CLEARING THE DECKS FOR THE UNIFORM CIVIL CODE? AN EVOLUTIONARY ANALYSIS OF THE SUPREME COURT'S ENGAGEMENT WITH RELIGIOUS FREEDOMS

Abstract

This paper deals with the fast-evolving contours of the religious freedoms of individuals and denominations, and seeks to highlight how the courts have, especially in recent times, clearly indicated their intent of prioritising the values of human dignity and non-discrimination over pedantic religious norms that were hitherto sought to be immunised. In doing so, the paper looks at the evolution of the essential religious practice doctrine, the systematically shrinking space for denominational autonomies and the move towards subjection of personal laws to a Part III scrutiny. All of these phenomena, it is argued, can prove to be instrumental in the ultimate fructification of the long-cherished constitutional goal towards having a uniform code, subject to the condition that such Code has to be carefully drafted, having due regards to the specificities of different religions and our pluralistic traditions, and should not become a tool of brute homogenisation by majoritarian interests.

I Introduction

IN ANY liberal democratic tradition, it is imperative that while individuals, and by a logical extension groups of individuals, are entitled to exercise their enjoyment of liberties which are constitutionally guaranteed, the state may need to, as a coercive force, come down heavily upon an unfettered enjoyment of such liberties, especially if in exercise of such liberties the individuals are found to have been impeding on the sacrosanct rights of other individuals or groups.[1] Similarly, it can also be seen that the state may, if it desires to positively enforce a welfare mandate in view of the larger benefits of the populace at large, bring in restrictions on the enjoyment of such rights by the individuals or groups of individuals, provided that the imposition of such restrictions bears a constitutional justification.

The Uniform Civil Code (UCC), a welfare mandate which finds its mention in article 44, a Directive Principle of State Policy (DPSP) provided for under Part IV of the Constitution, is one such overarching policy goal which justifies the abridgement of unfettered rights of individuals or groups of individuals, so far as their religious functions are concerned. Even though the Supreme Court of India has more than once lamented the fact that India has not been able to secure for its citizens a UCC so far and has directed the government to take concrete steps towards the implementation of the UCC,[2] there has been negligible progress in this regard. The reason behind such

1 A seminal discourse on the role of the state in restricting individual liberties can be seen in F.A. Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, London, 1960). *See also,* Alan Wertheimer, "Liberty, Coercion and the Role of the State" in Robert L. Simon (ed.), *The Blackwell Guide to Social and Political Philosophy* 38 (2002).

2 *Mohd Ahmed Khan* v. *Shah Bano Begum* (1985) 2 SCC 556; *Sarla Mudgal* v. *Union of India* (1995) 3 SCC 625; *Lily Thomas* v. *Union of India* (2000) 6 SCC 224; *John Vallamattom* v. *State of Kerala* (2003) 6 SCC 211; *Jose Paulo Coutinho* v. *Maria Luiza Valentina Pereira* (2019) SCC Online (SC) 1190.

governmental inaction could be attributable to factors which are largely extra-constitutional – reasons of politics, scepticism with disruption of a neutral equilibrium *etc.* Moreover, long-standing precedents like *State of Bombay* v. *Narasu Appa Mali* [3] and *Sri Krishna Singh* v. *Mathura Ahir* [4] which have been instrumental in keeping personal laws outside the ambit of the expression 'laws' in article 13(3) and thus ensured that they are not amenable to fundamental rights review, can also be looked at one of the reasons as to the reluctance to enact a UCC which would naturally have implications on a community's personal laws. In addition, the evolution of the 'Essential Religious Practices Test' (ERP), a test evolved by the Supreme Court to demarcate religious functions that are amenable to judicial scrutiny from those that are not; and the denominational autonomy in matters of religion granted to religious denominations by article 26(b) also appear as a roadblock towards the incorporation of a UCC, which could potentially have inevitable impacts on personal laws of the communities.

Despite these veritable roadblocks which have come in the way of incorporation of a UCC, this paper argues that the roadblocks should be cleared out not only to fructify a long-standing cherished constitutional goal set by our founding fathers, but also to positively enforce basic fundamental rights of large numbers and groups of people. The foundational hypothesis that this paper seeks to establish is that the UCC is a very important cog in the wheel towards eradication of discrimination and the securing of civil liberties.

The paper is divided into six parts. Part II looks at the nature of the UCC and seeks to address the question as to whether the implementation of the UCC renders a blow to our notions of pluralism and constitutional morality. Part III deals with the essential religious practices doctrine and shows how the jurisprudence surrounding this doctrine has gradually evolved to a position that the ERPs have been rendered almost redundant. Part IV similarly deals with the gradual redundancy of the contours of denominational autonomy in the context of their interplay with other fundamental rights. Part V deals with how the Supreme Court has moved away from the *Narasu* position and has unerringly pointed out that personal laws cannot be completely immunised from fundamental rights scrutiny. Finally, Part VI concludes the paper and provides insights into the court's most recent engagements with the issues of religious freedoms.

II Uniform civil code: A tool of brute homogenisation?

The Constitution of India is a document that fully understands and appreciates the diverse social and legal traditions of our country, and a reflection of the founding fathers' zeal to maintain and preserve the pluralistic traditions and the heterogeneous cultures can be witnessed from several provisions of the Constitution that are specifically

3 AIR 1952 Bom 84.

4 (1981) 4 SCC 421.

targeted at empowering or protecting separate groups of people.[5] Professor Mahendra Pal Singh, taking note of the need to protect the pluralistic traditions, observes that the UCC should not be considered to be one of the foremost constitutional goals, and that if it should be achieved at all, such achievement should be consistent with the fundamental duty enshrined in article 51A(e), which speaks about the need "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities".[6] While there can be no doubt that any form of brute homogenisation by a majoritarian state can ostensively render a telling blow to this much-avowed constitutional objective of promoting harmony and common brotherhood, a UCC could be considered to be a very essential step towards ensuring a 'secular' identity.[7] At a momentous time of our jurisprudential journey where the Supreme Court, in the landmark *Sabarimala*

5 See Constitution of India, arts. 29, 30, 350 (A), 350 (B), 371 (A) – 371 (J), Part X, ScHh. V and VI etc.

6 M.P. Singh, "Special Editorial Note on Uniform Civil Code, Legal Pluralism and the Constitution of India" V (Monsoon) *JILS* 5 (2014). In this paper, he quotes Tamanaha who had remarked, "[t]he longstanding vision of a uniform and monopolistic law that governs a community is plainly obsolete." *See* Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" 30 *Sydney L. Rev.* 374, 409 (2008).

7 In the Constituent Assembly, in responding to the debates on the incorporation of the UCC, K.M. Munshi addressed the objections to the Code that it would impair religious freedoms of communities and said, "There is one important consideration which we have to bear in mind [...] that the sooner we forget this isolationist outlook on life, it will be better for the country. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible a strong and consolidated nation. Our first problem and the most important problem is to produce national unity in this country. We think we have got national unity. But there are many factors—and important factors—which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible, we may be able to say, "Well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation". From that point of view alone, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that this is an attempt to exercise tyranny over a minority; it is much more tyrannous to the majority.

This attitude of mind perpetuated under the British rule, that personal law is part of religion, has been fostered by the British and by British courts. We must, therefore, outgrow it." Similarly, Alladi Krishnaswamy Iyer supported the arguments of Munshi and remarked, "A Civil Code, as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform civil code throughout the territory of India?"

See K.M. Munshi and Alladi Krishnaswamy Iyer, Constituent Assembly Debates, Vol. VII (Nov. 23, 1948), *available at:* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C23111948.html, last visited on Aug. 11, 2020).

judgement,[8] has categorically prioritised the constitutional values over age-old beliefs and practices that have a deleterious impact on such values, it is pertinent that we start seriously considering the implementation of a UCC. Of course, such a Code should be consistent with the constitutionally ordained protections to all groups of people, and should by no means seek to be a coercive imposition of majoritarian choices on even a minuscule minority. As Indu Malhotra J., rightly mentioned in the *Sabarimala* case, the spirit of pluralism, which is rooted in the notion of group autonomy and constitutional morality,[9] needs to be safeguarded while moving forward in this direction.

It is also pertinent to note in this regard that while there is no denial of the fact that religious practices and dogmas definitely require reformation and rationalisation from time to time by legislative interventions, it is important to preserve and safeguard the raison d'être of a religion's existence – the religion's very identity.[10]

It is in the context of preservation of the foundational features of a religion that the Indian Supreme Court had evolved the ERP jurisprudence in the mid-1950s. In view of this newfound focus on religious reformation and consequent harmonisations, it is pertinent to have a re-look at the ERP jurisprudence to test its relevance, efficacy and constitutional justification.

III Essential religious practices: Striking a balance between the religious and the secular

The quest for a religion's core identity can be witnessed from the journey of the ERP doctrine which has seen numerous crystallisations over the course of the last sixty-odd years of our constitutional existence, and has been looked at as one of the foremost ways to endure that the religion retains some degree of autonomy in specific activities of a religious nature against the onslaught of secular regulatory state laws. In enunciating this doctrine and carving out autonomous spheres for religious groups, one natural outcome was that the pluralistic traditions were also sought to be preserved through such recognition of essential religious practices.

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8 *Indian Young Lawyers' Association* v. *State of Kerala* (2019) 11 SCC 1.

9 *Ibid.* Although the opinion of Malhotra J. is the minority opinion, there is nothing in the majority view that stands in contradistinction to this specific observation of the Learned Judge.

10 Ayyanger J., had very famously commented on the laws that are aimed at religious reformation thus, "In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform", a religion out of existence or identity." See *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, AIR 1962 SC 853.

The doctrine can be traced back to the early days of our constitutional journey.[11] It was first articulated in the case of *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,*[12] popularly known as the Shirur Mutt case. In this case, while addressing the question as to where to draw the line between matters of religion and matters which are not, B.K. Mukherjea J, speaking for the court, observed:[13]

> A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

Thus, he played a lot of reliance on introspection into the tenets of the religion in order to find out whether a certain religious practice can be considered 'essential' or not. However, the court did not confine the recognition of such protection to the doctrines or beliefs of the community alone, but extended it to cover 'rituals, observances, ceremonies and modes of worship'.[14] Moreover, the court hastened to state that notwithstanding the ostensible sense of autonomy that articles 25 and 26 grant to the religious practices followed by an individual or by a group, they can be legitimately regulated by the state when they 'run counter to public order, health and morality' and when they are 'economic, commercial or political in their character though they are associated with religious practices'.[15]

From a rather charitable and generous beginning, the ERP doctrine went through significant circumscriptions over the new few decades. In *Durgah Committee Ajmer* v. *Syed Hussain Ali*,[16] Gajendragadkar J (as he then was) ignored the claims made by the

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11 For a detailed account of the evolution of the Essential Religious Practices Doctrine, See Rajeev Dhavan and Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities" in BN Kirpal, *et. al.* (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* 270 (Oxford University Press, New Delhi, 2000). *See also,* Ronojoy Sen, "Secularism and Religious Freedom" in Sujit Choudhry *et. al.* (eds.), *The Oxford Handbook of The Indian Constitution* 885 (Oxford University Press, New Delhi, 2016).

12 AIR 1954 SC 282.

13 *Ibid.*

14 *Ibid.* On this point, one may also refer to Mukherjea J's reiteration of the same idea in *Ratilal Pannachand* v. *State of Bombay,* AIR 1954 SC 388.

15 *Ibid.*

16 AIR 1961 SC 1402.

Khadims of the Ajmer Durgah in favour of their right to administer the Durgah as an essential right of a Muslim belonging to the *Sufi Chistia* order, and instead, after taking resort to a historical exploration into the nature of the regulation and management of the working of the Durgah, held in favour of the constitutionality of the Durgah Khwaja Saheb Act, 1955, a regulatory law that allowed the state to manage the administration of the Durgah.[17] This judgement also underscored the distinction between religious practices and superstitious beliefs, in these words: [18]

> Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.

Just like the Ajmer Durgah case, Gajendragadkar J continued his tirade towards narrowing down the scope of the ERP doctrine in *Tikayat Shri Govindlalji Maharaj* v. *State of Rajasthan*.[19] In this case, the court relied on historical antecedents to hold that the Nathdwara Temple Act, 1959 was constitutionally valid. In doing so, the court made an emphatic articulation on the state's regulatory ambit over matters of religion. It gave a three-prong test to examine the ambit of such regulation: first, whether the practice in question is religious in character; second, if the first answer is in the affirmative, whether it can be recognised as an integral or essential part of religion; and third, whether there is substantial evidence adduced before the court as to the conscience of the community and the tenets of the religion.[20]

This process of an ever-incremental ambit of state intervention over management of affairs associated with religion, quite appropriately dubbed as the "bureaucratization

17 *Ibid.*

18 *Ibid.*

19 AIR 1963 SC 1638.

20 *Ibid.* The same focused introspection can also be witnessed in the case of *Yagnapurushdasji* v. *Muldas,* AIR 1966 SC 1119. In this case, Gajendragadkar J further refines the third prong to only include such practices that are compliant with the public interest and reformist requirements of the Constitution. *See* Dhavan and Nariman, *supra* note 11.

of religion",[21] has only increased in the later decades, especially in course of a series of judgements delivered by Ramaswamy J in the 1990s,[22] which further facilitated the regulatory intervention of the state in some of the most famous religious shrines.

It can be noticed that just as the court attempted to sift the secular from the religious and superstitions from tenets and beliefs, it also sought to restrict the operation of the ERP doctrine to practices of antique origins only.[23] Similarly, the operation of the ERP doctrine in contemporary times has also limited its operation to eliminate social prejudices, no matter how deeply engrained in the community beliefs the practice might be.[24] Likewise, recent experience has shown us that the ERPs cannot exist in isolation from the larger principles of constitutionalism and constitutional morality.[25] Thus, it can be clearly said that the ERP has quite consistently undergone a significant watering down over the decades and in the process, the realm of religion has been considerably overshadowed by the realm of the secular.

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21 Sen, *supra* note 11.

22 *Adi Vishweshwaran of Kashi Nath* v. *State of Uttar Pradesh,* (1991) 4 SCC 606; *Bhuri Nath* v. *State of Jammu and Kashmir* (1997) 2 SCC 745; *Shri Jagannath Puri Management Committee* v. *Chintamani Khuntia,* (1997) 2 SCC 745.

23 *Acharya Jagdishwaranand Avadhut* v. *Commissioner of Police, Calcutta* (1983) 4 SCC 522; *Commissioner of Police, Calcutta* v. *Acharya Jagdishwaranand Avadhut* (2004) 12 SCC 508. There is however some serious scholarly criticism of these two judgments, popularly known as the *Ananda Margi* cases. It has been argued that instead of trying to locate the existence of the said practice of *Tandav* in the constitutive texts of the Ananda Margi group, the court could have simply relied on the wordings of article 26, more specifically the public order restriction, to justify the state denial of the group's claim to perform the *Tandav* on the streets of Calcutta. *See* Udai Raj Rai, *Fundamental Rights and Their Enforcement* 420 (PHI Learning Private Limited, New Delhi, 2011). *See* also Lakshmanan J's dissenting opinion in the second *Ananda Margi* case where he contradicts the antiquity theory thus: "…essential practices are those that are accepted by the followers as a method of achieving their spiritual upliftment and the fact that such a practice was recently introduced cannot make it any less a matter of religion".

24 An evidence of the same can be seen in Indu Malhotra J's denouncement of the practice of Sati in course of her minority opinion in the *Sabarimala* case. See *supra* 8.

25 It is apposite to quote in this context a part from D.Y. Chandrachud J's opinion in the *Sabarimala* case: *"The Respondents submitted that the deity at Sabarimala is in the form of a Naishtika Brahmacharya: Lord Ayyappa is celibate. It was submitted that since celibacy is the foremost requirement for all the followers, women between the ages of ten and fifty must not be allowed in Sabarimala. There is an assumption here, which cannot stand constitutional scrutiny. The assumption in such a claim is that a deviation from the celibacy and austerity observed by the followers would be caused by the presence of women. Such a claim cannot be sustained as a constitutionally sustainable argument. Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women cannot keep the Vratham is to stigmatize them and stereotype them as being weak and lesser human beings. A constitutional court such as this one, must refuse to recognize such claims.*[...]

The stigma around menstruation has been built up around traditional beliefs in the impurity of menstruating women. They have no place in a constitutional order. These beliefs have been used to shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order." See *supra* note 8.

IV Denominational rights: A *carte blanche* towards absolute autonomy?

In the previous section, we have seen that the domain of religious practice, even the apparently most essential ones, has undergone a quite drastic reduction in volume and significance over the years. Similarly, another area which has witnessed quite significant upheavals over the course of our constitutional journey has been the denominational rights, enshrined in article 26 of our Constitution.

The very basic difference between articles 25 and 26 of the constitution lies in the fact that whereas article 25 refers to an individual's freedom of conscience and the right to freely practice, profess and propagate religion, article 26 sets in when the individuals associate to form groups, called religious denominations. Religious denominations are defined as "*a religious sect or body having common faith and organisation and designated by a distinctive name*".[26] It is on application of this multi-prong test that several religious groups, like for example the followers of Shri Aurobindo and the people belonging to the Swaminarayan sect, were denied denominational status by the Supreme Court.[27]

There is another important factor that is crucial to recognising a group as a religious denomination. And that factor is – recognition, statutory or otherwise. In the recent case involving denial of access to women to enter the historic Haji Ali Dargah, the court looked at the nature of the trust that administers the Dargah and held that the trust was not one that derived its origin to any scripture, sect, cult or an identifiable group.[28] This factor plays a very important gate keeping role at the level of a threshold enquiry, because a lot of religious groups make very concerted attempts in looking for a denominational recognition, and the apparent autonomy consequent upon such recognition.

When one looks at articles 25 and 26 in unison, a unique omission in article 25 obviously meets the eye. While article 26 rights are made subject to "public order, morality and health", Article 25 rights, in addition to the three qualifiers as aforementioned, are also circumscribed by "other provisions of this part", obviously meaning the other fundamental rights, including article 26. Now, this leads to a paradoxical situation. Does the constitution therefore seek to suggest that when individuals amalgamate under one common theological umbrella to form a religious denomination, such amalgamation unfetters them from the shackles of all the other fundamental rights?

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26 *S.P. Mittal* v. *Union of India*, AIR 1983 SC 1. *See also, Swami Yagnapurushdasji* v. *Muldas,* AIR 1966 SC 1119.

27 *Ibid.*

28 *Noorjehan Safia Niaz* v. *State of Maharashtra* (2016) SCC OnLine Bom 5394. *See also, supra* note 8.

In other words, does the formation of a religious denomination automatically give to such denomination a right to discriminate?[29]

A definitive answer to this paradox can be had from the decision of the Supreme Court in the case of *Sri Venkataramana Devuru* v. *State of Mysore*.[30] In this case, the Supreme Court explores the relationship between articles 25 and 26, and holds that the two provisions need to be harmoniously interpreted. To quote Venkataramana Aiyer J: [31]

> We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26(b), must yield to the overriding right declared by Art. 25(2)(b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, ;then the question is not whether Art. 25(2)(b) over-rides that right so as to extinguish it, but whether it is possible-so to regulate the rights of the persons protected by Art. 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.

Thus, the court makes it very clear that the right of 'all sections of Hindus' to entering a temple 'of a public character', as enshrined by article 25(2)(b) of the Constitution cannot be considered subservient to the right of a denomination to 'manage its own religious affairs', as provided for in article 26(b) of the Constitution.[32] That is to say

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29 On this question, the following excerpt from Indu Malhotra J's dissent in *Sabarimala* is relevant*:* "*Unlike Article 25, which is subject to the other provisions of Part III of the Constitution, Article 26 is subject only to public order, morality, and health, and not to the other provisions of the Constitution. As a result, the Fundamental Rights of the denomination is not subject to Articles 14 or 15 of the Constitution." Supra* note 8.

30 AIR 1958 SC 255.

31 *Ibid.*

32 *Ibid.*

that just as any Hindu cannot demand an entry into a temple at all points of time of the day or the night, including in times when the entry is only restricted to the *Archaks*, they cannot be outrightly denied entry into the temple altogether by citing denominational autonomy.

This harmonisation of articles 25 and 26 are extremely crucial especially in light of practices that can be looked at as *prima facie* discriminatory, but which the religious denominations may seek to sanctify and immunise by locating them within the spheres of their denominational autonomy. Therefore, just as the court in *Devuru*[33] imposes fetters on the denominational autonomy argument in the context of article 25(2)(b), one can experience a similar strand of reasoning emanating out of D.Y. Chandrachud J's judgement in *Sabarimala* where he describes the denial of entry of women to the Ayyappa temple as akin to untouchability, and seeks to enforce the protection of article 17 against such practice.[34] The following passages from the judgement are very poignant in this context:[35]

> Article 17 is a powerful guarantee against exclusion. As an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution.
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> [...]
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> The caste system has been powered by specific forms of subjugation of women. The notion of "purity and pollution" stigmatizes the menstruation of women in Indian society. In the ancient religious texts and customs, menstruating women have been considered as polluting the surroundings. Irrespective of the status of a woman, menstruation has been equated with impurity, and the idea of impurity is then used to justify their exclusion from key social activities.

It is this distinct sense of abhorrence shown towards such exclusionary social practices that stand out as exemplary. Although all women, including upper-caste women, cannot be considered as victims of untouchability in the conventional sense of the term, the subtle reminder that "exclusion from key social activities" may consider a situation similar to a caste-related act of exclusion and subjugation, quite appropriately

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33 *Ibid.*

34 *Supra* note 8. One must admit in this context that none of the majority judges in *Sabarimala* (including D.Y. Chandrachud J.) had agreed to accept the argument that the *Ayyappans* constituted a distinct religious denomination by themselves. However, it is argued that the strong thrust towards looking at the exclusion of menstruating women from their right to temple entry as akin to untouchability shall definitely retain its relevance even if the sect in question administering the said temple would fall within the definition of a religious denomination.

35 *Ibid*.

underscores the humanist perspectives of the court and the need to restrict spheres of religious autonomy that are discriminatory and exclusionary in nature.[36]

Another interpretative utility of introducing the untouchability aspect to the exclusion and discrimination narrative is that article 17 is one such constitutional provision that provides a scope for direct horizontal application, as opposed to provisions like articles 14 and 15(1) that are vertically enforceable.[37] This is an important consideration to keep in mind, in light of the fact that there have been occasions when the courts have refused to interfere with grossly discriminatory religious practices like instantaneous triple talaq (also known as *talaq-e-biddat*) on the pretext that they are unable to enforce rights enshrined in articles 14 and 15(1) against a body that is not state.[38]

The above discussions lead us to a pinpointed observation. Just like the rapidly shrinking paradigm with the ERPs, the so-called autonomy of denominations is also undergoing severe constrictions and newer avenues of challenge and consequent curtailment. In this backdrop, it is virtually nugatory to continue persisting with a discriminatory practice by attempting to sanctify it with the elixir of a religious nature.

V Personal laws and fundamental rights scrutiny: Opening up new frontiers?

For a long time, the personal laws have been kept outside the definition of the term 'laws' within the meaning of article 13(3) of the Constitution. In the *Narasu Appa Mali* case,[39] a two judge bench of the High Court of Bombay consisting of Chagla CJ and Gajendragadkar J, after going into an elaborate historical account of the legislative history with respect to personal laws, drew a distinction between customs and personal laws and opined that while customs or usages which may be looked at as derivations from personal laws but not personal laws themselves could be considered as 'laws in force' under article 13(1) and thus made amenable to fundamental rights, the same would not apply to personal laws themselves.[40] Using this reasoning, the court refused

36 Martha Nussbaum equates caste-based untouchability with untouchability (or, as she points out, quasi-untouchability) on grounds of gender and sexual orientation. *See* Martha Nussbaum, "Disgust or Equality? Sexual Orientation and the Indian Law" in Zoya Hasan *et al* (eds.), *The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US* (Oxford University Press, New Delhi, 2018).

37 For a holistic discussion on horizontal application of Fundamental Rights, *see* Stephen Gardbaum, 'Horizontal Effect" in Choudhry *et al* (eds.), *supra* note 11. *See also,* Sudhir Krishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India" in C. Rajkumar and K. Chockalingam (eds.), *Human Rights, Justice, & Constitutional Empowerment* (Oxford University Press, New Delhi, 2007); Ashish Chugh, "Fundamental Rights - Vertical or Horizontal?" (2005) 7 SCC (J) 9.

38 On this point, see the minority judgement of Kehar, CJ (with Nazeer J) in *Sharaya Bano* v. *Union of India* (2017) 9 SCC 1.

39 *Supra* note 3.

40 *Ibid.*

to scrutinize the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 on the ground that such enactment leaves out Muslims and is thus a violation of infringement of article 14, 15(1) and 25 of the Constitution.[41]

The Supreme Court had an opportunity to deal with a similar question in the *Sri Krishna Singh* case,[42] where it came up with similar conclusions. In this case, the primary question was whether a Shudra can enter a religious order, become Sanyasi and be installed as the Mahant of a Math. The court, while overruling the judgement delivered by the High Court of Allahabad and allow that person to occupy the position, held that: [43]

> In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modified or abrogated by statute.

As much as the two cases cited above are considered to be the conclusive final words on this issue, it is pertinent to note the following observation made by the Supreme Court in the case of *C. Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami*:[44]

> Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Art. 13 if they violate fundamental rights.

In recent times, we have witnessed a spurt of decisions where grossly discriminatory practices hitherto sanctified as part of personal law have been held to be constitutionally impermissible. A glorious example of this phenomenon could be seen in the *Triple Talaq* case.[45] Both Nariman and Lalit JJ, in course of their judgement, make direct reference to the fact that the practice of *Talaq-e-Biddat* is discriminatory and thus unconstitutional.[46] But in doing so, they hesitated in addressing the question as to

41 *Ibid.*

42 *Supra* note 4.

43 *Ibid.*

44 (1996) 8 SCC 525. One can also witness a rights-based narrative in the context of personal laws in cases like *T. Sareetha* v. *T. Venkata Subbaiah*, AIR 1983 AP 356; *Ammini EJ* v. *Union of India*, AIR 1995 Ker 252; *Daniel Latifi* v. *Union of India* (2001) 7 SCC 740.

45 *Supra* note 38.

46 *Ibid.*

personal laws can be made subject to a fundamental rights scrutiny.[47] They rather relied on a circuitous mechanism whereby they held that the provisions of the Muslim Personal Law (Shariat) Application Act, 1937, which seeks to recognise *Talaq-e-Biddat* among all other forms of Triple Talaq,[48] is a pre-constitutional enactment falling within the definition of 'Laws in Force' under article 13(1) and is unconstitutional on grounds of manifest arbitrariness.[49]

D.Y. Chandrachud J, on the other hand, is a lot more direct in his approach towards this issue in the *Sabarimala* judgement.[50] In a clear assertion of constitutional supremacy over religious normativities, he opines:[51]

> Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution.

Placing the individual at the centrepiece of his scheme, he goes on to argue that any rule or practice that has the impact of impairing individual dignity, blocking his access

47 One must note here that the judges, despite recognising the need to address this question, refrained from actually doing it. To quote Nariman J, *"However, in a suitable case, it may be necessary to have a relook at this judgment in that the definition of "law" and "laws in force" are both inclusive definitions, and that at least one part of the judgment of P.B. Gajendragadkar, J., (para 26) in which the learned Judge opines that the expression "law" cannot be read into the expression "laws in force" in Article 13(3) is itself no longer good law."* For a more detailed discussion on the path taken by each of the Judges in this case, *See* Niraj Kumar and Akhilendra P. Singh, "Invalidating Instant Triple Talaq: Is the Top-Down Approach of Performing Personal Laws Relevant?" 11 *NUJS L. Rev.* 2 (2018).

48 S. 2 of the said law states: "2. Application of Personal Law to Muslims— Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

49 *Supra* note 47.

50 *Supra* note 8.

51 *Ibid.*

to or excluding him from having access to basic goods shall have to pass constitutional scrutiny, even if they are within the broad contours of personal laws or ERPs.[52]

Highlighting the need to further the "transformative vision of the Constitution" over archaic limitations set by cases like *Narasu*, this judgement goes on to be a path-breaker of sorts not only in exorcising the 'Ghost of *Narasu*',[53] but also in proving to be a harbinger of social transformation, especially for the groups which have been excluded and discriminated against by operation of pedantic religious dicta.

VII Conclusion

On November 14, 2019, the a five-judge bench of the Supreme Court had reopened the *Sabarimala* judgement on review,[54] and has referred certain questions that seemed to have been conclusively determined in *Sabarimala*, for reconsideration by a nine-judge bench in light of certain pending writ petitions which ostensively deal with similar issues (like entry of women into the Parsi Fire Temples and mosques, and Female Genital Mutilation) that overlap with the issues under consideration in *Sabarimala*.[55] While the very propriety of this review-cum-referral can be and has been severely critiqued,[56] what catches the eye is the zeal with which the Supreme Court set forth in bringing a closure to questions that have been crying for a decisive resolution for years. For example, the nine-judge bench would be required to resolve *inter alia* the interplay between articles 25 and 26 and other provisions of Part III and the possible conflict between the *Shirur Mutt* [57] and the *Dargah Committee*[58] case with respect to the

52 *Ibid.* In formulating his opinion, he quotes a seminal article by Gautam Bhatia, thus: "While it is true that Article 26(b) makes groups the bearers of rights, as pointed out above, the Constitution does not state the basis of doing so. It does not clarify whether groups are granted rights for the instrumental reason that individuals can only achieve self-determination and fulfilment within the 'context of choice' provided by communities, or whether the Constitution treats groups, along with individuals, as constitutive units worthy of equal concern and respect. The distinction is crucial, because the weight that must be accorded to group integrity, even at the cost of blocking individual access to important public goods, can only be determined by deciding which vision the Constitution subscribes to." Gautam Bhatia, "Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution" V(3) *Global Constitutionalism* 351.

53 Krishnadas Rajagopal, "With Sabarimala verdict, 'Ghost of Narasu' is finally exorcised" *The Hindu,* Sep. 28, 2018.

54 *Kantaru Rajeevaru* v. *Indian Young Lawyers Association,* Review Petition (Civil) No. 3358/2018 in W.P. (Civil) No. 373/ 2006.

55 *Ibid.*

56 Gautam Bhatia, "What is a Review?", *available at* <indconlawphil.wordpress.com/tag/sabarimala> last visited on Aug. 18, 2020.

57 *Supra* note 12.

58 *Supra* note 16.

interpretation of the ERP doctrine.[59] On May 11, 2020, the nine-judge bench, while seeking to conclusively settle the question as to whether questions of law can be referred to a larger bench on review, replied in the affirmative and gave its reasons for the same.[60] While the court defines the contours of the religious freedoms and their interplay with the non-discrimination provisions of the Constitution, it will certainly have to consider the jurisprudential evolution of the issue so far. Unmistakably, one conclusion emerges out of the catena of cases dealing with the issue – with the passage of time, the courts have attached more and more importance to matters of non-discrimination and civil liberties over pedantic religious practices and a perceived sense of denominational autonomy.

Assuming that there is no drastic departure from the broad principles that have been evolved over the decades, one can reasonably hold that the evolving jurisprudence has also cleared the decks for the introduction of the UCC in more ways than one. By significantly limiting the operation of the ERPs and the denominational autonomy, as well as the move towards subjection of personal laws to fundamental rights scrutiny, the courts have only reinforced its commitment towards harmonization of laws and adherence to the constitutional precincts. Moreover, the vistas created in favour of horizontal application of certain fundamental rights have only made enforcement more convenient.

However, what needs to be noted with caution is that harmonization does not necessarily indicate homogenisation. While there is a need to ensure that religious dogmas do not stand in the way of ensuring constitutional protections and guarantees to all, there should be adequate mechanisms to ensure that the pluralistic fabric of India is not jeopardised at the altar of uniformity. So long constitutional guarantees are secured and practices that are discriminatory and antithetical to the notion of human dignity are weeded out, religions and religious groups should be allowed to preserve their specificities rather than being bulldozed to accept one homogenised, and arguably majoritarian, UCC.

Shameek Sen[*]

59 *Supra* note 54.

60 One of the reasons given to justify the maintainability of the review was that Order XLVII Rule 1 of the Supreme Court Rules 2013, which deals with review petitions, only applies to civil and criminal proceedings, and not to matters arising out of writ petitions filed under art. 32. The 11 May order is *available at* :livelaw.in/pdf_upload-374614.pdf (last accessed on Aug. 18, 2020).

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