

Are personal laws justified in secular india law general essay

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Answer by: Raghav Pandey, 2012CJ014"[T]he personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a " Uniform civil Code" for the whole of India"[1]In the light of the above statement it is amply clear that personal laws are not at all justified in a secular India. Besides secularism the concept of equality is forcefully implemented by the constitution. Having personal laws for different religions is a blot on this concept. In answering the question posted above I would include a proposal for Uniform Civil Code for the country. In the end I would substantiate my answer with precedents set by the Supreme Court. History and OriginIndia's legal system is a common law system—a relic of British imperialism that is at the same time very different from the original British common law. During colonization, novel ideas of utilitarianism and legal positivism informed many English innovations in India.[2]The usual organic relationship between a legal system and its society was violently disrupted doubly by this experiment. Indians came to have a legal system developed in response to the needs of a very different society, that of England. But whereas laws in England have abandoned or modified most of these legal concepts, India maintains the " tradition" of the colonial laws. The concept of religious personal laws is one of those ideas.[3]Historically, in Europe, the law made a distinction between personal (often ecclesiastical) laws and the legal codes of the territory as a whole. In India before colonization, however,

Hindus and Muslims—with very few exceptions—were governed by their own respective laws. Colonization in India happened in a complex and geographically varied manner. Different parts of the country came under colonial control under different legal arrangements. British laws were introduced gradually and selectively and "personal matters" were to remain governed by the religious laws of these communities. However, the content of personal laws was determined almost randomly in the successive charters and regulations. Moreover, the substantive content of these rules was modified in judicial and legislative actions. The judicial role in this regard was significant even if unintentional. Gradually legislative changes were also introduced, but despite these changes the idea has persisted that the RPLs are immutable.[4]The practice of applying laws of religious communities in personal matters was regarded as the "saving" of religious laws, in part because of the language used. Different communities in India were identified by the religions they followed and the personal laws that the English administrators had decided to save were also in turn understood as religious, although in practice they could be community customs rather than scriptural rules. Thus religious laws and personal laws became interchangeable, and in the process it was forgotten that before the arrival of the British administrators, all aspects of the laws of Hindus and Muslims were religious. Moreover, British policies determined what should be designated as a personal matter, and of course the final shape of the laws governing such personal matters—whether administered by the English courts or legislated by the colonial parliaments—modified the religious laws of the people.

Contemporary PositionThe Constitution of India enacted on the 26th day of

November 1949 resolved to constitute India as a Union of States and a sovereign, socialist, secular, democratic republic. The large Indian population comprised of multicultural societies professing and practicing different religions. India. Under the constitutional scheme, amongst others, freedom of religion and the right to freely profess, practice and propagate religion is sacrosanct and is thus enforceable by a writ. Simultaneously, Part IV of the Indian Constitution lays down " directive principles of state policy" which are not enforceable by any court but are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles while making laws. Under Article 44 of the Constitution in this part, the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. The directive principles were in essence the dreams of the constitutional framers which the nation was not in a position to implement at that time. Hence they now serve as the guidelines for the government to function.

Existing Personal Laws in India

Personal laws are statutory and customary laws applicable to particular religious or cultural groups within a national jurisdiction.[5] India is a land of diversities with several religions. The oldest part of Indian legal system is the personal laws governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempts the solution of social problems by new methods in the light of experience of legislations in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given as hereunder. The main marriage law legislation in India applicable to the majority population, constituted of Hindus, is known as The Hindu Marriage Act, 1955, which is an Act to amend and codify the law relating to marriage among Hindus. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act, 1956, which is an Act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act, 1956 is an Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act, 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus. The Indian Parliament

also enacted the Special Marriage Act, 1954, as an Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act, 1969, a person has only to be a citizen of India to have a marriage solemnized under this Act outside the territorial limits of India. The Parsi Marriage and Divorce Act, 1936 as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India. The Christian Marriage Act, 1872, was enacted as an Act to consolidate and amend the law relating to the solemnization of the marriages of Christians in India and the Divorce Act, 1869 as amended in 2001, is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India. Case against the personal laws Here I will show how having different personal law is grossly undemocratic and beyond everything else goes beyond the bounds of reasonable logic The Muslim Personal Law (Shariat) Application Act, 1937, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Muslim Women (Protection of Rights on Divorce) Rules, 1986, apply to Muslims living in India. Muslim personal law, based on the Sharia, is not codified. Since Muslims are governed by the Sharia, an Indian male Muslim is entitled to have four wives at any time. Thus we can clearly see by allowing religion to interfere in the operation of law how the society is legalizing certain uncivilized concepts like polygamy to function legally within the judicial system. It is interesting to note that after independence, Pakistan

modernized its personal law and made it quite difficult for a man to marry a second time. Tunisia and Turkey have actually abolished polygamy. In India, only Muslim men may practice polygamy, and Hindu sons inherit greater shares of their parents' estates than their sisters do.[6] While one's religion determines which law will apply to him or her regarding marriage, divorce, Maintenance, guardianship, adoption, inheritance, and succession.[7] To quote Choudhary Hyder Hussain, a prominent Muslim lawyer, " Living under the British rule for about two centuries we have come to consider it only natural for Hindus to be governed by Hindu Law and Muslim to be governed by Muslim Law; but it is wholly a medieval idea and has no place in the modern world... I would therefore strongly urge the necessity of having one single code to be named as Indian Civil Code applicable to everybody living within the territory of Indian Union irrespective of caste, creed or religion persuasions. This is the juristic solution to the communal problem . It appears to be absolutely essential in the Interest of the unification of the country for building up one single nation with one single set of laws in the country." Need For Uniform Civil Code (UCC) Liberalism and positivism have joined to formulate a view of modern law as autonomous of the economy and society, in contrast to earlier conceptions of law that relied on historical or theological explanations.[8] The UCC has been perennially characterized with the stark opposition it faces by the Muslims. It was accurately pointed out in the constituent assembly that there were Hindus who were not in favour of UCC. It was believed by them that the personal law of inheritance, succession, etc. is an affair of their religion. If that were so, Indian women cannot ever be prearranged impartiality with a man which is enshrined in

Art. 14 of the Constitution. Art. 15(1) provides that the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.[9]Under Hindu law, we will find discernment against women ubiquitously. If personal law of Hindus is a fragment of Hindu religion, equality cannot ever be attained among men and women. Religion must be restricted to religion only and the secular activities attached to the religion must be regulated, unified and modified for a strong and consolidated nation.[10]The present Muslim law can never provide equality to Muslim women- if personal law is considered as a part of their religion. To elevate the position of Indian women and provide them equality, India is badly needed of a UCC for all Indians.[11]UCC and SecularismThe Government, the press, the politicians, the academics and even the minority organizations none of them have taken any sort of active interest in the UCC. [12]Thus we could easily infer from the attitude of people dominant these days that this concept has been overlooked and at worst they have spread false information and impression about it. But, if we see today's situation then India is more communalised then it was in 1947, so we should appreciate that the concept of UCC had become very important and need immediate concern. People, who were the founding fathers of constitution as well as non-Muslims believed that a uniform civil code was essential for our national accord and secularism. But along with them there are also few people who differ about this perception like Prof. Paras Diwan says "[T]he uniform civil code has nothing to do with Indianisation or national integration or interfering with the religion of one community or the other.[13]Even few Christian organisations believed that the seeds of communal violence in the

separation had been sown by separate personal laws. So in order to make India non-violent and at liberty from any sort of communal violence there is inevitability and urgency of creating UCC. The people who do not think that UCC as an instrument for national assimilation should recall to the days of India before the Britishers. Before, Britishers came to India Kazi's and Pandit's among the Muslims and Hindus both had already created a legal fiction in the laws. Women were not considered witness and they were regarded as Kafirs, whereas among Hindus, Pandit's gave unequal punishment to the offenders on the basis of the caste of offender and victim. To do away with all these complications and to create consistency Britishers framed laws like Criminal Procedure Code, 1898 and Indian Evidence Act, 1872. Uniform Civil Code: A Call from the Indian Judiciary

The supreme court in a litany of cases has either explicitly raised the demand for UCC or has declared those personal laws null and void which it found violative of Part III of the Constitution (Fundamental Rights). In other words in majority of the instances the Judiciary has upheld Fundamental rights whenever there is a conflict between the Fundamental Rights and the Personal Laws. Personal laws talked herein were both statutory and customary. The Supreme Court first directed the Parliament to frame a UCC in the year 1985 in the case of Mohammad Ahmed Khan v. Shah Bano Begum[14], popularly known as the Shah Bano case. In this case, a penurious Muslim woman claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure[15]after she was given triple talaq from him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125. The Court also held that Article 44[16]of the

Constitution has remained a dead letter. The then Chief Justice of India Y. V. Chandrachud observed that, " A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies" The second instance in which the Supreme Court again directed the government of Article 44 was in the case of Sarla Mudgal v. Union of India[17]. In this case, the question was whether a Hindu husband, married under the Hindu law, by embracing Islam, can solemnise second marriage The Court held that a Hindu marriage solemnised under the Hindu law can only be dissolved on any of the grounds specified under the Hindu Marriage Act, 1955. Conversion to Islam and Marrying again would not, by itself, dissolve the Hindu marriage under the Act. And, thus, a second marriage solemnised after converting to Islam would be an offence under Section 494[18]of the Indian Penal Code. Justice Kuldeep Singh also opined that Article 44 has to be retrieved from the cold storage where it is lying since 1949. The Hon'ble Justice referred to the codification of the Hindu personal law and held, " Where more than 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the ' uniform civil code' for all the citizens in the territory of India." The Supreme Court in July 2003[19]when approached by a Christian priest challenging the Constitutional validity of Section 118[20]of the Indian Succession Act. The priest, John Vallamatton from Kerala, filed a writ petition in the year 1997 asserting that Section 118 of the said Act was discriminatory against the Christians as it enforces unreasonable restrictions on their donation of property for religious or charitable purpose by will. The bench struck down

the Section declaring it to be unconstitutional. Chief Justice Khare stated that:" We would like to State that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India It is a matter of great regrets that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies." ConclusionThe answer would conclude by saying that there is no place of personal laws to be practised by different communities in a Secular country like India. Moreover the above argument is forcefully reinforced by the strong fundamentals of equality that are enshrined in the constitution. To sum it not having UCC flies in the face of the spirit of the Constitution. All the people of India must be administered by one set of laws. For national harmony and for secularism, UCC is necessary. The multiplicity of laws in personal law affairs is a blow and unswerving threat to national integrity and solidarity. The following countries have already implemented the UCC and its functioning over there without any glitches viz. Germany, France, Spain Canada, Japan, Turkey and Portugal. Government of India should take wits for enacting a UCC, which must encompass the finest elements of dissimilar civil laws of the various religion communities of the country and thus accomplish its positive responsibilities imposed upon it by Article 44 of the Constitution of India.