

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION (C) NOOF 2019

(PIL UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay

...Petitioner

Verses

Union of India & Another..... Respondents

URGENT APPLICATION

To,

The Registrar,

High Court of Delhi at New Delhi,

Sir,

Kindly treat the accompanying application as an urgent one in accordance with the High Court Rules and Orders.

Petitioner is filing this writ petition under Article 226 of the Constitution. Matter is urgent in larger public interest as prayed.

PETITIONER-IN-PERSON

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NOTICE OF MOTION**To,**

The Standing Council

Union of India / Election Commission of India

High Court of Delhi, New Delhi,

Sir,

Please find enclosed herewith three copies of above mentioned Writ Petition, which is being filed today before this Hon'ble Court and likely to be listed before the Hon'ble Chief Justice Court on 31.5.2019 or any other date fixed by the registry.

It's for your kind information and necessary action.

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MEMO OF PARTIES

...Petitioner

Verses

1. Union of India Through

The Secretary,

Ministry of Home Affairs

North Block, New Delhi-110001

2. Law Commission of India ThroughThe Chairman/Secretary 4th Floor,

Loknayak Bhawan,

Khan Market, New Delhi-110003

...Respondents

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SYNOPSIS

Directive Principles are affirmative instruction from the ultimate sovereign to the State authorities, to secure to all citizens; Justice – social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all fraternity, assuring dignity of the individual and unity and integrity of the nation. Therefore, it is duty of the State to direct their activities in such a manner so as to secure the high ideals set forth in the Preamble and Parts III and IV of the Constitution. The Directives are an amalgam of diverse subjects embracing the life of the nation and include principles, which are statements of socio economic rights, social policy, administrative policy and international policy.

Object of the Article 44 is to introduce a common civil code for all, which is essential to promote fraternity, unity and national integration. It proceeds on the assumption that there is no connection between religion and personal laws in a civilized society. While the Constitution guarantees freedom of conscience and of religion, it seeks to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage, just as it has been done even in the Muslim Countries like Turkey and Egypt etc. The object of Article 44 is not to encroach upon religious liberties guaranteed under Article 25.

Dr. B.R. Ambedkar, during the Constituent Assembly debate said that:

“In fact, bulk of these different items of civil laws have already been codified during the British Rule and the major items still remaining for a Uniform Civil Code are marriage, divorce, inheritance and succession”.

The several enactments, which have been made by the Parliament since Independence in the name of the Hindu Code relating to marriage, succession, adoption and guardianship, relate only to Hindus (including Budhists, Jains and Sikhs) and excludes the Muslims, who are the major slice of the minority communities and who are more vociferously objecting to frame a common civil code for all citizens of India.

In Shah Bano case, the Supreme Court has observed: *“It is a matter of regret that Article 44 has remained dead letter. It provides that ‘the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’ but there is no evidence of any official activity for framing a common civil code. A belief seems to have gained that it is for Muslim community to take a lead in the matter of reforms of their personal law. Common civil code will help the cause of national integration by removing desperate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is for the State, which is charged with the duty of securing a uniform civil code and it has legislative competence to do so. A counsel in this case whispered that legislative competence is one thing, the political courage to use that competence is quite another. We understand difficulties involved in bringing persons of different faiths and persuasion on a common platform but beginning has to be made, if the Constitution has any meaning. Role of the reformer has*

to be assumed by the Courts because; it is beyond endurance of sensitive minds to allow injustice when it is so palpable. Piecemeal attempts to bridge the gap cannot take the place of Common Code. Justice to all is for more satisfactory way of dispensing justice than justice from case to case”.

The objection against common civil code that it would be a tyranny to the minority community was strongly rejected by Ld. Munshi as thus: “*An argument has been advanced that the enactment of a common civil code would be tyrannical to minorities. Nowhere in advanced Muslim countries, personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a common civil code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. When the Sharia Act was passed, the Khojas and Cutchi Memons were highly dissatisfied. They then followed certain Hindu customs for generations since they became converts they had done so. They didn’t want to confirm to Sharia and yet by legislation of the Central Legislature where certain Muslim members who felt that Sharia law should be enforced upon the whole community carried their points. Khojas and Cutchie Memons unwillingly had to submit to it. When you want to consolidate a community, you have to consider the benefit, which may accrue, to the whole community and not to the customs. It is not therefore; correct to say that such an Act is tyranny of the majority. If you look at the Countries in Europe, which have a common civil code, everyone who has gone there from any part of the world and even minorities has to submit the common civil code. The point is whether we are going to consolidate and unify our personal law. We want to divorce religion from personal law, from what may be called social relations or from the rights*

of parties as regards inheritance of succession. What have these things got to do with religion. I really fail to understand. There is no reason why there should not be a common civil code throughout the territory of India. 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 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 faction, which still offer serious dangers to national consolidation. It is very necessary that whole of our life insofar as it is restricted to secular sphere must be unified in such a way that we may be able to say- '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, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that, this is not an attempt to exercise tyranny over a minority community; it is much more tyrannous to majority community".

Alladi Krishnaswami Iyer said that a Common Civil Code ran into every department of civil relation to the law of succession, to the law of marriage and similar matters; there could no objection to the general statement that 'State shall endeavour to secure a Uniform Civil Code'.

The Drafting Committee Chairman Dr. BR Ambedkar also spoke at some length on the matter. He said: "*We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal court.....We have the law of transfer of property which deals with property relation and which is operative*

throughout the country..... I can cite innumerable enactments, which would prove that the country has practically a Civil Code, uniform in its contents and applicable to the whole of the country.”

In John Vallamattom v. Union of India, [AIR 2003 SC 2902 : (2003) 6 SCC 611], the then Hon’ble Chief Justice of India Justice V. N. Khare, with whom the other two Judges, Justice Sinha and Justice Lakshman agreed and observed: *“A common civil code will help the cause of national integration by removing all contradictions based on ideologies”*. The Supreme Court also observed that *“the power of the Parliament to reform and rationalize the personal laws is unquestioned and the command of Article 44 of the Constitution is yet to be realized”*.

In Sarla Mudgal case [AIR 1995 SC 1531: (1995) 3 SCC 635], while insisting the need for a Common Civil Code, the Apex Court has held that fundamental rights relating to religion of members of any community would not be affected thereby. It was held that personal law having been permitted to operate under authority of legislation the same can be superseded by a uniform civil code. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized Society. Article 25 guarantees religious freedom and Article 44 seeks to divest religion from personal law. Marriage, succession and like matter of secular character cannot be brought under Articles 25-27.

LIST OF DATE

28.08.2017:	Petitioner submitted a Representation to the HMO.
04.04.2018:	Petitioner submitted a Representation to the LCI.
30.05.2019:	Respondents have not taken steps hence this PIL.

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PIL TO DRAFT A UNIFORM CIVIL CODE IN SPIRIT OF ARTICLE 44 READ WITH ARTICLES 14, 15, 21 OF THE CONSTITUTION OF INDIA**To,**

THE HON'BLE CHIEF JUSTICE

AND LORDSHIP'S COMPANION

JUSTICES OF THE HON'BLE HIGH

COURT OF DELHI

HUMBLE PETITION OF ABOVE-NAMED PETITIONER

THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petition is not guided by self-gain or for gain of any other individual person, institution or body. There is no motive other than the larger public interest in filing this petition. Petitioner has no personal interest or individual gain, private motive or oblique reasons in filing this PIL. It is bona-fide with sole purpose of public interest and interest of justice.
2. The source of averments made in this petition is personal knowledge and information collected from various sources, including newspapers and government websites. Petitioner is filing this PIL to draft a Uniform Civil Code in spirit of Article 44 of the Constitution of India.
3. Present petition is for benefit of poor, disabled, economically weaker section and socially-economically down trodden people and particularly the poor women. As they are incapable of accessing this Hon'ble Court themselves, petitioner is filing this PIL to secure fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution.

4. The Union Government and Law Commission of India is likely to be affected by the orders sought in this petition and they have been impleaded as Respondents. Petitioner submits that to its knowledge, no other persons, bodies, institutions are likely to be affected by the order/ direction sought in this writ petition.
6. Petitioner is an Advocate, practice in this Hon'ble Court and Apex Court and a social-political activist, striving for gender justice, gender equality and dignity of women and contributing his best to the development of socially-economically downtrodden people.
7. Petitioner has not filed any other petition either in this Court or in other Court seeking same or similar direction as prayed in this petition.
8. Petitioner has submitted a representation to the Central Government on 28.8.2017, which is annexed as **Annexure-1 (Pages 27-37)** and Law Commission on 4.4.2018, which is annexed as **Annexure-2 (Pg. 38-51)** There is no further requirement to move concerned authority for relief sought in this writ petition again. There is no other remedy available except approaching this Hon'ble Court by way of the instant petition.
9. Directive Principles are affirmative instruction from the ultimate sovereign to the State authorities, to secure to all citizens; Justice – social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote

among them all fraternity, assuring dignity of the individual and unity and integrity of the nation. Therefore, it is duty of the State to direct their activities in such a manner so as to secure the high ideals set forth in the Preamble and Parts III and IV of the Constitution. The Directives are an amalgam of diverse subjects embracing the life of the nation and include principles, which are statements of socio economic rights, social policy, administrative policy and international policy.

10.The object of the Article 44 is to introduce a Uniform Civil Code, which is essential to promote fraternity unity and national integration. It proceeds on the assumption that there is no connection between religion and personal laws in a civilized society. While the Constitution guarantees freedom of conscience and of religion, it seeks to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage, just as it has been done even in the Muslim Countries like Turkey and Egypt etc. The object of Article 44 is not to encroach upon religious liberties guaranteed under Article 25.

11.Dr. B.R. Ambedkar, during the Constituent Assembly debate said that: *“In fact, bulk of these different items of civil laws have already been codified during the British Rule and the major items still remaining for a Uniform Civil Code are marriage, divorce, inheritance and succession”*.

12.The several enactments, which have been made by the Parliament since Independence in the name of the Hindu Code relating to marriage, succession, adoption and guardianship, relate only to Hindus (including Budhists, Jains and Sikhs) and excludes the Muslims, who are the major slice of the minority communities and who are more vociferously objecting to frame a common civil code for all citizens of India.

13.In Shah Bano case, the Supreme Court has observed: *“It is a matter of regret that Article 44 has remained dead letter. It provides that ‘the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’ but there is no evidence of any official activity for framing a common civil code. A belief seems to have gained that it is for Muslim community to take a lead in the matter of reforms of their personal law. Common civil code will help the cause of national integration by removing desperate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is for the State, which is charged with the duty of securing a uniform civil code and it has legislative competence to do so. A counsel in this case whispered that legislative competence is one thing, the political courage to use that competence is quite another. We understand difficulties involved in bringing persons of different faiths and persuasion on a common platform but beginning has to be made, if the Constitution has any meaning. Role of the reformer has to be assumed by the Courts because; it is beyond endurance of sensitive minds to allow injustice when it is so palpable. Piecemeal attempts to bridge the gap cannot take the place of Common Code. Justice to all is for more satisfactory way of dispensing justice than justice from case to case”.*

14.The objection against common civil code that it would be a tyranny to the minority community was strongly rejected by Ld. Munshi as thus: *“An argument has been advanced that the enactment of a common civil code would be tyrannical to minorities. Nowhere in advanced Muslim countries, personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a common civil*

code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. When the Sharia Act was passed, the Khojas and Cutchi Memons were highly dissatisfied. They then followed certain Hindu customs for generations since they became converts they had done so. They didn't want to confirm to Sharia and yet by legislation of the Central Legislature where certain Muslim members who felt that Sharia law should be enforced upon the whole community carried their points. Khojas and Cutchie Memons unwillingly had to submit to it. When you want to consolidate a community, you have to consider the benefit, which may accrue, to the whole community and not to the customs. It is not therefore; correct to say that such an Act is tyranny of the majority. If you look at the Countries in Europe, which have a common civil code, everyone who has gone there from any part of the world and even minorities has to submit the common civil code. The point is whether we are going to consolidate and unify our personal law. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance of succession. What have these things got to do with religion. I really fail to understand. There is no reason why there should not be a common civil code throughout the territory of India. 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 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 faction, which still offer serious dangers to national consolidation. It is very necessary that whole

of our life insofar as it is restricted to secular sphere must be unified in such a way that we may be able to say- '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, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that, this is not an attempt to exercise tyranny over a minority community; it is much more tyrannous to majority community".

15. Alladi Krishnaswami Iyer said- *"A Common Civil Code ran into every department of civil relation to the law of succession, to the law of marriage and similar matters; there could no objection to the general statement that 'State shall endeavour to secure a Uniform Civil Code'".*

16. Dr. BR Ambedkar said: *"We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal court.....We have the law of transfer of property which deals with property relation and which is operative throughout the country..... I can cite innumerable enactments, which would prove that the country has practically a Civil Code, uniform in its contents and applicable to the whole of the country."*

17. In *John Vallamattom v. Union of India*, [AIR 2003 SC 2902 : (2003) 6 SCC 611], the then Hon'ble Chief Justice of India Justice V. N. Khare, with whom the other two Judges, Justice Sinha and Justice Lakshman agreed and observed: *"A common civil code will help the cause of national integration by removing all contradictions based on ideologies"*. The Supreme Court also observed that *"the power of the Parliament to reform and rationalize the personal laws is unquestioned and the command of Article 44 of the Constitution is yet to be realized"*.

- 18.**In *Sarla Mudgal* case [AIR 1995 SC 1531: (1995) 3 SCC 635], while insisting the need for a Common Civil Code, the Supreme Court has held that the fundamental rights relating to religion of members of any community would not be affected thereby. It was held that personal law having been permitted to operate under authority of legislation the same can be superseded by a uniform civil code. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized Society. Article 25 guarantees religious freedom and Article 44 seeks to divest religion from social relation and personal law. Marriage, succession and like matter of secular character cannot be brought under the Articles 25, 26 and 27. Hon'ble Judges requested the Prime Minister of India to have a fresh look at Article 44 and endeavour to secure for the citizens a uniform civil code throughout the territory of India and wanted the Court to be informed about the steps taken. However, in *Lily Thomas* case, the Court clarified the remarks made in *Sarla Mudgal* case was only as an opinion of the Judges and declared that no direction have been issued for any legislation. At the same time, the Court did not express any dissenting view of the need for a common civil code. It only held that to have a legislation or not is a policy decision and Court cannot give any direction to the Executive.
- 19.**That diversity in the personal matters along with religious differentiation leads to sentimental tension between different communities as has been learnt by bitter experience from the history leading to partition and subsequent events till today. It can never be forgotten that the policy of British imperialism was 'divide and rule' and for that purpose, they would at times can anything, which might make

the cleavage between Hindus and Muslims, wider and wider. The British rulers, thus, lost no opportunity in inserting even newer wages like the communal award, which planted separate representation in the legislature according to religion; and eventuality led to lamentable partition, which truncated the motherland and involved so much of bloodshed and inhuman outrages.

20. The ideological concept, which led to partition was the assertion of the Muslims that they constitute a 'Nation' separate from the Hindus. Even though Hindu leader did not admit two-nation theory. Partition is an accomplished fact and cannot be wiped off. The framers of the Constitution had in their mind the fresh experience of atrocities, which were committed at the time of partition of India. When the Muslims were given the options to go away to new dominion, it was quite natural for the leaders of divided India to aspire for the unity of the one nation, namely, Indian, so that history might not repeat itself.

21. By 42nd amendment; expression '*Unity of Nation*' was replaced by the '*Unity and Integrity of the Nation*' and Article 51A provides: *It shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem; (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; (c) to uphold and protect the sovereignty, unity and integrity of India; (d) to defend the country and render national service when called upon to do so; (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; (f) to value and preserve*

the rich heritage of our composite culture; (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures; (h) to develop the scientific temper, humanism and the spirit of inquiry and reform; (i) to safeguard public property and to abjure violence; (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

22. The Constitution makers wanted to establish a 'Secular State' and with that purpose they codified Article 25 which guaranteed freedom of religion, freedom of conscience and freedom to profess, practice and propagate religion, to all persons. But at the same time they sought to distinguish between essence of a religion and other secular activities, which might be associated with religious practice but yet did not form a part of the core of the religion, and with this end in view they inserted Clause 2(a) as thus: *"Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities, which may be associated with religious practices."*

23. Anybody, who raises an objection to implementation of Article 44 becomes guilty of violation of the Preamble, Article 44 as well as Article 51A and any Government, which yields to such demands, even after 68 years of the adoption of the Constitution, would be not only liable to the charge of throwing the Constitution to the winds, but also of being a party to the violation of Articles 44 and Article 51A, and also of guarantee of equality and non-discrimination on the ground of religion, race, caste, sex & place of birth under Articles 14-15 of the Constitution.

24. Article 51A enjoins every citizen to renounce practices derogatory to dignity of woman. It enjoins every citizen to develop scientific temper, humanism and the spirit of inquiry and reform. It needs little arguments to point out that a man marrying up to 4 wives or divorcing his wife by utterance of word ‘Talaq’ thrice; or refusal to maintain a divorced wife after a limited period; are all practices derogatory to the dignity a woman. Therefore, any person, who resorts such practices or urges that such practices should be immuned or that Article 44 must be wiped off or restricted to persons other than Muslims, is violating the Article 51A. Whether that provision of the Article 51A are unenforceable in the Court of law or not, is a different question; but in other countries, such a person would have lost his citizenship if not something more.

25. It is a radical argument that Article 44 should not be implemented because it is opposed to Sharia. It is pertinent to quote former CJI Justice Chagla’s article ‘Plea for Uniform Civil Code’ - *“Article 44 is a mandatory provision binding the Government and it is incumbent upon it to give effect to this provision... The Constitution was enacted for the whole country, it is binding for the whole country, and every section and community must accept its provisions and its Directives”*.

26. As far as the plea of Muslim identity is concerned, it is nothing but a relic of the two-nation theory, which was asserted by Muslim leaders to carve out a separate State on the basis of religion. On the other hand, Nationalist Indian leaders all along urged that there was only one Nation, viz. India; and after the Muslims went away on the partition, there was nothing to stand in the way of proclaiming in the Preamble that the goal of India was One Nation united by the bond of fraternity.

27. There should not be any fear of losing identity when the Constitution guarantees religion, language, culture, in Articles 26, 29, 30 of the Constitution. After the partition, the Muslims who preferred to remain in divided India knew very well what they could get from the Secular Indian Government. Hence, *to cry for more, is nothing but a resurrection of slogan 'Islam in Danger' which led to the partition of India.*
28. It is next contended that even though a common civil code is desirable, it should not be implemented until Muslim themselves come forward to adopt it. It is only a diluted form of plea for abolition of Article 44, because the Article 44 may virtually be effaced if the Muslims never come forward with their consent. None of Directives lay down that they can be implemented only if there is 100% consents of citizens throughout the territory of India. The Constitution was adopted after due deliberation as to its provisions being beneficial to people of India, by the Constituent Assembly having enough Muslim representatives.
29. Illiterate/ignorant parents don't desire that their children should go to school instead of helping them in agriculture, or earning money in factories. Should the implementation of Article 45 wait until these people give their consent? The controversy arising from the Shah Bano case clearly exposed that it is only a section of the Muslim community, who would not accept it. Is there any precedent in any country, where the caprices of such a fraction of the population having allowed to stand in the way of unity, integrity and progress of the entire nation and the implementation of the fundamental law of the country, adopted by a solemn Constituent Assembly? Article 44 is addressed to State thus it is duty of State to implement it in consonance with Articles 14, 15 and 21.

30.The Supreme Court has observed: *“A belief seems to have gained ground that it is for the Muslims community to take a lead in the matter of reforms of their personnel law.....But it is the State which is charged the duty of securing a uniform civil code for the citizens of the country. This duty has been imposed on the State with the object of achieving national integration by removing disparate loyalties to laws which have conflicting ideologies.”*

The question arises – why then has the Union Government failed to discharge the Constitutional mandate for more than 6 decades? The Answer has been pithily answered by the Court – *“lack of political courage”* – which many other responsible persons have amplified as the fear of losing Muslim votes at the next election.

31.The State has failed to implement Article 44 and also violated the norm of much-vaunted secularism. It is curious that the Government has not yet protested against the decision of the Indian Muslim Personal Law Board to setup parallel Courts in many localities to decide the cases under Shariat, even though the setting up of such a parallel Courts will not only sound a death knell to Article 44 of the Constitution, but also to other provisions providing for one system of judiciary throughout the territory of India for all its people. It is definitely a retrograde step cutting at the roots of the Constitution of India.

32.It is also urged that the Shariat is immutable being founded on the Quran which is ordained by the God. Apart from the historical fact that this issue has been concluded by the partition of India and adoption of the Constitution, it has been belied by the multifarious changes by way of reform in all the Muslim State e.g. Egypt, Jordan, Morocco, Pakistan, Syria, Tunisia, Turkey – where no question of Hindu dominance arose.

33. It is pertinent to State the Report of the Commission on Marriage and Family Laws, which was appointed by the Government of Pakistan in 1955, and which should have demolished, once for all, the plea that the Shariat is immutable. In words of Allama Iqbal, *“The question which is likely to confront Muslim Countries in the near future, is whether the Law of Islam is capable of evolution – a question which will require great intellectual effort, and is sure to be answered in the affirmative.”*
34. One more logic is given that even if a common civil code is formulated, it should be optional for the Muslims to adopt its provisions. Petitioner states that it is only a diluted version of the forgoing pleas, viz. that the Shariat is immutable; that no Code can be imposed on Muslims without their consent. It is unmeaning to draw-up a uniform civil code as enjoined by Article 44 if it is not binding on every citizen.
35. Polygamy is totally prohibited in Tunisia and Turkey. In countries like Indonesia, Iraq, Somalia, Syria, Pakistan and Bangladesh, it is permissible only if authorized by the prescribed authority. Unilateral Talaq has been abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq etc. In Pakistan and Bangladesh, any form of extra judicial Talaq shall not be valid unless confirmed by an arbitration council but in India, it is continuing. The Dissolution of Muslim Marriage Act, 1939, provided Muslim women to obtain dissolution in certain cases, which they do not have under the Shariat. Under the Act, marriage with another woman would be treated as an act of ‘cruelty’ to bar a husband’s suit for restitution of conjugal rights. The Act has been adopted in Pakistan and Bangladesh with amendments. The statement of objects and reasons of the Act, which has been conceded by Muslims

in India, Pakistan and Bangladesh is illuminating: *“There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the Court dissolving her marriage in case a husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her un-provided for and under other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India.”*

36. Government should come forward with firm pronouncement instead of being beguiled by statements issued by few fundamentalists. Shariat is controlled by legislation in Pakistan and Bangladesh. In India, a uniform law of maintenance was adopted by Section 488 CrPC. When Section 125 CrPC extended to divorced women, Muslims contended that it should not be applied to them as it was contrary to Shariat but Court turned down this contention and rejected the argument that according to Sharia, husband's liability to provide for maintenance is limited to iddat. It was held that Section 125 CrPC overrides the personal law.

37. The Supreme Court interpreted that under Section 3 of the Act, 1986, a Muslim husband is liable to make provision for the future of a divorced wife even after iddat period. [*Sabra Shamim versus Maqsood Ansari, (2004) 9 SCC 606*] Justice Khalid of Kerala High Court reminded the plight of Muslim women and wanted the law to be amended to alleviate their sufferings and above decisions were approved by the Supreme Court in *Shamim Ara v State of UP [(2002) 7 SCC 518]*.

38. Goa has a common civil code since 1965, which is applicable on all its citizens. Now a pertinent question arises - if Uniform Civil Code can be implemented in Goa, then why not throughout the territory of India.

39. In the Constituent Assembly, Mr. Nasiruddin's speech says thus: "*certain aspects of the Civil Procedure Code have interfered with our Personal Law and very rightly so and also that marriage and inheritance are similar practices associated with religion*". [Vol-VII, P542]
40. Even, minor girls are victim of Polygamy and Nikah Halala and various form of contract marriage viz. Nikah Mutah and Nikah Misyar. Such incidents are routinely published in Electronic, Print and Social Media. That is why India urgently needs a Uniform Civil Code in spirit of Article 44 read with Articles 14, 15 and 21 of the Constitution.
41. It is necessary to study the Civil Laws of the developed countries particularly the Common Civil Code of America, France, China and Japan. It is also necessary to incorporate the best practices of all religions and communities. It is pertinent to state that Goa has a Common Civil Code since long time. Therefore, the same code may be amended and adopted as a Common Civil Code throughout the territory of India.
42. The right of equality guaranteed under Article 14, right against non-discrimination guaranteed under Article 15 and right to life and liberty guaranteed under Article 21 can't be secured and Gender Justice and Gender Equality cannot be achieved without implementing the Uniform Civil Code in spirit of Article 44 read with Articles 14, 15, 21.
43. If the Preamble is key to understand the Constitution of India, the Directive Principles are its basic ideals. The Constitution makers poured their mind by setting forth humanitarian socialist secular principles, which epitomized hopes and aspirations of people and declared the Directive Principles as the fundamentals in the governance of the country. Therefore, it is duty of the Government to implement it.

PRAYER

Keeping in view the above stated facts, constitutional obligation of the Government to implement Article 44 of the Constitution, Judgments of the Supreme Court, particularly in Shah Bano, John Vallamattom, Sarla Mudgal, Shayara Bano and Sabrimala Case and benefits of Common Civil Code, it is respectfully prayed that this Hon'ble Court may be pleased to issue a writ, order or direction or a writ in the nature of mandamus to:

- a) direct the Union of India to constitute a Judicial Commission or a High Level Expert Committee, to draft a Uniform Civil Code in spirit of Article 44 of the Constitution within three months, while considering the best practices of all religions and sects, Civil Laws of developed countries and international conventions; and publish it on the website for at least 60 days for extensive public debate and feedback;
- b) in the alternative, direct the Law Commission of India to draft a Uniform Civil Code in spirit of Article 44 of the Constitution within three months, while considering the best practices of all religions and sects, Civil Laws of developed countries and international conventions; and publish it on the website for at least 60 days for wide public debate and feedback;
- c) pass such other order(s) or direction(s) as this Hon'ble Court may deem fit and proper to effectuate Article 44 of the Constitution of India and secure gender justice, gender equality and dignity of women.

PETITIONER-IN-PERSON

(Ashwini Kumar Upadhyay)

IN THE HIGH COURT OF DELHI AT NEW DELHI
WRIT PETITION (C) NOOF 2019
(PIL UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay

...Petitioner

Verses

Union of India & Another..... Respondents

AFFIDAVIT

do hereby solemnly affirm and declare as under:

1. I am sole petitioner above named and well acquainted with facts and circumstances of the case and as such competent to swear this affidavit.
2. I have filed the present writ petition as PIL. There is no personal gain, private motive or oblique reasons in filing this petition. It is totally bona-fide and purely in larger public interest and interest of justice.
3. I have gone through the Delhi High Court (Public Interest Litigation) Rules, 2010 and do hereby affirm that the PIL is in conformity thereof.
4. I have no personal interest in the litigation and neither myself nor any body in whom I am interested, would in any manner benefit from the relief sought in the present litigation save as a member of the General Public. The petition is not guided by self-gain or gain of any person, institution, body and there is no motive other than of Public Interest.
5. I have done whatsoever enquiry/investigation, which was in my power to do, to collect all data/material which was available and relevant for this Court to entertain the present petition. I further confirm that I have not concealed in the present petition any data/material/information which may have enabled this Court to form an opinion whether to entertain this petition or not and/or whether to grant any relief or not.
6. I have read and understood the contents of accompanying synopsis and list of dates (pages 4-8) and writ petition (pages (9-27) and total pages (1-36) which are true and correct to my personal knowledge and belief.
7. Annexures filed along with this are true copies of respective originals.
8. Averments in the affidavit are true/correct to my personal knowledge and belief. No part of Affidavit is false nor has anything been concealed.

DEPONENT

(Ashwini Kumar Upadhyay)

VERIFICATION

I, the Deponent do hereby verify that contents of above affidavit are true and correct to my personal knowledge and belief. No part of it is false nor has anything material been concealed there from.

I solemnly affirm today i.e. the 30th day of May 2019 at New Delhi.

DEPONENT

(Ashwini Kumar Upadhyay)

APPENDIX

ARTICLE 14 IN THE CONSTITUTION OF INDIA

14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India
Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

ARTICLE 15 IN THE CONSTITUTION OF INDIA

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

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

ARTICLE 21 IN THE CONSTITUTION OF INDIA

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

ARTICLE 44 IN THE CONSTITUTION OF INDIA

44. Uniform civil code for the citizens The State shall endeavour to secure for the citizens a uniform civil code throughout territory of India

Annexure-1

To,

28.08.2017

Hon'ble Home Minister,

Government of India, New Delhi,

Through: The Secretary – Ministry of Home

Subject: To enact a Uniform Civil Code in spirit of the Article 44

Sir,

1. If the Preamble is key to understand the Constitution, the Directive Principles are its basic ideals. The Constitution makers poured their mind by setting forth humanitarian socialist principles, which epitomized the hopes and aspirations of people and declared the Directives as the fundamental in the governance of the country. They are affirmative instruction from the ultimate sovereign to the State authorities, to secure to all citizens; Justice – social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all fraternity, assuring dignity of the individual and unity and integrity of the nation. It is duty of the State to direct their activities in such a manner so as to secure the high ideals set forth in the Preamble and Part IV of the Constitution. The Directives are an amalgam of diverse subjects embracing the life of the nation and include principles, which are statements of socio economic rights, social policy, administrative policy and international policy.
2. The object of the Article 44 is to introduce a uniform civil code for all the Indian citizens to promote fraternity, unity and national integration. It proceeds on the assumption that there is no necessary connection between religion and personal law in a civilized society. While the Constitution guarantees freedom of conscience and of religion, it seeks to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage, just as it has been done even in Muslim Countries like Turkey and Egypt. The object of Article 44 is not to encroach upon religious liberties. The Article 25 already reserves such right of the State. Dr. BR Ambedkar said in the Constituent Assembly: "In fact, bulk of these different items of civil laws have already been codified during the British Rule and the major items

still remaining for a Uniform Civil Code are marriage, divorce, inheritance and succession (adoption, guardianship).” It is to be noted that the several enactments, which have been made by Parliament since Independence in the name of the Hindu Code relating to marriage, succession, adoption and guardianship, relate only to Hindus (including Budhists, Jains and Sikhs) and excludes the Muslims, who are the major slice of the minority communities and who are more vociferously objecting to the framing of a uniform civil code for all citizens of India.

3. In Shah Bano case, the Apex Court held: “It is a matter of regret that Article 44 has remained dead letter. It provides that ‘the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’ but there is no evidence of any official activity for framing a common civil code. A belief seems to have gained that it is for Muslim community to take a lead in the matter of reforms of their personal law. Common civil code will help the cause of national integration by removing desperate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is for the State, which is charged with the duty of securing a uniform civil code and it has legislative competence to do so. A counsel in this case whispered that legislative competence is one thing, the political courage to use that competence is quite another. We understand difficulties involved in bringing persons of different faiths and persuasion on a common platform but beginning has to be made if the Constitution has any meaning. Role of the reformer has to be assumed by the Courts because; it is beyond endurance of sensitive minds to allow injustice when it is so palpable. Piecemeal attempts to bridge the gap cannot take the place of Common Civil Code. Justice to all is for more satisfactory way of dispensing justice than justice from case to case”.
4. One of the main objection against uniform civil code that it would be a tyranny to minority community was rejected by Sh. K.M. Munshi in the Constituent Assembly as thus: “An argument has been advanced that the enactment of a common civil code would be tyrannical to minorities. Nowhere in advanced Muslim countries, personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a

common civil code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. When the Sharia Act was passed, the Khojas and Cutchi Memons were highly dissatisfied. They then followed certain Hindu customs for generations since they became converts they had done so. They didn't want to confirm to Sharia and yet by legislation of the Central Legislature where certain Muslim members who felt that Sharia law should be enforced upon the whole community carried their points. Khojas and Cutchie Memons unwillingly had to submit to it. When you want to consolidate a community, you have to consider the benefit, which may accrue, to the whole community and not to the customs. It is not therefore; correct to say that such an Act is tyranny of the majority. If you look at the Countries in Europe, which have a common civil code, everyone who has gone there from any part of the world and even minorities has to submit the common civil code. The point is whether we are going to consolidate and unify our personal law. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance of succession. What have these things got to do with religion. I really fail to understand. There is no reason why there should be a common civil code throughout the territory of India. 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 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 faction, which still offer serious dangers to our national consolidation. It is very necessary that whole of our life so far as it is restricted to secular sphere must be unified in such a way that we may be able to say- '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, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that, this is not an attempt to exercise tyranny over a minority community; it is much more tyrannous to the majority community".

5. Sh. Alladi Krishnaswami Iyer said that a Civil Code ran into every department of civil relation to the law of succession, to the law of marriage and similar matters; there could no objection to the general statement that State shall endeavour to secure a Uniform Civil Code.
6. The Drafting Committee Chairman Dr. Ambedkar also spoke at some length on the matter. He said: “We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal court.....We have the law of transfer of property which deals with property relation and which is operative throughout the country..... I can cite innumerable enactments, which would prove that the country has practically a Civil Code, uniform in its contents and applicable to the whole of the country.”
7. In *John Vallamattom versus Union of India*, AIR 2003 SC 2902: (2003) 6 SCC 611, the then Hon’ble Chief Justice of India Justice V. N. Khare, with whom the other two Judges, Justice Sinha and Justice Lakshman agreed, observed as thus: “A common civil code will help the cause of national integration by removing all contradictions based on ideologies”. The Court also observed that “the power of the Parliament to reform and rationalize the personal laws is unquestioned and the command of Article 44 of the Constitution is yet to be realized”.
8. In *Sarla Mudgal Vs. Union of India*, AIR 1995 SC 1531: (1995) 3 SCC 635, while insisting the need for a Common Civil Code, the Apex Court held that the fundamental rights relating to religion of members of any community would not be affected thereby. It was held that personal law having been permitted to operate under authority of legislation the same can be superseded by a uniform civil code. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized Society. Article 25 guarantees religious freedom and Article 44 seeks to divest religion from social relation and personal law. Marriage, succession and like matter of secular character cannot be brought under Article 25, 26 and 27. Hon’ble Judges requested the Prime Minister of India to have a fresh look at Article 44 and endeavour to secure for the citizens a uniform civil code throughout the territory of India and wanted the Court to be informed about the steps taken. However, in *Lily Thomas Vs. Union of India*, the Court

clarified the remarks made in Sarla Mudgal case only as an opinion of the Judge and declared that no direction have been issued for any legislation. At the same time, the Court did not express any dissenting view of the need for a common civil code. It only held that to have a legislation or not is a policy decision and Court cannot give any direction to the Executive.

9. That diversity in personal matters along with religious differentiation leads to sentimental tension between different communities as has been learnt by bitter experience from the history leading to the partition and by subsequent events till today. It can never be forgotten that the policy of British imperialism was 'divide and rule' and for that purpose, they would at times fan anything, which might make the cleavage between Hindus and Muslims, wider and wider. The British rulers, thus, lost no opportunity in inserting even newer wages like the communal award, which planted separate representation in the legislature according to religion; and eventuality led to lamentable partition, which truncated the motherland and involved so much of bloodshed and inhuman outrages. The ideological concept, which led to partition was the assertion of the Muslims that they constitute a 'Nation' separate from the Hindus. Even though Hindu leader didn't admit two-nation theory, the partition is an accomplished fact and cannot be wiped off. The framers of the Constitution had in their mind the fresh experience of atrocities, which were committed at the time of partition. When the Muslims were given the options to go away to the new dominion, it was quite natural for the leaders of divided India to aspire for the unity of the one nation, namely, Indian, so that history might not repeated itself.
10. By the 42nd amendment; expression 'Unity of Nation' was replaced by the 'Unity and Integrity of the Nation' and Article 51A was introduced as the fundamental duty as thus: (a) to abide by the Constitution and respect its ideals and institutions; (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; (c) to uphold and protect the Unity and integrity of India; (e) to promote harmony and the spirit of *common brotherhood* amongst all the people of India, transcending religious, linguistic and regional or sectional diversities, to renounce parties derogatory of dignity of women.

11. The Constitution makers wanted to establish a 'Secular State' and with that purpose they codified the Article 25(1) which guaranteed freedom of religion, freedom of conscience and freedom to profess, practice and propagate religion, to all persons. But at the same time they sought to distinguish between the essence of a religion and other secular activities, which might be associated with religious practice but yet did not form a part of the core of the religion, and with this end in view they inserted Clause 2(a) as thus: "Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities, which may be associated with religious practices."
12. Anybody who raises an objection to implementation of the Article 44 becomes guilty of violation of the Preamble, Article 44 as well as Article 51A of the Constitution and any Government, which yields to such demands, even after 66 years of the adoption of the Constitution, would be not only liable to the charge of throwing the Constitution to the winds but also of being a party to the violation of Article 44 and Article 51A specifically, and also of guarantee of non-discrimination on the ground of religion of Article 15 of the Constitution.
13. Clause (e) of the Article 51A enjoins every citizen to renounce practices derogatory to the dignity of woman. It needs little arguments to point out that a man marrying up to four wives or divorcing his wife by the utterance of word 'Talaq' thrice; or refusal to maintain a divorced wife after a limited period of time (three months); are all practices derogatory to the dignity a woman. Therefore, any member of the Muslim community, who resorts to such practices, who himself or urges that such practices should be immuned from legislation or that Article 44 itself must be wiped off or restricted to persons other than Muslims, is violating Article 51A. Whether that provision is unenforceable in the Courts of law are not is a different question; but in other countries such a person would have lost his citizenship if not something more.
14. It is a radical argument that Article 44 should not be implemented because it is opposed to Sharia. It is pertinent to quote former CJI Justice Chagla's article 'Plea for Uniform Civil Code' - "Article 44 is a mandatory

provision binding the Government and it is incumbent upon it is to give effect to this provision... The Constitution was enacted for the whole country, it is binding for the whole country, and every section and community must accept its provisions and its Directives”.

15.As far as the plea of Muslim identity is concerned, it is nothing but a relic of the two-nation theory, which was asserted by the Muslim leaders to carve out a separate State on the basis of religion. On the other hand, the nationalist Indian leaders all along urged that there was only one Nation, *viz.* India; and after the Muslims went away on the partition, there was nothing to stand in the way of proclaiming in the Preamble that the goal of India was One Nation united by the bond of fraternity. There should not be any fear of losing identity when the Constitution guarantees religion, language, culture, in Articles 26, 29,

30. After the partition, the Muslims who preferred to remain in divided India knew very well what they could get from the secular government. To cry for more, is nothing but a resurrection of slogan “Islam in Danger” which led to the partition of India.

16.It is next contended that even though a common civil code is desirable, it could not be brought about until the Muslim themselves came forward to adopt it. It is only a diluted form of plea for abolition of Article 44 altogether, because the Article may virtually be effaced if the Muslims never come forward with their consent. None of Directives lay down that they can be implemented only if 100% consents. Constitution was adopted after due deliberation as to its provisions being beneficial to people, by Constituent Assembly having Muslim representatives.

17.Illiterate and ignorant parents do not desire that their children should go to school instead of helping them in agriculture, or earning money in factories. Should the implementation of Article 45 wait till these people give their consent? The controversy arising from the Shah Bano case clearly exposed that it is only a section of the Muslim community, who would not accept it. Is there any precedent in any country, where the caprices of such a fraction of the population having allowed to stand in the way of the unity and progress of the entire nation and the implementation of the fundamental law of the country, adopted by a solemn Constituent Assembly? Article 44 of the

Constitution is addressed to the State thus it is duty of the State to implement it in letter and spirit in consonance with Articles 14, 15, 21.

18.The Apex Court has observed: “A belief seems to have gained ground that it is for the Muslims community to take a lead in the matter of reforms of their personnel law.....But it is the State which is charged the duty of securing a uniform civil code for the citizens of the country. This duty has been imposed on the State with the object of achieving national integration by removing disparate loyalties to laws which have conflicting ideologies.” The question arises – why then has the Union Government failed to discharge this Constitutional mandate for more than six decades? The Answer has been pithily answered by the Court - lack of political courage – which many other responsible persons have amplified as the fear of losing Muslim votes at the next election. The State has not only failed to implement the Article 44 but it has violated the norm of the much-vaunted secularism. It is also curious that the Government has not yet protested against the decision of the Indian Muslim Personal Law Board to setup parallel Courts in many localities to decide the cases under Shariat, even though the setting up of such a parallel Court will not only sound a death knell to the Article 44 but also to the provisions in the Constitution providing for one system of judiciary for the entire nation and all its people. It is a retrograde step cutting at the roots of the Constitution of the India.

19.It is also urged that the Shariat is immutable being founded on the Koran which is ordained by the God. Apart from the historical fact that this issue has been concluded by the partition of India and adoption of the Constitution of India, it has been belied by the multifarious changes by way of reform in all the Muslim State e.g. Egypt, Jordan, Morocco, Pakistan Syria Tunisia Turkey – where no question of Hindu dominance never arose. It is pertinent to State the Report of the Commission on Marriage and Family Laws, which was appointed by the Government of Pakistan in 1955, and which should have demolished, once for all, the plea that the Shariat is immutable. Allama Iqbal says: “Question which is likely to confront Muslim Countries in the near future, is whether the Law of Islam is capable of evolution – a question which will require great intellectual effort, and is sure to be answered in the affirmative.”

- 20.**One more logic is given that even if a common civil code is formulated, it should be optional for the Muslims to adopt its provisions. Applicant states that it is only a diluted version of the forgoing pleas, viz. that the Shariat is immutable; that no Code can be imposed on the Muslims without their consent. It is unmeaning to draw-up a uniform civil code as enjoined by Article 44 if it is not binding on every person within the territory of India.
- 21.**Polygamy is totally prohibited in Tunisia and Turkey. In countries like Indonesia, Iraq, Somalia, Syria, Pakistan and Bangladesh, it is permissible only if authorized by the prescribed authority. Unilateral Talaq has been abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq etc. In Pakistan and Bangladesh, any form of extra judicial Talaq shall not be valid unless confirmed by an arbitration council but in India, it is continuing. The Dissolution of Muslim Marriage Act 1939 provided Muslim women to obtain dissolution in certain cases, which they do not have under the Shariat. Under the Act, marriage with another woman would be treated as an act of ‘cruelty’ to bar a husband’s suit for restitution of conjugal rights. The Act has been adopted in Pakistan and Bangladesh with amendments. The statement of objects and reasons of the Act, which has been conceded by Muslims in India, Pakistan and Bangladesh is illuminating: “There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the Court dissolving her marriage in case a husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her un-provided for and under other circumstances. Absence of such provision has entailed unspeakable misery to innumerable Muslim women in British India.”
- 22.**History of triple-talaq is intriguing. (a) It has no sanction in Koran and Shiah don’t recognize its validity. Under Shiah Law, divorce by the husband may be valid only if the husband pronounces an Arabic formula in presence of two witnesses. (b) Even though contrary to the Shariat, Hanafis follow this form of Talaq as ‘irregular’ form, founded on practice introduced by the Ommayede monarchs in the second century of the Mohammedan era. During British regime, many High Courts condemned it as contrary to Shariat and upheld its validity on ground of practice.

- 23.** Under the Constitution, controversy continued and various Muslim scholars expressed their opinion against triple-talaq. The Government, however, remained inactive in order to appease the sentiments of one section of the Muslim population, viz., the Sunnis. On 21.05.1993, the Jamiat Ahle Hadith, the highest authority of Shariat has come out with the conclusion that *Talaqul-Ul-Biddat* is contrary to Shariat. If Government is serious to bring about a common civil code, it should now come forward on support of the aforesaid authoritative pronouncement instead of being beguiled by statements issued by few fundamentalists led by Personal Law Board, which is a NGO, registered under the Society registration Act 1860.
- 24.** Shariat is controlled by legislation in Pakistan and Bangladesh. In India, a uniform law of maintenance was adopted by Section 488 of the CrPC. When Section 125 of the CrPC extended to divorced women, Muslims contended that it should not be applied to them as it was contrary to Shariat but this contention was turned down by the Apex Court. The argument that according to Muslim Personal Law, husband's liability to provide for the maintenance of his divorced wife is limited to the period of iddat was rejected by the Apex Court. It was held that Section 125 of CrPC overrides the personal law. To overcome this decision, Parliament enacted Muslim (Protection of Rights of Divorce) Act 1986. In spite of legislation, the Apex Court has held that the Act 1986 actually codifies what has been stated in Shah Bano's Case. It was held that as regards to divorced Muslim women's right, the starting point should be Shah Bano's Case, and not the original texts or any other material – all the more so when varying versions as to the authenticity of the source or shown to exist. It was held that the law declared in Shah Bano's Case, was after considering "Quran" and other Commentaries and texts. It was observed that the rationale behind Section 125 of CrPC is to avoid vagrancy or destitution on the part of a Muslim women. Article 21 of the Constitution was also taken into consideration.
- 25.** The Supreme Court interpreted that under Section 3 of the Muslim Women (Protection of Rights and Divorce) Act 1986, a Muslim husband is liable to make provision for the future of a divorced wife even after the iddat period.
[Sabra Shamim versus Maqsood Ansari]

(2004) 9 SCC 606] Justice Khalid of Kerala High Court (as his Lordship then was) reminded the plight of Muslim women and wanted the law to be amended to alleviate their sufferings. The above two decisions were approved by the Supreme Court in Shamim Ara versus State of UP [(2002) 7 SCC 518]. In regard to tribal women, the Court recognized the laws as patriarchal and declined to give a general direction regarding customs and other inheritance laws which discriminated women. The Court protected the rights of women by suspending the exclusive rights of male succession till the women chose other means of livelihood. This enactment cannot, therefore, be cited in support of the contention that Muslim Personal Law is immutable and cannot be subjected to legislation. In this context, we may recall the concession made by Mr. Nasiruddin in the Constituent Assembly, that certain aspects of the Civil Procedure Code, 1908, have interfered with our Personal Law and *very rightly so* and also that marriage and inheritance are similar practices associated with religion. [Constituent Assembly Debate Vol-VII, P542] **Sir,**

Keeping in view the above stated facts and circumstances, the constitutional obligation of the Union Government to implement Article 44 of the Constitution, recent Judgment of the Supreme Court in the matter of Triple-Talaq and urgent need and benefits of a Common Civil Code for all the citizens of India, I humbly request you to constitute a High Level Expert Committee or a Judicial Commission or direct the Law Commission to draft a Uniform Civil Code for all citizens, considering the best practices of all the religions and sects, Civil Laws of the developed countries, international conventions in consonance with the Article 44 read with Article 14, 15 and 21 of the Constitution and publish it on the website for at least 30 days for comprehensive public debate and feedback before introducing it in Parliament;

Thanks and Warm Regards.

Annexure-2

To,

04.04.2018

Dr. Justice B.S. Chauhan,

Chairman, Law Commission of India,

Loknayak Bhawan, Khan Market, New Delhi-110003,

Subject: To draft a Uniform Civil Code in spirit of the Article 44

1. Directive Principles are affirmative instruction from the ultimate sovereign to the State authorities, to secure to all citizens; Justice – social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all fraternity, assuring dignity of the individual and unity and integrity of the nation. Therefore, it is duty of the State to direct their activities in such a manner so as to secure the high ideals set forth in the Preamble and Parts III and IV of the Constitution. The Directives are an amalgam of diverse subjects embracing the life of the nation and include principles, which are statements of socio economic rights, social policy, administrative policy and international policy.
2. The object of the Article 44 is to introduce a uniform civil code for all Indian citizens to promote fraternity, unity and national integration. It proceeds on the assumption that there is no necessary connection between religion and personal laws in a civilized society. While the Constitution guarantees freedom of conscience and of religion, it seeks to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage, just as it has been done even in Muslim Countries like Turkey and Egypt. The object of Article 44 is not to encroach upon religious liberties.

3. Dr. B.R. Ambedkar, during the Constituent Assembly said as thus: *“In fact, bulk of these different items of civil laws have already been codified during the British Rule and the major items still remaining for a Uniform Civil Code are marriage, divorce, inheritance and succession”*.
4. The several enactments, which have been made by the Parliament since Independence in the name of the Hindu Code relating to marriage, succession, adoption and guardianship, relate only to Hindus (including Budhists, Jains and Sikhs) and excludes the Muslims, who are the major slice of the minority communities and who are more vociferously objecting to frame a uniform civil code for all citizens of India.
5. In Shah Bano case, the Supreme Court has observed: *“It is a matter of regret that Article 44 has remained dead letter. It provides that ‘the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’ but there is no evidence of any official activity for framing a common civil code. A belief seems to have gained that it is for Muslim community to take a lead in the matter of reforms of their personal law. Common civil code will help the cause of national integration by removing desperate loyalties to laws, which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is for the State, which is charged with the duty of securing a uniform civil code and it has legislative competence to do so. A counsel in this case whispered that legislative competence is one thing, the political courage to use that competence is quite another. We understand difficulties involved in bringing persons of different faiths and persuasion on a common platform but beginning has to be made, if the Constitution has any meaning. Role of the reformer has*

to be assumed by the Courts because; it is beyond endurance of sensitive minds to allow injustice when it is so palpable. Piecemeal attempts to bridge the gap cannot take the place of Common Code. Justice to all is for more satisfactory way of dispensing justice than justice from case to case”.

6. The objection against uniform civil code that it would be a tyranny to the minority community was strongly rejected by Sh. Munshi as thus: *“An argument has been advanced that the enactment of a common civil code would be tyrannical to minorities. Nowhere in advanced Muslim countries, personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a common civil code. Take for instance Turkey or Egypt. No minority in these countries is permitted to have such rights. When the Sharia Act was passed, the Khojas and Cutchi Memons were highly dissatisfied. They then followed certain Hindu customs for generations since they became converts they had done so. They didn’t want to confirm to Sharia and yet by legislation of the Central Legislature where certain Muslim members who felt that Sharia law should be enforced upon the whole community carried their points. Khojas and Cutchie Memons unwillingly had to submit to it. When you want to consolidate a community, you have to consider the benefit, which may accrue, to the whole community and not to the customs. It is not therefore; correct to say that such an Act is tyranny of the majority. If you look at the Countries in Europe, which have a common civil code, everyone who has gone there from any part of the world and even minorities has to submit the common civil code. The point is whether we are going to consolidate and unify our personal law. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties*

as regards inheritance of succession. What have these things got to do with religion. I really fail to understand. There is no reason why there should not be a common civil code throughout the territory of India. 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 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 faction, which still offer serious dangers to national consolidation. It is very necessary that whole of our life insofar as it is restricted to secular sphere must be unified in such a way that we may be able to say- '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, I submit, the opposition is not, if I may say so, very well advised. I hope our friends will not feel that, this is not an attempt to exercise tyranny over a minority community; it is much more tyrannous to majority community".

7. Sh. Alladi Krishnaswami Iyer said that a Civil Code ran into every department of civil relation to the law of succession, to the law of marriage and similar matters; there could no objection to the general statement that *'State shall endeavour to secure a Uniform Civil Code'*.
8. The Drafting Committee Chairman Dr. BR Ambedkar also spoke at some length on the matter. He said: *"We have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete criminal court.....We have the law of transfer of property which deals with property relation and which is operative*

throughout the country..... I can cite innumerable enactments, which would prove that the country has practically a Civil Code, uniform in its contents and applicable to the whole of the country.”

9. In John Vallamattom v. Union of India, [AIR 2003 SC 2902 : (2003) 6 SCC 611], the then Hon’ble Chief Justice of India Justice V. N. Khare, with whom the other two Judges, Justice Sinha and Justice Lakshman agreed and observed: *“A common civil code will help the cause of national integration by removing all contradictions based on ideologies”*. The Supreme Court also observed that *“the power of the Parliament to reform and rationalize the personal laws is unquestioned and the command of Article 44 of the Constitution is yet to be realized”*.

10. In Sarla Mudgal case [AIR 1995 SC 1531: (1995) 3 SCC 635], while insisting the need for a Common Civil Code, the Supreme Court has held that the fundamental rights relating to religion of members of any community would not be affected thereby. It was held that personal law having been permitted to operate under authority of legislation the same can be superseded by a uniform civil code. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized Society. Article 25 guarantees religious freedom and Article 44 seeks to divest religion from social relation and personal law. Marriage, succession and like matter of secular character cannot be brought under the Articles 25, 26 and 27. Hon’ble Judges requested the Prime Minister of India to have a fresh look at Article 44 and endeavour to secure for the citizens a uniform civil code throughout the territory of India and wanted the Court to be informed about the steps taken. However, in Lily Thomas case, the Court clarified the

remarks made in Sarla Mudgal case was only as an opinion of the Judges and declared that no direction have been issued for any legislation. At the same time, the Court did not express any dissenting view of the need for a common civil code. It only held that to have a legislation or not is a policy decision and Court cannot give any direction to the Executive.

11.That diversity in the personal matters along with religious differentiation leads to sentimental tension between different communities as has been learnt by bitter experience from the history leading to partition and subsequent events till today. It can never be forgotten that the policy of British imperialism was ‘divide and rule’ and for that purpose, they would at times can anything, which might make the cleavage between Hindus and Muslims, wider and wider. The British rulers, thus, lost no opportunity in inserting even newer wages like the communal award, which planted separate representation in the legislature according to religion; and eventuality led to lamentable partition, which truncated the motherland and involved so much of bloodshed and inhuman outrages.

12.The ideological concept, which led to partition was the assertion of the Muslims that they constitute a ‘Nation’ separate from the Hindus. Even though Hindu leader did not admit two-nation theory. Partition is an accomplished fact and cannot be wiped off. The framers of the Constitution had in their mind the fresh experience of atrocities, which were committed at the time of partition of India. When the Muslims were given the options to go away to new dominion, it was quite natural for the leaders of divided India to aspire for the unity of the one nation, namely, Indian, so that history might not repeat itself.

13. By 42nd amendment; expression 'Unity of Nation' was replaced by the 'Unity and Integrity of the Nation' and Article 51A was introduced, which inter-alia provides that: *It shall be the duty of every citizen of India*
- (a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem; (b) to cherish and follow the noble ideals which inspired our national struggle for freedom; (c) to uphold and protect the sovereignty, unity and integrity of India; (d) to defend the country and render national service when called upon to do so;*
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women; (f) to value and preserve the rich heritage of our composite culture; (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures; (h) to develop the scientific temper, humanism and the spirit of inquiry and reform; (i) to safeguard public property and to abjure violence; (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.*
14. The Constitution makers wanted to establish a 'Secular State' and with that purpose they codified Article 25 which guaranteed freedom of religion, freedom of conscience and freedom to profess, practice and propagate religion, to all persons. But at the same time they sought to distinguish between essence of a religion and other secular activities, which might be associated with religious practice but yet did not form a part of the core of the religion, and with this end in view they inserted

Clause 2(a) as thus: *“Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities, which may be associated with religious practices.”*

15.Anybody, who raises an objection to implementation of Article 44 becomes guilty of violation of the Preamble, Article 44 as well as Article 51A and any Government, which yields to such demands, even after 68 years of the adoption of the Constitution, would be not only liable to the charge of throwing the Constitution to the winds, but also of being a party to the violation of Articles 44 and Article 51A, and also of guarantee of equality and non-discrimination on the ground of religion, race, caste, sex & place of birth under Articles 14-15 of the Constitution.

16.Clause (e) of the Article 51A enjoins every citizen to renounce practices derogatory to the dignity of woman. Clause (h) enjoins every citizen to develop scientific temper, humanism and the spirit of inquiry and reform. It needs little arguments to point out that a man marrying up to four wives or divorcing his wife by the utterance of word ‘Talaq’ thrice; or refusal to maintain a divorced wife after a limited period of time (three months); are all practices derogatory to the dignity a woman. Therefore, any member of the Muslim community, who resorts to such practices, who himself or urges that such practices should be immuned from legislation or that Article 44 itself must be wiped off or restricted to persons other than Muslims, is violating the Article 51A. Whether that provision of the Article 51A are unenforceable in the Court of law or not, is a different question; but in other countries, such a person would have lost his citizenship if not something more.

- 17.**It is the most radical argument that Article 44 should not be implemented because it is opposed to Sharia. It is pertinent to quote the former CJI Justice Chagla's article 'Plea for Uniform Civil Code' - *"Article 44 is a mandatory provision binding the Government and it is incumbent upon it to give effect to this provision... The Constitution was enacted for the whole country, it is binding for the whole country, and every section and community must accept its provisions and its Directives"*.
- 18.**As far as the plea of Muslim identity is concerned, it is nothing but a relic of the two-nation theory, which was asserted by Muslim leaders to carve out a separate State on the basis of religion. On the other hand, Nationalist Indian leaders all along urged that there was only one Nation, viz. India; and after the Muslims went away on the partition, there was nothing to stand in the way of proclaiming in the Preamble that the goal of India was One Nation united by the bond of fraternity.
- 19.**There should not be any fear of losing identity when the Constitution guarantees religion, language, culture, in Articles 26, 29, 30 of the Constitution. After the partition, the Muslims who preferred to remain in divided India knew very well what they could get from the Secular Indian Government. Hence, *to cry for more, is nothing but a resurrection of slogan 'Islam in Danger' which led to the partition of India.*
- 20.**It is next contended that even though a common civil code is desirable, it could not be implemented until Muslim themselves come forward to adopt it. It is only a diluted form of plea for abolition of Article 44 of the Constitution altogether, because the Article 44 may virtually be effaced if the Muslims never come forward with their consent. None of Directives lay down that they can be implemented only

if there is 100% consents of the citizens throughout the territory of India. The Constitution was adopted after the due deliberation as to its provisions being beneficial to the people of India, by the Constituent Assembly having enough Muslim representatives.

21. Illiterate/ignorant parents don't desire that their children should go to school instead of helping them in agriculture, or earning money in factories. Should the implementation of Article 45 wait until these people give their consent? The controversy arising from the Shah Bano case clearly exposed that it is only a section of the Muslim community, who would not accept it. Is there any precedent in any country, where the caprices of such a fraction of the population having allowed to stand in the way of unity, integrity and progress of the entire nation and the implementation of the fundamental law of the country, adopted by a solemn Constituent Assembly? Article 44 is addressed to State thus it is duty of State to implement it in consonance with Articles 14, 15 and 21.

22. The Supreme Court has observed: *“A belief seems to have gained ground that it is for the Muslims community to take a lead in the matter of reforms of their personnel law.....But it is the State which is charged the duty of securing a uniform civil code for the citizens of the country. This duty has been imposed on the State with the object of achieving national integration by removing disparate loyalties to laws which have conflicting ideologies.”* The question arises – why then has the Union Government failed to discharge the Constitutional mandate for more than 6 decades? The Answer has been pithily answered by the Court – *“lack of political courage”* – which many other responsible persons have amplified as the fear of losing Muslim votes at the next election.

23. The State has not only failed to implement Article 44 of the Constitution but also violated the norm of the much-vaunted secularism. It is also curious that the Government has not yet protested against the decision of the Indian Muslim Personal Law Board to setup parallel Courts in many localities to decide the cases under the Shariat, even though the setting up of such a parallel Courts will not only sound a death knell to Article 44 of the Constitution, but also to the other provisions in the Constitution providing for one system of judiciary throughout the territory of India for all its people. It is definitely a retrograde step cutting at the roots of the Constitution of India.

24. It is also urged that the Shariat is immutable being founded on the Quran which is ordained by the God. Apart from the historical fact that this issue has been concluded by the partition of India and adoption of the Constitution, it has been belied by the multifarious changes by way of reform in all the Muslim State e.g. Egypt, Jordan, Morocco, Pakistan, Syria, Tunisia, Turkey – where no question of Hindu dominance arose.

25. It is pertinent to State the Report of the Commission on Marriage and Family Laws, which was appointed by the Government of Pakistan in 1955, and which should have demolished, once for all, the plea that the Shariat is immutable. In words of Allama Iqbal, *“The question which is likely to confront Muslim Countries in the near future, is whether the Law of Islam is capable of evolution – a question which will require great intellectual effort, and is sure to be answered in the affirmative.”*

26. Goa has a common civil code since 1965, which is applicable on all its citizens. Now a pertinent question arises - if Uniform Civil Code can be implemented in Goa, then why not throughout the territory of India.

27. One more logic is given that even if a common civil code is formulated, it should be optional for the Muslims to adopt its provisions. Petitioner states that it is only a diluted version of the forgoing pleas, viz. that the Shariat is immutable; that no Code can be imposed on Muslims without their consent. It is unmeaning to draw-up a uniform civil code as enjoined by Article 44 if it is not binding on every citizen.

28. Polygamy is totally prohibited in Tunisia and Turkey. In countries like Indonesia, Iraq, Somalia, Syria, Pakistan and Bangladesh, it is permissible only if authorized by the prescribed authority. Unilateral Talaq has been abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq etc. In Pakistan and Bangladesh, any form of extra judicial Talaq shall not be valid unless confirmed by an arbitration council but in India, it is continuing. The Dissolution of Muslim Marriage Act, 1939, provided Muslim women to obtain dissolution in certain cases, which they do not have under the Shariat. Under the Act, marriage with another woman would be treated as an act of 'cruelty' to bar a husband's suit for restitution of conjugal rights. The Act has been adopted in Pakistan and Bangladesh with amendments. The statement of objects and reasons of the Act, which has been conceded by Muslims in India, Pakistan and Bangladesh is illuminating: *"There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the Court dissolving her marriage in case a husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her un-provided for and under other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India."*

- 29.If the Government is serious to bring about a common civil code, it should come forward with authoritative pronouncement instead of being beguiled by statements issued by few fundamentalists led by All India Muslim Personal Law Board, which is an NGO, registered in 1973.
- 30.Shariat is controlled by legislation in Pakistan and Bangladesh. In India, a uniform law of maintenance was adopted by Section 488 CrPC. When Section 125 CrPC extended to divorced women, Muslims contended that it should not be applied to them as it was contrary to Shariat but the Court turned down this contention. The Court also rejected argument that according to Muslim Personal Law, husband's liability to provide for maintenance of his divorced wife is limited to iddat. It was held that Section 125 CrPC overrides the personal law.
- 31.The Supreme Court interpreted that under Section 3 of the Act, 1986, a Muslim husband is liable to make provision for the future of a divorced wife even after iddat period. [*Sabra Shamim versus Maqsood Ansari*, (2004) 9 SCC 606] Justice Khalid of Kerala High Court reminded the plight of Muslim women and wanted the law to be amended to alleviate their sufferings and above decisions were approved by the Supreme Court in *Shamim Ara v State of UP* [(2002) 7 SCC 518].
- 32.In the Constituent Assembly, Mr. Nasiruddin's speech says thus: "*certain aspects of the Civil Procedure Code have interfered with our Personal Law and very rightly so and also that marriage and inheritance are similar practices associated with religion*". [Vol-VII, P542]
- 33.Even, many minor girls are victim of polygamy and Nikah Halala, and contract marriage viz. Nikah Mutah and Nikah Misyar. Such incidents are routinely published in Electronic, Print and Social Media.

- 34.**It is necessary to study the Civil Laws of the developed countries particularly the Common Civil Code of France, China and Japan. It is also necessary to incorporate the best practices of all religions and communities. It is pertinent to state that Goa has a Common Civil Code since long time. Therefore, the same code may be amended and adopted as a Uniform Civil Code throughout the territory of India.
- 35.**The right of equality guaranteed under Article 14, right against non-discrimination guaranteed under Article 15 and right to life and liberty guaranteed under Article 21 can't be secured and Gender Justice and Gender Equality cannot be achieved without implementing the Uniform Civil Code in spirit of Article 44 read with Articles 14, 15 & 21.
- 36.**Applicant was intervener in Triple Talaq matter. On 23.3.2018, the Supreme Court has issued notice on Applicant's Petition [WP(C) 202 of 2018] seeking ban on Polygamy, Nikah-Halala and Sharia Courts.

Sir,

If Preamble is key to understand the Constitution, the Directive Principles are its basic ideals. The Constitution makers poured their mind by setting forth humanitarian socialist secular principles, which epitomized hopes and aspirations of people and declared the Directive Principles as the fundamental in the governance of the country.

Keeping in view the above stated facts and circumstances, kindly draft a Uniform Civil Code in spirit of the Article 44 read with Articles 14, 15 and 21 of the Constitution and publish it on the website.

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION (C) NO OF 2019

(PIL UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay

...Petitioner

Verses

Union of India & Another

...Respondents

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PETITIONER-IN-PERSON