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Statement of the Problem

To India goes the distinction of being a home for all the major religions of the world. It is for this reason that it is often described as ‘Land of Religious Toleration’. Its historic past dating back over 4000 years gives ample testimony to this claim. Many of the ancient Indian sacred texts and works on polity are outstanding documents on religious toleration. Indeed, most of the ancient Indian rulers followed a unique policy of Medieval Period was for more enlightened that Muslim rule elsewhere. A noteworthy effect of their rule was the emergence of a new synthesis of Hindu and Muslim doctrines. With the establishment of British rule, India came in contact with secular ideas and thoughts of the west. Attempts were made to harmonise western doctrines and concepts with those of India. The liberal and democratic movement of the west strengthened Indian secular trends. Religious freedom clauses of many western countries also considerably influenced Indian thinking. The Indian Constitution passed in 1950 guaranteed to every person subject to necessary limitations the right to profess, practise and propagate religion. It must, however, be stressed here that although the theme that underlines the constitutional provisions, takes into account the
western ideas, it is essentially Indian, being the product of her history and tradition.¹

The Constitution of India guarantees freedom of conscience, Freedom to profess, practise and propagate religion, however is subjected to certain limitations imposed by the constitution. The judiciary has made further effort to curtail by laying down principle that the constitution protects only the essential aspects of religious freedom. India, being a secular country, allows the existence of various religion and does not promote any particular religion. The question of inviability of personal laws was discussed by the Constituent Assembly twice, first when the fundamental rights in Part III relating to personal laws, was incorporated in the Constitution and secondly, at the time when Article 44 contained in Part IV of the Constitution to secure Uniform Civil Code was debated. The Muslim members of the Constituent Assembly vehemently opposed the move but the Constituent Assembly with equal vehemence refused to accept the contention that Muslim Personal Law is immutable and inseparable law in Islamic religion.

Dr. Ambedkar refused to accept the immutability of the personal laws and held that state could change personal laws as a measure of social welfare and reform. To ensure the religious, linguistic, cultural and educational identity the Constitution of
India contains special provisions for the protection of Indian minorities. These freedoms assure that Muslims who are the largest minority in India do enjoy these accordingly and there shall be no intervention or discriminates on in the name of prohibition, reformation, abrogation or change in their personal laws which is religious and cultural symbols of the Muslim Indians. The scope of religious freedom is not left unlimited as it does not immunise these religious laws from legislation which run counter to public order, morality, social welfare and social interest.

It is stated that for social welfare reason, the state has the authority to enact a law under Article 25(11) and to formulate ‘Uniform Civil Code’ under Article 44 throughout the territory of India. It is to be remembered that when Article 44 was being put forth for debate in the Constituent Assembly the Chairman of the Drafting Committee Dr. B.R. Ambedkar:

"The Muslims unnecessarily read too much in Article 44."

He further declared that:

"No government can exercise the legislative power in such a manner as to provoke Muslim community to rise in rebellion, to think, it would be a mad government if it did so."^2

The Supreme Court judgement of April, 1985 in Shah Bano case was widely, almost universally regarded in the country as a
landmark judgement and an earth shaking event. Unfortunately the controversy that followed the judgement resulted in more heat than light, and displayed ignorance, prejudice and fanaticism rather than a rational argument. The Supreme Court judgement in Shah Bano case and the subsequent debate over it have divided Hindus and Muslims of the country so sharply as no other issue ever did since independence. An overwhelming majority of the Muslims of India protested against the decision of Supreme Court of India and convinced the government that the judgement was wrong hence it should be corrected by the legislation. Apart from this, the Supreme Court had in 1979 and 1980 ruled that the amount paid by the way of 'Mehr', which customed required the husband to settle on the wife at the time of marriage, was no substitute for maintenance. But it is worth noting that the Supreme Court judgement in these two cases did not settle much controversy amongst the Muslims in India. The reason seems to be that in Bai Tahira and Fazlun Bi cases the Supreme Court had only passed the judgement relating to the maintenance of Muslim divorcee but in Shah Bano case in addition to the maintenance of the Muslim divorcee the Court also directed the government of India to look into the desirability of enacting a Uniform Civil Code throughout the territory of India. When in 1949 Article 44 of the constitution was enacted directing that "The state shall
endeavour to secure for citizens a Uniform Civil Code throughout the territory of India", we had already Uniform Codes of laws covering almost every aspect of legal relationship excepting only those matters in which we were governed by the various personal laws. The laws of Contract, the Transfer of Property, the sale of Goods, the Partnership, the Companies and Negotiable Instruments, Civil Procedure, Arbitration and Limitation, and a host of other statutory laws were Uniform Code applying to all throughout the country. As Ambedkar observed during the debates in the Constituent Assembly on the draft of Article 35 (subsequently enacted as Article 44), the only province which was not covered by any Uniform Civil Code was marriage and succession and it was the intention of those who enacted Article 44 as part of the constitution to bring about that change. Infact, Article 44 could have only the different personal laws in view, the rest of the field having mostly, if not wholly been covered by Uniform Civil Codes. the article, therefore, appears to be a demonstration of the conviction on the part of its framers that the existence of the different religion oriented personal laws of ours were not in tune with the egalitarian philosophy of our new National Charter and required to be replaced by a set of general and territorial laws contained in a Uniform Civil Code.

Mr. Justice Gajendra Gadkar, former Chief Justice of India has observed' that in any event the non-implementation of the
provision contained in Article 44 amounts to a great failure of democracy and the sooner we take suitable actions in that behalf, the better and that "In the process of evolving a new Secular Social order a Common Civil Code is a must".

Justice Hedge, a former judge of the Supreme Court has also observed that "Religion oriented personal laws were a concept of medieval times alien to modern societies which are secular as well as cosmopolitan" and that "so long as our laws are religion oriented we can hardly build up a homogenous nation.

A unanimous five judge Bench of the Supreme Court has also regretted in Shah Bano Begum that "Article 44 of our constitution has remained a dead letter" and that "a begining has to be made if the constitution has to be any meaning". In yet a latter decision in Jordan Diengdeh, a two Judge Bench of the Supreme Court has reiterated that "the time has come for the intervention of the legislature in there matters to provide for a uniform code of marriage and divorce and to provide by law for a way but of the unhappy situations in which the couples like the present have found themselves." The Court directed that a copy of this order may be forwarded to the Ministry of Law and Justice for early action as they deem fit to take.

In a latter decision in Sarla Mudgal Justice Kuldeep Singh observed:
"One words have long will it take for the government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India. The traditional Hindu Law-Personal Law of Hindu-governing inheritance, succession and marriage was given a go-by as back as 1955-56 by codifying the same. There is no justification whatever in delaying in definitely the introduction of a Uniform personal law in the Country."

He further clarified that:

"Article 44 is based that there is no necessary connection between religion and personal Law in a civilised society. Article 25 guarantees religion freedom where as Article 44 seeks to divest religion from social relation and personal law, marriage, succession and like matter of a secular character can not be brought within the guarantee enshrined under Articles 25,26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all the sacremental origin, in the same manner as in the case of the Muslims or the Christians."

After criticising the successive governments for not implementing the constitutional mandate under Article 44 of the
constitution of India he directed the Government of India through Secretary Ministry of Law and Justice to file an affidavit of a responsible officer in this court by August 1996 indicating therein the steps taken and efforts made by the Government of India towards securing a "Uniform Civil Code" for the citizens of India.

It is however, true that five members\textsuperscript{12} of the Constituent Assembly, all of whom were Muslims strongly expressed\textsuperscript{13} themselves against this article and moved without success amendments to this Article to secure exclusion of all Personal Laws from its operation and one member unhesitatingly branded this article as "tyrannous provision"\textsuperscript{14} and "tyrannous measure"\textsuperscript{15}. A modern legal scholar has also very strongly doubted\textsuperscript{16} any correlationship between Uniform Civil Code and national solidarity and has gone to the length of holding that "a logical probability appears to be that code in question will cause dissatisfaction and disintegration than serve as a common umbrella to promote homogenity and national solidarity.\textsuperscript{17} The learned scholar has relied, among other on Fyzee\textsuperscript{18} and has also quoted with approval a progressive Muslim lady law-person who has been quiet categorical in declaring that it is

\begin{quote}
"naive to imagine that such a code would cut down the number of communal riots or lead to integration; it would serve no purpose except to divide us."
\end{quote}
Family relations in India are governed by religious personal laws. Personal laws are often referred to as Civil laws but in India they are more correctly termed religious personal laws and distinguished from other civil laws. The four major religious communities: Hindu, Muslim, Christian and Parsi, each have their Personal Laws. They are governed by their respective religious laws in matters of marriage, divorce, succession, adoption, guardianship and maintenance. In the laws of all these communities, women have less right than men in corresponding situations that in itself is not surprising since religion in every part of the world discriminate against women. Religious personal laws are reputedly on religious rules and doctrines.\(^{19a}\)

It is sometimes alleged that the personal laws are discriminatory in nature and the Muslim Personal Law is more discriminatory against women which will be cleared by way of following illustrations.

1. The Muslims are polygamous, but the Hindus, Christians and Parsis are monogamous.

2. The Muslims are allowed extra-judicial divorce, but the Hindu, Christians and Parsis can effect divorce only through court.

3. A wife married under the Muslim Law can be divorced by the husband at whim or pleasure, but a wife married under the
Hindu, Christian or the Parsi law can be divorced only on certain grounds specified on those laws and only through court.

4. Under the Muslim Law, a husband’s apostasy from Islam results in automatic dissolution of a Muslim marriage though a wife’s apostasy does not.

Under the Hindu law, apostasy from Hinduism by either of the spouses does not effect a Hindu marriage, though it confers on the non-apostate spouse a right to sue for divorce.

Under the Parsi law also, any spouse ceasing to be a Parsi Zoroastrian would only entitled his or her spouse to sue for dissolution, but would not otherwise effect a Parsi marriage.

Under the Christian law, a change of religion has no effect on a Christian marriage except where the apostate husband has married again, in which case the wife would be entitled to sue for divorce.

5. Under the Muslim law, a divorced wife is not entitled to any maintenance, from the husband, except during the period of Iddat. But the other personal law allows a divorced wife post divorce permanent alimony.
6. Under the Muslim Law, a daughter inherits half the share of the son; but under the Hindu law a daughter shares equally with the son. (It may, however, be noted that under the Indian Succession Act governing the Parsis and also others who are not Hindus, Muslims, Buddhists, Sikhs or Jains, the position is the same as under Muslim Law).

7. Under the Muslim law a person cannot dispose off more than one-third of its properties by will; but the other Personal laws do not impose any such limitations.

8. Muslim law confers on a person the right to pre-empt any property in respect of which he is a co-sharer, or a participator in appendages or immunities or an adjoining donour. But the other personal laws do not confer any such right.

Now, if all these discriminations follow from the different personal laws and the personal laws apply to a person only on the ground of his belonging to or professing a particular religion, then these discriminations are also operating on the ground of religion only and Article 15 forbidding discrimination on the ground of religion alone would strike down all these provisions and unconstitutional and ultra vires.20

However, the Constitution of India adopted by the state subsequent to independence from Britain guarantees equality
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(including sex-equality) to everyone (Article 14 & 15). The state is expressly prohibited from discriminating on the grounds of sex. The Constitution declares void all laws which are inconsistent with its provisions regarding Fundamental Rights (Article 13). Yet religious personal laws that discriminate against women are still being applied almost four decades after the adoption of the Constitution. The Constitution and religious personal laws, while seemingly in conflict with each other, have coexisted for nearly fifty years.

The state has not adopted a consistent policy with regard to the reform of religious personal laws. Hindu Personal law has been extensively reformed in order to give equal legal rights to Hindu women. The Personal laws of other (minority) communities have been left virtually untouched, ostensibly because the leaders of these communities claim that their religious laws are inviolable and also because there is said to be no demand for change from within their communities. The present situation is that the women of minority communities continue to have unequal legal rights and even though women of the majority community has yet to gain complete formal equality in all aspects of family law.

The debate about religious personal laws has until now concentrated on their religious nature and on the capacity of the secular state to change them. This is partly because the state has
neither rejected nor totally expected the claims about the inviolable nature of religious personal laws. That the Constitution is ambiguous about the nature of religious personal laws is indicated by the fact that the arguments in favour of their reform as well as those against any reform are both based on the provisions of the Constitution. The state claims the right to reform these laws in order to bring them into conformity with the Constitution by giving women equality. The opposition to reform is based on the Constitutional right to freedom of conscience guaranteed as a Fundamental Right by Articles 25-28, which is claimed to encompass the right to be governed by religious personal laws. The Constitution does not resolve the difficult questions as to whether the religious nature of these laws prevents a secular state from interfering with them or whether the personal nature of these laws as distinct from territorial laws makes them immune to state control. Such ambiguity in the Constitution permits contradictory claims and permits the claims to act discrepantly with respect to essentially similar claims of different communities. 21

It is intended to approach the question from a purely legal point of view, shorn of religious sentimentalism and political abracadabra. The question that is intended to be raised in this academic venture is the problem of the Uniform Civil Code and whether we should have a Uniform Civil Code relating to or
replacing the different personal laws operating throughout India. Whether it will be beneficial for national solidarity or it will be injurious for that. Does Muslim personal law allows reform in it and if such a reform is allowed what should be the mechanism for such a reform? Moreover to what extent the reform can be done and what would be the model of the proposed Uniform Code for marriage and succession and matters.

Scope of the Study

The basic aim of this academic venture is to highlight the seriousness of the problem of gender discrimination based on religion based personal laws. It is also intended to search out the real intentions of the framers of the Constitution. Whether they wanted an immediate enactment of an All India Civil Code or whether it was a slow step by step approach. The objective of the present study is to find out the correct relationship between the Part III and Part IV of the Constitution of India i.e. Fundamental Rights and Directive Principles. The aim of the work is also to see the state action regarding the reform of Hindu Personal Law. The present is intended demonstrate study the state policy towards the reform of personal laws since 1947. The role of judiciary regarding the controversy of Uniform Civil Code and personal laws is also discussed keeping in view the prevailing situation in the country. An indepth study of the subject is need of the day; so that suitable measures have been suggested for
incorporation in the Constitution of India for solving the problem of Uniform Civil Code.

Objectives of Present Study

The present study was undertaken keeping in view the following broad objects:

1. To find out the historical perspectives of personal laws in India.
2. To enquire into the causes of heated debate in the Constituent Assembly between Muslim and Non-Muslim member over the issue of Uniform Civil Code.
3. To enquire into the causes of opposition from the minorities especially the Muslims.
4. To analyse the emerging pattern of the Indian judiciary regarding Uniform Civil Code and Muslim Personal Law.
5. To evaluate the existing legal position of personal laws in India.
6. To analyse the system of reform in Muslim Personal Law.
7. To critically evaluate the desirability of having a Uniform Civil Code for all the communities in India.
8. To draw conclusions and put forward suggestions in order to solve this problem.

Chapter I of this study is devoted to the statement of problem and its importance in India. In recent years not a month passes without a newspaper carrying statements of political
leaders, social workers, women organizations and religious leaders regarding implementation of Uniform Civil Code or it’s opposition. The problem has become very serious due to the mixing of politics in this socio-legal issue.

The proper understanding of the subject cannot be done without looking into the history of personal laws. Three different legal systems having their origin in Hinduism and Islam and British Christian system have influenced Indian society. Basic principles of Hindu law were drawn from Vedas and Puranas. Epics like Ramayana, Mahabharata and Bhagwat Gita were moral fountain head. Manu is accepted as first law giver and Manu Smiriti is regarded as first law book. In ancient India, the king usually did not interfere in personal laws of people. Local customs and traditions were part of legal systems. During Muslim rule, Muslims were governed by their religion based personal laws. Whereas Hindus were left to produce their customs, traditions and religion based laws in family matters. During British rule, the colonial masters did not interfere in the personal laws of Hindus and Muslims. During the last years of their rule Britishers attempted to codify various personal laws.

Chapter II provides an insight into the above mentioned issues. The chapter is sub-divided into three parts namely, personal laws in ancient India, personal laws in Muslim India (medieval period) and personal laws in British India.
Chapter III peeps into the legislative history of personal laws and Uniform Civil Code. Existence of numerous personal laws in India are known phenomenon, hence, its relevance and utility was bound to be discussed in the Constituent Assembly. On the basis of debates on personal laws in Constituent Assembly, the weak points of the framers of the constitution have been highlighted. For two years, the Constituent Assembly witnessed debates in favour of and against Uniform Civil Code. In fact the issue of Uniform Civil Code divided the House on communal lines. This chapter critically examines the viewpoint of the protagonists and opponents of Uniform Civil Code.

Chapter IV discusses different dimensions of Uniform Civil Code. The misconceptions about Uniform Civil Code have been highlighted. Uniform Civil Code is victim of certain misconceptions and it is an irony that the interpretation as well as implementation of Article 44 of our Constitution is not being taken into account in its right perspective. There are pre-judicial attempts on the part of Legislature and court both to examine the whole issue from the ‘majoritarian’ approach. Such attempts defeat the very purpose of Article 44. There is erroneous quest for Common Civil Code simply because Article 44 does not direct the Legislature to enact a Civil Code.

It contains a principle basically for uniformity in Civil laws. All these issues have been dealt in this chapter.
Chapter V is intended to examine and evaluate various cases decided by High Court and the Supreme Court of India. Important court cases have been discussed in this chapter which attracted the attention of affected groups. In these cases either the constitutionality of personal laws has been challenged or the courts have expressed suo-motto opinion in favour of enactment of a Uniform Civil Code. Attempts have been made to make impartial analysis of the judgement delivered and their affects on the masses. For this purpose five important, well known and celebrated cases have been selected. These cases are:

* State of Bombay v. Narasu Appa Mali (AIR 1952 Bom. 84);
* Mohd Ahmad Khan v. Shah Bano (AIR 1985 SC 945);
* Ms. Morden Diengdeh v. S.S. Chopra (AIR 1985 sC 935);
* Sarla Mudgal v. Union of India [(1995) 3 SCC 635] and
* Ahemdabad Women Action Group v. Union of India [(1997) 3 SCC 573].

Chapter VI focusses on the relationship between Fundamental Rights and Directive Principles of State policy. This chapter is intended to be an analytical note on Fundamental Rights and Directive Principles. It takes into account the legislative history well categorised into three periods on the basis of Supreme Court’s decision on Directive Principles. In the first period Madras v. Champakam Dorai Rajan (1951), Hanif
Qureshi (1959), in Re Kerala Education Bill, 1957; in the second period Chandra Bhavan's case and in the third period Minerva Mills and post Minerva Mills cases have been thoroughly and critically analysed. The myth that the Directive Principles of State Policy can override the Fundamental Rights has been demolished.

Discrimination against women in India is prevalent in every sphere of life and most women experience some form of disadvantage. As such widespread existence of discrimination does not lend itself to analysis as a simple or unified phenomenon, it is not possible to study all aspects of discrimination against women. Chapter VII is intended to discuss the history of Hindu law reforms in its totality. In this chapter an attempt has been made to traces the legislative history of the Hindu law reform proposals with the main aim of identifying the gains made in women’s legal rights at the initiative of the state, as well as pointing out the areas in which legal equality has not yet been granted. A detailed analysis of the process of Hindu law reform reveals the reasons that were put forward to justify the denial of equal rights to women. Statements made by state functionaries about the basis of their authority to reform religious personal laws will give some idea of the perceptions of political leaders about the relationship between the state and religion. They also provide an insight into their conception of law as a technology for social transformation.
Chapter VIII is an attempt to trace the legislative history of the religious personal laws of minorities namely Muslims, Christian and Parsis. Under the religious personal laws of minorities women had fewer rights than men, except in the case of Parsi law. There was also a considerable amount of diversity in the laws governing Christians to Muslims. The chapter is subdivided into 5 parts. Legislative activity with regard to Islamic law, the enactment of the Dissolution of Muslim Marriage Act, 1939, the Special Marriage Act, 1954, Hindu Law Reforms Act, The Criminal Procedure Code, 1973, Reforms in Christian Personal Laws and Reforms of Parsi Personal Laws. In this chapter it has been shown that the state is trying to achieve equality of men and women but its attitude differs for Hindu and minorities due to several reasons.

Chapter IX deals with the reform of Muslim Personal Law. Whether personal laws should remain status quo or change be initiated from reformative angles? Reformation in Muslim personal law is a controversial issue, diving the community for and against such a process. To address the issue meaningfully, several aspects as the permission to make any change and the manner for that shift including the identified areas must be considered. This chapter discusses the possibility of any change in Islamic law, mechanism for change and the areas where the reform is most required.
Chapter X is devoted to the role of the Government towards achieving the mandate of Article 44 of the Indian Constitution. Its attitude towards the Hindu Personal Law and Muslim Personal Law has been analysed. Role of politicians has also been analysed. The attitude of the press, the intellectuals - both Hindus and Muslims, Ulema and the role of minority organisations has also been incorporated in this chapter.

On the basis the discussions and findings in the preceding chapters, inferences and conclusions have been drawn which find place in chapter XI of the present study. Several suggestions have been made in this chapter to solve the ticklish problem of Uniform Civil code and personal laws in India.

Research Methodology

In the processing of this work the doctrinal method of research was adopted. The work does not involve any field study as lot of relevant material is available in the printed form. For the purpose of this study extensive survey of textual materials, articles, newspapers and writeups formed the basis of preliminary study which was then expanded to cover a deeper survey of the literature. Ancient texts, Constituent Assembly Debates, Parliamentary Debates, Legislative Assembly Debates, relevant statutes and landmark decisions have been scanned and analysed in a systematic manner. The present work is thus based on the above referred material and is an original contribution to the problem studied.
References:

5. Fazlun Bi vs. Khader Vali, AIR 1980 SC 1730
9. AIR 1985 SC 945
10. AIR 1985 SC 935
11. AIR 1995 SC 1531
12. Mohammad Ismail Sahib, Naziruddin Ahmad, Mahboob Ali Beig Saheb Bahadur, B. Pocker Sahib Bahadur and Hussain Imam.
14. *Id.* at 544-545.
15. B. Pocker Sahib Bahadur
17. *Id.* at 122.
18. *Ibid*

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20. *Id.* at 180.

21. *Supra note* 19a at 19.