ISSN 0975 - 1882 RNP/NPCity/237/2015-2017

Under No. 72101/99 Registered with the Registrar of Newspapers for India

Date of posting 20th of every month

ADVERTISEMENT RATES IN THE NCC REVIEW

	Full Page	*Half Page*	*Inside Cover*	*Cover*
Single	Rs. 1200	Rs. 800	Rs. 1400	Rs.1600
Multiple*	Rs. 900	Rs. 650	Rs. 1050	Rs. 1200

*Multiple rates applicable per insertion for at least three consecutive insertions. All other terms and conditions shall remain same.

NCC REVIEW SUBSCRIPTION RATES

	1 year	**3 year**	**5 year**
Indian Subscriptions ***(Regular)***	INR 250	INR 500	INR 800
Indian Subscriptions ***(Discounted for Theological Educators, Pastors, Evangelists, Students - Individuals only. NOT for Organisations, Institutions, Librarians, etc.)***	INR 200	INR350	INR 550
UK Subscriptions	GBP 31	-	-
USA, South America, Canada, Europe, Africa, Asia, Australia, New Zealand, Subscriptions	USD 45	-	-

PAYMENT MODES:

VPP: Place your subscription order by email: <ncci@nccindia.in> (Rs.20/- added to subscription cost)

Demand Draft: To be drawn in favour of "National Council of Churches in India" payable at Nagpur.

Cheque: To be drawn in favour of "National Council of Churches in India" (Please add Rs. 20/- for outstation cheques).

Money order: To be sent to: The Editor, NCC Review, Nagpur.

Bank Transfer:

Bank name: INDIAN BANK
Branch: NAGPUR
IFSC CODE: IDIB000N007
A/C NAME: NATIONAL COUNCIL OF CHURCHES REVIEW
A/C NUMBER: 496991073

National Council of Churches in India

NCC REVIEW

Vol. CXXXVII
No.05
June 2017

The National Council of Churches Review (NCC Review)
The Organ of the National Council of Churches in India
Formerly published as ***"The Harvest Field"*** *since 1862*

Vol. CXXXVII **No.05** **June 2017**

Contents

✍**Editor, Publisher & Printer:** Rev. Dr. Roger Gaikwad, National Council of Churches in India, P.B. No.: 205, Civil Lines, Nagpur-440 001, Maharashtra India, ***Phone:*** +91-712-2531312, 2561464 *Fax:* +91-712-2520554 ***Email***: <ncci@nccindia.in>✍**Managing Editor:** Communication Secretary ✍**Printed at:** Shyam Brothers, Near ST Stand, Ganeshpeth, Nagpur ✍**Owner:** Rev. Dr. Roger Gaikwad, National Council of Churches in India ✍**Place of Publication:** National Council of Churches in India, P.B. No.: 205, Civil Lines, Nagpur-440 001, Maharashtra, India ✍**Place of Printing:** Shyam Bros, Near ST Stand, Ganeshpeth, Nagpur

Registration No. 223/2011

EDITORIAL

The June 2016 issue of NCC Review focusses on the Uniform Civil Code (UCC). We are extremely happy that several distinguished Muslim and Christian scholars have contributed to this issue. We hope this issue of the Review, will help all readers, especially the Christian community to understand the complex issue surrounding the Uniform Civil Code (UCC); and will respond to it. Indeed, it is important that the Christian community listens carefully to what Muslim scholars have to say about the UCC; because it is important to recognize that the UCC has been used against the minorities; particularly against the Muslim community since the very beginning.

The UCC has been an issue of controversy ever since India became independent. The British colonial rulers permitted personal laws on marriage, family, inherit for each religious and ethnic community; whereas the criminal laws were the same for all the citizens. The colonial rulers did not want to interfere in the religious affairs of any community, especially when they recognized the complex nature of various religious practices even within each religious community in different places in the country. The Constitutional assembly itself was divided over the question of the UCC. It is interesting to note that the RSS opposed the UCC even in those early days. The founder of the Hindu Mahasabha, Shyama Prasad Mukherjee, was one of the most vociferous opponents of Hindu reform acts. Ironically today it is the right-wing Hindu groups that are advocating the UCC. The leaders of the minorities had expressed their apprehension about the UCC in the constitutional assembly itself - in fact, it was opposed by all religious groups.

During the Constituent Assembly debates, Dr. B.R. Ambedkar strongly supported the UCC as he thought it was the best way to reform the Indian society. In his words, *"I personally do not understand why religion should be given this vast, expansive jurisdiction, so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what is this liberty for? We have this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights."*

Finally, a compromise formula was reached to retain the UCC under the Article 44 which states: "The state shall endeavour to secure for the citizens

a uniform civil code throughout the territory of India". It is one of the 23 directive principles in the Indian Constitution, which implies that it is not enforceable by any court, but it is the duty of the state to apply these principles when drafting laws.

The present BJP led government has declared that it would like to reintroduce the Uniform Civil Code and make it binding on all communities. Hence, they have asked the law commission to make its recommendation. In its turn, the law commission has sent out a questionnaire to the public and asked for responses. This has moved the UCC debate once again to centre stage. In fact, this has created a lot of apprehension in the minds of the minorities about the UCC and the government proposal.

National Council of Churches in India (NCCI) and Catholic Bishops' Conference of India (CBCI) have jointly responded to the Law commission's proposal on 27th November 2016. They have strongly criticized the law commission's method of asking the public the question about the personal laws; instead of initiating meaningful dialogue with different religious and civil society groups. The General Secretaries of both bodies said "We regret to inform you that we will not be responding to the questionnaire sent along with your appeal. But we are ready for a serious discussion on the Uniform Civil Code rather than answering a few questions." The NCCI and CBCI, are still awaiting a response from the Law Commission, and are ready to make a formal, considered comment if the Law Commission presents a draft. In this issue of the NCC Review the common letter of NCCI and CBCI to the government is included.

Regretfully, the UCC has got linked with the "Triple Talaq" debate. The Supreme Court is presently hearing the Triple Talaq case and will be delivering its judgement soon. The Supreme Court made it clear that it will rule only on the issue of Triple Talaq; and not on the Uniform Civil Code. The Triple Talaq debate as well as the UCC are being used against the minority community and has created a perception in the public mind that the minorities have been enjoying special privileges. It is used to stereotype the Muslim community and has given space for making untrue and demeaning comments about their practices and culture. It has also portrayed the Indian Muslim women's condition within the Muslim community negatively; as if

they are oppressed and voiceless and that the Muslim community needs to be disciplined for this. This allows us to comfortably ignore the fact that Indian society is patriarchal and that women in all the religions face discrimination and inequality. It is not about any one religion but is about the whole society and all religious groups. India has a long way to go to achieve gender equality.

Prof. T.K. Oommen points out that India is not a nation state but a national state. A nation state is normally based on one language or culture whereas India has a multiplicity of languages, cultures, traditions and religions even within each state. A national state is radically different from a nation state because a national state consciously fosters and celebrates pluralism. The former Law Minister Verrappa Moily had said "UCC was not implementable. It is impossible to implement it in a multi-cultural, multi-racial and multi-dimensional country like India"

We also need to remember that the Indian Courts have dealt with and legislate on many of the inequalities within personal laws and have made many amendments. The fact that the Supreme Court is hearing the Triple Talaq case is that there is always some judicial scrutiny of any injustice in our country. The minorities are not against reform in personal laws. However, there is a trust deficiency with the present Government on the side of minority communities. The minority communities are afraid that the Government is imposing the Hindu code as a Common civil code to cover all communities. Hence, we feel that instead of a common civil code the present civil codes of all religious communities need to be reformed. It is the strong recommendation of the minorities that politicians will not use this issue again for their narrow political gain and communalizing society. The Christian community should be open for reformation in the Christian Personal laws.

Cow vigilantism is continuing in different parts of the country. Unfortunately, it has become so routine, that there is not much media and public attention. There is no justification that the modern state allows any form of vigilantism. The Ministry of Forest and Environment has brought another notification on the cow trade which will make it impossible for the farmers to sell and buy cows – this will affect farmers as well as meat trade'. In turn, it will affect the Indian economy itself. The modern secular state is

supposed to play a neutral role in all religious affairs, unfortunately, it is taking one point of view from one particular religion. This may give short term political benefits for the ruling party; but it will affect the polity of the country in long run. It is disheartening to see some irrational High Court judgements and comments on cow protection.

The farmers are struggling all over the country. They have been fighting for the minimum price for their products as they experience a vicious cycle of poverty in their life. There was recently the Tamil Nadu Farmers protest in Delhi where they even took out a naked protest in front of the Prime Minister's residence. Unfortunately, they have only been receiving empty promises and nothing has come out concretely. The state and central Governments should work together to resolve the farmer's crises. The Christian community has not done much to stand in solidarity with the farming community.

May God be with us and lead us during these tumultuous times in India. We have an opportunity as the Christian community to work for justice and peace.

Samuel Jayakumar
Executive Secretary,
Policy, Governance and Public Witness,
National Programme Commission NCCI

Gender equality should guide the process of reforming family laws and not national integration

*- Irfan Engineer**

Supreme Court of India has yet again asked the Union Government to file affidavit and state whether it intended to bring Uniform Civil Code (UCC for brevity). In the Shah Bano Judgment (Shah Bano v. Mohammad Ahmed Khan, 1985) the Supreme Court observed *"It is a matter of regret that Article 44 of the Constitution has remained a dead letter".* In Sarla Mudgal v. Union of India (1995), similar observations were made. Though the Supreme Court takes on the role of a reformer assuming lack of courage in the political class, it is only the legislature that can bring in the UCC. The repeated observations of the Supreme Court are on the strength of the Article 44 of the Constitution which states *"The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".*

Article 44 is included in Part IV of the Constitution which is about Directive Principles of State Policy. Provisions of Part IV are merely guiding principles and cannot be enforced by courts. The Supreme Court has ignored other provisions of the Part IV which include, that the state shall strive to secure a social order in which justice – social, economic and political – shall inform all the institutions of national life; that the state shall strive to minimize inequalities in income; that operation of economic system does not result in the concentration of wealth and means of production to the common detriment; etc. These guiding principles are far more important today as the Government of the day is ignoring these provisions. One wishes that the Supreme Court had made the Government to file affidavit and asked what laws and policies did the state want to bring in to give effect to objectives of justice and equality in Part IV of the Constitution.

The Supreme Court wants to do away in one stroke the practices of centuries. Till the passage of *The Muslim Personal Law (Shariat) Application Act, 1937,* (hereinafter, "The Shariat Act" for brevity), Muslims in India were governed by diverse customary and religious laws. From the Sultanate period onwards, Shari'a Law was applied only to noble Muslims. However converts from amongst artisan castes continued to be governed by their

*Dr. Irfan Engineer is Director for the Centre for Study of Society and Secularism (CSSS), Mumbai

customary practices e.g. Meo from Rajasthan, Pranam Panthis and Pir Panthis in Gujarat, Sat Panthis from MP, Khojas, Bohras & Cutchi Memons. Kazi Mughis-ud-Din of Biyana was offended by the changes in Shari'a made by Allauddin Khalji, the first ruler to establish Sultanate. Khalji replied, *"I am an ignorant man and I am ruling this country in its best interests. I am sure, looking at my ignorance and good intentions, the Almighty will forgive me, when he finds that I have not acted according to Shari'a".*

In NWFP, Hindu customary law in succession and other matters were in vogue till 1939 when Central Legislature abrogated application of Hindu Laws to Muslims of NWFP and applied Shari'a Law to them. Till 1937, in United Provinces, Central Provinces and Bombay, Muslims to a large extend were governed by Hindu Law in matter of succession. *Marumakkathayam* Law applied not only to Hindus but also to Muslims in the North Malabar. *Marumakkathayam* Law is matrilineal practice.

Customary practices were too varied to comprehend for the colonial state and therefore more reliance was placed on scriptures. Manusmriti was translated in 1776. Charles Hamilton under directions of Hastings, translated the Hedaya (The Guide) from Arabic into English in 1791 but was abandoned halfway. However, after the 1857 rebellion, the Crown declared, that all those in authority under it would *"…abstain from all interference with the religious belief or worship of any of our subjects".* Thus the Colonial state unified the criminal laws, taxation and commercial law, but by and large refrained from interfering in family laws unless thought politically expedient.

Women leaders of nationalist movement demanded comprehensive code regulating marriage, divorce and inheritance. Kamaladevi Chattopadhyay, Sarojini Naidu, Muthulaxmi Reddy, Begum Shah Nawaz of All Indian Women's Conference supported uniform code during their convention in 1933. With Govt. of India Act, 1935, Hindu and Muslims leaders pressed for law reforms to elevate the position of women. While introducing the Bill – Hindu Women's Right to Property Act, 1937, Dr. G.V. Deshmukh said that the it was necessary to set right the Colonial interpretation of "limited estate" and "reversion" to widows. MHM Abdullah, who introduced "The Application of Shariat Act, 1937" said, "[t]he bill aims at securing uniformity of laws among Muslims in all their social and personal relations… It also

recognizes and does justice to the claims of women for inheriting family property who under customary law are debarred from succeeding to the same"

The UCC debate in the Constituent Assembly:

It is in this background that Article 35 of the draft Constitution (now included as Article 44) was debated. Mohammad Ismail Sahib and Naziruddin Ahmad wanted to amend Article 35 and include that no one would be compelled to give up their personal laws. They argued that right to adhere to one's personal law was part of their right to religion and way of life. Citizens could not be compelled to give up their personal laws in order to augment harmony (Constituent Assembly, 2003, p. 540). Ahmad argued that Art. 35 was in conflict with Art. 19 of the draft Constitution (now Art. 25) which gave citizens right to profess, practice and propagate their religion. Ahmad wanted the interference by state in matters of religion to be a gradual and slow process. Hindus too were opposed to UCC. K.M. Munshi, an ardent supporter of UCC, said, *"I know there are many among Hindus who do not like a UCC… they feel that personal laws of inheritance, succession etc. are really a part of their religion. If that were so, you can never give, for instance, equality to women."* Munshi was in favour of UCC on the grounds of gender equality and for unity of the nation. He said, *"whether we are going to consolidate and unify our personal laws in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession."* (p. 547). But then Pocker Sahib Bahadur (p. 545) and Hussain Imam (p. 546) asked which Hindu law would become the basis of UCC given the diverse traditions within Hinduism and differences in educational levels in the country.

Dr. B R Ambedkar said, *"It (Article 35) does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens."* The future Parliament, Ambedkar opined, could bring in family laws that were applicable to those who voluntarily chose to be bound by it (p. 551). The Special Marriage Act, 1954 is such a voluntary code. Art. 35 was passed by the Constituent Assembly without any amendments that protected the citizens from being compelled to give up their personal laws.

BJP and the UCC

While the debates on inclusion of Art. 35 of the Draft Constitution were to provide for gradual extrication of family laws from religion and march towards the goal of gender justice, the Hindu nationalists advocated UCC in order to use it as a weapon to scare the minorities of impending majoritarian hegemony and to invoke their opposition. This could then be useful to demonstrate the separatist mentality of the minorities. The BJP has been demanding UCC to promote national integration. Union Law Minister D V Sadanand Gowda e.g. said that UCC was necessary for national integration (Express News Service, 2015). This is not withstanding the fact that BJP's Election Manifesto 2014 mentions promises UCC on the ground of gender justice, *"drawing upon the best traditions and harmonizing them with the modern times".*

However the moot question is, given the mind boggling diversity of traditions within all the religious communities, how painful will be the negotiations to draft such a uniform code? And, will the UCC be in consonance with the diversity? Which of the diverse traditions will form the basis of the UCC?

Regional Diversity

The Dravidian Southern regions follow various practices which are more gender just compared to the North in matters of inheritance of property. There was custom of handing over a piece of land to the daughter at the time of her marriage within Madras Presidency and the income from it was for her exclusive use and devolved on her female heir. Women could remarry if her husband's whereabouts were not known for a long time; and if the first husband returned, the woman could choose to live with either. Matrilineal practices were prevalent in Nayars, Nambudiris and Malabar Muslims. According to *Sambandham* practice, women continued to live in their natal house after marriage and children belonged to their caste and *tarawad*. *Sambandhan* marriages were loose matrimonial alliances which could be easily terminated with consent of both parties. *Tarawad* and *tavazi* were female headed joint family systems with line of descendants through female. These traditions were brought to an end with Hindu Succession Act, 1956. In Lakshadweep Islands inhabited by 99% Muslim population followed the matrilineal system of *marumakkathayam*. Muslims in Kerala have retained their *marumukkatayam* system and Mappilla *tarawad*.

Mithakshara Joint family system was abolished in Kerala. Kerala abolished Malabar joint families of matrilineal type governed by *Marumukkatayam, Aliyasantana, Nambudiri* and other matrilineal laws but they are operative in Karnataka, TN and AP. The Christian Succession Acts of Travancore and Cochin are in vogue in Kerala with its practice of Joint family system.

Portuguese Civil Law is still applicable in Goa (Portuguese Decrees on Marriage and Divorce, 1910 and Decree on Canonical Marriages, 1946 in Goa Daman and Diu and Dadra and Nagar Haveli. However the Gentle Hindu Usages Decree, 1880 allows application of some customs. Thus different family laws are applicable to Goan Hindus than in other parts. The Law for Goan Christians and Muslims as well is different from those applicable to their fellow members in rest of the country. The Shariat Act and the Special Marriages Act do not apply in Goa.

Hindus, Christians and Muslims in Puducherry are divided into two groups – *Renoncants* and others. *Renoncants* are still governed by French Civil Code and to others, other Indian laws are applicable.

The Hindu Marriage Act 1955 was re-enacted by J&K Assembly. J&K has its own Hindu Succession Act, without repealing the Buddhist Succession Act, 1943. Till recently, Muslim Laws were applicable but local customs prevailed in matters of inheritance. The Muslim Personal Law (Shariat) Application Act, 1937 was made applicable only recently in J & K.

Tribal customary law is protected by legislation in Meghalaya, Mizoram, Nagaland, and Sikkim. The Khasi, Jaintia and Garo tribes continue matrilineal inheritance even after their conversion to Christianity.

Mitakshara school of Hindu law has four regional variations: Varanasi, Mithilia, Dravida and Maharashtra which governs the succession.

Diversity within Religious communities, caste and Scheduled Tribes

The Hindu Family laws have been extensively amended by the three southern states in India – TN, AP and Kerala. Agricultural land is excluded from the operation of the Shariat Act. The Shariat Act was made applicable to these three Southern states only till 1963.

Marriage among lower castes is less sacramental and more of contractual (with consent of adults marrying) without the rituals of *saptapadi* and *kandyadan*. The practice of bride price prevails amongst the lower castes (*Kanyashulka*).

Christian Tribals all over the country have been exempted from the Indian Succession Act. The four Hindu legislations are also inapplicable to the Scheduled Tribes.

Specific Hindu, Buddhist, Jain and Sikh customs running counter to general statutory provisions enjoy full legal protection under the law, including those customs (i) violating statutory rules to sapinda relationship and prohibited degrees in marriage; (ii) customary marriage rites replacing saptapadi; (iii) Customary divorce and (iv) adopting major and married children.

Amongst Muslims, customs and usage relating to wills, legacies and adoption enjoy statutory protection even under the Shariat Act. Sunni Bohras and Khojas are governed by Hindu customs and usages.

One is afraid that the UCC could be a threat to this rich diversity. The legislations enacted to regulate Hindu Personal Laws have threatened the local customs and traditions, particularly those that were more gender just. The journey towards "uniformity" is informed by Brahmanical traditions and smriti texts ignoring the vast body of traditions of the OBCs, SCs and STs. The Hindu community is sought to be unified around *smriti* texts.

The Muslim Personal Law is also applicable in all diversity evident from the above discussion. That is why the Muslim Personal Law Board dithers from codifying their law and one is afraid that the Wahabi-Hanafi fiqh would dictate codification, not because it is in the best interest of the community, but because they are better organized and networked to influence the process.

Conclusion

In Western law, there is a distinction between 'public law' and 'private law'. Public law governs the relation between individual and the state and includes taxation, commercial law, property law and criminal law – matters internal to the state. Private law on the other hand concerns relations within

the space of family – affairs related to marriage, divorce, guardianship of children, maintenance on divorce, succession, etc. While the former is legislated, codified and applied by law courts, the latter developed on precedence, customs and traditions. The British Colonial rulers legislated uniform laws as far as public affairs were concerned but wisely decided not to disturb customary traditions and religious traditions being followed in personal laws.They did bring in legislations to stop reprehensible practices like *sati* and 'Age of Consent' Bills.

In a multicultural society, state should be extremely cautious in imposing customs, traditions and religious laws of one community through legislation in personal affairs. Secularism in India has always meant citizens enjoying freedom to profess, practice and propagate religion. Cultural diversity requires that communities be given freedom to govern their personal affairs in accordance with their traditions, customs and religion, unless it violates fundamental rights, particularly, gender justice.

What we need is a "Uniform" civil code and not a "Common" civil code. Uniform civil code means uniformity of principles applicable e.g. in regards gender justice and equality without necessarily enforcing same or common code on communities having diverse cultural traditions. Dr. Ambedkar said in the Constituent Assembly, that the UCC need not be enforced on unwilling citizens. We should march towards a uniform regime of gender just family laws but drawing from the diverse traditions and allowing space for diversity. Gender equality alone should be guiding this process and the same could be achieved through gradual reforms of existing family laws.

References

Constituent Assembly. (2003). *Constituent Assembly Debates: Official Report Volume VII.* New Delhi: Lok Sabha Secretariat.

Express News Service. (2015, October 14). Uniform Civil Code must for national intergation, says Law Minister. *The Indian Express*, p. 11.

Sarla Mudgal v. Union of India (The Supreme Court of India 1995).

Shah Bano v. Mohammad Ahmed Khan, Criminal Appeal Nol. 103 of 1981 (The Supreme Court of India April 23, 1985).

Should There be a Uniform Civil Code for India?

*- T.K.Oommen**

Uniform Civil Code as an idea and as a programme is widely contested in India. By and large, the tendency is to confine to the Indian experience, but we need to take the idea to a different level; I will even say to the world level and look at the situation in a comparative perspective. In the final analysis, the issue of UCC is a matter of relationship between the state and the citizen and there are three different ways in which this relationship has been defined over the ages. Historically speaking, in culturally and racially plural empire states and feudal polities, the citizen-state relationship was hegemonic in the sense that the state prescribes those norms and laws and usually those of the mainstream community, for the whole polity. Sometimes these mainstream communities are religious, sometimes racial, and sometimes linguistic. But these polities are authoritarian and therefore there was hardly any possibility of people sharing in the process of shaping what is called the universal civil code. The minorities were asked either to assimilate or to accept a subordinate position. And this is a position not applicable or acceptable to India. But this is precisely the position the RSS has all along taken as implicated in the dictum: one nation, one culture, one people. But this idea was in vogue in Europe for long.

After the Treaty of Westphalia in 1648 (Westphalia is a region in Germany) the idea of nation state emerged and with that the idea of homogenization of culture came: One nation, one culture, one people is precisely that; although unfortunately we cannot apply the idea of nation state itself to India. Thus 1648 actually saw the beginning of the uniformity pattern in Western Europe according to which citizens should have direct link with the central state authority. This meant that there are no intermediary structures, the civil society or voluntary associations, which can mediate between the state and the citizens. The citizens, as individuals, can have or should have a direct relationship with the state and the state can regulate their behaviour in all contexts.

The uniformity pattern was reinforced by another big idea – the enlightenment idea, which invented the universal man (human being). So, there is no space for human beings set in specific traditions; each of these

* Dr. T.K. Oommen is Professor Emeritus, Jawaharlal Nehru University, New Delhi.

traditions having its own integrity. Human beings are visualised as complete, autonomous, independent entities. The context for this came when the anti-Jewish riots broke out in1789 in Alisace in France. And the Count of Claremont – Tonnerre declared, and I quote, "The Jews should be denied everything as a nation but granted everything as individuals." So, as individuals, the Jews, can have their rights, their privileges, and their entitlements but as a nation or as a group they should be denied everything. Why? Because if the Jews were recognised as a nation or as an identity group or a minority group within the sovereign state, their loyalty to the nation state would erode. That was the problem or may I say, the fear. So, the idea of uniform civil code which adhered to the idea of enlightenment does not suit the Indian Republic. If we were all one culturally, that is religiously, linguistically, etc., then we can think in terms of a uniform civil code.

The third type of state-citizen relationship namely the pluralist pattern, recognizes several identities based on religion, race or language within the state territory. It is very wrong to refer to such polities as nation states, but should be referred to as national states. A national state is radically different from a nation state because a national state consciously fosters and celebrates pluralism. Think of the Indian situation, India has no official religion according to the Constitution but in everyday life certain religious communities may be dominant in some parts of the country. This dominance is largely a function of the size of the population. Therefore, I want to suggest that the idea of uniform civil code is antithetical to the very spirit and letter of the Indian Constitution. It is true that the Indian Constitution promised the possibility of uniform civil code in future. One must understand the context in which the promise we made; the time at which the Constitution was formulated.

Indian Constitution was drafted as we all know soon after the division of India based on religion resulting in the formation of Pakistan as an Islamic country. Many hold that India is then, at least in the minds of many, conceived as a Hindu nation. Because of this context the people who were formulating the constitution including Dr. Ambedkar, had to negotiate with the vast majority of the people whose representatives were present in the Constituent Assembly. It is in that context, the promise of a uniform civil code, ignoring the specificities of the non-Hindu minorities, was made. It was necessary to contain the possibility of enormous discontent and

eruption of violence. That is how we must see the rationale of the promise. After all the Indian Constitution has been already amended nearly a hundred times. Therefore, one cannot uphold the Indian Constitution as a perfect document. It will have to be amended depending on the changing context. So, we have to re-read the Constitution. When lawyers say "the Constitution provides" it should not be taken as a referrent of its infallibility. If we have to uphold the pluralist pattern of citizen-state relationship which endorses religious pluralism within the polity, the idea of uniform civil code should be abandoned and any effort to implement that should be resisted.

I can immediately see some people resisting my argument because it could be misunderstood as upholding and perpetuating gender inequality and discrimination. Most people who are arguing for a uniform civil code are assuming that the moment that is put in place gender inequality and discrimination would disappear. It will not. Gender discrimination and inequality are specific to certain religious practices; these are not the same in say Buddhism and Jainism or in Islam and Christianity. So, there is no question of majority and minority in the context. Each of the religious communities should have the willingness and resources to examine their internal situation in terms of gender inequality and injustice. Of course, the state can facilitate and accelerate, this process by appropriate legislations and more importantly implementing those legislations. But it is for the religious communities to seek state intervention and at any rate keep it to the minimum.

I have already said India is not a nation state of the European kind wherein the political and cultural boundaries coexist. In fact, most European states, with one or two exceptions, are named after their language – Germany, Portugal, France, etc. There has been lots of problems because when some of these nation states have been established the majority-minority question in terms of language was very intense. They have to 'solve' the problem by destroying all the minority languages. But in India just as we do not have a national or official religion, we do not have one official language. There is hardly any country in the world which has even a second official language. The United States of America which is said to be multicultural, has no second language. There is no country in the world where there are as many as 22 languages recognized as official languages. If one's language is bigger in terms of size one has some advantages; it has a greater instrumental value. Non-Hindi speakers learn Hindi because it has instrumental value, not that

they identify with Hindi emotionally; people identify with their respective mother tongues. And unlike religion, one can always study and internalize several languages.

My question is, therefore if we can have several languages officially recognized why not we have several civil codes officially accepted? I don't see any reason why we should not have them given the religious complexity of this country. In fact, there are already three legal systems in India, the state legal system (SLS), which is common to all citizens. Whether a Hindu, a Muslim, or a Buddhist commits a murder or theft we know the process to which they are subjected to would be the same. So, there is a uniform criminal code for the entire citizenry of in this country. Second, we have religious legal systems (RLS) applicable to particular religious communities. We have a very curious situation here – all the religions of Indic origin are clubbed into one category when it comes to religious legal system through the Hindu Code Bill. The Hindu Code Bill was piloted by none other than the first Prime Minister of this country who was widely hailed as 'secular in his conviction. The Hindu Code Bill defines Hindus, Jains, Buddhists, Sikhs and unfortunately Adivasis who are not converts to one of the non-Indic religions as Hindus. Buddhism, Jainism and Sikhism are widely perceived as offshoots of Hinduism but Adivasi religion is independent of that. Religion of Adivasis existed much before Hinduism emerged. Till 1931, there was a separate entry in the Indian Census known as 'Animists' or 'Nature Worshippers' or simply 'Tribal religion'. They were three per cent at that time, which was a huge number. But in 1951 (in 1941, there was no Census as you know), the category has been knocked out. If an Adivasi does not explicitly claim that he or she is a Buddhist or a Muslim or a Christian, that person is simply enrolled as a Hindu. That, I think, was the first *Ghar Wapsi* of independent India. Many people claim that this was not because of secular Nehru but because of the Hindutva leaning of Sardar Patel. But that is not the point; the point is, this happened. And, the plurality of Indian religious communities will have to be recognized legally that is by SLS in India. Instead, the central tendency is to argue for a uniform civil code for all the religious communities.

Thirdly we have the folk legal system (FLS). Think of any linguistic community and one will find there are certain local practices which are accepted widely and these local practices are the folk ways or people's ways as against the state ways – the legal system. You cannot wish away these

folk-ways because they are not a part of state-ways; folk-ways are cultural imprints. To permit folk-ways to exist and even to celebrate them is no license to indulge in violence. The state legal system is an overarching legal system but that does not mean that peoples' inclination to have their specific ways of living should change; Maharashtra has Ganesh Puja, Bengal has Kali Puja, the people of Kerala have Onam; think of it. Of course, in the course of celebrating these folk-ways sometimes, unfortunately, some violence is generated which should be condemned and stopped.

If one looks at India in terms of its mind boggling cultural diversity, there will have at least three levels of legal systems – SLS, RLS, FLS. The uniform civil code is an idea applicable to the nation state which has culturally homogenous societies and given India's stupendous cultural diversity, homogenization of culture is not applicable to India unless we want to mutilate the life styles, and destroy the cultural practices of a large number of human beings; it devastates their cultural identify. I don't know whether that is the intent of the state. Even if it is the intent of the state, as civil society organizations, I include religious groups as part of civil society organizations, must resist it and provide the rationale for resisting it. If the argument is that Constitution promises Uniform Civil Code we need to amend the Constitution to suit Indian society, Indian cultural system and its ethos. As it is rightly said, the Constitution is meant for the people and if it is not in tune with the peoples' lives, it will have to be changed to uphold equity, justice, identity and dignity of the citizens.

● ● ●

Uniform Civil Code – not a Mandate to abolish or substitute Personal Laws and Customs of the Minorities or Tribals

*- M. P. Raju**

"It is seldom appropriate for one group within society to seek to insert their moral beliefs, however profoundly held, into a document designed for people of fundamentally differing views." Robert Drinan wrote in American Herald (March 1974) in the context of American Supreme Court ruling on Abortion in 1974.

Is it then appropriate to force on the unwilling minorities of India, family laws based on the moral principles, religious beliefs or customs of other people in the name of a uniform civil code? But then, is Indian constitutionalism so powerless to look on when the fundamental human rights of women, children and the weak are trampled upon in the name of personal laws or customary laws or in the name of legal pluralism?

The debate about the uniform civil code is mainly about the struggle between legal uniformity and legal pluralism. Sometimes it is pictured as a combat between secularism and religion-based personal laws. It is also presented as a legal duel between women's rights and anti-women practices of minority religions.

Uniform Civil Code directive under Article 44 of the Constitution of India has again been taken out as a stick to beat the minorities and tribal communities. It is also a trick to divide the majority community and minority communities. In this game the majoritarian syndrome can easily be diagnosed.

Meaning of the concept

Article 44 provides as follows: "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." This finds place in Part IV of COI. In view of the provisions of Article 37 in the beginning

*Dr M. P. Raju is an advocate practicing in the Supreme court of India and author of books including *Minority Rights: Myth or Reality* (2002); *Uniform Civil Code - A Mirage?* (2003); and *Education - A Mission in Jeopardy?* (2005). His forthcoming book is *Constitutional Values: Towards an Indian Theory of Values and Constitutional Culture* (Media House, Delhi)

of this part, this directive shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

The concept of a uniform civil code has acquired several meanings. Courts have understood it differently. Different benches of the same court have given it varying interpretations. Even among jurists there is no unanimity about its construction. According to some, the uniform code directive is a misfit in the Constitution and according to some others, it is only distant Constitutional dream. In fact, it carries no single meaning over historical time. Susanne Hoeber Rudolph and Lloyd I. Rudolph have identified five possible meanings for the uniform civil code.

One. The British implicitly moved toward a uniform civil code without calling it so. At the cultural level, making the law more uniform, standardizing it, was an expression of rationalization and modernization. Legal uniformity was in keeping with the formal organizations of the raj's administrative state. It made the law more legible for bureaucrats who were strangers to India's diversity and villages. And it was believed to facilitate control. These rationales were equally congenial to those charged with ruling the post-colonial state.

Two. For modernist, rationalist nationalists a uniform civil code seemed to promise national integration. It would do for twentieth-century India what nineteenth-century nationalism was thought to have done for European states, dissolve or erase differences. It would help bring into being a nation whose people shared an identity congruent with state boundaries.

Three. For civil rights activists, those speaking for the marginalized and powerless, women, children, cultural and ethnic minorities, and lower classes, a uniform civil code signified the expansion of rights to categories of persons oppressed by patriarchal, gerontocratic, collective, and oligarchic forms of social domination and control.

Four. For religious minorities, the uniform civil code signified an effort to erase the personal law of diverse communities. It posed a threat to their cultural identity, even to their cultural survival.

Five. For Hindu nationalists, a uniform civil code promised a legal means to eliminate cultural differences and the "special privileges" accorded to "pampered minorities." It would also have rectified what they perceived as an injustice, the reform in the 1950s of Hindu personal law (the "Hindu Code Bills") without reforming the Muslim personal law, making it possible in principle (but rarely in practice) for Muslim men to have four wives and to divorce at will.(2001: 55)

According to Susanne and Lloyd, at independence the first three meanings of the uniform civil code were dominant. In the last decade, especially since the destruction of the Babri Masjid in December 1992, the last two meanings have come to the fore, seeing the uniform civil code as a means to diminish if not eradicate cultural pluralism.(ibid.)

The uniform code directive has provided an occasion for a contest between legal pluralism and legal universalism in modern India. Legal pluralism recognized and legitimized the personal law of India's religious communities. Legal pluralism emphasises the individual rights and liberties and refuses to recognise the group orientated identities based on religion or culture. However, the uniform code debate has brought to the fore several core issues of constitutional importance.

Legal Pluralism in the Indian Ethos

Legal pluralism and group-identities-orientated personal laws have been part of our Indian legal history from very ancient times. The ancient Indian legal systems had been accommodative of the different customary laws and had permitted the implementation of such laws within their communities. Similarly, these systems did not have any difficulty in accepting the religion based legal systems.

Plurality of civil laws, legal pluralism or dispensation of different personal laws for different communities within the same country or under the same sovereign is not anything new but has been well accepted all through the world and even in India. It is well acknowledged that this legal pluralism was present from the ancient times in the Indian tradition.

Legal pluralism has been one way to give expression to India's continuously and variously constructed multi-cultural society. Legal universalism has been associated with nationalist ideas about equal, uniform citizenship and

treats individuals alone as the basic units of society and state. Legal pluralism treats corporate groups as the basic units, the building blocks, of a multi-cultural society and state. Particular legal rights and obligations arise from collective identities such as Hindu, Muslim, Christian, Sikh, Jain, Buddhist, and Parsi, and to *samparadays* (sects) and *quoms* (communities) such as Dadupanthis, Kabirpanthis, Sunnis, Shias, etc.

A Maple Leaf from Canada

Article 44 of our Constitution which deals with uniform civil code "had a precedent in section 94 of the Constitution of Canada"(FIC-A Study, p. 324, footnote). The Constitutional Advisor in his note to the sub-committee on fundamental rights has shown section 94 of the Canadian Constitution as the source of the present Article 44. (FIC-SD, Vol.II, p. 150)

It may be useful to extract section 94:

> "94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts of Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof." - Constitution Act, 1867 (Originally, "The British North America Act, 1867")(U.K. 30 & 31 Victoria, C.3)

The speeches by Dr Ambedkar also show that what was intended by the civil code directive was similar to what was intended by the said provision of the Canadian constitution.

Framing the Directive in the Constituent Assembly

Granville Austin categorically holds that the Constitution's spirit came from the objectives resolution. (New Delhi: 1999, p.5). The objectives resolution was adopted on January 22, 1947 unanimously and in a solemn manner, all members standing. (The Framing of the Constitution - Select Documents, vol. II, p. 3).

Through this resolution, the Constituent Assembly declared its firm and solemn resolve to proclaim India as an Independent Sovereign Republic "wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality;" and "wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes;" (Constituent Assembly Debates (CAD), vol I, p.59)

Though there is no reference to the concept of uniform civil code in the objectives resolution, the above guarantees and safeguards help us to understand that pluralism, freedom of religion and safeguards for minorities and tribal communities were among the declared objectives.

There is an interesting reference to the basis for the sovereignty of law which includes civil code in the speech of Dr. S. Radhakrishnan (CAD, Vol.II, pp.253-60) in the Constituent assembly on 20th January 1947 commending the objectives resolution moved by Jawaharlal Nehru. He had said:

> "Much has been said about the sovereignty of the people. We have held that the ultimate sovereignty rests with the moral law, with the conscience of humanity. People as well as kings are subordinate to that..."(ibid, p. 256). According to him moral law is the basis of the sovereignty including sovereignty of law. Since the moral law derives from different religions, philosophies and cultures, implied is the necessity of the personal laws and legal pluralism in a multicultural and pluralist country like India.

In the Constituent Assembly the representatives of different communities had asserted the importance of preserving the personal laws of the communities. Representing the Parsees, Mr. R.K. Sidhwa submitted a memorandum on minorities dated 31/3/1947 wherein he insisted on behalf of the Parsees their desire that their personal law should continue to exist in the new Constitution and any amendment in these Acts shall be made only with the consent of the Parsee community as has been done in the past. He further said:

> "It is further suggested that no enactment affecting the religion, customs, personal law, endowments, and other cognate subjects

should be initiated and passed except with their own concurrence obtained as in the case of Matrimonial Act and other Acts."
(ibid.p.321)

Mr. S.P. Mukherjee in his Memorandum on Minorities dated 17/4/1947 had made a specific plea as follows:

"No Bill, nor any clause thereof, nor a resolution introduced by a member of a legislature affecting one or the other communities, which question is to be determined by the members of that particular community in the legislature concerned, shall be proceeded with, if three-fourth of the members of that community in that particular legislature oppose the Bill, or any clause thereof, or the resolution."

Mr. Ujjal Singh and Harnam Singh submitted a memorandum on minorities dated March/April 1947 on behalf of the Sikhs demanding protection for their personal laws, customs and practices, including the preparation and use of 'jhatka' meat in public institutions treated on a par with 'halal' meat and the manufacture, sale, the keeping and wearing of kirpans by the Sikhs.

Mr. R. N. Brahma in his memorandum on the safeguards for the Plains Tribal people of Assam (March/April 1947) pleaded for their religious, cultural and educational safeguards and more specifically for statutory rights to retain and develop their own cultural peculiarities.

The representatives of the Jain Community had submitted a memorandum (March/April 1947) to the Minorities sub-committee which insisted that they strongly felt that the Jains should be treated as a minority and it would be doing a grave injustice to the Jain community if they were merely treated as a branch of Hinduism. They also pleaded that "No legislation affecting religion, culture, philosophy, temples, *maths* and their property as well as the personal law of the Jains should be introduced without the consent of the Jain community and their accredited representatives in the Central and Provincial Legislatures." They also requested that the Jain law should be accepted as binding as the personal law for the Jain community. (ibid. p.376)

The Jain Swetambar Conference also made their submissions through a memorandum (May 7, 1947) highlighting the necessity of protecting their religious matters from interference. They submitted that there is a common feeling in the community that there should be no interference by others in

their religious or socio-religious institutions and "that no law interfering with the management or administration of the Jain temples and places of pilgrimage, their religious orders of *Sadhus* and *Sadhvis*, their literature and *Pustak Bhandars*, their trusts and other religious and charitable institutions, their art and architecture, should be enacted which has not the approval of the community." (ibid. P.384-385)

Dr. B. R. Ambedkar concluded the debate on Article 35 (present Article 44) with his speech and gave an assurance to the minorities including Muslims who were apprehensive of the uniform civil code directive: Dr Ambedkar on behalf of the Assembly had assured the minorities that this directive is not meant to enforce one single code on all the citizens.

Further Assurance was given to the minorities in the Constituent assembly regarding this directive during the discussions on the fundamental freedoms. Even though on 23/11/1948 after a detailed debate, the constituent Assembly had incorporated the Uniform Civil Code directive into the Constitution as Article 35 which now stands as Article 44, the uniform code directive and the permissibility of personal laws came for debate in the context of the fundamental freedoms under Article 13 (the present Article 19). (Constituent Assembly Debates, Vol. VII; pp. 779-82). Concluding the debate on Article 13 and replying to all the objections and motions, Dr. Ambedkar dealt with the question of saving personal law and also explained the meaning of the directive for securing a uniform civil code under the Directive Principles. He categorically assured that there is no obligation upon the State to do away with the personal laws. (CAD vol.VII, p. 781-2)

Thus through the words of Dr. Ambedkar, the country and the Constituent Assembly have given an assurance to the minorities that the uniform civil code directive is not intended to annihilate their personal laws. It has also been clarified that Article 44 is not an obligation on the State to bring in uniformity finishing off all personal laws of the minorities or legal pluralism. It is also evident that personal laws will be in its teeth to the extent of the State's power to bring in social reform and justice.

Thus from the history of the framing of Article 44 and the assurances publicly given in the Constituent Assembly it is clear that the uniform code directive was never intended or understood as a directive to do away with

all personal laws whether based on religion, culture or custom. At the same time, it was intended as a measure to bring in social reform even in the area covered by personal laws or culture in tune with the Constitutional scheme. Even though the history of the drafting or the speeches made in the legislative chamber may not be very material in construing even a constitutional provision, in the present case it is a proof that the plain meaning of the words as also the meaning consistent with the whole constitutional scheme is the same as those intended by the Constitution-makers and reflected from the history of the framing of the Article 44.

An Agenda for Legal Pluralism

Is the uniform civil code directive consistent with the constitutional objective of pluralism? The recent 11-judge decision of the Supreme Court of India has unequivocally reiterated the constitutional objective of pluralism. If so the civil code directive can not be understood as an agenda for legal universalism or for a common civil code annihilating all legal pluralism in the arena of family laws or the customary laws of the tribal communities. It may be apposite to refer to what Dr Ambedkar had said while moving the Draft Constitution in the Constituent Assembly: “Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that man was vile.” (CAD Vol. VII 1989 reprint, p. 44)

Uniform Civil Code versus Minority Rights

The Uniform Code Debate cannot be allowed to turn into a dispute of Uniform Civil Code versus minority rights. It cannot be the intention or objective of the Constitution of India. To practice and preserve the personal laws have been internationally recognised as part of the human rights of the minorities. Recently, Justice Sinha of the Supreme Court, though in a minority opinion has referred to this fact. After referring to the international covenants and declaration on the minority rights Justice Sinha has laid down that the kind of ‘minority rights’ that they feel they are entitled to claim if their equality within the State is to be real includes, "provision for respect of the family law and personal status of the minority and their religious practices and interests" (para 195 of the judgment in Islamic Academy v. State of Karnataka dated 14th August 2003.)

Thus right to have their own personal and customary laws which are not in conflict with the human rights and fundamental rights is an essential

ingredient of the rights of minorities in any democratic country. It is in consonant with the scheme our Constitution has adopted. Thus Uniform Civil Code directive cannot be interpreted to mean the abolition of the personal or customary laws of the minorities or tribals. At the same time, it cannot be understood as a free for all for the minorities or a hands off policy by the State – Legislature, Executive or the Judiciary – in the area of personal laws or customary laws. They have to be brought in to be consistent with the fundamental rights and the basic features of the Constitution. That is the command of Article 44. It is not a dogma for introducing legal homogeneity annihilating the minorities’ distinct cultures and identities; neither is it a motto for legal pluralism as understood in the context of cultural federalism. It is an agenda for pluralistic uniformity, like our unitary federalism. It is the only meaning possible once we read the Uniform Civil Code directive under article 44 together with the rights of the minorities under Article 29, 30, 25 and 26 and the fundamental duty of respecting our composite culture under Article 51 A as also the other provisions of the Constitution relating to pluralism, federalism and substantive equality.

Securing a Uniform Civil Code

According to the established principles for interpreting constitutional provisions the meaning of the plain words should be preferred. If two meanings are possible the one which is more consistent with the overall scheme of the Constitution should be preferred following the rule of harmonious construction.

Keeping in mind the above principle, if we look at the Article 44 of the Constitution which gives a uniform civil code directive to the State as part of State policy, the plain meaning is not ambiguous. “The State shall endeavour to secure for the citizens a uniform civil code through out the territory of India.” The keywords in the above article are “uniform civil code”. However, to understand the meaning of these words we may have to read them together with the other words of the article.

The meaning of the word “uniform” can denote the same in form though differing in essence or content. The word “code” can mean both procedural law and substantive law. Civil code will include all kinds of civil laws, both procedural and substantive. Thus it can be seen that the meaning of the words “civil code” does not have any reference to personal laws or family laws. However, from the plain meaning it cannot be referred that personal

laws or family laws cannot be included in the meaning of civil laws. At the same time there is nothing to imply in the words that civil code solely or at least mainly means or apply to family laws or personal laws. Hence it should be understood that the civil code means all kinds of civil laws both procedural and substantive including contract law, commercial law, personal law and all branches of civil law which can ordinarily be understood and grouped under civil law. Thus it should be understood that the directive for a uniform civil code applies to all branches of civil law and not limited to family laws or personal laws. If that is so the meaning of word "uniform" should be understood as applicable to all kinds of civil laws in the overall scheme of the Constitution. So understood, uniformity cannot mean homogeneity.

This is evident from very scheme of the Constitution which contemplates civil law legislation by each of the states (provinces) as per the State list (list II) of the Seventh Schedule of the Constitution. A uniform civil code in the meaning of annihilating and substituting all existing plurality of laws would amount to repeal of the constitutional scheme and the federal character.

It would also militate against the fundamental rights under article 29 entitled protection of interests of the minorities including the rights of any section of citizens to conserve its distinct culture.

Further such a universalistic majoritarian meaning of the directive would bring to nought the provisions for protecting the tribal customs and legislative schemes and special civil laws for the scheduled areas under Schedule 5 and 6 of the Constitution.

To test the requirement of uniformity you can take the example of Civil Procedure Code to see as is applicable to the procedural law. Even though the civil procedure code is made applicable throughout the territory of India constitutionally permissible changes and classifications are deemed to be permitted. The State amendments even to the procedural law will not be against the command of uniform civil law. Similarly creating special rights or different rights for classifiable groups or classes also will not be considered as against the requirement of uniformity. In other words, the uniform should be considered to be a species of equality principle. As the concept of equality permits classification with objective criteria having rational nexus and the concept of principle of substantive equality even requires differential treatment. The concept of uniformity of civil law not only

permits classification but in certain context may command or require classification or differential legislation. For example, creating or providing for special rights for constitutionally classified groups such as, women, children, Scheduled Castes, Scheduled Tribes and Backward Classes cannot be considered contradictory to the mandate of uniformity under Article 44. Similarly is the constitutional classification based on culture, language or script vide Article 29 of the Constitution or classification on the basis of religious and linguistic minorities for permissible purposes. Similar is the case with other numerous permissible classification relatable to the exercise of the freedom of conscience as also the right to freedom of religion.

It will be absurd to understand the mandate of uniformity to be in conflict with the constitutional scheme of pluralism. Thus it can safely be said that the uniformity under Article 44 is a handmade of the equality concept permeating the whole constitutional scheme and enshrined in Article 14 and the related provisions which is a natural sibling of pluralism and substantive equality. Thus seen the command of having a uniform civil code through out the territory of India will not be in conflict with the principle of federalism or the legislative competence of Parliament and State Legislatures concurrently and independently. Similarly creating or allowing special or different rights for different classifiable groups will not be in conflict with the mandate of uniformity to the extent it is not hit by the mandate of equality which itself permits and even requires classification and differential treatment. Hence the personal or the family laws or for that matter different customs of different communities cannot be understood to be hit by the mandate of uniformity until and unless they are in the teeth of the equality principle.

The meaning of uniform civil code should be understood in conjunction with the other words of the article. The command of the article is to endeavour to secure a uniform civil code. It is important the word "endeavour" should be understood to mean try hard to do or achieve something. This means wherever it is possible it should be achieved. It is also important to note that Article 44 is intended for the citizens. There are a lot of civil laws which are applicable to non-citizens. In our constitutional schemes there are even fundamental rights which are available to non-citizens. Similarly there are legal rights available in our civil law which are applicable even to non-citizens. Article 44 excludes all those civil laws and

legal rights which are applicable to non-citizens. So those rights are permitted to be outside the mandate of uniform civil code. Another important aspect is the requirement of securing the uniform civil code for the citizens is qualified with 'throughout the territory of India.' Thus the uniformity should be understood in relation to the territory of India. The civil law should be uniform throughout the territory of India. This uniformity should be understood subject to the permissible territorial or regional. Thus understood the mandate of Article 44 is not a mandate for homogeneity at any cost nor is it against legal pluralism allowing customary laws, personal laws or different codified laws consistent with the fundamental rights and the constitutional scheme.

Uniform Code and a Composite Culture

Law especially civil law has its root and basis mainly in the culture and philosophy of the people. The relationship between law on the one side, the morality and ethics on the other is well accepted. More the shades of culture and philosophy more will be the shades of civil law system. Justice Krishna Iyer in a judgement, written by him when he was a judge of the Kerala High Court, has stated that "law is largely formalised and enforceable expression of a community's cultural norms". Therefore he has said that it will be impossible for alien minds to understand law as it is difficult for them to fully understand the soul of culture. [Yousef Rautar vs. Sawarama, AIR 1971 Kerala 261]. It is interesting to note that Justice Krishna Iyer after a little sojourn in support of a uniform civil code in the sense of substituting the personal laws had returned to his support of legal pluralism. He has publicly made a powerful plea that "the personal laws may be reformed within without a quantum leap into a common code." It is worth noticing that in many countries including United States people are governed by different laws based on region and religion.

The legal pluralism of the Indian variety is similar to the special varieties of multi-culturalism and federalism India has adopted.

Is uniform civil code compatible with the continuing existence and integrity of personal laws? It is relevant to see how S.P. Sathe sees the issue of a uniform civil code. According to him, "The Constitution doubtless visualizes the emergence of a uniform civil code but does it mean a single law for all?... Within one nation there can exist a number of legal systems. In fact federal government, means the coexistence of such multiple laws.... This means that Maharashtra may have its own family law different from that of Karnataka. In the U.S. each state has its own matrimonial law."

A uniform law, in the words of S. P. Sathe, "does not necessarily mean a common law but different personal laws based on uniform principles of equality of sexes and liberty for the individual...."(1995:38)

This is in tune with the contemporary political thought recognising corporate identities under a single sovereign. According to Susanne Hoeber Rudolph and Lloyd I. Rudolph, "Legal pluralism is not simply a question of values. It is also a question of power, of who gets what, when and where. "Universality" in the law is not only valued by enlightend liberals and Fabian socialists, it is also the strategy of centralizing modern states. Pluralism in the law is both a norm and the strategy of those who favour dividing, limiting and sharing sovereignty in federal and pluralist states that allow for diversified geographically and culturally defined communities."(2001: 37-38)

Not a Directive for Universalism

Uniformity, universalism or homogeneity is not a medicine for the discriminatory anti-women and unjust practices, customs or laws. Uniformity by itself cannot ensure that a legal system would be free of gender bias or discrimination. In India there is a number of common civil codes which still perpetuate anti-women, discriminatory and unjust provision. Some of them are being challenged in the courts as anti-constitutional, sometimes successfully and sometime unsuccessful. It is not clear that legal uniformity or a common civil code is not a magic band or a trick which automatically will make the whole legal system human rights sensitive or free of gender bias.

There appears to be much sense in what Professor Tahir Mahmood points out that 'uniform civil code' is written without capital letters. This itself shows that the mandate is not for enacting a common or uniform civil code for the whole of India abolishing all personal laws, customary laws or the legal pluralism. It is a command to the legislature to secure to the citizens of this country a civil law system which is uniform throughout the territory of India, that is, one in form but pluralistic in substances. In other words, it is a command for securing and not forcing. It is a command for uniformity as a handmaiden of substantive equality, a mandate not to abolish the differences but to reform the undesirable. It is a mandate for endeavouring to secure a code, a codification of all civil laws including personal laws of all communities and the customary laws of tribal communities with required reform in tune with universal declaration of human rights and the fundamental rights.

● ● ●

Uniform Civil Code – a Muslim point of view

*- Zafarul-Islam Khan**

Uniform, or Common, Civil Code (UCC) is one of the 23 directive principles of the Indian Constitution. Article 44 of the Constitution says: "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." Unlike other directive principles, which are yet to be complied with, the demand for UCC with reference to the Constitution is made from time to time, especially by proponents of Hindu ultra-nationalism who find it a suitable stick to beat the Muslim community with. The issue is being hotly discussed these days due to the interest shown by the apex court and the BJP government at the Centre.

The demand for a uniform civil code in India was first put forward by women activists in the beginning of the twentieth century to safeguard women's rights, equality and secularism. This demand was supported by Jawaharlal Nehru in 1930 but he had to face opposition by senior Congress leaders like Vallabhbhai Patel and Rajendra Prasad.[1]

The reason for this demand was the denial of women's rights within the Hindu system. Till Independence in August 1947, a few law reforms were passed to improve the condition of women, especially Hindu widows. A major effort to reform Hindu laws was made by Dr BR Ambedkar when he piloted the Hindu Code Bill which legalized divorce, provided for monogamy and gave inheritance rights to daughters. But, due to intense opposition of the code being "anti-Hindu", only a diluted version was passed via four different legislations, viz.:

1. The Hindu Marriage Act,
2. Succession Act,
3. Minority and Guardianship Act, and
4. Adoptions and Maintenance Act.[2]

*Dr. Zafarul-Islam Khan has a PhD in Islamic Studies from Manchester University. He was editor of *The Milli Gazette* during 2000-2016 and served for three terms as the President of the All India Muslim Majlis-e Mushawarat, the umbrella body of Indian Muslim organizations. He may be contacted at edit@milligazette.com

[1] Wikipedia, "Uniform civil code" -- https://en.wikipedia.org/wiki/Uniform_civil_code. Accessed on 24-5-17

[2] "Why doesn't India have a uniform civil code?": https://www.quora.com/Why-doesnt-India-have-a-uniform-civil-code -- accessed on 24-5-17

The issue of UCC was discussed at length in the Constituent Assembly but no consensus was reached. The suggestion to include a provision for a common civil code in the list of Fundamental Rights was made by M.R. Masani for the first time at the meeting of the Fundamental Rights Sub-Committee of the Constituent Assembly on 28 March, 1947. After heated debate, the proposal was voted out. The idea was pressed further and his forceful advocacy carried the day. The Sub-committee this time recommended that it may be included in the Directive Principles – the non-justiciable and non-enforceable section of the Constitution.[3] Thus the proponents of UCC had to accept the compromise of it being added to the Directive Principles because of heavy opposition (from the Hindu side).[4] According to academic Paula Banerjee, this move was to make sure it would never be addressed.[5]

The Indian Parliament discussed the report of the Hindu law committee during the 1948–1951 and 1951–1954 sessions. It was found that the orthodox Hindu laws were pertaining only to a specific school and tradition because monogamy, divorce and denial of a widow's right to remarry and inherit property were present in the *Shashtras*. Law Minister Ambedkar recommended the adoption of a uniform civil code. He had done research on the religious texts and considered the Hindu society structure flawed. According to him, only law reforms could save it and the Hindu Code Bill was this opportunity. He faced severe criticism from the opposition though Nehru supported these reforms.[6]

The Minorities Sub-committee of the Constituent Assembly, which examined the report of the Fundamental Rights Sub-committee, was dissatisfied with the wordings of the Article as proposed. It, therefore, observed in its Interim Report of 19 April, 1947, that the Article be re-drafted to make it clear that while a UCC for all citizens was eminently desirable, *its application should be made on an entirely voluntary basis.*[7]

[3] Moosa Raza, "Uniform Civil Code," *The Milli Gazette*, 1-15 November 2015 -- http://www.milligazette.com/news/13252-uniform-civil-code -- accessed on 30-5-17

[4] *Wikipedia*, "Uniform civil code" -- https://en.wikipedia.org/wiki/Uniform_civil_code -- accessed on 24-5-17

[5] *Wikipedia*, op. cit.

[6] *Ibid.*

[7] *Ibid.*

Winding up the debate in the Constituent Assembly on the subject, Dr Ambedkar said, "All that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. Therefore, no one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India…. *Sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No Government can exercise its powers in such manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad government if it did so".*[8]

The idea of a uniform civil code was the brain-child of a single individual which was adopted and supported by K.M. Munshi and Sir A. Krishnaswamy Iyer. It was, however, equally strongly opposed by the members belonging to the minority community. It took its place amongst the Directive Principles on the assurance of Dr. Ambedkar quoted above.[9]

Jawaharlal Nehru, the first Prime Minister of India, believed that "It is obvious that no change can be imposed from the top. It will thus become the duty of the Government of the day to try to educate public opinion so as to make it accept the changes proposed…. and that any change of this type *will only apply to a community when the community itself accepts it*".

Indira Gandhi, as Prime Minister, reiterated the assurance in 1967 and again in 1969. She said that "no decision concerning the minorities' rights would be taken without first consulting them. In fact, *any such move would have to come from the minority communities themselves"*.

These assurances were further reinforced by Prime Minister Rajiv Gandhi who said, "I am in favour of a uniform civil code, but want it to be introduced only after a consensus is reached among political parties, religious leaders and eminent personalities …it must come by a specific decision, *some sort of unanimity* that we need such a code… Let us not try to slip that in by the back door, because that will not work…".[10]

[8] Ibid.
[9] Ibid.
[10] Ibid.

Law Minister under the previous UPA government, Veerappa Moily, said UCC was not implementable. "It is impossible to implement it in a multi-cultural, multi-racial and multi-dimensional country like India. And anybody who thinks it is a communal agenda, then they are wrong. This cannot be a Hindu-vs-Islam or Islam-vs-Hindu. Multiple practices are available… Any number of tribals we have in the country, they have their own personal laws. Many of the backward classes… for example, some of the families, in fact a majority of the families in my district that is Dakshina Kannada, and Udupi and also in coastal Kerala, we have the *marumakkathayam* (matrilineal inheritance) practice… through a uniform civil code, you cannot bulldoze them," he said, adding that the UCC cannot just be viewed in the context of Muslims. "This is a question of practices of many communities, hundreds of communities in India. So when you address uniform civil law, you cannot just limit it only to Muslims. Or the Hindus only…Within Hindus, there are many practices…"[11]

Interestingly, a most influential Hindutva ideologue, Shri Guru Golwalkar, the late Sarsangchalak of the RSS, was in agreement with these views. In an interview with the RSS mouthpiece *Organiser* in 1972, Shri Golwalkar met in advance all the arguments later to be used by the Supreme Court which had said "A Common Civil Code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies":

Q. You don't think that a Uniform Civil Code is necessary for promoting the feeling of Nationalism?
A. I don't. This might surprise you or many others. But this is my opinion. I must speak the truth as I see it.
Q. Don't you think that uniformity within the nation would promote national unity?
A. Not necessarily. India has always had infinite variety. And yet, for long stretches of time, we were a very strong and united nation. *For unity, we need harmony, not uniformity."* [12]

[11] Manoj C G, "His party cautious, Moily says triple talaq practice needs reform," *Indian Express*, October 15, 2016 -- http://indianexpress.com/article/india/india-news-india/his-party-cautious-moily-says-triple-talaq-practice-needs-reform-3083512/ -- accessed on 30-5-17.

[12] *Organiser*, 26 August, 1972 quoted in Moosa Raza, *op. cit*.

During recent decades, the UCC issue has been raised from time to time mostly by Sangh Parivar, Leftist parties and feminists, especially since the Shah Bano controversy in 1985,[13] which had led to the passage of the "Muslim Women's (Protection of Rights on Divorce) Bill" in 1986 making Section 125 of the Criminal Procedure Code inapplicable to Muslim women. Ever since the Shah Bano case became a nationwide political issue and a widely debated controversy. The BJP was the first party in the country to promise UCC if elected into power.[14]

Article 44 of the Constitution talks of securing a Uniform Civil Code *throughout* the territories of India. But how can Parliament enact, even if it wanted to, a Code which *cannot* apply to the territories of Jammu & Kashmir, Nagaland and Mizoram? Will this not be against a clear provision of the Constitution? Will this not be a clear discrimination between these three states and the rest of India? Can such a discriminatory code be called a UCC? On the other hand, can the Kashmiris, Nagas and Mizos be compelled to adopt a Uniform Civil Code in the light of Articles 370, 371-A and 371-G of the Constitution?

The current UCC debate goes to October 2015, when the Supreme Court of India asserted the need of a UCC saying, "This cannot be accepted, otherwise every religion will say it has a right to decide various issues as a matter of its personal law. We don't agree with this at all. It has to be done through a decree of a court".[15] The Muslim community asserted that the Muslim Personal Law is an issue of its religious and cultural identity protected by Articles 15 and 25 of the Constitution. Muslims believe that UCC is a back-door attempt to impose Hindu values on every Indian.

[13] It was about legality of maintenance to a Muslim divorcee beyond *Iddat* (three month waiting after divorce). As against Islamic Personal Law, Supreme Court had awarded life-long maintenance to Shah Bano, a divorcee. Muslim agitation forced the then union government headed by Rajiv Gandhi to enact a law to satisfy Muslim demands though legal loopholes allow courts even now to order maintenance to Muslim divorcees beyond *Iddat*.

[14] *Wikipedia, op. cit*.

[15] Utkarsh Anand, "Uniform Civil Code: There's total confusion, why can't it be done, SC asks govt," *Indian Express*, October 13, 2015 -- http://indianexpress.com/article/india/india-news-india/uniform-civil-code-supreme-court-asks-govt-why-cant-it-be-done-tell-us-your-plan/ -- accessed on 30-5-17.

Of late as a result of the current debate about Triple Talaq[16], the UCC issue received further attention because of the present BJP-led Union government's deep interest and open espousal of the UCC. This is the first time in independent India that the Central government has called for the abrogation of the Muslim Personal Law (MPL) and enactment of a UCC. Hitherto, Union governments in and outside Parliament had consistently reiterated that no changes will be made in the MPL unless the demand came from within the Muslim community. To thwart such interference, the community established a (private) All India Muslim Personal Law Board (AIMPLB) in 1972. The board has the representation of all Muslim sects in the country and enjoys a strong support of the community. This was demonstrated lately when AIMPLB presented a petition against UCC with 48.1 million signatures to the Law Commission of India on 13 April, 2017 rejecting any change in the MPL.[17]

MPL, as practiced in India, goes back to the early days of the British colonial rule in India after the demise of the Mughal State in 1857. Soon thereafter the Shariat-based Mughal laws were abolished but Muslims and other communities were allowed to practice their personal laws where both parties of a dispute belonged to the same religion. Even before 1857, the Lex Loci Report of October 1840, while emphasizing the importance and necessity of uniformity in the codification of Indian law relating to crimes, evidences and contract, recommended that personal laws of Hindus and Muslims should be kept outside such codification. Thereafter the British Queen's 1859 Proclamation promised absolute non-interference in religious matters. So while criminal laws were codified and became one for the whole country, personal laws continued to be governed by separate codes for different communities.[18]

Shariat-related judgements of British courts were compiled by Dinshah Fardunji Mulla, a Parsi, in his book *Principles of Mahomedan Law*. It still

[16] A Muslim husband's spelling three (i.e., complete and final) divorce to his wife in one sitting.

[17] "Law commission handed over signatures of 4.81 cr people who are happy with Triple Talaq", Ummid.com, April 14, 2017 -- http://www.ummid.com/news/2017/April/14.04.2017/muslim-personal-law-board-meets-law-commission-on-triple-talaq.html -- accessed on 31-5-17

[18] https://www.quora.com/Why-doesnt-India-have-a-uniform-civil-code - - accessed 24-5-17

remains to this day the main source of guidance for Indian courts on issues related MPL. The British colonial government gave this practice a legal cover by enacting Shariat Act in 1937 which provided that for a number of situations (including inheritance of personal property; marriage; dissolution of marriage through *talaq*, *ila*, *zihar*, *li'an*, *khula*' or *mubara'at*; maintenance; *mehr*; guardianship; gifts; trust and wakfs) the rules of decision in cases where the parties are Muslim shall be Muslim personal law (Shariat). This Shariat Act still remains operative in India though some specific changes were made over the years like the Waqf Act enacted in 1995 and re-enacted in 2013.

The current Union government and media give an impression as if Muslims alone have their separate personal laws. The fact is that many religious and ethnic communities in India have their personal laws, like Sikhs, Christians, North-Eastern communities and tribes, adavasis, tribals, mountain people and even Hindus. According to the former Indian Law Minister Veerappa Moily, there are between 200 to 300 personal laws operative in India. Even the Hindu community will not easily let go its personal laws as was seen in 1956 when small changes in the Hindu code were fiercely contested and the then President of India Dr. Rajinder Prasad willy-nilly signed the revised laws. As of now, only the state of Goa has a common family law based on the erstwhile Portuguese civil law, which continued to be implemented after its annexation in 1961, thus being the only Indian state to have a uniform civil code. But even there, Muslim women are facing many problems as a result.[19]

Moreover, the Special Marriage Act, 1954 permits any citizen to have a civil marriage outside the realm of any specific religious personal law. This Act provides a form of civil marriage to any citizen irrespective of religion. This law applies to all of India, except Jammu and Kashmir. In many respects, this act is almost identical to the Hindu Marriage Act of 1955. It allows even Muslims to marry under it. Under this act polygamy is illegal, and inheritance and succession are governed by the Indian Succession Act rather than the respective personal law. Divorce also is governed by the secular law, and maintenance of a divorced wife is decided along the lines set down in the civil law.[20]

[19] See Nazrana Shaikh, "Uniform Civil Code in Goa? Hindus, Christians spared but difficulties for Muslims", *The Milli Gazette*, April 2, 2017 -- http://www.milligazette.com/news/15495-uniform-civil-code-in-goa-hindus-christians-spared-but-difficulties-for-muslims

[20] *Wikipedia, op. Cit*.

Muslims' point of view is that the community is content with its MPL and does not want any change in it. The AIMPLB, though initially against the abrogation of the Triple Talaq[21], has now under the pressure of the Supreme Court relented and agreed to appeal to the community to shun this bad practice which is considered an undesirable innovation (*bid'at*) in Islam as it is against the clear rules set for divorce by the Holy Qur'an (2:226-232; 65:1-7).

Another problem with UCC is that no one knows what it is, what provisions it will cover, how it will affect the existing laws of the various communities, including the laws of the majority community. Has anybody thought of consulting the Hindu community in this regard? Everybody seems to believe that the Uniform Civil Code will affect only Muslims and Christians. What will happen to the provision of the Hindu Undivided Family by the taxation laws of the country which are used by millions of Hindus to avoid taxes paid by non-Hindus. If such benefits are retained for the Hindu Undivided Family, can it still be called a UCC?

Muslims perceive that the issue of UCC, raised mainly by the Sangh Parivar, is only to tease the community as no one within the government or without has come up within a draft UCC. A representative meeting of Muslim community leaders in Mumbai in October 2016 said that the issue of UCC should not be discussed unless the government comes up with a draft.[22]

Another objection to the UCC is that its proponents are choosy about the directive principles of the Indian constitution. None of the directive principles have so far been complied with despite the fact that some of them are stated with much more stress than UCC. The directive principles of the Indian Constitution include:

Art. 47 (first part): The State shall regard among its primary duties to

[21] Triple Talaq, or three divorce pronouncements by the husband, is practiced by Muslims, mainly illiterate as against 3-month procedure set by the Qur'an (2: 226-232). A recent study, based on a field survey, has shown that it is least practiced types of talaq in the Muslim community as in only 0.3 per cent of surveyed cases the divorce took place in the form of instant triple talaq: Abusaleh Shariff & Syed Khalid, "Unimportance of triple talaq," *Indian Express*, May 29, 2017 --http://indianexpress.com/article/opinion/columns/unimportance-of-triple-talaq-supreme-court-muslim-law-4678304/ -- accessed on 30-5-17

[22] "Let Govt. present Uniform Civil Code draft: Indian Muslim intellectuals and leaders," *The Milli Gazette,* Oct 18, 2016 -- http://www.milligazette.com/news/14838-let-govt-present-uniform-civil-code-draft-indian-muslim-intellectuals-and-leaders

raise (i) the level of nutrition and (ii) the standard of living of the people and (iii) improve public health.

Art. 46: The State shall promote with special care (i) the educational and economic interests of the weaker sections of the people and (ii) protect them from social injustice and all forms of exploitation.

Art. 39: The State shall direct its policy towards securing that (a) The citizens, men and women, equally, have the right to an adequate means of livelihood; (b) The ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) The operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Art. 39A: The State shall secure (that) (i) Operation of the legal system promotes justice, on a basis of equal opportunity; (ii) Provide free legal aid, by suitable legislation or schemes or any other way; (iii) Ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Art. 49: It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export.

Art. 41: The State shall make provision (for securing) the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.

Art. 42: The State shall make provision (for securing) just and humane conditions of work and for maternity relief.

Art. 40: The State shall take steps to organise village panchayats for self-government.

Art. 43 A: The State shall take steps to secure the participation of workers in the management of industry.

Art. 48 (second part): The State shall take steps to preserve and improve the breeds, and prohibit the slaughter of cows and calves and other milch and draught cattle.

Art. 50: The State shall take steps to separate the judiciary from the executive in the public services of the State.

Art. 38(1): The State shall strive to secure and protect a social order in which justice – social, economic and political – shall inform all the institutions of the national life.

Art. 38(2) (first part): The State shall strive to minimise the inequalities in income.

Art.38(2) (second part): The State shall endeavor to eliminate inequalities in status, facilities and opportunities.

Art. 43: The State shall endeavor to secure to workers a living wage, decent standard of life and leisure and, in particular, promote cottage industries in rural areas.

Art. 44: The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.

Art. 45: The State shall endeavor to provide for free and compulsory education for all children until they complete the age of fourteen years.

Art. 47 (second part): The State shall endeavor to bring about prohibition of the consumption of intoxicating drinks and of drugs which are injurious to health.

Art. 48: The State shall endeavor to organise agriculture and animal husbandry on modern and scientific lines.

Art. 48A: The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the county.

Art. 51: The State shall endeavor to provide international peace and security; maintain just and honourable relations between nations; foster respect for international law and treaty obligations; and encourage settlement of international disputes by arbitration.[23]

It is clear that all these directive principles remain either fully ignored or very partially fulfilled although most of them have been mentioned in the Constitution with greater emphasis than that given to the UCC. In such a situation, only partisan politics and the urge to railroad certain sections of society are driving the proponents of UCC to impose it on an unwilling majority.

The country's diversity, multiple religious laws and ethnic traditions, which not only differ sect-wise but also by community, caste and region, will not allow the application of a UCC. Religious minorities look at the issue as part of identity politics and a matter of religious freedom. The Sangh Parivar and its political wing, the BJP, exploit this issue to gain Hindu electoral support.

● ● ●

[23] Based on a chart prepared by Dr Syed Zafar Mahmood as part of his response to the Law Commission of India on UCC, on 17 Nov 2016.

India and a Uniform Civil Code

*- Wajahat Habibullah**

Beginning with the very initiation of the discussions in the Constituent, The Constitution of India in its chapter of Fundamental Rights has vide Article 26 decreed as follows:

> **Article 26** *Freedom to manage religious affairs*
>
> *-Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-*
>
> *a) To establish and maintain institutions for religious and charitable purposes;*
>
> *b) To manage its own affairs in matters of religion;*
>
> *c) To own and acquire movable and immovable property; and*
>
> *d) To administer such property in accordance with law*
>
> *And specific to the cultural and educational rights of minorities are the following;*
>
> **Article 29** *Protection of Interest of Minorities:-i) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same 2) No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.*
>
> **Article 30** *Right of minorities to establish and administer educational institutions-1) all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*

What then are minorities? A notification of 1993 related to the setting up of a National Commission of Minorities specified Muslims, Christians, Sikhs, Buddhists and Parsees as minorities. To this were added Jains by a notification of 2014. Although this classification has been upheld by the apex court in a ruling of 2005, that very ruling described India as a nation of minorities. This description is grounded on the meaning of the word Hindu, which describes the community that constitutes 80% of India's population.

* Mr. Wajahat Habibullah is a retired civil servant and was the Chairperson of the National Commission for Minorities. He also served as Chief Information Commissioner of India.

The Meaning of Hindu

The word Hindu is very much misunderstood and misused. The fact is that both the words "Hindu" and "India" are of foreign origin. The word "Hindu" is neither a Sanskrit word nor is this word found in any of the indigenous dialects and languages of what we know as India. It should be noted that "Hindu" is not a religious word at all. There is no reference of the word "Hindu" in ancient Vedic scripture.

It is said that the Persians used to refer to the Indus a major river which flows partly in India and mostly in Pakistan, as Sindhu. However, the Persians could not pronounce the letter "S" correctly in their native tongue and mispronounced it as "H." Thus, for the ancient Persians, the word "Sindhu" became "Hindu." The ancient Persian Cuneiform inscriptions and the Zend Avesta refer to the word "Hindu" as a geographic name rather than a religious name. The ancient Greeks and Armenians followed the same pronunciation, and thus, gradually the name stuck.

The ancient Greeks used to mispronounce the river Sindhu as Indos. When Alexander invaded India, the Macedonian army referred to the river as Indus and the land east of the river as India. The Greek writers who wrote about Alexander preferred to use the same name.

For the Arabs the land became Al-Hind. Muslims who travelled to India at the close of the first and the beginning of the second millenium referred to the Indian subcontinent as "Hindustan" and the people who lived there as Hindus. Thus, if we go by the original definition of the word Hindu, any person living in the land beyond the river Indus is a Hindu and whatever religion he or she practices is Hinduism, the word Hindu being a secular word. Hinduism denotes any religion or religions that are practiced by the people living in the Indian subcontinent. In the strictest sense then the proper word to use for those people who follow the Scriptures of The Vedas is *"Sanatana Dharma",* not "Hinduism" as is commonly used. It is then not difficult to understand why India has been described as a nation of minorities.

Yet Hinduism today has evolved into a faith that includes those who are comfortable with being labelled as Hindu. All religions are a way of life and all religions seek to provide a path for humans to liberation of the spirit. But because the Hindu faith springs from no single revelation or dogma, as is the

case in the Judeo Christian tradition, and has remained always in a state of dynamism it has been both absorptive and contributory-witness the 19th century inputs of Arya and Brahmo Samaj. This has been characterised by each stream retaining its distinct identity

The most significant example of this characteristic is the history of Buddhism, which took birth in India, but had come near to disappearance in the Indian heartland by the close of the 1st millennium when it had reached its maximum spread across the world, till its revival as a separate religious grouping in India in the 20th century. Yet the principles of Buddhism, including the elevation of the Lord Buddha to the level of a deity, incorporated into the body of Hinduism by the eighth century sage Adi Shankaracharya have remained a constant in the evolution of the Hindu faith finding expression in Gandhi's principle of Ahimsa. And the personal laws of the Buddhist community remain distinct.

India-Building a nation

India represents an unprecedented experiment in nation building after centuries of being part of empires that have laid the foundations of its economic, social and geographic boundaries. This experiment is unprecedented because it differs radically from the idea of a Nation State based on European experience which based national boundaries on the strength of ethnic, linguistic and religious commonalities. Switzerland indeed presents a successful experiment but that is restricted to successfully holding three nationalities together in a form of State based on maximum autonomy in a minuscule geographic expanse. The concept of 'nation' was no doubt disseminated across the world in an age of colonialism, when subject people looked with envy upon the concept that had fuelled such domination. US President Wilson's insistence at the time of drafting the Treaty of Versailles that the concept be respected gave a formal basis to such an approach. And so small states, emerging from colonial rule, often ethnically diverse with these diversities sometimes hostile were, as in the division of the Ottoman empire, sought to be moulded into nation states, with, as we can now see, lasting resentments or, in breaking the yoke of colonial power, seeking themselves to build nations.

In India the imperial legacy meant that each community evolved its own civil code. And although the Sharia, with modifications described in Abul Fazl's *A' in-i- Akbari* (The Akbari constitution) provided the basis of law, while civil law

was administered by the communities with no state interference. An excellent example is the Muslim Personal law in Kashmir, preserved to this day in accordance with Article 370 of India's constitution despite Mughal, Afghan, Sikh and Dogra rule since the 16th century. This law allows a daughter to inherit like a son (*Dukhtar Khan i nasheen*), and a son born post a father's demise is recognised as heir (*pisr parvarda*), in keeping with the Islamic tradition that in case there subsists in society a tribal law administering social relations, that law will take precedence over the Sharia.

The Public Space in the Modern State

Modem society, however has created what might be called a public space in which all sections of society must participate. The public sphere is the space where diverse groups with diversity of views and opinions contend to influence the political discourse, social policy and law making. As defined by Vinay Samuel of the Anglican Mainstream in his reflections on 'The Challenge of Secularism to Religious Communities in Asia Today" it is also the space where the State, that entity which has the coercive power of the law, relates to individuals, interest groups, religious institutions, civil society and communities. This has two defining features: 1) All members of society have direct access to a public space and 2) market principles operate in that public space, which means that all participants of the space are legal equals and no single vision, particularly a religious one, can presume to command comprehensive, confessional and visible authority. So, direct access, equality of relationships and contracts, market principles and real time all constitute the modern public square.

By its nature that space becomes a secular space in modern states. As secular space it is open, ambivalent (no hegemony or hierarchy of different values) and undetermined. It is an ambiguous space neither wholly sacred nor profane, with space for both or either. Hence, in a democracy with guaranteed religious freedom, there has to be a defining principle of what is public and what is private. Social relations governing each community bound together in the public space constitutes what remains distinct to that community in that public space. And this is the pivot on which has been built the modern Indian republic

Increasingly today's societies are described as having reached a post secular space as far as the state is concerned. This is the "period in which, for the first time, multiple modernities, each with their respective relationship to

religious belief and practice are overlapping and interacting within the same shared predominantly urban spaces." In that public sphere, a neutral space, or a space to diffuse any threat or risk to religions or certain type of religions is required. In today's Indian society this has been provided through respect for religious laws as spelled out in the Constitution provisions quoted.

Justice Krishna Iyer, in *The Hindu* of Sept 6 2016 has pleaded, "My powerful plea is that the personal laws may be reformed from within, without a quantum leap into a common code. Remarkable changes in Islamic laws are possible without violating the Quran but adopting progressive hermeneutics."[1] The issue described as Triple Talaq has unnecessarily been confused with the issue of a uniform civil code, thus thrusting India's minority Muslim community into the defensive. But this dilemma is essentially a question of whether the Supreme Court can pronounce on an issue of personal law. It is my case that it not only can but it must.

The last time that Supreme Court sought to rule in a matter concerning Muslim personal law was in 1985 resulting in what has come to be known as the Shah Bano amendment. Shah Bano was married to Mohammed Ahmad Khan, an affluent and well-known advocate of Indore, Madhya Pradesh from whom she had five children. But after 14 years of this prolific marriage Khan took a younger second wife. For a time he lived with both, but when Shah Bano was 62 she was thrown out together with her five children. In April 1978, Khan even stopped giving her the paltry Rs. 200 per month that was said to have been promised. With no means to support herself and her children, Shah Bano petitioned a local court in Indore, against her husband citing section 125 of the Code of Criminal Procedure, asking for maintenance of ₹500 for herself and her children. Khan's response: in November 1978 was to pronounce an irrevocable talaq (divorce) taking the defence that hence Shah Bano had ceased to be his wife and therefore he was under no obligation to provide maintenance for her except as prescribed under the Islamic law, which was her *mehr*, promised on marriage, Rs.5,400 in all. While courts at different levels directed payment of different sums, all a mere pittance, holding that section 125 of the Criminal Procedure Code applies to Muslims, in 1980. Khan took the matter in appeal before the Supreme Court claiming that Shah Bano was no more his responsibility because he had a second marriage, which was permissible under Islamic Law.

[1] VK Krishna Iyer "Unifying Personal Laws", *The Hindu* 'Opinion' Sept 6, 2016

The Supreme Court of India in a two judge bench with Justices Murtaza Fazal Ali and A. Varadarajan who first heard the matter, held in light of the earlier decisions of the court that section 125 of the Code did indeed apply to Muslims, referred Khan's appeal to a larger Bench. Some Muslim quasi-religious bodies namely All India Muslim Personal Law Board and *Jamiat Ulema-e-Hind* joined the case as intervener. The matter was then heard by a five judge bench chaired by Chief Justice Chandrachud, and comprised of Justices Ranganath Mishra, DA Desai, O. Chinnappa Reddy, and E S Venkataramiah. In a unanimous decision of April 23 1985 in Mohammed Ahmed Khan v. Shah Bano Begum and Ors. (1985 SCR (3) 844) the Supreme Court, dismissed Khan's appeal and confirmed the judgment of the High Court. It held unequivocally that *"there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself."* There was no doubt, held the apex court, that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to a divorced wife. Besides, Section 125 of the Code of Criminal Procedure applies to all regardless of caste or creed. So Shah Bano had the right be given maintenance money, similar to alimony.

The court also went on to discuss the desirability, of bringing of a uniform civil code in India holding that a common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. This judgement was vigorously criticised by the Muslim clergy. In this context the opinion of Justice Krishna Iyer, quoted from *The Hindu* of Sept 6 2016 has a specific relevance.

The source of Muslim Personal Law in India is the Muslim Personal Law (Shariat) Application Act, 1937 a law that is a colonial anachronism enacted to win over the Muslim clergy from what was, thanks to the legacy of the war of 1857, a Muslim population largely hostile to the British. As acknowledged in the Statement of Object of the Act, it was in fact moved by The *Jamiat Ulema i Hind*, described in the Act as the "greatest Moslem religious body".

As Director in the Prime Minister's office at the time, before there whom there was a slew of representations, petitions and recommendations on the subject, in my note on the file, I had pointed out that the representations

received were primarily from the clergy and seemed to arise from an apprehension that the ascendancy granted to them by the 1937 Act in matters concerning social relations amongst Muslims was under threat. And indeed the law does state in Section 2 that in matters concerning "intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law". But I advised that the apex court had arrived at its decision after due reference to the provisions of the Holy Quran. Government must respect the supreme character of that court and even if the arguments of the clergy in the matter are well founded, it is for the court to judge on their application, not government and not the clergy.

Nevertheless, consequent to the ruling, the Muslim Women (Protection of Rights on Divorce) Act was adopted in May 1986 that nullified the Supreme Court's judgment in the Shah Bano case. The Statement of Objects and Reasons of this Act clarifies that when a Muslim divorced woman is unable to support herself after the period that she must observe after the death of her spouse or after a divorce, during which she may not marry another man, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law. But when a divorced woman has no such relatives, and does not have enough means to pay the maintenance, the magistrate would order the State Waqf Board to pay the maintenance. The 'liability' of the husband to pay the maintenance was thus restricted to the period of the *iddat* only.

The consequences of this Act are open to debate. Yet the message that it brings home is that the application of the usual law, as enunciated by the Supreme Court, would have been of greater benefit and extended to the Muslim woman the rights granted to every other Indian. In today's vitiated communal environment it is best if the apex court were to take on the responsibility of interpreting personal law, including in the widely excoriated practice of the triple talaq, which in the view of many practising Muslims is not the law, not even accurate Sharia, in which it is described as *bid'at* (heresy). Admittedly, despite media hype this is not common practice

among Muslims. But a ruling by the apex court will hopefully carry the message that while each religious community is entitled to its personal law governing social relations along well established tradition, it must conform to the rights guaranteed to the individual under the Constitution.

In conclusion therefore, it cannot be denied that in keeping with India's own tradition and the application of the modern principle of secularism there can be little doubt that each community must be allowed flexibility in managing its own social relations. A reference here to the practice in the USA the world's foremost democracy would not be misplaced. In that country each State has its own personal laws. The American legal system remains firmly within the common law tradition brought to the North American colonies from England. Yet traces of the civil law tradition and its importance in the hemisphere maybe found within state legal traditions across the United States. Most prominent is the example of Louisiana, where civil law is a consequence of Louisiana's history as a French and Spanish colony prior to its purchase by the US from France in 1803. Many of the south-western states have variations of civil law in their state consequent to their history of Spanish and Mexican rule. California, for example, has a state civil code organized into sections that echo traditional Roman civil law categories pertaining to persons, things, and actions; yet the law contained within California's code is mostly common law. These variations have never been perceived in the US as compromising their nationhood, but instead have been seen as its strength. In India we have an overall constitutional provision giving equal rights to all; hence the court lauding the principle of a uniform civil code. But this principle can be readily met by ensuring that the personal laws, while continuing to cater to the specific tradition of all communities that together constitute the whole, are interpreted in a manner that they adhere to the constitution. And the best judge of that is not the government nor indeed the clergy but the Supreme Court of India.

NCCI-CBCI RESPONSE TO THE UNIFORM CIVIL CODE

CATHOLIC BISHOPS' CONFERENCE OF INDIA (CBCI)

C.B.C.I. Centre, 1 Ashok Place, Near Gole Dakkhana, New Delhi-110 001 India
Tel: +91 11 2334 4470 | 2336 2956 | 2334 4695 Fax: +91 11 2336 4615

Most. Rev. Theodore Mascarenhas SFX
SECRETARY GENERAL

Prot.1891/GenSec2016 (3-b-10/CBCI-GC) 22nd November, 2016

Dr. Justice B.S. Chauhan
Former Judge of the Supreme Court of India
Chairperson, Law Commission of India
14th Floor, HT House, Kasturba Gandhi Marg,
New Delhi – 110 001

Subject: Appeal on the proposed Uniform Civil Code

Dear Sir,

This is with reference to your appeal dated 7th October, 2016, regarding the "comprehensive exercise of the revision and reform of family laws" with reference to article 44 of the Indian constitution.

You have asked for responses from citizens, religious groups, social groups, minority groups, etc. to respond to the above mentioned appeal.

The leadership of the Christian Community, comprising over 25 million people of India from different denominations and diverse cultural practices would like to state as follows.

1. The Constitution of India recognises and protects the religious and cultural diversity of India and this should be the guiding principle while taking up any initiative that seeks to reform the personal laws of religious and cultural communities.
2. Though the appeal sent by the Law Commission states that "…the norms of no one class, group or community dominate the tone or tenor of family law reforms…" the accompanying questionnaire does not reflect this sentiment.
3. Issues related to the religious practices of a certain community should be discussed with that particular community and cannot be subject of a general questionnaire of this type which demands yes and no answers since a large number of the respondents may not understand the theological, religious and cultural ethos of that particular community.
4. We strongly uphold the need for just laws that recognise the due dignity of and respect for women and we support any move that will ensure this. Such issues should be addressed while amending the personal laws of the respective different communities; we however, question the wisdom of imposing an uniform civil code on all communities on the excuse of rendering justice to women.

For the above reasons, we regret to inform you that we will not be responding to the Questionnaire sent along with your appeal. But we are ready for any serious discussion on the Uniform Civil Code rather than answering few questions.

+Theodore Mascarenhas — Roger Gaikwad

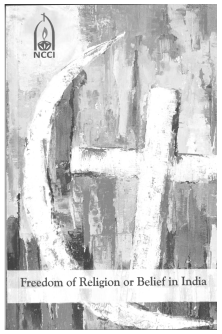
Rev. Dr. Theodore Mascarenhas SFX
Secretary General
Catholic Bishops' Conference of India

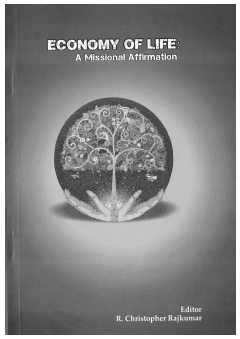
Rev. Dr. Roger Gaikwad
General Secretary
National Council of Churches in India

e-mail: secretarygeneralcbci@gmail.com • cbcisec@gmail.com • twitter: cbci@Indianbishops
facebook : https://www.facebook.com/indianbishops • website : www.cbci.in

NCCI PUBLICATIONS

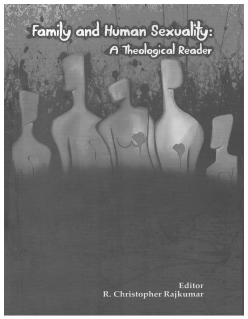
Freedom of Religion or Belief in India *A Study on Discrimination and Violence againstChristians and Muslims in India (2013 - 2015)* ***NCCI 2016***

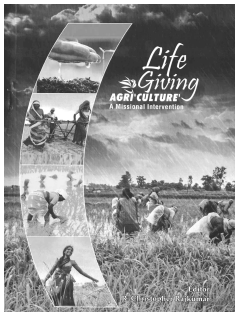




Economy of Life: A Missional Affirmation R. Christopher Rajkumar (Ed.) ***NCCI 2016***

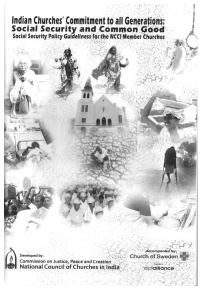
Family and Human Sexuality : A Theological Reader R. Christopher Rajkumar (Ed.) ***NCCI 2016***





Life Giving Agriculture : A Missional Intervention R. Christopher Rajkumar (Ed.) ***NCCI 2016***

Indian Churches' Commitment to all Generations: Social Security and Common Good *Social Security Policy Guidelines for the NCCI Member Churches* R. Christopher Rajkumar (Ed.) ***NCCI 2016***



Indian Churches' Commitment to all Generations: Social Security and Common Good *Social Security Policy Guidelines for the NCCI Member Churches* **(in Hindi Lang)** R. Christopher Rajkumar (Ed.) ***NCCI 2016***