. It is also known as Sapru Committee. The committee issued a questionnaire to the various associations, groups and individuals inviting their views on the desirable fundamental rights in the future constitution of India and the machinery that could be suggested for the enforcement of those fundamental rights which were not justifiable. It was here that the separation of rights started first of all. Several individuals and organizations responded to the questionnaire and some of them gave the details of fundamental rights which they wanted to include in the future Constitution of India. The All India Depressed Class League in its memorandum submitted list of fundamental rights including the social and economic rights.33

3.4.10 Distinction between economic and civil right

Venkatarangaiah distinguished the civil rights from the economic rights. He wanted to incorporate two sets of rights in the constitution, the former being enforceable in the courts of law and the latter not. He also gave reasons for the distinction between the two sets of rights and observed: Civil rights are of justifiable character and they can and ought to be enforced through courts of justice. Social and economic rights cannot be enforced through courts because they involve positive action in the forms of new legislative measures. Administrative organization, accumulation of large financial and perhaps the total transformation in some cases of economic system in the country. Thus non-justifiable right can enforce with passing separate law for dealing a particular subject. These cannot be accomplished through decrees issued by the courts. This does not, however, mean that rights not justifiable are ineffective as rights and that their incorporation in the Constitution serves no purpose. It only means that while enforcing some rights we have to look to courts, for enforcing others we have to look to other political institutions. Thus, Venkatarangaiah anticipated the inclusion of non-justifiable economic and social rights in the frame-work of Constitution of India.

3.4.11 The Sapru Committee

It 1945 considered the suggestions received from various quarters on the subject of fundamental rights and reached the following conclusions. First, protection of minority rights was absolutely

33 Ibid, p 39
necessary. Second, there was a need for laying down adequate and appropriate standards for legislative and administrative actions and the courts. Third that the justifiable and non-justifiable fundamental rights, be discussed and pleaded for incorporation in the future Constitution. Finally, the Sapru Committee in its “Constitutional proposals” recommended that a declaration of fundamental rights in an Indian Constitution was absolutely necessary. It envisaged two sets of fundamental rights—one justifiable and the other non-justifiable. It did not suggest how the division was to be made. It left this task to be performed by the constitution-framing body and observed that the task may be difficult but it was not impossible. The proposal of the Sapru Committee was definitely a significant achievement and advancement on the earlier proposals because it made distinction between fundamental rights as justifiable and non-justifiable and recommended the inclusion of latter also in the Constitution.\(^{34}\)

### 3.4.12 Directive Principles through Constituent Assembly

The Constituent Assembly was mainly an elected body and represented almost all shades of public opinion. Its deliberations began on 9 December 1946. It became a sovereign body on 15 August 1947 when India gained independence. Its broad ideological spectrum provided by the Indian National Congress was enlarged by the inclusion of non-congress specialists from various disciplines and walks of life. Thus organized it settled down to the framing of a Constitution of free India in a pragmatic way with a view to bringing about the renascence of the Indian society. The Constituent Assembly was first convened on 9 December 1946 and Rajendra Prasad was elected permanent Chairman on 11 December 1946. The first great achievement was the adoption of the historic Objectives Resolution on 22 January 1947. This Resolution was moved by Jawaharlal Nehru on 13 December 1946. This Resolution formed the basis not only of various provisions of the constitution but also preamble.\(^{35}\)

Nehru in his speech on the Resolution emphasized that the House should not consider this Resolution in its literal meaning but should look at its sprit. He reminded that the members of the Assembly were not to function for a party or a group but for whole of the India. Explain the democracy and socialism in this Resolution and not only the content of democracy but the

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\(^{34}\) Paramjit S. Jaswal, Directive Principle Jurisprudence and Socio Economic Justice in India. APH Publishing Corporation 5 Ansari Road, Daryaganj New Delhi, 1996, p 40

\(^{35}\) Ibid, p 41
content, of economic democracy in this Resolution.; stand for socialism and that India will go
towards the Constitution of a socialist state and I do believe thatthe whole world will have to go
that way. It means people should abide the equality and equal status of human being in all field of
life. Nehru requested the House to consider the resolution in the “mighty prospect of our past, the
turmoil of the present and the great and unborn future that is going to take place soon.\(^{36}\)

Many members of the Constituent Assembly participated in the discussion on the Objectives
Resolution. There was great emphasis on what we call fundamental rights under the present
Constitution. The emphasis on socio-economic rights also did not lag behind. The majority of the
members considered the incorporation of social policy in the Constitution without undermining
the importance of fundamental rights. It would be in the fitness of things to take into
consideration a few observations of members during the discussion on Objectives resolution and
before its final adoption on 22January 1947.

M.R. Jayakar, speaking on the importance of the Resolution said that it was a vital resolutionand
it laid down the essentials of the next Constitution He highlighted the economic and socialistic
importance of the Resolution and observed that it envisaged far-reaching social changes- social
justice in the fullest sense of the term. The liberties of the individuals were resolution also
emphasized that the development of the individuals were restricted to the extent the people really
desired it. The Resolution also emphasized that the development of the individual personality
would be main aim of our social good.

S. Radhakrishnan, Visualizing the importance of fundamental rights, emphasized that though
state regulation for socio-economic revolution was necessary, it should not have been done at the
expense of the human spirit.

Vijayalkshmi Pandit observed that there were two aspects before them- negative and positive.
She laid emphasis on positive aspect because while the negative aspect was concerned with the
ending of imperialist domination, the positive aspect would perform the most important task of
building up India as social democratic state which enables her to free herself socially and
economically and reach her destiny.

\(^{36}\) Paramjit S. Jaswal, Directive Principle Jurisprudence and Socio Economic Justice in India. APH Publishing
Corporation 5 Ansari Road, Daryaganj New Delhi, 1996,p 42
Finally, in the concluding speech Nehru said that the Assembly was to free India through a new Constitution, to feed the starving people and clothe the naked masses, and to give every Indian fullest opportunity to develop himself according to his capacity.

### 3.4.13 Fundamental Rights and Fundamental Principles of State Policy

B.N. Rau, the Constitutional Adviser to the Government of India, suggested that the assurances was to split into two sets in the following manner: First, fundamental rights relating to personal liberty and political freedom and enforceable in the courts of law. Second, fundamental principles of state policy relating to social, economic and other matters unenforceable in the courts. Rau noticed that in certain Constitutions such as the Constitution of the U.S.S.R and Weimer Constitution of German Reich, both classes of rights were covered under the head “Fundamental Rights.”

The reason was that neither was intended to be enforced by legal action. But according to Rau there was difference in both the classes of rights, that is, fundamental rights imposed a negative duty on the state while the, others required a positive action on its part. He found this difference clearly in the Irish Constitution. The Irish Constitution had separated the former were to some extent enforceable by the courts, but the latter not at all. The principle of social policy set forth were intended for the general guidance of the *Qireachtas* (Irish Parliament) and were not to be cognizable by any court. There was no similar provision for fundamental rights expressly excluding the jurisdiction of court.

One of the reasons for attraction of the Assembly members towards the constitutional socialism expressed in the Irish directive principles of social policy was the long standing affinity of the Indian National Congress with the Irish national movement. Rau also noticed a similar distinction recognized by Lauterpacht in his ‘International Bill of the Rights of Man’ He provided for two articles dealing with social and economic rights and distinguished from the others relating to personal or individual rights. He observed that the latter could be enforceability was not possible regarding social and economic rights. The reason for such distinction can be

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38 Ibid, p 45.
best described in his own words: These two articles represent the social and economic provisions of the bill of rights. The main difficulty connected with this category of rights was that of international supervision and enforcement. There is no specific test of observance, in an individual case of the obligation to secure just and humane conditions of work, or the right to work or adequate opportunities in education, and to public assistance in case of unemployment and old age, depends upon the economic conditions and development of each state. Moreover, while with regard to personal rights of freedom the test is absolute. The social and economic rights are related to the predominant standard of life and a variety of social and economic factors in the country concerned.

Rau, being influenced by this analysis, suggested the incorporation of similar provisions in the Constitution of India on Irish model. He separated the two classes of rights: Part A dealing with the fundamental principles of state policy which was non-justifiable and Part-B with fundamental rights strictly so called drafting the provisions in Part A. The preliminary portion was taken from article 45 of the Irish Constitution with a difference that while the principle in the Irish Constitution was meant for the guidance of the Oireachtas (Irish Parliament) alone, these were to be for general guidance of the State under the Indian Constitution. The first and third clauses were taken from Havana and Russian Constitutions respectively. The sixth clause pertaining to the standard of nutrition was modeled on the lines of recommendations of the united Nations Conference on food and Agriculture, 1943 and read as: To raise the levels of nutrition and standard of living of its own people.  

3.4.14 Three Revolutions

K. Santhanam explained the situation in terms of three revolutions: First, the political revolution that would end with independence, second, the social revolution meant to get India out of medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education. Third the economic revolution- the transition from primitive rural economy to scientific and planned agricultural industry. S. Radhakrishnan also emphasized that there must be a socio-

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economic revolution not only to satisfy the fundamental change in the structure of Indian Society. He emphasizes on holistic change in the society. It also suggested to give gender justice.

3.4.15 Advisory Committee

The framers of the Constitution faced three-fold problem while framing the provisions relating to the fundamental rights: First, the difficulty to define what fundamental rights were and to make the list of the same. Second, classification of rights into justifiable rights defined therein. The last problem could be solved by making easily definable rights enforceable in the ordinary courts and keep the rest out of their preview. When no solution could be found out regarding the first two problems, Govind Vallabh Pant moved a resolution in the Constituent Assembly on 24 January 1947 for the appointment of Advisory Committee to bring out a solution to the problem. While moving a resolution for the constitution of advisory Committee on Fundamental rights, Pant stated:

I cannot however refrain from referring to the morbid tendency which has gripped this country for the last many years. The Individual citizen who is really the backbone of the State, the pivot, the cardinal centre of all social activity, and whose happiness and satisfaction should be the goal of every social mechanism, has been lost here in that indiscriminate body known as the community. We have even forgotten that a citizen exists as such. There is the unwholesome, and to some extent a degrading habit of thinking always in terms of communities and never in terms of citizens. (Cheers). But it is after all citizens that form communities and the individual as such is essentially the core of all mechanisms and means and devices that are adopted for securing progress and advancement.

It is the welfare and happiness of the individual citizen which is the object of every sound administrator and statesman. So let us remember that it is the citizen that must count. It is the citizen that forms the base as well as the summit of the social pyramid and his importance, his dignity and his sanctity, should always be remembered. Thus Pant has strongly supported the

\[^{40}\text{Ibid, p 47}\]
social contract theory of politics. The first meeting of the committee was held on 27 February 1947 and Vallabhbhai Patel was unanimously elected its Chairman.

The first meeting of the sub-committee on Fundamental Rights was held on 27 February 1947 and J.R. Kriplani was elected its Chairman. Alladi Krishnaswami Ayyer and M.R. Masani suggested that only the enforceable rights of the citizens should be included in the Constitution and the inclusion of non-justifiable principles would be meaningless. To support their contention the relevant provision from the United States Constitution was cited. K.T. Shah Emphasis that along with rights, there must be some obligations on the citizens.

HarnamSing taking support from the Russian Constitution emphasized the inclusion of both justifiable as well as some non-justifiable rights in the new Constitution of India.  

K.M. Munshi, in a note, submitted to the Sub-Committee, observed that most of the general declarations and international documents had proved ineffective to check the growing power of modern state. On the contrary, they created an unwarranted impression of progress and freedom. The fate of Weimer Constitution was an example. He though that in India the general precepts which might be considered less than necessary by an advanced thinker on socialistic lines would not be looked at, much less understood or applied in some parts of the country where feudal options were still deeply ignored. He also felt that the Sub-Committee had to consider whether fundamental rights of the nature of mere precepts should be embodied in the Constitution and if not what should be the justifiable rights. He also emphasized on the inclusion of provision to be issued by the Courts.

At the meeting of 30 March 1947, the Sub-Committee turned its full attention to the positive rights using Rau’s draft, his collection of precedents and in particular the example of Irish Constitution, the members adopted rapid succession provisions laying down that the state should promote social, economic and political justice. The members also drafted provisions based on

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Munsi’s draft fundamental rights and based on articles in Lauterpacht International Bill of Rights of Man.\(^ {44} \)

On the basis of recommendation of Sub-committee on fundamental rights, Rau prepared a draft of the report on April 3, 1947 which was to be submitted by the Sub-Committee to the Advisory Committee for their comments. The annexure to the Draft Report contained two chapters. The first chapter enumerated justifiable rights and the second chapter, non-justifiable rights.

Raj Kumari Amrit Kaur, Hansa Mehta and Shah spoke in favor of the principles and stressed that these directives though non-justifiable were very vital to the social progress of the country. It was, therefore, essential to mention either in the foreword or in the end of clause 35 that the state was obliged to take necessary steps, as soon as possible, to assure the fulfillment of these directives.\(^ {45} \)

It is worth noting that of the three members of the Sub-Committee of fundamental rights, who wanted the Uniform Civil Code to be justifiable, Shri Minoo Masani was a Parsi, Rajkumari Amrit Kaur was a Christian from the Royal House of Patiala and Smt. Hansa Mehta was a Hindu.\(^ {46} \) They held that one of the factors keeping India from advancing to nationhood was the existence of personal laws based on religion. They suggested, therefore, the transfer of the clause regarding a uniform civil code to the part dealing with justiciable rights.\(^ {47} \)

3.4.16 The Minorities Sub-Committee

It considered the various clauses and had one comment on the clause proposing a uniform civil code for all citizens. The sub-committee agreed that a uniform civil code should be made on an eminently desirable, but felt that the application of such a code should be made on an entirely voluntary basis.\(^ {48} \)

3.5 Approaches As Collected From Constitutional Provisions

\(^ {44} \) Ibid, p 50s
\(^ {45} \) Paramjit S. Jaswal, Directive Principle Jurisprudence and Socio Economic Justice in India. APH Publishing Corporation 5 Ansari Road, Daryaganj New Delhi, 1996, p 53
\(^ {46} \) Vasudh Dhamamwar, Towards the Uniform Civil Code, N.M. Tripathi Private Ltd. Bombay, 1989 p 3
\(^ {47} \) B. Shiva Rao, the framing of India’s constitution a study, the Indian Institute of Public Administration, 1968, P.325.
\(^ {48} \) Ibid. P 325.
Some Constitutional provisions themselves indicate the approach to uniform civil code.

3.5.1 Article 44: Uniform Civil Code

Article 44. Uniform civil code for the citizens- The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

The language used in the article seems to be in the nature of commands or constitutional order to the state pursuing it to perform social, economic and cultural functions. In Article 44 the word ‘Endeavour’ is used for the objectives to be pursued. It also means that it is obligatory on the part of the State to make the best efforts to achieve the objectives mentioned therein.49

3.5.2 Meaning of Code Clarified

What is code? In legal terminology, a code means a collection or compendium of various laws, relating to a particular subject, e.g., the Civil Procedure Code or the Criminal Procedure Code, already enacted in India.

While many parts of this law have already been codified in enactments applicable to the entire population of India, such as the Civil Procedure Code, Evidence Act, Transfer of Property Act and the like, controversy rose as to the formation of a uniform code relating to the family or personal law of the parties relating to matters such as marriage and divorce, succession, adoption.

3.5.3 What is personal law?

There has been much controversy as to what was ‘personal law’. But it was not necessary to enter into such hair-splitting controversy for any treatment of Article 44 of the Constitution, for, the framers of the Constitution clearly indicated what they meant by the word ‘personal law’ in Entry 5 of List III of the VII Schedule of the same Constitution. Entry 5 says - “5. Marriage and Divorce; infants and minors; adoptions; wills, Intestacy and succession; joint family and

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partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law”.

The second part of the Entry indicates wherefrom we are to find the meaning of ‘personal law’ – viz; the law known as ‘personal law’ under the pre- Constitution period. 50

This brings us to Entries 6 and 7 of the Government of India Act, 1935, which were as follows:

3.5.4 The Government of India Act, 1935, Schedule VII

List III. Concurrent List.

Part I
Entry 6. Marriage and divorce; infants and minors; adoption.
Entry 7. Wills, intestacy, and succession, saves as regards agricultural land.51

The purpose of the directive principles was to supplement fundamental rights for broad-basing democracy and for the collective well being of the citizens.

Provisions as to certain legal matters:

Section 292- Existing law of India to continue in force- Notwithstanding the repeal by this Act of the Government of India Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

There is nothing in the section to suggest that there was any intention to curtail the power of the Indian Legislature or other competent authority to decide in what manner a new Law should operate as against the existing rights and causes of action. It is well-established that a competent legislature may legislate even retrospectively.52

Before the Government of India Act, 1935, the similar provision was made in section 112 of the Government of India Act, 1915. Which was as follows?

52 Ibid, p 484
3.5.5 The Government of India Act, 1915

Section 122- Law to be administered in cases of inheritance and succession- The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, an when the parties are subject to different personal laws or custom to which the defendant is subject. 53

This section is very important; it will resolve the problem of conflict of law.

Indeed, the balancing process between the individual rights and the social needs is a delicate one. It is primarily the responsibility of the ‘State’ and in the ultimate analysis of ‘Courts’ as interpreter of the Constitution and the law.

3.5.6 Article 44 and other relevant provision in Indian Constitution

Preamble: Preamble is the mirror of the constitution. It expresses the philosophy of the constitution. India is now Sovereign socialist secular democratic Republic. Citizens have given assurance of Justice, Liberty, Equality and fraternity. These lofty principles are required to be applied in the family matters.

Justice without equality was not palatable to the framers of the constitution. They included both in the Preamble, and reinforced it within the right to equality to which no less than five articles, 14,15,16,17 and 18 are devoted. 54

Article 14 Equality before law-The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

54 Vasudh Dhagamwar, Towards the Uniform Civil Vide, N.M.Tripathi Private Ltd. Bombay, 1989 p 56
(3) *Nothing in this article shall prevent the State from making any special provision for women and children.*

These articles are required to apply to the family matters. It gives gender justice to the woman Community.

*Right against exploitation.*

Article 23 - *Prohibition of traffic in human beings and forced labor.* Article 24 - *Prohibition of employment of children in factories, etc.*

The same principles shall apply towards the prohibition of child marriages and forced marriages as well as polygamy. Woman who is weaker section of the society, her rights will be protected.

*Article 21-Protectiosn of life and personal liberty. - No person shall be deprived of his life or personal liberty except according to procedure established by law.*

Liberty is antithetic to equality, and equality and arbitrariness being sworn enemies; anything arbitrary is also unequal both according to political logic and constitutional law and is therefore, isolative of Article 14. The same logic shall apply to the personal laws. In personal laws woman’s dignity shall be protected and accordingly personal laws are required to be amended.

*Right to Freedom of Religion- Article 25 to 28.* These rights are guaranteed to every citizen of India. These are not absolute. India has accepted secular and socialist goal. Indian secularism is treating all religions equally or equal before the state. No state religion has been recognized. Therefore secular matters like marriage and succession cannot be brought under the guarantee of religious freedom. Thus, these fundamental rights provisions are supporting to the article 44.

For the purposes of the Uniform Civil Code, it is the religious minorities that are granted as being affected. The Scheduled Tribes have not been taken into account though at 7.0% they form the second largest minority of India. This is perhaps because both for religion and culture, the Scheduled Tribes are not a monolithic group. They are predominantly Animists but not exclusively so. Tribals throughout India have been known to convert to Christianity. In Kerala, Ladakh and North-East India, they follow Buddhism. In some areas, tribals have accepted Islam

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and in Arunachal, tribals are Vaishanavas by religion. Even though Buddhist, Animist and Vaishnava tribal’s have been exempted from the application of Hindu personal law statutes, they are perceived as Hindus just as Christian tribals are regarded as Christians and Muslim tribals as Muslims. But the fact remains that whatever their culture, linguistic and religious differences, the tribal’s share one feature and that is their vulnerability to exploitation by non-tribals, whatever may be the religion of either side. Nor can it be denied that taken together, the tribals have a way of life quite distinct from non-tribal.\footnote{Vasudha Dhagamwar, Towards the Uniform Civil code, N.M. Tripathi Private Ltd. Bombay, 1989 p 6}

In directive principle of state policy is the Socio-Economic policy of India. Articles 37, 38, 39,39A and 51 are indirectly or directly giving support to the article 44.

Article 12 has given definition of state. The state includes the Government and Parliament of India and the Government and the Legislature of each of thes States and all local or other authorities.

Thus Governmentof India has full right to legislate personal laws of any community. The same powers are also vested with the State Governments. Personal laws are placed under concurrent list. Therefore in this matter state and center are having equal rights in their respective jurisdiction. They are equally responsible for uniform civil code.

\textit{Article 13- Laws inconsistent with or in derogation of the fundamental rights-}

\textit{(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this para, shall, to the extent of such inconsistence, be void.}

This article is not going to apply to personal laws. This exclusion to the personal law should be withdrawn by way of necessary amendment. The Provisions of fundamental rights should be applicable equally to the families which are primary institution of society and state.
Judicial power to decide cases under Article 44.

Supreme Court under Article 32 and appellate jurisdiction. High Court also having jurisdiction under article 226 and 227. As and when cases of personal laws come before the courts, courts have given decisions as well as directions to the central government to pass appropriate laws.

3.6. Approaches from Comparative Study of Various Countries on Area of Family Law

The traditional view of the nation-state as it evolved in the west assumed a one-to-one correspondence between nation, state, and law. That is, one law was held to apply to the people of one nation, and that law was seen as emanating from and enforceable by one state, the main theorist of nationalism to deal explicitly with the role of law. Anthony Smith saw law as central to nationalism. He referred to a distinction originally made by Hans Kohan between ‘western’ and ‘non-western’ form of nationalism. Western meant England, France, the Netherlands, the United States, and the British dominions. Here, nationalism coincided with political and economic changes and was a predominantly political occurrence.

It reflected a rational, universal concept of political liberty and the right of man, based in a secularized Christianity (in a Protestant form in England, and a Catholic from in France), and drew its primary support from the political and economic strength of the educated middle classes. In the west nations grew up as unions of citizens, by the will of individuals who expressed it in contracts, covenants or plebiscites. The idea integrated around a political idea, looking towards the common future which would spring from their common efforts. It is civic nationalism model.⁵⁸

According to Anthony Smith, civic nationalism was based on a common code of laws over and above the local laws. Indeed, uniform laws were the very basis of the civic model of nationalism. Laws were applied uniformly to all citizens without exception, and the state both generated the laws and enforced them. The nation is a community of laws and legal institutions. Its members are bound by a common code and have uniform rights and obligations. There are in principle, no exceptions on grounds of “race, colour or creed”, age, sex or religion. The laws emanate from a

⁵⁸ Rina Verma Williams, postcolonial Political and Personal Laws Colonial Legal Legacies and the Indian State, Oxford University press, New Delhi 2006, P 29,30
single source, the territorial state as the expression of the nation, and their uniformity, their standardization, reflects the sovereign of the nation-state.  

According to Hans Kohn non-western world meant Central and Eastern Europe as well as Asia. It is contrast form of western nationalism. The non-western nationalism came to these areas when they were still relatively backward in their social and political development, so it evolved as a cultural rather than political phenomenon. It focused on the literature, folklore, language, and the history of a religion or people, and drew its primary support from the aristocracy and the mass of peasants. In this nationalism, did not find its justification in arational societal conception but in the “natural” fact of a community, held together, not by the will of its members nor by any obligations of contract, but by traditional ties of kinship and status. Eastern nationalism substituted for the legal and rational concept of ‘citizenship’ the infinitely vaguer concept of “folk” It is an ethnic nationalism. 

According to Anthony Smith the ethnic model does not mean that ethnic nations, in practice, lack standardized codes or institutions; simply, that these do not figure prominently in their concept of the nation or provide the ideological bond for its members, Instead, ethnic nationalists appeal to the existing customary and linguistic ties which they then set out to standardize and elaborate, elevating customs into rules and laws.

3.6.1. Legal Centralism

The core idea that law could only be that which was enforced and enforceable by the state formed the conceptual base of idea of legal centralism. Legal centralism held that ‘law is and should be the law of the state, uniform for all persons, exclusively of all other law, and administered by a single set of state institutions [while] other, lesser normative orderings ought to be and in fact are hierarchically subordinate to the law could not be conceptually severed from the state because in the final analysis, the state’s monopoly on the means of violence underpinned the authority of law. Thus it is the factual power of the state which affords the

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59 Ibid. P 30
60 Rina Verma Williams, postcolonial Political and Personal Laws Colonial Legal Legacies and the Indian State Oxford University press, New Delhi 2006, Pp 29,30
61 Ibid. P 31
empirical condition for the actual existence of ‘law’. Hence the necessary connection between the concept of law as a single, unified and exclusive hierarchical unit of political organization.\footnote{Ibid Pp 31, 32}

There are various approaches at international level. These approaches are changing according to the community and nations. Some approaches are as follow:

3.6.2. Family law approach in Muslim World

Professor Tahir Mahmood did research relating to comparative law; he has written a book in the year 1972 on Family Law reform In the Muslim World.

He has done comparative study of Muslim family Law of the globe. He comes to the conclusion; Islamic Personal Law, as presently applicable in a large number of countries, is not uniform. It is not a new development. Never in its history was the legal system of Islam uniform. From its very beginning it had developed various schools and sub-schools, and Muslims in different parts of the world had severally adopted one or more of them. Muslims in a large number of countries both theocratic as well as secular and both with a majority as well as with a minority of Muslims continue to adhere to the family law of the various traditional schools of Islamic legal system.

Many of these countries, it is evident; find no discrepancy between the provisions of the said law and the modern social conditions. In 20\textsuperscript{th} century the outstanding reforms introduced in some of these countries. Particularly in the field of Marriage-age, guardianship in marriage, polygamy, unilateral divorce, women’s right to dissolution of marriage, settlement of matrimonial disputes and legitimacy of children occupy prominent places in the statutory family law newly enacted in most of these countries.\footnote{Tahir Mahmood, Family Law Reform in the Muslim World, N.M. Tripathi PVT. LTD. Bombay, Ed. 1972 P.273.}

Family law of Muslims in the modern world may be classified into three different groups as follows:

i) The countries where the classical family law of Islam, according to its various schools, remains unchanged and uncodified til the present day,
ii) The countries where Islamic family law has been completely abandoned and replaced by the modern statute law applicable to all citizens irrespective of their religion, and

iii) The countries where the locally prevalent forms of Islamic family law have been reformed through modern legislative process, either by adopting provisions of the various other schools of Islamic law itself or by subjecting some of its institutions to certain regulatory measures. ⁶⁴

Multifarious Reforms in Muslim Family Law:-

Tahir Mahmood has given the multifarious Reforms in Muslim Family law as follows:

I) Intra- Doctrinal Reform.
II) Extra- Doctrinal Reform.
III) Regulatory Reform. And
IV) Codification.

3.6.2 Intra- Doctrinal Reform

The Prophet of Islam is reported to have said: ‘Diversity of opinion among my people is a mercy from God.’ The social progress and legal reform in the contemporary Islam show that the Prophetic Statement had significant implications and was destined to create history. The flexibility of Islamic legal system, resulting from the plurality and divergence of juristic opinion within its broad framework, has achieved a tremendous success in keeping it alive through the chains of revolutionary changes in the socio-economic conditions. After Prophet Islam was divided into several Schools and various countries adhered to particular Schools of Islamic law, due to the locally dominant influence of their founders. In modern world conditions have changed. The state and the community realized the inconvenience of traditional Islamic law and therefore the comprehensive law of the Sharia comprising the totality of all legal opinion within its framework, is quite flexible and rich. Muslim in many countries have, therefore, now crossed the barriers of the officially adopted or otherwise dominant school of law. They have enacted codified laws on the basis of a selection of legal rules derived from more than a single school, or even from all the schools of Islamic law. Benefitting by this flexibility, The Islamic

⁶⁴Ibid. pp. 2, 3
People in many countries of the modern world have successfully reformed certain aspects of their traditional family law, without parting with its fundamental Principles.  

3.6.2.2 Extra- Doctrinal Reform.

In some exceptional cases, the reformers - in some countries, have gone beyond the limits of Islamic juristic opinion. Turkish law of marriage and divorce are the best examples; the same have been copied by the Muslim of Cyprus. Tunisia abolished bigamy and Pakistan Introduced orphaned grandchildren’s right to inheritance, and compulsory registration of marriage.

3.6.2.3 Regulatory Reform.

Important reforms have been introduced into the traditional family law, in many countries, through regulatory measures effected either by legislation or by administrative regulations. The checks imposed by such regulatory laws do not generally contravene any substantive or mandatory principles of Islamic law, yet they help eradicate the evil practice of misusing the traditional law. Reforms of this nature have been effected, apart from several Arab countries; in Pakistan, Indonesia, Malaysia, Brunei, Singapore and Ceylon.

3.6.2.4. Codification

Some countries have been codified Muslim personal law. For example; the Egyptian family Laws of 1920 and 1929, the Turkish Family (Marriage and Divorce) Law, the marriage Ordinance, 1959 of Algeria, the Dissolution of Muslim Marriage Act, 1939 of India and Pakistan, and the Muslim family Laws Ordinance, 1961 of Pakistan are all wholly based on the provisions newly introduced into the respective local forms of Islamic family law.

The spheres of reforms in family law are not identical in all the countries. See Table I which show the major aspects of Matrimonial law; age of marriage Islamic family law severally reformed in

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66 Ibid p 269
68 Ibid. p 269, 270
the various countries as represented by Tahir Mahnood\textsuperscript{69}. Though it needs updating it is useful for providing a general vision. Table I has been displayed at the end of thesis.

In \textit{Table II} displayed by Tahir Mahmood in his book Muslim law in India and Abroad:\textsuperscript{70} It shows the age of boys and girls for custody and Guardianship it has displayed in appendix of the present thesis.

Thus the reform of matrimonial law in Islamic world has been the major subject of reform in all the countries referred to above. Marriage-age, guardianship in marriage, polygamy, unilateral divorce, women’s right to dissolution of marriage, settlement of matrimonial disputes and legitimacy of children occupy prominent places in the statutory family law, newly enacted in most of these countries.

\textbf{3.6.3 Models of Family law- Church-State Relations Models}

Professor Donald Horowitz describes four models of explaining legal change: the evolutionist model, the utilitarian model, the social change model, and the internationalist model.

i. The evolutionist model is a macro-model which ascribes legal changes in socio-economic development.

ii. The utilitarian model is a micro-model that ascribes legal change to social efficiencies.

iii. The societal change model views legal change as naturally reflecting societal opinions and social structures.

iv. The internationalist model, also referred to as the instrumentalist model, sees certain leaders as intentionality causing legal change.\textsuperscript{71}

General analysis of models of Church-State relations and models of minority culture recognition. There is a relationship between certain models of church-state relations and level of recognition accorded to minority cultures within the state. There are five models of church-state relations exist; these are as follows:

\textsuperscript{69}Tahir Mahmood and Saif Mahmood\textit{Family Muslim Law in India and Abroad; Universal Law Pbulishing Co.} new Delhi- IndiaFirst Ed. 2012, Reprint 2013, P.290-91.

\textsuperscript{70}Ibid, P 298

\textsuperscript{71}Shimon Shetreetand Hiram E. Chodosh , \textit{Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse}, Oxford University Press New Delhi, 1\textsuperscript{st} Published 2015, pp.16-17.
1) The Theocratic Model.
2) The Absolute-Secular Model.
3) The separation of State and religion Model.
4) The Established Church Model.
5) The Acknowledged Religions Model

3.6.3.1. The Theocratic Model

It is religion-dominated model. It has single officially recognized religion, and forbid other religions.  

3.6.3.2 The absolute-Secular Model

It has prohibited religion in law. It is also called dictatorial Model.

3.6.3.3 The separation of church and State Model

In this model State can declare itself a secular state - for example France, Turkey, India and Post communist Russia and new adopted constitution of Nepal in 2015

3.6.3.4. The Established Church Model

In this model the state declares religion and church as being particularly sanctified by it. This can materialize through state financial support to the religion of its church, or through benefits provided to members of the religion. State allows freedom of religion. Example of this model is England, Northern Ireland, Denmark, Norway, Iceland, Finland, Sweden, Greece and Bulgaria. It gives preference to the state religion.

3.6.3.5. The Acknowledged Religions Model

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72 Ibid, pp.35-36.
73 Ibid. p 35.
74 Ibid.P.35.
75 Ibid. p 36 to 41
76 Shimon Shetreet and Hiram E. Chodosh. Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015 p 41, 42.
In this model, the country does not recognize one formal religion, and a formal national state church does not exist. This is also called religion-neutral model. This model adopted by Germany, Latvia and Hungary.77

3.6.3.6. Recognition of Minority Cultures Model

The recognition of minority cultures is partially dependent on the model of church-state relations that has been adopted by the state. The recognition of minority cultures can be analysed through five models of exemptions and privileges:

i) Privileges and exemptions which relieve direct conflicts between specific laws and religious tenets in cases where adherence to one requires disobedience to the other.

For instance, permitting citizens not to serve in the army, doctors not to perform certain operations (such as abortion), or to allow for exceptions to legislated days of rest, all on the basis of religion.

ii) Privileges and exemptions which relieve indirect conflicts in cases where the law creates an economic loss or social hardship upon those who follow certain religious or conscientious principles

An example of indirect conflict arises in fluoridation cases. Where individuals are religiously opposed to the use of any drugs, fluoridation of water supplies forces them to choose between their religion, and the expense and inconvenience of seeking a pure water supply.

iii) Relief from regulation of certain religiously or conscientiously motivated activities for instance, exemptions from zoning regulations for churches.

iv) Desirable exemptions from the discharge of legal duties, the performance of which would not necessarily create a conflict For example, tax exemptions for churches, including exemptions from income tax, property tax, estate and gift tax, and inheritance tax.

77 Ibid. P 42, 43, 44.
v) Privileges conferred through affirmative action taken by government to allow satisfaction of religious and spiritual needs under circumstances that, without such affirmative government action, would prevent religious fulfillment. For instance, providing worship and pastoral care in state hospitals.  

3.6.3.7 The Market Model

According to the market model, the liberal idea brings about situations of radicalization. The approach of the market model explains the result of the liberal approach. According to this model, the adjustment of religious groups to modernity that is the deviation from traditions reflects adjustment to market conditions.  

3.6.4. Important country and their models

3.6.4.1. Germany: It is the recognized religions model

Germany formally recognizes the catholic, Protestant, Anglican, Jewish, and Muslim religions as recognized religions. The recognized religions allowed to participate in public policy or spending of amount on particular scheme; how public media run or which minority faiths are considered dangerous sects. Those that are not recognized are not getting any assistance from the state.

*This Model is not suitable to Indian culture and latter and spirit of the Indian Constitution.*

3.6. 4.2. India: It is Democratic Liberal Model.

The philosophy underlying the Constitution of India is liberal, and is based on the liberal philosophy of democracy, equality and non-discrimination. This model protects individuals as individuals, for individuals comprise as state, and not groups. If protecting the individuals

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78 Shimon Shetreetand Hiram E. Chodosh , Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015, p 44, 45.
79 Ibid. P 58.
80 Ibid. P 45.
81 Ibid. P 48
82 Shimon Shetreetand Hiram E. Chodosh , Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015, P 49
requires protecting the groups they belong to, so be it, but these groups should not be extended protection merely due to the fact that they are groups.  

In colonial period the intentionality model came more into play with regard to the religious orientation of India’s personal laws. British administrators determined that colonial rule would be made most efficient were laws to be standardized: British laws for most matters, and uniform religious laws for personal matters, personal laws were divided into ‘Hindu’ and ‘Muslim’ personal laws, imposing on the Muslim populations a standardized Islamic code which replaced the diverse Muslim legal practices which had existed earlier. In other words, the standardized Islamic laws were applied primarily for political reasons, without consideration to the good of the population.

3.6.4.3 England: It has having the established Church Model

It recognizes multiple religions. It is democratic with regard to religion. It gives preference to state religion. In England, the recognized religion Anglicanism is accorded special treatment: for instance, the monarch must be Anglican in order to rule the kingdom, and cannot convert to a different religion. In the coronation Oath, the monarch pledges to maintain the Protestant Reformed Religion established by the law, and to be the ‘Defender of the Faith’, interpreted to mean the Protestant –Christian faith.

India has not accepted state religion as such. India has accepted democratic liberalism.

3.6.4.4 Turkey: It is known as aggressive secular model

Mustafa Kemal introduced this model: it is based on kemalism six ideological principles upon which Ataturk’s reform program was built: Secularism, republicanism, nationalism, populism, reformism, and etatism (statism). Ataturk introduced dramatic reforms. He introduced a European-modeled secular legal code which revamped laws affecting marriage, women, and family relations. This law inter alia outlawed polygamy and Muslim divorce by renunciation, and

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83 Ibid. p 49  
84 Ibid. 46  
85 Ibid p 41-42  
86 Shimon Shetreetand Hiram E. Chodosh . Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015, p.7, 45
introduced civil marriage. Secularism was achieved in other areas as well, for instance, by excluding Islam from any official role in Turkey, secularizing public education, and suppressing Islamic religious orders.  

This aggressive secular model is useful for passing Uniform Civil Code.

3.6.4.5. French Model: It is known as assimilations model

It disapproves of cultural differences, and that expects that its immigrants refrain from defining themselves as members of minority groups. It values inclusion in assimilations model countries is higher than the value of tolerance for others, and integration is often achieved through coerced suppression or absorption.  

Thus France’s secular character is drawn from the attitude of sameness. Hence there is no official ‘Muslim community’ in France; rather, Muslim identifying themselves as belonging to an ethnic, cultural, or religious minority are portrayed by the French as ‘casualties of the integration process’ and an attitude that works against the common good. It is suppressed minority model.

France and Turkey models are known as aggressive secular model. It gives more importance to the secularism and sameness. This model can be used in India for protecting human rights and gender justice.

3.6.4.6. Canada Model: It is the pluralist model

The Canadian Government actively recognizes and promotes the interests of cultural and religious minority groups and the principle of the ‘cultural mosaic’s an important national value of which Canadians are proud of. For instance, the Canadian Multiculturalism Act, 1988, states in its preamble that: ‘the Constitution of Canada recognizes the importance of preserving and enhancing the multicultural heritage of Canadians’. The 2006 Canadian Census recognized over 200 different ethnic origins within the country.

\[\text{Ibid, p 96.}\]
\[\text{Ibid, p 69.}\]
\[\text{Shimon Shetreetand Hiram E. Chodosh, Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015, p 70.}\]
This model can also be used for protecting multicultural heritage of India. Personal laws should change for protection of human right and gender justice.

3.6.4.7 United States of America: It is known as melting pot model.
In this model diverse cultural minorities are amalgamated, but not suppressed. This model differs from the assimilationist model in that rather than minorities adopting the majority identity, the majority is created through the fusion of many groups.90

This melting pot model is very much similar to Indian composite culture. It can be used for cultural practices; which are not violating human rights and gender justice.

3.6.4.8 Israel: It is pluralistic model.

Israel is a Jewish State. In 1948 this state came into existence. It recognizes all religions will treat equally. This system recognized freedom of all religious communities. This system confirmed the British and Ottoman structure of allowing each of the country’s recognized religious communities its own religious court system which applies and adjudicates personal law according to the religious law of each community.

In Israel today specific laws exist for each of the recognized Jewish, Muslim, Druze, and Christian communities. An excellent characteristic of the Israeli system is that it cultivates a cultural mosaic, encouraging religious and cultural freedom. However, cultural mosaics can have disintegrating tendencies, especially when philosophies of different cultural groups are opposed.

Hence, rather than fostering increasing self-identify as ‘Palestinian. Thus, one of the issues facing Israel is that any attempt to remove the modified-Ottoman system of different legal religious groups would be interpreted by many as an attempt to reduce the national-cultural identity of the Arab population. A weakness of the Israeli system is the right and status of women and non-recognition of certain religions. Many secular Israelis, whether Jewish or Arab, resent what they consider to be compulsory implementation of religious

90Ibid. p 70.
Law in important matters of personal law including marriage and divorce.\(^91\)

*Israel and India are following the same model in personal laws; but India has accepted democratic liberalism. Therefore Indian model is flexible and reformatory.*

### 3.6.4.9. Indonesian: It is social Change model

It is a combination of Islamic customary law, and indigenous customary norms. The Indonesian constitution emphasizes that Indonesia is ruled by the rule of law. Indonesian model is societal change model. It is Muslim majority country. Personal laws have been under the jurisdiction of the religious courts in this area for a long period of time. These personal laws include inheritance, marriage, divorce and pious endowments (waqaf)\(^92\)

In day- to- day life India is also following similar model like Indonesia.

### 3.6.4.10 Kenya - Religious model.

In Kenya, religious laws are recognized. In Kenya, Muslims make up only between fifteen and thirty per cent of the population of Kenya. They are governed by Islamic laws with regard to personal status. Personal status includes marriage, divorce, and inheritance. The religious courts are provided for in the constitution, on the basis of the internationalist model in order to serve the people.\(^93\) Under this model state has power to pass the law for the welfare of the people.

Indian model is more reformatory than Kenya. India has religious personal laws but those laws are going to adjudicate by secular court and not by religious court.

### 3.6.4.11 South Africa: It is Utilitarianism model.\(^94\)

South African experience with religious personal laws through the utilitarianism model lens. The Muslim community in South Africa has long governed portions of its personal laws through its own set of informal religious tribunals, which are not subject to review by the South African

\(^91\)Shimon Shetreetand Hiram E. Chodosh , Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1\(^{st}\) Published 2015 , p 112
\(^92\)Ibid. p 82
\(^93\) Ibid, p 83
\(^94\) Ibid. P 83
civil court system. This system has caused hardship to sections of the population. Consider a Muslim women who wishes to divorce: not only may she be unable to by way of the religious tribunals, but the South African civil courts may also not hear her case, as they might consider the underlying marriage to be invalid, having been consecrated outside of the South African Civil System. The response to this situation, the South African Law Reform Commission published Discussion Paper 101 in 2001 which contained a Draft Bill on Islamic Marriages, which includes provisions regarding the recognition of and dissolution of Muslim marriages in South Africa, the status and capacity of spouses in these marriages, custody of and access to minor children, maintenance, and proprietary consequences. But yet it has not been passed.

This model is not useful to Indian situation.

3.6.4.12Nepal: It is secular model

It was a Hindu state. Now it has become a secular federal state. Nepal is characterized by a plethora of ethnical minorities, with fifty-five ethnic/caste groups in the country. In addition to the importance of ethnic/caste groups, Nepal’s divorce range of religious and language groups play important political roles.

Protests and unrest stemmed from the belief by many ethnic groups that they were being discriminated against on the basis of ethnicity or caste or gender. The Dalits protested against caste-based discrimination, including caste-based untouchability (‘descent based discrimination’), in both the private and public realms. They also protested against violence against Dalit women and against regional discrimination, and for equal language rights.

In turn, the Madhesis complained of regional discrimination and their inability to receive citizenship. They demanded their own federal state with regional autonomy, proportional representation, equal access to government employment, affirmative action, and equal cultural and language rights.95 Thus at last Nepal a Hindu state became secular state.

95 Shimon Shetreetand Hiram E. Chodosh , Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015, p 88
From the analysis of theories and of the models of church and state relations, and the analysis of the attitude toward different cultures and religious or cultural groups in general, respect must be given to groups who maintain differences. This is based on the concept of freedom of choice and respect for culture. However, the respect for cultures in qualified by the principle that basic and recognition and consideration of their customs and the standards of conduct. These qualifications and considerations of their customs and the standards of conduct. These qualifications include respect of human rights, gender equality, monogamy of marriage, and refraining from customs which involve inflicting of bodily harm or deprivation of rights of members of the community that seek recognition. In the framework of protecting gender equality, the claim of community to exercise forced divorce without reasonable cause shall be rejected. Likewise, the deprivation of alimony and maintenance of divorced women or the restriction of the period of eligibility to such rights by the religious law must also be rejected.

3.6.4.5 Some Important Universal Model

Some important model of the world which has accepted are as follows:

3.6.4.5.1 Individualistic Model or Human Right model

According to Shimon Shetreet and Hiram E. Chodoshin theories of Multiculturalism the classical view of liberalism, which places individuals, and individual rights and freedom at its centre The purpose of the democratic liberal state is to protect individuals as individuals, for individuals comprise a state, and not groups. If protecting the individuals requires protecting the groups they belong to, so be it, but these groups should not be extended protection merely due to the fact that they are groups.

The justification of group right is that an individual’s cultural identity is inseparable from his personal liberty. It means protecting individual, the groups rights are require to protect within society. The objection to the right of the group is that of minorities within minorities. Since most cultural groups, especially illiberal ones, are patriarchal by nature, women within those groups tend to be discriminated against. Within a state, minority groups have less power than majority groups, and are relatively powerless to protect themselves, and therefore we want to protect them.
On the other hand, by giving rights to minorities within the minority groups, we are effectively weakening the group. This will result because providing protection to individuals will strengthen the minorities within the group vis-à-vis the group, necessarily weakening the group itself. This will counter-run to our original aim, of strengthening the group. The group rights should only be accorded so long as they advance individual liberties. Removing the focus from the individual and placing it on group, on an effort to solve this dilemma, is incoherent and does not truly solve the problem. The problem of minorities within minorities is truly a difficult one. How to solve is truly a difficult one. Therefore it can be solved with the principle of utility.

The group rights can protect only so long as the benefit to the individuals belonging to that group is greater than the harm caused to the individual whose freedom or right is infringed upon. It means the right of the members of groups to withdraw from the group, and also recognizes the right of the state to intervene in situations of violation of basic human rights.96

3.6.5.2 The recognition of Culture and Cultural rights in the European Union

The European Union (EU) has placed an emphasis on the recognition of culture and cultural rights. For the last decade and a half, countries interested in joining the EU have had to demonstrate that they, inter alia, have institutions sufficient to preserve human rights, have respect for and protect minorities, and that they accept the obligations and intent of the EU.97

3.6.6 Proposed Model for Uniform Civil Code in India

Indian model is liberal democratic model. It is not effective for social legislation. For passing social legislation aggressive secular model is best for preparing action plan and its execution.

3.6.6.1 Aggressive Secular Model

As per social problem is concern there are various currents prevail in society. Some are support to the proposed codification some are counter to the proposal and some cross currents are going to support or oppose on certain conditions. Therefore it will highly impossible to bring

96 Shimon Shetreet and Hiram E. Chodosh, Uniform Civil Code for India Proposed Blueprint for Scholarly Discourse, Oxford University Press New Delhi, 1st Published 2015, p 48 to 56
97 Ibid, p 48 to 56
consensus in the society. Therefore first pass the law there after the law lead public opinion. This model applied during Hindu law codification. The same method shall apply to passing UCC.

3.6.6.2 Issues before codification

Issues which are required to deal at the time of codification of UCC these are as follows:

a) Marriage
   i) Official marriage or traditional form of marriage, instead going to detail in this matter marriage shall register in the government office. Age of the spouses should fixed and strictly followed. Monogamy should mandatory.
   ii) Prohibited degree it should decide as per the medical science. At the same time the small tribe or microscopic caste after considering their problem some exceptions may provide for certain period.

b) Divorce

   Uniform substantial and procedural law should provide for all people irrespective of their community. Customary divorce shall declare illegal. Right of spouse in family property also consider at the time of divorce.

c) Judicial Separation

   Uniform law may provide for judicial separation.

d) Rule of Succession

   Uniform rule of succession shall applicable to male and female equal share should provide to man and woman. If the tribal people are concern some exception shall granted. If the tribal girl will marry to non-tribal person then the tribal girls succession should consider differently otherwise the tribal person may lose his daughter and property as well. Thus the tribal person and community will suffer total loss.
e) Testamentary Succession

Uniform law of testamentary succession shall pass. It may applicable to all community.

f) Adoption

Adoption is the highest quality of life of human civilization. It should not oppose on the basis of religion. Muslims and Christens are not having provision of adoption. Every community in India there is practice of adoption. Uniform law of adoption shall pass. Detail law of inter-country adoption shall pass as per international guidelines.

g) Child Custody

Child custody should give on the basis of best Interest of the child. Wife and Husband should treat as natural guardian. Gender just law should pass in this subject.

h) Children’s Rights

In UCC there shall be special provisions for the welfare of the child. Divorce rate has increased therefore special provisions should made for interest of child. New trend of live-in relation has emerged therefore illegitimate child will born. Therefore the concept of illegitimate child shall declare illegal.

i) Take best of all family laws of India; including tribal customary laws in Uniform Civil Code.

j) International conventions on family matters should consider and take essential part of it in UCC; so that it will become at par with international standard.

k) It should have extraterritorial jurisdiction; so that it will help to resolve dispute of private international law.

l) There shall be revision of family laws after every thirty years so that it will update according to the need of community.

3.6.6.3 How to implement?

First Mode: i) Frame the program and policy; ii) codify UCC; iii) keep it open for discussion;

iv) Get suggestions from public; v) finally pass the UCC. Implement it immediately.
**Second mode:** pass the UCC and make it optional for first two year and then make compulsory to all citizens.

**Third mode:** Pass the subject vise Acts, like marriage, divorce, succession, adoption, at initial and later on compile in code. This mode is more suitable in present situation.

**3.6.6.4 Need to Amend Constitution of India**

There is need to amend constitution for giving effect to UCC.

**First:** Article 13. Laws inconsistent with or in derogation of fundamental rights be void shall be made applicable to family laws. It should be made justiciable

**Second:** Abolition of discrimination against woman; a separate Article should provide in Right to Equality; like Article 17. Abolition of untouchability.

**Thirdly:** In division of power this subject of family should shift from concurrent list to Central list. It will impose responsibility over the center. The rule making power may assign to state with the prior approval of central Government.

Thus women should consider as citizen of India. Family is basic unit of society and nation. Every human being is living in family. Family is independent kingdom of the family members and Family is their own universe. The discriminatory and arbitrary provisions of family laws are creating Ramayana and Mahabharata in family life. There will not be gain but loss. Therefore family should administered according to gender just law; for welfare of the family in general and woman and children are in particular. It is possible in Uniform Civil Code.

There is insignificant need of financial budget; but need moral courage and national character. National aggressive model gives equal importance to Ideas and Action therefore it gives quack expected relief and change.

**3.7. Approaches towards Family Law as gathered from International Conventions, Charters, Declarations, Protocols, Guidelines etc.**
Thus the state and Religion both have failed to give gender justice and protection to human rights. They have failed to give justice to the matters. Gender just family laws are not passed. Therefore the international community came forward and passed several conventions and declarations to protect the human rights and to provide gender justice. These associations maintain equal distance to the religion and state and made provisions for just family laws in those conventions. Though the conventions by themselves may or maynot be enforceable by themselves they provide the beams of light to illuminate the way. They can guide the legislatures. They have backing of some international and national nongovernment organizations. Besides they too serve the judiciary to cut some new paths by way of interpretation.

After Second World War, World Community accepted Human Rights and Gender Justice in Public and Private Life.


The text says:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
To promote social progress and better standards of life in larger freedom.  

Thus international community set goal of the fundamental rights, gender justice and social welfare. International law and conventions also gave importance to the family as a natural and fundamental unit of society. The Provisions of family law made in international conventions are as follow:

3.7.2. Universal Declaration of Human Rights, 1948

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98Ian Brownlie and GuyS.Goodwin-Gill, Oxford University Press, 4th Edi. 2002 P.2
The United Nations Organization set a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedom and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 16, 25 and 26 of Universal declaration of Human rights, 1948 are directly related to family matters. Those are as follows:

**Article 16**

1. *Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to form a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

2. *Marriage shall be entered into only with the free and full consent of the intending spouses.*

3. *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

**Article 25**

1. *Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

2. *Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*

**Article 26**

1. *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and*
professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be giving to their children.99

Thus in above Articles rights of marriage, rights of husband and wife and right of children have been accepted. Right to education also accepted as human right. We see a enlarged view of family. The functions of the family go much beyond what was known for centuries earlier. There is a quantum jump in understanding the intricacies of a family. All these should be considered at academic level before coming up with uniform civil code.


Article 8- Right to respect for private and family life

1. Everyone has right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12- Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.100

99 Ian Brownlie and Guy S. Goodwin-Gill, Oxford University Press, 4th Ed. 2002 Pp.18 to 22
100 Ibid. 402 & 403
In this convention also given importance of family and marriage. It can help to the framing of UCC in India.

3.7.4. International Covenant on Civil and Political Rights, 1966

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right to men and women of marriageable age to marry and to form a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, Provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.\(^{101}\)

Under this convention a new set off novel rights related to the family front have been enunciated. It affirms that family needs the protection of society and State. It also takes necessary care on dissolution of marriage. It refers to registration after birth and name. Interestingly it provides that every child has a right to a nationality. May be very relevant in present day political turmoil. Our future family laws may have to take care of these problems.

\(^{101}\)Ian Brownlie and Guy S. Goodwin-Gill, Oxford University Press, 4th Ed. 2002 P. 189
3.7.5. International Convention on the elimination of all forms of Racial Discrimination, 1966

Article 5

Article 5 (d) (iv) The right to marriage and choice of spouse;
Article (d) (vi) The right to inherit;
Article 5 (e) (iii) The right to housing;

Thus in this article, States Parties undertake to prohibit and to eliminate racial discrimination in all forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law. It has given importance to family matters too. It will help a lot in framing UCC in Multicultural society of India.

3.7.6 American Declaration of Rights and Duties of Man, 1948

Article V

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article VI

Every Person has the right to establish a family, the basic element of society, and to receive protection there for.

Article VII

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Article IX

Every Person has the right to the inviolability of his home.

This declaration has given place to family life and family. This Declaration protect the Individual rights as a human right and bring principle of liberty and freedom in family life. It will certainly help to bring Principle of freedom and Justice in UCC.


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102 Ibid. Pp.163 & 164
103 Ian Brownlie and Guy S. Goodwin-Gill, Oxford University Press, 4th Edi. 2002 Pp.165 to 167
Article 17- rights of the family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The states parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 18 – Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19 – Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State. 104

This Convention also given importance to the family, child and gender justice. It has given importance of name and surname. It will certainly help to the UCC.


Article 16

104 Ian Brownlie and Guy S. Goodwin-Gill, Oxford University Press, 4th Edi. 2002 P 677
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality to men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.¹⁰⁵

Thus, this convention gives more stress to gender justice in all social field including family matters. It is a convention that looks forward to eliminate discrimination against women in all matters relating to marriage and family. As it refers to equality to men and women it strikes at

gender bias in some of our family laws. It is to be noted that some provisions of family laws as discussed in earlier chapters have escaped the constitutional axe though de facto in practice they were volatile of gender justice. The courts sometimes have come with an obiter. These conventions reinforce the need for law reform.


The States Parties to the American convention on Human Rights adopted this Additional Protocol the States Parties to the American convention on Human rights ‘Pact Dan Jose, Costa Rica,’ reaffirming the rights of family as under:

**Article 15- Right to the Formation and the Protection of Families**

1. *The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.*

2. *Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.*

3. *The States Parties hereby undertake to accord adequate protection to the family unit and in particular:*

   (a) *To provide special care and assistance to mothers during a reasonable period before and after childbirth;*

   (b) *To guarantee adequate nutrition for children at the nursing stage and during school attendance years;*

   (c) *To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;*

   (d) *To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.*

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106 Ibid. Pp. 693 & 698
Article 16- Rights of Children

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the state. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

This protocol has taken adequate care to protect the family and children. It will help to UCC. It will help to protect the children’s right in family law.


The Preamble says that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Article 9

1. States’ Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States’ parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child State Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the Person(s) concerned.

Article 21

States’ Parties that recognize and / or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to
ensure that the placement of the child in another country is carried out by competent authorities or organs.

Thus the child’s right to his family and adopted child’s right is protected. It will guide to the framers of UCC to include comprehensive rights of children in family law; which is very important in changing society. These conventions are enlarging the sphere of family law either in code or special legation.

3.7.11. Declaration on the Elimination of Violence against Women, 1993

This declaration accepted to recognizing the women’s rights on the basis of equality, security, liberty, integrity and dignity of all human being.

Article 1

For the purposes of this Declaration, the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking of women and forced prostitution;

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(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Thus this declaration condemned all forms of violence against women even in family life too. It will help to protect the right of women against domestic violence. India has already progressed in this path through new legislation such as Domestic Violence Act.

3.7.12. Inter-American convention on the prevention, Punishment, and Eradication of violence against Women, 1994

Chapter I – Definition and Scope of Application

Article 1
For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

Article 2
Violence against women shall be understood to include physical, sexual and psychological violence:

(a) That occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the women, including, among others, rape, battery and sexual abuse;

(b) That occurs in the community and is perpetrated by a person, including, among others, rape, sexual abuse, torture, trafficking in person, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

(c) That is perpetrated or condoned by the state or its agents regardless of where it occurs.

Chapter II – Rights Protected

Article 3
Every women has the right to be free from violence in both the public and private spheres.

Article 4
Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others:

(e). the rights to have the inherent dignity of her person respected and her family protected;

Article 6

The right of every woman to be free from violence includes, among others:

(a) The right of women to be free from all forms of discrimination; and
(b) The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of Inferiority or subordination.

Thus, this convention tried its level best to eradication of violence against women. It has given importance of sexual violence too. It will help to UCC to include comprehensivedomestic violence and protect woman from domestic violence.

3.7.13. Declaration on the human rights of Individuals who are not Nationals of the Country in which they live, 1985¹¹⁰

Article 5

Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the state in which they are present, in particular the following:

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(d) The right to choose a spouse, to marry, to form a family;

4. Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien.

This is interesting declaration regarding family especially as it concerns individuals who are not nations.


Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human rights and international human rights law.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political economic, social and cultural life of the State.

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual fights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or their cultural values or ethnic identities.

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(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

Article 8 Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 33
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34
Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 43
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Thus in this draft on the rights of Indigenous people take maximum care to protect their all family as well as cultural rights and it gives gender justice. It will help to the UCC to take appropriate provision for the protection of Tribal People.
3.7.15. Cairo Declaration on Human Rights in Islam, 1990

Article 1
(a) All human being from one family whose members are united by submission to god and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, color, language, sex, religious belief, Political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path of human perfection.
(b) All human beings are God’s subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.

Article 5
(a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, color or nationality shall prevent them from enjoying this right.
(b) Society and the state shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

Article 6
(a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.
(b) The husband is responsible for the support and welfare of the family.

Article 7
As of the moment of birth, every child has rights due from the parents, Society and the State to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care.

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(a) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari‘ah.

(b) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the shari‘ah

Article 8
Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.

Article 25
The Islamic Shari‘ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

Thus Cairo Declaration on human rights in Islam has accepted family rights are human rights it considered right of the children and earning right of the women. Earning right of the woman can include in UCC. It will help to financial empowerment of women in family. It will help to women to become economically independent.

3.7.16. Arab Charter on Human Rights, 1994

Article 17 Privacy shall be inviolable and any infringement thereof shall constitute an offence. This privacy includes private family affairs, the inviolability of the home and the confidentiality of correspondence and other private means of communication.

Article 38
(a) The family is the basic unit of society, whose protection it shall enjoy.

(b) The State undertakes to provide outstanding care and special protection for the family, mothers, children and the aged.

This Arab Charter on human rights has given due importance to the family it has taken care of children and elderly persons but gender justice has not mentioned. This declaration will help to

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protect the rights of aged person in UCC. Now a days elderly persons problems are becoming serious. It should deal in UCC.


Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 29

Individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect, his parents at all times, to maintain them in case of need;

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African charter of human rights have given due importance to the family. It protect the right of the all family members. This is the charter of third world country. The third world country’s Problems are similar in nature. Therefore, these provisions of family are certainly help to the framing of UCC in India.


Article 10- protection of Privacy

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

Article 18- Protection of the Family

1. The family shall be the natural unit and basis of society it shall enjoy the protection and support of the State for its establishment and development.

2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

3. No child shall be deprived of maintenance by reference to the parents’ marital status.

Article 19- Parent Care and Protection

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child

2. Every child who has separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.

3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the person or Persons in whose respect it is made.

4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

Article 20 – Parental Responsibility

1. Parents or other persons responsible for the child shall have the Primary responsibility of the upbringing and development the child and shall have the duty:
   (a) To secure that the best interests of the child are their basic concern at all times;
   (b) To secure, within their abilities and financial capacities, conditions of living necessary to the child’s development; and
   (c) To ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures;
   (a) To assist parents and other persons responsible for the child and in case of need provide material assistance and support programmers particularly with regard to nutrition, health, education, clothing and housing;
   (b) To assist parents and others responsible for the child in the performance of child-rearing and ensure the development of working parents are provided with care services and facilities.

Article 24- Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:
   (a) Establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information. that the adoption is permissible in view of
the child’s status concerning sons concerned have given their informed consent to the adoption on the basis of appropriate counseling;

(b) Recognize that inter-country adoption in those States who have ratified or adhered to the International convention on the Rights of the Child or this Charter may, as the last resort, be considered as an alternative means of a child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be care for in the child’s country of origin;

(c) Ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) Promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements, and Endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) Establish a machinery to monitor the well-being of the adopted child.

Article 25- Separation from Parents

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance.

2. States parties to the present Charter:

(a) Shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could, among others, foster placement, or placement in suitable institutions for the care of children;

(b) Shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s up-bringing and to the child’s ethnic, religious or linguistic background.

African charter on the rights and welfare of the child is comprehensively covered children’s right in general and right in family in particular. It will help to the neglected part of family law of the world in general and family law of India in particular. Thus It will definitely help to UCC to protect the children’s right in family.


Article 3- Right to Dignity
1. Every women shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.
2. Every women shall have the right to respect as a person and to the free development of her personality.
3. States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.
4. States Parties shall adopt and implement appropriate measures to ensure the protection of every women’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

Article 4- The rights to life, Integrity and Security of the Person
1. Every women shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.
2. States parties shall take appropriate and effective measures to:
   
   (a) Enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public.

116 Human rights in international law, Council of Europe Publishing Universal Law Publishing Co. Pvt. Ltd Delhi, 3rd edition, First Indian Reprint 2009, pp.603 to 613
Article 6- Marriage
States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

a. No marriage shall take place without the free and full consent of both parties
b. The minimum age of marriage for women shall be 18 years;
c. Monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.
d. Every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognized;
e. The husband and wife shall, by mutual agreement, choose their matrimonial regime and place of residence;
f. A married women shall have the right to retain her maiden name, to use it as she pleases, jointly or separately with her husband's surname;
g. A woman shall have the right to retain her nationality or to acquire the nationality of her husband;
h. A women and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests;
i. A woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children;
j. During her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.

Article 7- Separation, Divorce and Annulment of Marriage
States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

a. Separation, divorce or annulment of a marriage shall be effected by judicial order;
b. Women and men shall have the same rights to seek separation, divorce or annulment of a marriage;

c. In case of separation, divorce or annulment or marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;

d. In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 14 – Health and reproductive rights

1. States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

a. The right to control their fertility;

b. The right to decide whether to have children, the number of children and the spacing of children;

c. The right to choose any method of contraception;

d. The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

e. The right to be informed on one’s health status and on the health status of one’s partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices;

f. The right to have family planning education.

2. States Parties shall appropriatemeasures to:

a. Provide adequate, affordable and accessible health services, including information, education and communication programmers to women especially those in rural areas;

b. Establish and strengthen exiting pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;

b. Protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.
Article 16 – right to adequate Housing

Women shall have right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, Access to adequate housing.

Article 20 – Widows’ rights

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provision:

a. That widows are not subjected to inhuman, humiliating or degrading treatment;

b. That a widow shall automatically become the guardian and custodian of her children, after the death of her husband, unless this is contrary to the interests and the welfare of the children;

c. That a widow shall have the right to remarry, and in that even, to marry the person of her choice

Article 21 – right to inheritance

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right of the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents’ properties.

Thus in this Protocol to the African Charter on the Rights of Women; Human rights as well as women rights are fully protected. This is the bright charter in the women’s right. It can guide to the world for protection of woman’s right in family laws in general and it certainly helps to the UCC in particular.

3.7.20. Copenhagen Declaration on Social Development, 1995 ¹¹⁷

1. For the first time in history, at the invitation of the United Nations, we gather as Heads of State and Government gathered to recognize the significance of social development and human well-being for all and give to these goals the highest priority both now and into the twenty-first century.

3. We acknowledge that our societies must respond more effectively to the material and spiritual needs of individuals, their families and the communities in which they live throughout our diverse countries and regions. We must do so not only as a matter of urgency but also as a matter of sustained and unshakeable commitments through the years ahead.

25. We heads of State and government are committed to a political, economic, ethical and spiritual vision for social development that is based on human dignity, human rights, equality, respect, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people. Accordingly, we will give the highest priority in national, regional and international policies an action to the promotion of social progress, justice and the betterment of the human condition, based on full participation by all.

26. To this end, we will create a framework for action to:

(h) Recognize the family as the basic unit of society, and acknowledge that it plays a key role in social development and as such should be strengthened, with attention to the rights, capabilities and responsibilities of its members. In different cultural, political and social systems various forms of family exist. It is entitled to receive comprehensive protection and support;

(j) Promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all, including the right to development, promote the effective exercise of rights and the discharge of responsibilities at all levels of society; promote equality and equity between women and men; protect the rights of children and youth; and promote the strengthening of social integration and civil society;

(m) Recognize and support indigenous people in their pursuit of economic and social development, with full respect for their identity, traditions, forms of social organization and cultural values.
Thus the Copenhagen Declaration on Social Development, 1995, also gives importance to family life and family development. It also gives importance to gender justice. It gives importance to child and youth development. It also gives importance to the development of indigenous people. It has given importance to overall development of mankind. Changing world reflection has been found in this declaration. It will certainly help the UCC to accommodate new changes in family law.


Guiding principles on International displacement, 1997, has taken appropriate precaution of family matters. It has given place to family in these principles. It postulates that every human being has a right to respect of his or her family life. It refers to families that are separated by displacement, an unfortunate development of the modern world. These are the principles that need to be considered in legislation related to family law.


Adopted by General Assembly Resolution AIRES/61/106 OF 13 December 2006

Article 1 – Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedom by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The convention on the rights of persons with Disabilities has given importance of overall development of the persons with disabilities. In this convention right for privacy and right for home and the family is given due importance. Due importance to the Right for women with disabilities and Children with disabilities are given. Thus right to equality and gender justice is

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given to all persons of disabilities. This will certainly help UCC to protect the rights of disabled persons in Family. The convention is very elaborate.

3.7.23. Private International Law

Private International law is not a law as such. It is also known as conflict of law. Under this head the dispute of family laws are resolved with the help of family law of the Plaintiff or the person where case has been filed etc. In these cases the husband and wife are remarried under the foreign law or they lived in foreign country. In foreign marriages conflict of law situation arises, then private international laws is applied at the time of deciding such cases. Court considers family law of the plaintiff or defendant or the family law of the nation where the suite has been filed or the best interest of the child and relief will be granted to depute.

There are Hague Conventions on Private International Law which made continuous endeavour to obtain uniform rules of conflict of laws


The convention deals with family maintenance.


Article 1

The objects of the present Convention are-

(a) To establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect to his or her fundamental rights as recognized in international law;

(b) To establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of or trafficking in child;
(c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention.\textsuperscript{119}

Thus these conventions can guide to frame the suitable legislation in the respective field to Indian legislators.

Thus international approaches towards family laws are based on principle of equality and gender justice. Children’s right in family laws are based upon best interest of child. Human rights are the basis of these conventions. Convention on the rights of persons with disabilities has recognized family rights of persons of disabilities. World approach to family law is humanitarian. India can use it at the time of framing uniform civil code.

3.8. Legislation Relevant to Uniform Civil Code

Law is never static. Since human society constantly undergoes changes because of social-economic pressures, law must also change keeping pace with social changes. The system of law under which people live should be responsive to the social needs of the present times and should reflect current values and philosophies of the society. Otherwise, dichotomy will arise between law and society which will adversely affect social stability and progress. Even when law has been codified, there is no finality about law.

As Maine points out the sign of a progressive human society is whether law keeps on growing after its codification. A country with codified law needs to look into the statutes from time to time, revise them and re-enact them in order to bring them up-to-date. After codification, the function of the courts undergoes some change. It becomes less creative. Instead of developing the law to embrace new relationships or new set of facts, the courts confine themselves by and large to the narrower task of interpreting parliamentary language. The early British codifiers of law for India had envisaged that the code being enacted would need constant periodical revision.\textsuperscript{120}

\textsuperscript{119} V.C. Govindaraja, The Conflict of Law in India Inter-Territorial and Inter-Personal Conflict, Oxford University Press 2011, P. 349.
\textsuperscript{120} M.P. Jain, Outlines of Indian Legal & Constitutional History Lexis Nexis Butterworth Wadhwa Nagpur, Sixth Edition 2006 P 501
3.8.1 Section 125, 127 of Criminal Procedure Code, 1973

Section 125, 127 are for maintenance to the wife, Children and parents. These sections are not new. In old Criminal Procedure Code 1898 were corresponding sections were 488 and 489. Section 488 of Criminal Procedure Code 1898 the relevant portion is as follows;

Section 488- Order for maintenance of wives and Children:-

(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding [one hundred] rupees on the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.  

Section 125 of Code of Criminal Procedure, 1973 the relevant portion is as follows:

Section 125- order for maintenance of Wives, Children and parents.- (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) His father or mother, unable to maintain himself or herself.

121 Government of India Ministry of Law, The unreplead Central Acts with Cronological Table and Index, Volume IV from 1898 to 1907, both inclusive Second Edition 1950 p 207-208
Explanation- (b) “wife” includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

As far as changes in these legal provisions are concerned, the former law of section 488 of 1898 it was used to only destitute wife or the wife who has not been taken by her husband. In the said law divorced women have not been included as well as parents are also not included. Therefore this legal provision was applicable to Hindus as well as Muslims and other persons without consideration of their religion or caste or community.

Section 125 is applicable to the wives, children and parents. Its scope is wider than previous code. It includes new class that is parents. Another group is the Divorced Wife/ or Wives. It has created Shaha Banu controversy in the year 1985. Thus the progressive law became debatable issue in India. Lastly Government of India passed a separate Legislation for Muslim Community namely: The Muslim Women (Protection of Rights on Divorce) Act, 1986.

Indian Parliament at first time passed Legislation in Muslim personal law. The Muslim Community accepted the law making authority of Indian parliament in their personal law. Indian Parliament has further widen the scope of maintenance of the divorced wife which we do not findin Section 125 of Cr.P.C. 1973.

Section 4 - Order for payment of maintenance: of The Muslim Women (Protection of Rights on Divorce) Act, 1986. It gives power to the Court to pass an order against the husband if the husband is not in a position to pay maintenance to his divorced wife then the court may pass order against the Relative of her husband if they are not in a position to pay the maintenance to the divorced wife of their relative the Court may direct to the State Wakf Board establish under section 9 of the Wakf Act, 1954 (29 of 1954).

Thus in section 125 of Cr.P.C. 1973 -If the husband is not in position to maintain the wife she is nothaving any remedy to get the maintenance. But the Muslim Women (Protection of Right, etc) Act 1986, provides wide remedy to wife if the husband will fail to pay the maintenance then

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the relatives of matrimonial or natal family and if they are also poor then the State Wakf Board. It means legally she will get maintenance from either of the source.

Thus Indian Parliament and Government have passed very good law in the field of maintenance. Parliament should think to make necessary changes in the Section 125 of Cr.P.C. 1974 for providing maintenance to the really poor wife who cannot get maintenance from Matrimonial or natal family. Then the main object of Act to stop the destitution and vagrancy of the divorced wife. Then the section 125 of Cr. P.C. will become real humanitarian and real piece of Social welfare legislation.

Section 127 Of Cr.P.C. of 1973 it is a alteration in allowance this section is similar to Section 489 of old Code of 1898. According to the changing circumstances the allowance may change accordingly the concerned party can move application to the court, the court may pass appropriate order.

3.8.2. The Special Marriage Act, 1954

This Act has completed more than 60 years since 1954 it is enforceable all over India as well as all citizens of India. It is also applicable to resolving to matrimonial matters of Private International law. It can be used to settle dispute in between Inter religious as well as Inter-caste marriages.

This Act originally enacted in 1872. It provided for a form of marriage for persons who did not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina Religion. The Act provided for a civil Marriage before a Register of Marriages between two persons neither of whom professed any of the above-mentioned religions. The Act insisted on monogamy as neither party to the marriage could have a husband or wife living. The minimum age for marriage was fixed at 18 years for male and 14 years for female. If any of the parties was below 21, he or she must have obtained the consent of his or her guardian. The marriage can be dissolved under Indian divorce Act, 1869. The Property of a person marrying under the Act was to devolve according to the Indian Succession Act, 1865. The Special Marriage Act, 1954 is an

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important landmark in the secularization of the laws in India. While introducing the bill in the Lok Sabha the Hon’ble Mr.C.C.Biswas stated: “It is an attempt to lay down a uniform territorial law of marriage for the whole of India.”

The Special Marriage Act, 1954 serves us in two different ways. To a person who wishes to marry within his or her own religious community it is available as an alternative to his or her religion-based personal laws the persons concerned. On the other hand to a person who desires a marital relationship outside his or her religious community, the Act furnishes a law under which he or she can freely fulfill the desire, irrespective of the restrictions on such a marriage under his or her personal law. Thus both intra-communal as well as inter-communal marriages are possible under the Act. This is so since the religion of the parties intending to marry is absolutely irrelevant in regard to the application of the Act. The law of marriage and divorce contained in the Act is secular law enacted by the legislature of secular India.

As such it need not and in fact must not, take notice for any purpose whatsoever of the religious affiliations of those who avail its provisions. The Act was put on the statute book in the background and light of some of the newly adopted constitutional ideals, viz., secularism, equality before law, equal protection of laws and uniformity in the civil laws. The marriage did not take place when the parties are in prohibited degree of relationship. This act is applicable to the Indian citizens who are residing outside India. Thus this Act is having extra-territorial jurisdiction. Now-a-days this act is very much helpful to resolve conflict of personal laws and to resolve conflict of Private International laws.

3.8.3 Dowry Prohibition Act 1961

Dowry custom is social evil. Its origin is in the Kanyandaan; which means literally, the gift of a virgin. It is recommended in the Shastras that “she” be duly adorned with jewellery and then be gifted away. The meritorious act of danda, however, remained incomplete till the receiver was given dakshina. So when the bridegroom or Varna was given something in cash or kind, along with Kayadaan, it was Varadakshina. This act was voluntary in nature without any coercive

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overtones. The implied ideology governing dowry was that it was a means of pre-mortem inheritance for the girl from her parents’ wealth.

Under the mitakshra system, a woman was not entitled to a share in the parental wealth, and the system of bestowing the daughter with handsome dowry seemed to have been introduced to overcome this restriction. With increasing industrialization breeding the desire to make fast money- daksina- originally intended to be a token- gained all characteristics of a market transaction. The custom which had its origin is sublime sentiments has now become a curse for the whole society.127

There was demand from the people to pass the law prohibiting dowry. In response to this demand the dowry prohibition Act, 1961 was passed by the Parliament. It is very short Act. It consists of 10 sections. Its long title is An Act to prohibit the giving or taking of dowry. Section 2 of the Act gives definition of dowry. It is applicable to all persons irrespective of their religion Community and caste.

Section 3 of the Act made provision of penalty for giving or taking dowry Section 4 penalty for demand of dowry. Section 5 it has Ban on advertisement. Section 5. Agreement for giving or taking dowry to be void. Section 7. Cognizance of offences. Section 8 the offences to be cognizable as well as non-compoundable thus the Act has been enforced since last 65 years but there is no reduction of offences.

Day by day offences are increasing. The rate of dowry is also increased. It is found in all sections as well as communities. It has become very serious challenge to the social system. Erstwhile Prime Minister Pandit Jawaharlal Nehru has said, ” Legislation cannot by itself normally solve deep-rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to be given a certain shape”. The success or failure of the act is depended upon response of the people to the implementation of the Act. This problem is faced by almost all the families either directly or indirectly. Therefore everybody should be required to give positive response at collectively and at individual level. Whatever its

failure the peace of social legislation is very good. It is step forward towards Uniform Civil Code.

3.8.4 The Family Court Act, 1984
The main object of the act is an Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

The court is going to be established at metro or large cities whose population will be more than one million population. The person who is eligible to be appointed to District Court can be appointed as judge of family court. In the appointment of Family court Judge; women are given preference. The principal Judge of family court may work as an administrative Judge.

Family Court is a Tribunal. Section 7 gives the jurisdiction of Family Court. The matters pertaining to marital relationship, legitimacy, maintenance, guardianship or custody of minor. The procedure of family court is also laid out. According to section 6 Counselors, are going to be appointed for resolving case before trial. If conciliation fails, then matter will be decided by the court. Advocates are not allowed to practice before the family Court. With the permission of Court advocate can appear before the court. Procedural laws are not going to be followed strictly. Judge is given liberty to follow the suitable procedure. Thus family courts are giving speedy justice to the needy people. There is no court fee in the family court. Thus Family Court Act 1984 in reality is secular law. There are demands for establishment of family court at every district level. It suggests its success.

3.8.5 The Protection of Women from Domestic Violence Act, 2005
Domestic violence is undoubtedly a serious interference with the human rights. The Vienna Accord of 1994 and the Beijing Declaration and platform for Action (1995) have acknowledged that domestic violence is an important human rights issue. The United Nations Committee on Woman (CEWAW) in its General Recommendation No.XII (1989) has recommended that State Parties should act to protect women against violence of any kind especially that occurring within the family. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband
or his relatives, it is an offence under section 498A of Indian Penal Code. The civil law does not provide any remedy for such act of cruelty. Keeping in view the rights guaranteed under Arts. 14, 15 and 21 of the Constitution of India the Protection of Women from Domestic Violence Act 2005 was passed to implement the following objectives amongst others.

(i) It covers those women who are or have been in relationship with the abuser where both parties live together in a shared household and are reflected by consanguinity, marriage or adoption, besides, family members living together as a joint family are included. Women who are sisters, widows, mothers, single women living with the abuser are entitled to legal protection under this Act.

(ii) The Expression “domestic Violence” would include not only actual abuse or threat but also harassment by way of unlawful demand for dowry.

(iii) The Act would provide roof rights of women to secure housing. It also provides for the right of women to reside in her matrimonial home or shared household.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person.

(v) It provides for appointment of Protection Officers. 128

This Act is very good step for protecting rights of the woman in a family. It is secular Act applicable to all sections of the society. The State is required to appoint the protection officers. They should give proper training.

3.8.6 Other Laws:

The Foreign Marriage Act, 1969 this Act provides Procedure for Foreign marriages Indian citizens. It is also supporting to bring uniformity in foreign marriages. It is procedural law. The Maintenance and Welfare of Parents and Senior Citizens Act 2007 gives speedy justice to the senior Citizens. It is uniformly applicable to all citizens. The prohibition of Child Marriage Act 2006 it repealed earlier Act. The penal provisions have been provided for in this Act. This Act is also applicable to all citizens of India. Thus three organs of government playing very important role to bring changes in family laws according to Article 44 of Indian Constitution.

3.9. Conclusion

Thus Indian enacted laws in family matter have created good background for framing uniform civil code. The International policy for family law and Indian public policy of family laws are supportive to one another. These policies are very much interested to protect the family and accept gender justice. World is ready to accept the best interest of child in family matters. India has also accepted the same.

After looking at Indian Constitution and World Human Right approach it is decided to proceed to next chapter IV on case law.