

Issue Brief

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Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach

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Cover Photo: Drafting Committee of the Constituent Assembly of India, February 1948; (Sitting - from left) N. Madhava Rau; Saiyid Muhammad Saadulla; Chairman of the Drafting Committee, B.R. Ambedkar; Alladi Krishnaswami Ayyar; and Constitutional Adviser to the Constituent Assembly, Sir B.N. Rau (Standing from left) Chief Draughtsman of the Constitution, S.N. Mukerjee; Jugal Kishore Khanna; and a member of the Research Team of the Constituent Assembly, Keval Krishan; in New Delhi. Photo: The Hindu Archives.

Uniform Civil Code: The Importance of an Inclusive and Voluntary Approach

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ABSTRACT

The call for a Uniform Civil Code (UCC) has long featured on the agenda of the Bharatiya Janata Party (BJP) and found mention in its manifesto for the 2019 Lok Sabha election. The issue is not new either for the BJP or for Indian politics: it has been at the centre – and sidelines – of political and legislative debates for well over a century and a half. The BJP was the first party in the country to promise the implementation of UCC if it were to be elected into power. Now that it holds the reins of power, it may be a matter of days before the subject leapfrogs from the cycle of debates to actual law. The urgency seems unavoidable given the ruling party’s recent history with regard to the revocation of Article 370, rendering all forms of talaq to be void, in the context of the talaq-i-biddat, and the determination it has shown towards the construction of the Ram temple in Ayodhya.

Keeping in mind the right wing political narrative dominant in the country, the recent pronouncements made in political quarters as well as by the Supreme Court, **C.K. Mathew, who was Chief Secretary of Rajasthan before retiring from the Indian Administrative Service (IAS)**, traces the trajectory of the UCC debate, linking it to the contentious evolution of the Hindu Code Bill, and other key developments since independence, such as the Shah Bano case. He draws also attention to international experiences from Rome, France, and the UK and other countries, including the Islamic nations.

Mathew accepts that UCC has been a long-pending matter and also that it is arguably a necessary push in the direction of equity and freedom, especially with regard to gender. And yet he advises caution in applying it to a diverse people with varying degrees of religious sensibilities. The way forward, he says, is not to force it on an unwilling people but to follow the middle path of voluntary adoption, as once suggested by the Chairman of the Drafting Committee of the Constitution of India and the country’s first Law Minister, B.R. Ambedkar:

“It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that **in the initial stage the application of the Code may be purely voluntary.** [Emphasis by author.]”

I. INTRODUCTION

The ongoing political narratives in India, seen in newspaper columns, heard in drawing rooms, and bolstered by specific statements by political leaders from the ruling Bharatiya Janata Party (BJP) and its allies are pointers towards moves to put in place a Uniform Civil Code (UCC) by the nationalist right wing on India's proud, plural, and diverse country and society^{1,2}. This, however, is not a new debate. The movement for the creation of a UCC for the country is over a 180 years old (if, as we shall see, we take the starting point of this momentous debate as the report of the Second Law Commission of 1835) and has been debated and discussed widely, albeit intermittently, in public and political discourses ever since. The ruling party at the Centre, the BJP, is already speaking of a UCC, which merited a specific subhead in its manifesto for the 2019 Lok Sabha elections:

“11. Uniform Civil Code

Article 44 of the Constitution of India lists Uniform Civil Code as one of the Directive Principles of State Policy. BJP believes that there cannot be gender equality till such time India adopts a Uniform Civil Code, which protects the rights of all women, and the BJP reiterates its stand to draft a Uniform Civil Code, drawing upon the best traditions and harmonizing them with the modern times.”³

An ideologue of the Rashtriya Swayamsevak Sangh (RSS), Seshadri Chari, as recently as August 19, 2019, made the case for the BJP government to bring in a UCC on the heels of the revocation of Article 370.

“The Uniform Civil Code (UCC) was part of the BJP manifesto and had been of the Jan Sangh's manifesto too. The RSS has also been claiming it. In fact, the UCC and abrogation of Article 370 have been the longest-standing demands of the Jan

¹ A shorter version of this article ‘Uniform civil code: Why and why not’ was published on July 10, 2017, at *Governance Now*, and can be accessed at: [https://www.governancenow.com/views/columns/uniform-civil-code-why-and-why-not].

² **Timesnownews.com. 2019.** Uniform Civil Code by 2020? Modi govt likely to table UCC Bill in Parliament in December 2019. [https://www.timesnownews.com/india/article/uniform-civil-code-by-2020-modi-govt-likely-to-table-ucc-bill-in-parliament-in-dec/501855].

³ **Bharatiya Janata Party. 2019.** *Sankalp Patra Lok Sabha 2019* [Manifesto of the Bharatiya Janata Party, 2019]. p. 37. [https://www.thehinducentre.com/resources/article26769375.ece/binary/BJP-Election-2019-english.pdf].

Sangh right from its formation. The only addition in the BJP manifesto is Ram Janmabhoomi.”⁴

The present is, therefore, is an appropriate moment to look at the past. The intention to bring in the UCC has been articulated. What we have seen from the government so far is a track record of enforcing legislation as a solution to contentious issues, (Article 370 being the most recent example). Prime Minister Narendra Modi and the Union Home Minister, Amit Shah have shown a steely determination to push ahead with their decisions. The choice of issues addressed also suggests that much thought and deliberation have gone into the process: the rendering void of talaq in all its forms (in the context of talaq-i-biddat) is a prime example. But for some stray objections which a flailing Congress party could summon up, there was general approval for the steps taken. The government of the day, it appears, chooses its battles carefully, and then steps in relentlessly, leaving the bewildered Opposition disunited and in disarray. Therefore, this seems to be an opportune moment for the government to address the long pending matter of a UCC. A careful look at the manner in which the issue of the UCC evolved in India will be fruitful for all of us and shall assist us in arriving at a better understanding the complex issues involved.

⁴ **Nair, P. 2019.** It's Time For Uniform Civil Code. This Will Help Muslims Break Taboos: Seshadri Chari, *Outlook*, August 29. [<https://www.outlookindia.com/magazine/story/india-news-its-time-for-uniform-civil-code-this-will-help-muslims-break-taboos-seshadri-chari/302081>].

II. HISTORICAL BACKGROUND

The Second Law Commission, constituted by the British Government, which submitted its report in 1835, which stressed the need for uniformity in codification of Indian law relating to crimes, evidences and contracts, however, specifically recommended that personal laws of Hindus and Muslims should be kept outside such codification.

‘In their Second Report the Commission examined the problems of Lex Loci and codification and came to the conclusion that “what India wants is a body of substantive civil law, in preparing which the law of England should be used as the basis, but which, once enacted, should be the law of India on the subject it embraced. And such a body of law, prepared as it ought to be with a constant regard to the condition and institutions of India, and character, religions, usages of the population, would, we are convinced, be of great importance to that country.” **The Commission also recommended that codification should not extend to matters like the personal laws of the Hindus and Mohammedans which derived their authority from their respective religions.**⁵ [Emphasis by author]

The Report was informed by the views of J.H. Harington, member of the Viceroy’s Council in Bengal, who argued against a more general application of British laws to the inhabitants of the country. He did so on three grounds: first, that the fixed habits, manners and prejudices and the long established local customs were totally opposite in principle and practice to that of England; second, that the people here are not only ignorant of the language in which these laws were written, but could not possibly acquire a knowledge of “our complex, though excellent, system of municipal law”; and third, that the laws of England could not be applied here, as they ought to be “suitable to the genius of the people and all the circumstances in which they may be placed”.⁶

The conscious decision taken by the 1835 Report was to separate the personal laws of the various religions and communities of India and keep it out of the proposed codification. Ultimately, this was reflected in Queen Victoria’s Proclamation of 1858 – issued when the British government took over the sovereign power of the administration of the country after displacing the East India

⁵ **Law Commission of India. 1958.** *Fourteenth Report (Reform of Judicial Administration)*, Ministry of Law, Government of India, September 26, Vol. 1.

[<http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf>].

⁶ **Banerjee, A. C. 1984.** *English Law in India*, Abhinav Publications, pp. 133.

[<https://books.google.co.in/books?id=7MXExXXb9usC&pg=PA134&hl=en#v=onepage&q&f=false>].

Company in the wake of the 1857 revolt – promising absolute non-interference in religious matters.

“We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship of any of Our subjects, on pain of Our highest Displeasure.”⁷

This specifically meant the clear separation of the two spheres of law. The public sphere, governed by the British and Anglo-Indian law, in crime, land relations, laws of contract and evidence, which applied equally to every citizen irrespective of religion; and the personal laws of the people on matters such as inheritance, succession, marriage, and religious ceremonies and so on.

Three contextual issues

There are three issues that immediately crop up:

1. One; it could be argued that it was probably wise in 1858 for a foreign colonial power to stay clear of the dangers of dabbling in areas related to religion and personal custom in the overall interest of maintaining peace and tranquillity in the nation. This emphasises the wisdom inherent in the Queen’s Proclamation, for it was then necessary to soothe the troubled storm waters of the 1857 turmoil.

In the present context, it could be further argued that in independent India, where sovereignty rests with the people under a constitutional democracy, there is no external constraint that can prevent the Indian government – duly and successively elected to power on the principle of universal suffrage for seven decades – to legislate on a common uniform personal code to govern the personal sphere of law such as marriages and succession etc.

2. Two; it is not only non-Hindus who may have severe objections to the promulgation of a law that will govern their most inherent beliefs and faith as well as customs and practices. There has been opposition to the principle in question amongst sections of the Hindus as well because of wide variations in customs amongst its many castes and communities.

⁷ Wolff, J. 1997. *Religion in Victorian Britain: Culture and Empire*, Manchester University Press, pp. 123.

[The full text of the *Proclamation by the Queen in Council to the Princes, Chiefs and people of India (published by the Governor-General at Allahabad, November 1st 1858)*.

[<https://www.bl.uk/collection-items/proclamation-by-the-queen-in-council-to-the-princes-chiefs-and-people-of-india>].

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In fact, when the issue was being hotly debated in the Parliament during the discussions on the Hindu Code, some apologists for the status quo referred to the Vedas and the *dharmashastras*, stating that the rule of conduct is the highest law: they tried to place custom and tradition on a pedestal even above the protection of human rights. Other speakers, while supporting the need for a UCC, cleverly disguised their opposition by emphasising the need to respect diversity amongst the various communities and castes within the Hindus. Of course, some of the more vocal critics spoke about the dangers to the Hindu religion if the UCC was approved.⁸

3. And three, and in favour of the UCC, it is also well known that the Hindu law for a long time discriminated against women by depriving them of inheritance, remarriage and divorce. Their condition, especially those of Hindu widows and daughters, was poor due to this and other prevalent customs. Could religious practices be employed to deny basic fundamental rights and freedoms to women? Could not the UCC be employed to rectify the errors of a rigid discriminatory society and bring greater equity and compassion into social life? Of course, the question applied to other religions as well, especially the inconsistencies obvious within Muslim law that discriminated against women in more obvious and apparent ways. It is also understood that the general mood of the country recognises the urgent imperative to enable the Muslim woman to find her own identity and establish herself as an individual.

⁸ **Rajagopaul, G.R. 1975.** The Story of the Hindu Code, *Journal of the Indian Law Institute*, Vol 17, No. 14 October-December, pp. 537-558.

III. DEVELOPMENTS BEFORE AND AFTER INDEPENDENCE

Progressive sections in British-ruled India and women's organisations protested the discrimination against women and this led to a spate of laws passed with respect to the Hindus which were beneficial to women, such as the Hindu Widow Remarriage Act of 1856, Married Women's Property Act of 1874, with its Amendment Act of 1923, and the Hindu Inheritance (Removal of Disabilities) Act of 1928, which in a significant move, permitted a Hindu woman's right to property.⁹ So also the Hindu Women's Right to Property Act of 1937 was a significant step for assuring rights to women. Earlier the share of the deceased husband used to pass on to the other co-sharers of the property. With the promulgation of this Act, its most important provision was to give the widow the same rights which her husband had enjoyed while he was alive.

The growing tide of legislation that delved into personal issues of ordinary men and women of the country, generated debate and controversy and required a reasoned and measured response from the government of the day.

B.N. Rau Committee and Codifying Hindu Law

This finally led to the setting up in 1941 of the B.N. Rau Committee – officially the Hindu Law Committee – whose task it was to examine the question of the necessity of common Hindu laws. Rau was an Indian civil servant, jurist, diplomat and statesman known for his key role in drafting the Constitution of India as Adviser to Constituent Assembly.

The B.N. Rau Committee recommended a codified Hindu law, which would give equal rights to women in keeping with the modern trends of society. However, it must be mentioned that its focus was primarily on reforming the Hindu law in accordance with the scriptures. The committee reviewed the 1937 Act and recommended a civil code of marriage and succession for Hindus. After much study, it presented the government with two draft Bills on March 1942 regarding

⁹ Chavan, N. and Kidwai, Q. J. 2006. *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code*. Hope India Publications.

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intestate succession and marriage. Unable to clinch the matter, the Rau Committee was revived and reconstituted once more in 1944: it finally sent its report to the Indian Parliament with a draft Bill in February 1947.

The Rau Committee report dealt comprehensively with Intestate and Testamentary Succession including Maintenance, Marriage and Divorce, Minority and Guardianship and Adoption. As procedure demanded, the draft went before a select committee again, this time chaired by Ambedkar himself. When it finally came up for discussion in February 1951, India was already a free nation. Discussions continued, but were endless, the Hindu Code Bill lapsed and was re-submitted only in 1952.

The provisions had to be broken up into separate parts, apparently to nudge through the radical changes in smaller steps, rather than as a wholesale transformation. The Hindu Marriage Bill was passed in May 1955, and the Hindu Succession Act in June 1956. Later, the Hindu Minority and Guardianship Bill was passed in August 1956 and the final component, the Adoptions and Maintenance Bill in December 1956.

The Hindu Code and the "curious" call for a UCC

The question remains to this day: why was the personal law of the Hindus alone being codified and why a uniform code for the entire populace was not being attempted by the framers of the Constitution? G.R. Rajagopaul, himself a witness to the developments of those momentous days, as a member of a 'small committee' set up by Ambedkar "to examine" the Hindu Code Bill when it was pending in the Constituent Assembly in 1948, attempts an answer:

"...it was felt that an attempt should be made to codify the Hindu law and if this succeeded, and of the measures produced thereby had in themselves intrinsic merits commending them for universal application, the time would not be far off when other communities might like to follow suit and ask for reconsideration of their own law in the light of changed situations."¹⁰

It was a pious hope, but that one that did not materialise.

¹⁰ **Rajagopaul, G.R. 1975.** The Story of the Hindu Code, *Journal of the Indian Law Institute*, Vol 17, No 4, October-December, pp. 537-558

The Hindu Code that had been prepared in this context had the stamp of Ambedkar who, as a radical thinker, had criticised the Hindu law on many an occasion. The draft Hindu Code Bill received much criticism and the issues that were opposed pertained to monogamy, divorce, abolition of coparcenary (women inheriting a shared title) and inheritance to daughters.

The first President of the country, Rajendra Prasad, opposed these reforms; other critics included Sardar Vallabhbhai Patel, a few senior members and Hindu fundamentalist parties. The fundamentalists called it “anti-Hindu” and “anti-Indian”. In order to deliberately stall the proceedings, they demanded a UCC applicable to all religions and not only for the Hindus¹¹.

In fact, the opposition to the Hindu Code Bill, in the form presented to the Parliament, came from an array of members representing various factions of the Hindu majority and others within and without the Parliament. As mentioned above, the most important of them were conservative hardliners of the Congress party, among them veterans like Vallabhbhai Patel, Rajendra Prasad, and J.B. Kripalani who had a completely different world view from Nehru’s. Rajendra Prasad even threatened to refuse Presidential assent to the Bills: Patel concurred in private, but was disinclined to argue with Nehru.

The other critics included “the Hindu fundamentalists within the Congress Party who were substantial in number led by Deputy Speaker M. Ananthasayanam Ayyangar”¹²; the Hindu Mahasabha and its women’s wing, “with representatives like Shyama Prasad Mukherjee, N.C. Chatterjee and others who opposed the Bill strongly for threatening the so-called religious foundations of Hindu society.”¹³

Importantly, Som throws light on how the UCC came into the political narrative, and why and how Ambedkar responded to this move for a common code:

“By using inverse logic the Mahasabha leaders tried to suggest that the Hindu Code was, after all, a communal measure and a uniform Civil Code should have been made instead, to give effect to the secular ideals of the country. The motives of the Mahasabha, however, were betrayed when Dr Shyama Prasad Mukherjee made the suggestion that the Hindu Code be optional. Ambedkar was provoked into

¹¹ **Ibid.**

¹² **Som, R. 1994.** Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance? *Modern Asian Studies*, Cambridge University Press, February, Vol. 28, No. 1, pp. 165-194.

¹³ **Ibid.**

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dismissing S. P. Mukherjee's remarks as not worth serious consideration since he had after all, as member of Nehru's Cabinet, whole-heartedly supported the Code which he was now opposing. Ambedkar also pointed out that innocuous suggestion that a uniform Civil Code be initiated seemed curious, as he wondered how could opponents of the Bill turn overnight into protagonists of a Civil Code."¹⁴

Som also gives details of the other groups which opposed the Hindu Code: the Sikh group “who resented being clubbed with the Hindus” and feared that the Code would be an attempt to absorb them into the Hindu fold; the Muslim group who “were obviously encouraged by the Hindu fundamentalist group within the Congress to tilt the scales in their favour”; and finally, the women parliamentarians, not because they were opposed to the Code, but because they felt that the measures “were not going far enough”.

The arguments they pushed forward included the following: the need to protect the hallowed traditions of the Hindu *shastras*; the resentment arising from the fact that the Muslim Personal Law remained untouched; the proposed measures affecting the bulk of the population had not been circulated so as to ascertain public opinion and was being pushed through hastily; and, most importantly, the grant of equal property rights to women threatened the well-entrenched economic rights of the male in the society.

It was the powerful voice of Nehru that kept the discussion going. He was disgusted by the repeated by the pristine references to the Hindu *shastras*.

“For Nehru, the Hindu Code was a necessary reform measure which fitted into his larger perspective of all-round national development. As he put it, ‘we talk about Five Year Plans, of economic progress, industrialization, political freedom and all that. They are all highly important. But I have no doubt in my mind that the real progress of the country means progress not only on the political plane, not only on the economic plane, but also on the social plane. They have to be integrated, all these, when the great nation goes forward.’”¹⁵

The women Members of Parliament, had previously thrown their weight with the fundamentalists; but now, probably influenced by Nehru, they began to understand the contradictions they would have to confront as the Hindu Code was going a long way in granting them significant rights. In a significant political move, they reversed their position, and backed the Hindu law reform. They

¹⁴ **Ibid.**

¹⁵ **Ibid.**

feared that publicly allying with the conservative Hindu group would cause a further setback to their rights and seriously damage their future attempts to gain equality with their men folk in all other matters. Ultimately, therefore, an abridged and diluted version of this Bill was passed by the Parliament in 1956, which while excluding non-Hindus from the ambit of the reform, brought into the statute books four separate Acts, namely the Hindu Marriage Act, the Hindu Succession Act, Minority and Guardianship Act and the Adoptions and Maintenance Act.

In a gesture to indicate the willingness of Parliament to consider the issue of a uniform code at some later point in time, it was decided to add the implementation of a UCC in Article 44 as a Directive Principle specifying that “The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India.” This decision to include the UCC only as a non-justiciable Directive Principle rather than as a justiciable Article was opposed by progressive women members like Rajkumari Amrit Kaur and Hansa Mehta. Aparna Mahanta writes that the

“failure of the Indian state to provide a uniform civil code, consistent with its democratic secular and socialist declarations, further illustrates the modern state’s accommodation of the traditional interests of a patriarchal society”.¹⁶

¹⁶ Samaddar, R. (Ed) 2005. *The Politics of Autonomy: Indian Experiences*, SAGE Publications, pp. 56-59.

IV. THE FOUR HINDU ACTS

The four laws that came into existence in 1956 may be quickly examined for our understanding. A “remarkable”¹⁷ role was played by H.V. Pataskar, Minister of State in the Law Ministry in not only piloting these Bills through both Houses of Parliament, but also by conducting “frequent informal meetings to encourage accommodation.”¹⁸

A: The first of them, **the Hindu Marriage Act of 1955**, is included as part of the Hindu Code Bills. The main purpose of this enactment was to amend and codify the laws relating to marriage among Hindus and others; others meaning in this context, the Buddhists, Jains and Sikhs. Besides the amendment and codification of Sastrik Law, it introduced separation and divorce which was earlier non-existent in Sastrik Law. This enactment brought uniformity of law for all sections of Hindus.

Section 2 of the Hindu Marriage Act, 1955 says:

1. “This Act applies -
 - a. to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;
 - b. to any person who is a Buddhist, Jaina or Sikh by religion; and
 - c. to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

- a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

¹⁷ Rajagopaul, G.R. Op. Cit.

¹⁸ Levy, H.W. 1969. Lawyer-Scholars, Lawyer-Politicians and the Hindu Code Bill, 1921-1956. *Law & Society Review*, Vol 3. No. 2, Special Issue Devoted to Lawyers in Developing Societies with Particular Reference to India (Nov., 1968 – Feb., 1969. pp. 303-316.

- b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
 - c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.
2. Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.
 3. The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section."¹⁹

The Act provided for conditions under which a Hindu marriage was to be solemnised, registration of such marriages, the restitution of conjugal rights as well as judicial separation, the provision for divorces, punishment for divorces etc.

The application of the Act to all Hindus by religion in all of the religion's derivatives, while also clubbing together other religions, namely Jains, Buddhists and Sikhs, was initially a point of concern and debate, though with the passage of time, it seems to have been accepted by all the people. It needs to be pointed out here that with the passage of the amended Anand Marriage Act, Sikhs now also have their own personal law related to marriage. The Indian Parliament cleared the Anand Marriage Amendment Bill in 2012, which paved the way for the validation of Sikh traditional marriages, amending the Anand Marriage Act of 1909, thus providing for compulsory registration of "Anand Karaj" marriages. With the new legislation, couples whose marriages have been registered under this Act will not be required to get their marriage registered under the Registration of Births, Marriages and Deaths Act, 1969, or any other law for the time being in force. However, the UK does not recognise such marriages and Sikh British citizens still require a legal English marriage as per law. In passing it may be mentioned that the Hindu Marriage Act still shows its provisions as being applicable to Hindus as well as Sikhs.

B: The Hindu Succession Act, 1956, is the second of the Acts of the Parliament, under the umbrella of what was envisaged as the Hindu Code, enacted to amend and codify the law relating

¹⁹ **The Hindu Marriage Act, 1955.**

[<https://indiacode.nic.in/bitstream/123456789/1560/3/a1955-25.pdf>].

to intestate or unwilled succession, among Hindus, Buddhists, Jains, and Sikhs. Hailed for its consolidation of Hindu laws on succession into one, this Act lays down a uniform and comprehensive system of inheritance and applies to persons governed by all schools of religious thought such as the *Mitākṣarā* and *Dāyabhāga* schools.²⁰

“One of the important differences between the two schools is that under the *Dayabhaga*, the father is regarded as the absolute owner of his property whether it is self-acquired or inherited from his ancestors. *Mitakshara* law draws a distinction between ancestral property (referred to as joint family property or coparcenary property) and separate (e.g. property inherited from mother) and self-acquired properties. In the case of ancestral properties, a son has a right to that property equal to that of his father by the very fact of his birth. The term son includes paternal grandsons and paternal great-grandsons who are referred to as coparceners. An important category of ancestral property is property inherited from one's father, paternal grandfather and paternal great-grand father.”²¹

The Hindu woman's limited estate was abolished by the Act. Any property possessed by a Hindu female is to be held by her as her absolute property and she is given full power to deal with it and dispose it of according to her will. Parts of this Act were amended in 2005 by the Hindu Succession (Amendment) Act, 2005, which revised rules on coparcenary property, giving daughters of the deceased equal rights with sons, and subjecting them to the same liabilities and disabilities. The amendment essentially furthers equal rights between males and females in the legal system.

The applicability of this Act is similar to Section 2 of the Hindu Marriage Act, 1955, quoted above. The anomaly mentioned with regard to the Hindu Marriage Act whereby persons of certain other

²⁰ By way of explanation, it could be said that in the *Mitakshara* School, largely practised in Bengal and Assam, the allocation of inherited property was based on the law of possession right from the time of birth. Self-acquired property could be passed on through the instrument of a will. Joint family property went to the group known as coparceners, i.e. those who belonged to next three generations. Therefore in *Mitakshara* School, sons had an exclusive right by birth in joint family property.

However, in the *Dayabhaga* School, the doctrine of son's birth right and the devolution of property by survivorship had limited space. The property is inherited after the death of the person who was in possession of it. It is established that in the *Mitakshara* School neither the father nor any other coparcener could normally disaffect the joint family property. Under the *Dayabhaga* School there is no such constraint and each coparcener has complete right of separation of his exclusive share in the joint family property. To put it simply, *Mitakshara* was based on the 'principle of ownership by birth', and *Dayabhaga* on principle of 'ownership by death'

²¹ **Sivaramayya**. n.d. *Schools of Hindu Religion: Discrimination in Inheritance Law[s], India Together*. [http://www.indiatogether.org/manushi/issue100/sivarama.htm]

religions were clubbed with the Hindus though they may not be Hindus by religion continues to be an issue.

C: The Hindu Minority and Guardianship Act, 1956, was the third of the statutes introduced as part of the Hindu Code. The Act was meant to enhance the Guardians and Wards Act of 1890, not serve as its replacement. This Act specifically served to define guardianship relationships between adults and minors, as well as between people of all ages and their respective property. A minor and a guardian were defined in this Act as follows:

4. “Definitions.—In this Act,—

- a) “minor” means a person who has not completed the age of eighteen years;
- b) “guardian” means a person having the care of the person of a minor or of his property or of

both his person and property, and includes—

- i. a natural guardian,
- ii. a guardian appointed by the will of the minor’s father or mother,
- iii. a guardian appointed or declared by a court, and
- iv. a person empowered to act as such by or under any enactment relating to any Court of wards.

- c) “natural guardian” means any of the guardians mentioned in section 6.”

Section 6 says:

“6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are—

- a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
- b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
- c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

- a. if he has ceased to be a Hindu, or
- b. if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

**UNIFORM CIVIL CODE:
THE IMPORTANCE OF AN INCLUSIVE AND VOLUNTARY APPROACH**

Explanation.—In this section, the expressions “father” and “mother” do not include a step-father and a step-mother.”²²

As with the other Acts of the Hindu Code, this Act also applies to all Hindus, including those who practise the religions of Buddhism, Sikhism, and Jainism. Both legitimate and illegitimate minors with at least one parent, fall under the jurisdiction of this Act. The father is the primary guardian for a legitimate boy and unmarried girl and their property, while the mother is the secondary guardian. However, the mother is the primary guardian for all children under the age of five. For illegitimate children, the mother is the primary guardian, while the father is the secondary guardian. A married girl’s husband becomes her guardian. For an adoptive son, the adoptive father is the primary guardian, then the adoptive mother. Should a parent cease being a Hindu or become a renouncer, hermit, or ascetic, that parent will lose his or her guardian rights.

D: The last of the statutes of the Hindu Code enacted by Parliament in 1956 was the **Hindu Adoptions and Maintenance Act**. This Act dealt specifically with the legal process of adopting children by a Hindu adult, as well as the legal obligations of a Hindu to provide "maintenance" to various family members including, but not limited to, his wife or wives, parents, and in-laws. In Hindu Vedas, begetting a son is one of the three debts that a Hindu was required to discharge in this world. Yet, illegitimate sons also have their rights, acknowledged from the Vedic age to this date. Some of the illegitimate sons were also fitted into the system of sonship and those who were left out were never denied maintenance. It was believed that the one who was responsible, either directly or indirectly, for the birth of a child, had to provide for its maintenance. These ideas are reflected in the provisions of the Act.

This Act too, like the other three Acts mentioned above, has been made applicable to Hindus and all those considered under the umbrella term of Hindus, including Buddhists, Jains and Sikhs. Illegitimate children also shall get the benefit of maintenance under the provisions of the Act. Persons who are Muslims, Christians, Parsis or Jews are excluded from this definition. Moreover, if the wife is not a Hindu, then the husband is not bound to provide maintenance for her under this Act under modern Hindu Law.

The fact remains that the separate Acts under what would have been a Hindu Code, while bringing some form of uniformity in social and religious customs, failed to control the prevalent gender

²² **The Hindu Minority and Guardianship Act, 1956**, May 19, 1986.
[<https://indiacode.nic.in/bitstream/123456789/1649/3/A1956-32.pdf>]

discrimination. As the Acts applied only to Hindus, and religions under the umbrella term 'Hindu', women from the other religions remained victims of male chauvinism and other forms of prejudices. Especially so, the Muslim women who did not get the benefit of inheritance of agricultural land.

Nehru accepted that the Bill was incomplete, but was reluctant to make too many drastic changes which could stir the anger of other communities. But he took pride in the fact that it was an "outstanding achievement" of his time.²³ His principle of women's equality as an ideal to be pursued in Indian politics was eventually accepted by the previous critics of the Bill. A UCC, for him, was essential for the country, but he hesitated in forcing it down upon any community, especially if that community was not ready for such a reform. Indeed, his vision of uniformity was not forcibly enforced, but was added as a desirable objective under the Directive Principles of the Constitution.

²³ Sarkar, S. and Sarkar, T. 2008. *Women and Social Reform in Modern India: A Reader*. Indiana University Press. pp. 490-491.

V. A SECULAR MARRIAGE ACT AND SHAH BANO

An Act which predated the above statutes, namely the Special Marriage Act, 1954, also deserves a place in this analysis. This Act provides for civil marriage for any citizen irrespective of religion, thus permitting any Indian to have their marriage outside the boundaries of any religious personal law. The law applied to all of India, except Jammu and Kashmir, though it would apply there too, when amendments to Article 370 come into operation.

Though the Act is almost identical to the Hindu Marriage Act of 1955, it gives some idea as to how secularised the law regarding marriages had become. The Special Marriage Act allowed Muslims to marry under its provisions and thereby retain their protections, generally beneficial to Muslim women, which could not be found in their personal law. Under this Act polygamy was illegal, and inheritance and succession would be governed by the Indian Succession Act, rather than the respective Muslim personal law. Divorce also would be governed by the secular law, and maintenance of a divorced wife would be along the lines set down in the civil law. While distinct from the Hindu personal law, the Act provided the safeguards that had been considered in the statutes of the Hindu Code to the Muslim beneficiaries of the Act.

The Shah Bano case

We need to take some time to consider a possible historic opportunity that had presented itself to the Rajiv Gandhi government to make substantial changes to the position and status of Muslim women. This pertains to what is now known as the Shah Bano case of 1985.

Bano was a 73-year-old woman who bravely, and with much courage, sought maintenance allowance from her husband, Muhammad Ahmad Khan, who divorced her after 40 years of marriage by the triple talaq system as permitted under the Muslim personal law. He refused her claim for maintenance and the matter went into protracted legal proceedings. Though Bano was initially granted maintenance by the verdict of a local court in 1980, the matter was taken up to the Supreme Court, which finally ruled in her favour under the provisions of Section 125 of the Code of Criminal Procedure, (Cr.P.C) 1973, which applied to all citizens irrespective of religion. It further recommended that the long pending UCC be set be finally enacted.

The Shah Bano judgment observed thus:

“It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.”²⁴

Before *Shah Bano*, two other Muslim women had previously received maintenance under the Criminal code in 1979 and 1980.

The relevant section of the Cr. P.C. reads as follows:

“125. Order for maintenance of wives, children and parents.

“If any person having sufficient means neglects or refuses to maintain...his wife, unable to maintain herself... a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife... at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.”²⁵

It is relevant to observe that the maximum amount payable under this provision is only Rs 500 a month. However, the Shah Bano case soon became a hotly debated political issue. It is interesting to note that after the 1984 anti-Sikh riots, most of the minorities in India, with Muslims being the

²⁴ **Supreme Court of India. 1985.** *Mohd. Ahmed Khan vs Shah Bano Begum And Ors.* April 23. [<https://indiankanoon.org/doc/823221/>].

²⁵ Criminal Procedure Code 1973, Section 125. [<https://indiacode.nic.in/bitstream/123456789/6571/1/crpc.pdf>].

largest, feared attacks on their identity and felt the need to safeguard their culture.²⁶ Muslim conservatives accused the government of encouraging Hindu dominance over every Indian citizen at the expense of the minorities. The Criminal Procedure Code was seen as a threat to the Muslim personal law, which they considered their cultural identity. According to them, the judiciary recommending a UCC was evidence that Hindu values would be imposed over every Indian. The possible reason for this was the animosity between hardline fundamentalist sections in the two religions: The Hindu Code being well established in the country by now, the fear amongst the minorities was that its provisions would become the template for superimposition on the minorities. This was an unexpressed fear that could not be reasonably satisfied through logic and discussions.

The Muslim Women (Protection of Rights in Divorce) Act, 1986

The worst effect of this case can be seen in the succumbing of the Rajiv Gandhi Government, when it passed a law nullifying the Supreme Court judgment through the Muslim Women (Protection of Rights in Divorce) Act, 1986. This made Sec. 125 non-operable for Muslim women. According to this, maintenance was payable to the divorced wife only during the *iddat* period (the mandatory waiting period when the divorce matters are being settled), and not thereafter. The fate of the divorced woman after the *iddat* period remained dark and uncertain. This act of the government was viewed by large sections of citizens, including Muslim women, with contempt and fury and may have resulted in the loss of confidence of the people in the party.²⁷

The Muslim orthodoxy felt threatened by the judiciary-directed modification of the Muslim personal law. Rajiv Gandhi's Congress government, which previously had their support, lost elections in December 1989 perhaps because of its initial endorsement of the Supreme Court's decision and its later turnaround by passing the Muslim (Protection of Rights in Divorce) Women Act, 1986. The members of the Muslim Personal Law board started a campaign for complete autonomy in their personal laws and this became a national issue as can be seen from the news coverage of the time.

²⁶ Lawrence, B. B and Karim, A. 2007. *On Violence: A Reader*. Duke University Press. pp. 265-267.

²⁷ Mody, Z. 2013. Summary of "10 Judgements that changed India", Shobha De Books.

An independent Muslim Member of Parliament proposed a Bill in the Lok Sabha to protect the community's personal law. Sensing the political error that it had committed and its impact on the Muslim vote-bank, the Congress Party reversed its previous position and supported this Bill.

The Hindu right, the Left, Muslim liberals and women's organisations strongly condemned it. The debate now centred on the divinity of the Muslim personal law and the claim that a judicial court had no role to play in such matters. It also led to a situation of defining a woman's right according to her specific community, with Congress political leader Jaffar Sharief saying, "today, in the Shah Bano's case, I am finding that many people are more sympathetic towards Muslim women than their own women. This is very strange."²⁸ It would not be out of place to say that the legal reversal of introducing the Muslim Women (Protection of Rights in Divorce) Act of 1986²⁹, significantly also dampened the national women's movement of all religions and civic groups in the 1980s.

An opportunity squandered?

It may well be argued that the Rajiv Gandhi government squandered a historic opportunity to bring about a significant reformation of the rights of Muslim women. Given the specific intent of the Supreme Court, the Government could have taken the great leap forward.

In fact, the Supreme Court had quoted Dr Tahrir Mahmood from his book *Muslim Personal Law* (1977 edition pp. 200-202) as he exhorted the Muslim Community:

“instead of wasting their energies in exerting theological and political pressure to secure an ‘immunity’ for their traditional personal law from the state’s legislative jurisdiction, the Muslim will do well to begin by exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code.”

This was signal enough for the government to have initiated reforms which would have had a salutary and far-reaching impact on the community and the country as a whole.

²⁸ Samaddar, R. 2005. *The Politics of Autonomy: Indian Experiences*. SAGE Publications. pp. 60-63.

²⁹ **The Muslim Women (Protection of Rights on Divorce) Act, 1986.**

[http://legislative.gov.in/sites/default/files/A1986-25_1.pdf].

VI. THE GOA FAMILY LAW

Surprisingly, Goa is the only State in India which has a form of UCC. The Goa Family Law, originating from the Portuguese Civil Code, continued to be implemented even after Goa's annexation in 1961³⁰. A word about the mother law may not be out of place: The Portuguese Civil Code of 1867 - which was extended to Portugal's overseas provinces including Goa in November, 1869 - is a remarkable piece of legislation promulgated by King Luiz Augusto Rebello da Silva. Comprising 2538 articles, it underwent various legislative amendments from time to time by inclusion of other related laws such as law of marriage, protection of children, divorce, civil registration, civil procedure etc. Interestingly it defines important concepts of civil law, including its scope, the sources of rights and obligations etc. The function of civil law has been defined thus: "Civil Law recognizes and specifies such rights and corresponding duties; ensures and protects the enjoyment of rights and the performance of duties; lays down the circumstances in which a citizen may be disabled from exercising rights and the manner in which such disability may be overcome." It is significant to note that within the scope of Article 9, and through a separate decree of 16th December 1880, "it ordered safeguarding in favour of the gentile Hindus of Goa, without distinction of Old and New Conquests, their special and peculiar usages and customs reviewed and codified by this decree."³¹ There is a lesson for us in there somewhere; a Christian Catholic Government situated in Lisbon, ordering the protection of the customs and practices of its Hindu subjects, residing in faraway Goa on the Indian sub-continent. And this happened about 140 years ago.

The Goa Family Law was in the news not long ago: The Supreme Court drew attention to this as recently as September 2019, when it observed in *Jose Paulo Continho vs Maria Luiza Valentina Pereira*:

"21. However, Goa is a shining example of an Indian State which has a uniform civil code applicable to all, regardless of religion except while protecting certain limited rights. It would also not be out of place to mention that with effect from 22.12.2016 certain portions of the Portuguese Civil Code have been repealed and replaced by the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 which, by and large, is in line with the Portuguese Civil Code. The salient features with regard to family

³⁰ Government of Goa, 2018. *Portuguese Civil Code, 1867*, Panaji.

[<https://indiacode.nic.in/bitstream/123456789/8312/1/ocrportuguesecivilcode.pdf>].

³¹ *Ibid.*

properties are that a married couple jointly holds the ownership of all the assets owned before marriage or acquired after marriage by each spouse. Therefore, in case of divorce, each spouse is entitled to half share of the assets. The law, however, permits pre-nuptial agreements which may have a different system of division of assets. Another important aspect, as pointed out earlier, is that at least half of the property has to pass to the legal heirs as legitime. This, in some ways, is akin to the concept of ‘coparcenary’ in Hindu law. However, as far as Goa is concerned, this legitime will also apply to the self-acquired properties. Muslim men whose marriages are registered in Goa cannot practice polygamy. Further, even for followers of Islam there is no provision for verbal divorce.”³²

However, Ramakant D. Khalap, who was the Chairman of the Goa Law Commission (April 2009-March 2012), raises two fundamental questions:

The first is whether the family laws in Goa truly “uniform”?

“That the Family Laws of Goa are uniform in all respects is a misconception which we have tried to expose through our Report No.21 aptly titled as the “Protection of Institution of Marriage Bill 2012”. This Bill and the accompanying Report and Statement of Objects and Reasons highlight how the “Concordata’ ‘i.e. the Treaty signed between the King of Portugal and the Holy See (The Pope) in 1940 permits the Catholics to get married in Church but simultaneously takes away the Jurisdiction of the Civil Courts in matters of separation of spouses, annulment of Marriage and Divorce and further proceeds to make our constitutionally created High Court of Judicature a mere post office performing the onerous task of conveying the decrees of the Canonical Courts to the Civil Registrars for recording the dissolution of marriage in the marriage Register maintained by the Civil Registrar. The law vests no power in the High Court to examine the Decrees of Canonical Courts on the touchstone of Constitutional validity or Public Policy. The very fact that such an anachronism on the legal system of the Country could continue for well over 50 Years after liberation emphasizes the [“raison d’etre”] of a validly constituted Law Reforms Commission.”³³

He continues by pondering over the issue of a civil code and Article 44:

“Should Goa or for that matter India have a Civil Code of its own? This is a million dollar question. We toyed with this idea for a considerable time. It is a gigantic work and requires perhaps a specially constituted Law Commission for the sole purpose of drafting a Civil Code for the State of Goa and or the Country as a

³² **Supreme Court of India. 2019.** *Jose Paulo Coutinho vs Maria Luiza Valentina Pereira*, September 13. [<https://indiankanoon.org/doc/190351781/>].

³³ **Law Commission, Goa. 2012.** Reports of Law Commission. March 05. [<http://goalawcommission.gov.in/CHAIRMAN'S%20MONOLOGUE.pdf>]

whole. We leave this issue to the powers that be and hope that one day the dream enshrined in Article 44 of the Constitution of India will be realized.”³⁴

We must, of course, keep in mind that there are some discordant views about the Goan law itself. The tolerance of bigamy amongst Hindus, the essentiality of church marriages and prohibition of divorce for Catholics, etc are oddly anachronistic in the modern world. Further, Albertina Almeida, a prominent Goan lawyer had this to say:

“The ‘Goans’ (meaning the dominant class/caste Goans) on the one hand have been wanting to distinguish themselves from the Portuguese, and from the *mestiços* (mixed race of Portuguese and Goan parents), and on the other hand also want to distinguish themselves from the rest of India, while maintaining all the distinctions that they have already made between themselves. It suited the Goan to distinguish himself from the non-Goan (the rich ‘Indian’) and the migrant by whom he felt overwhelmed either because of larger power potential or numbers. Be it in the field of law, music, song and dance, cuisine, games, language, art, architecture.....the story is the same. In and through all these fields of life, there is a desire to consolidate the existing power equations. This has been further strengthened by the economic driver of tourism, which has taken the form of neo-colonialism, and where it was essential to stereotype the image of an exotic Goan with a different image of a hybrid between Indian and Iberian culture.”³⁵

Evidently, the Goan personal law, often touted as a model that could be followed by the minority community, has its own fault lines.

³⁴ **Ibid.**

³⁵ **Almeida, A. 2016.** Goa's Civil Code Shows That Uniformity Does Not Always Mean Equality, *The Wire*, August 08.

[<https://thewire.in/law/goas-uniform-civil-code-is-not-the-greatest-model-to-follow>].

VII. THE HINDU CODE: DEBATES, DILUTIONS, AND THE CALL FOR A UNIFORM CIVIL CODE

As we harken back to those tumultuous days of intense debates in the parliament, in the final analysis it may be said it stands to the credit of Nehru that the Hindu Code was at all passed, though in an abridged fashion. The UCC as originally envisaged was never realized. It remained a pious hope, caught among the linguistic trappings of Article 44 of the Directive Principles of the Constitution. Muslim law remained untouched: it was several decades later that instant triple talaq was outlawed by a strong pro-Hindu government; and though clerics opposed it, the modern Indian, and the world in general, largely welcomed the measure. There are those who would argue later that the objections raised in the Parliament during the debate on the Hindu Code, could have been talked through, if persistence and determination could have steadied the legislative intent.

Nehru was conscious of the criticism that the amendments that were finally approved diminished the Bill. But he was always to hold the view that one had to make a beginning somewhere and that the essential principles underlying the changes were not given up. Even those Parliamentarians who did not see eye to eye with him did concede that without him, the legislation would not have been passed at all. Amrit Kaur said it succinctly when she commented that the social reforms that are now on the Statute Book would have been talked out if it had not been for Jawaharlal's powerful advocacy and insistence on them.³⁶

The debate surrounding the UCC, with its far-reaching implications for all religions and communities, combined with undeniable impact on issues pertaining to the secular nature of this country, is one of the most controversial subject of current Indian politics. The plural and multi-religious nature of the country and its religious laws, with differentiation not only in caste and religion, but even in region and sects, further complicates the issue. Women's rights groups have argued that this is not so: the only issue is the protection of their rights and security, irrespective of religion and the possibility of its misuse by political groups.³⁷

³⁶ Som, R. Op Cit. pp. 165-194.

³⁷ Chavan, N. and Kidwai, Q. J. 2006. *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code*. Hope India Publications. pp 13-20.

“Neither necessary nor desirable”: 21st Law Commission

In the midst of all this clamour, it was a little unexpected, though perhaps cautionary, that the 21st Law Commission struck a wary note. In the initial paragraphs of its report dated August 31, 2018, it wrote:

“While diversity of Indian culture can and should be celebrated, specific groups or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has, therefore, dealt with laws that are discriminatory rather than providing a uniform civil code **which is neither necessary nor desirable at this stage** [emphasis by author]. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.” (Para 1.15)³⁸

That said, one must also factor in the Hindu nationalists view this issue in the light of the concept of their laws enshrined in the four Acts collectively called the Hindu Code, which they say, is secular and equal to both sexes. The BJP was the first party in the country to promise the implementation of UCC if it were to be elected into power. Now that it holds the reins of power, it may be but a matter of days before the subject holds centre stage in the never-ending debates of our complex and fascinating country.

From another perspective, the UCC’s importance for gender equality cannot be denied and in a country like India, where women’s rights are daily contested and often denied, this is of special significance. And most significantly, the imperative for reforming the archaic personal laws of Muslims which allow unilateral divorce and polygamy cannot be ignored. The recent law that makes the triple talaq a crime has found approval among most sections of our society, except the conservative Islamic segments.

On a more practical level, the Supreme Court of India has also been asserting the need for a UCC. It had also made certain pronouncements recently in two cases that make it amply clear that it is in favour of a UCC.

³⁸ **Law Commission of India. 2018.** *Consultation Paper on Reform of Family Law*, Government of India, August 31. [<http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf>].

In *ABC*³⁹ vs The State (NCT of Delhi) decided on July 6, 2015, the court dealt with the issue of guardianship of a Christian unwed mother without the consent of the child's father. While ruling in the woman's favour, it said: "It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation."⁴⁰

Again, very recently, in Civil Appeal 7378 of 2010 delivered on September 13, 2019, (*Jose Paul Coutinho vs Maria Luiza*), the Supreme Court stated

"Whereas the founders of the Constitution in Article 44 in Part IV dealing with the Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard."⁴¹

³⁹ The name ABC is used to protect the identity of the party in sensitive personal cases.

Supreme Court of India. 2015. *Abc vs State (Nct Of Delhi)*, Indiankanoon.org, July 06. [<https://indiankanoon.org/doc/162566950/>].

⁴⁰ **Ibid.**

⁴¹ **Supreme Court of India. 2019.** *Jose Paulo Coutinho vs Maria Luiza Valentina Pereira*. September 13. [<https://indiankanoon.org/doc/190351781/>].

VIII. COMMON CIVIL CODES: SOME INTERNATIONAL EXPERIENCES

It is also pertinent to note that many of the countries of the world do have their own codified civil law applicable on all its citizens uniformly, without fear or favour, affection or malice. Perhaps we have not yet comprehended this fact consciously as a nation. The logic and imperative of having a civil code homogeneously applied on its citizens, irrespective of religion, sex or any other consideration, cannot be overemphasised. A quick survey of some of these civil laws or codes as extant in some other parts of the world will give us a broader view of the requirement of a common code in India.

Justinian and the Roman origin

We all do know that Civil law refers to a body of rules that attempts to define and make justiciable the private rights of citizens: ideally it offers legal remedies that may be sought in a dispute. It covers all the related areas of law such as contracts, torts, property and family law.

The concept of civil law can be traced back to the Romans – although other examples, such as the code of Ur-Nammu of Mesopotamia may be a comparable example – and is a good starting point to trace the evolution of civil law. The Romans used doctrines to develop a code, specific to the Roman people, that determined how legal issues would be decided. They called it *Jus Civile*, the legal historical term which embraces all the rules and principles of law derived from the customs and legislations of Rome, as opposed to those derived from the customs of all nations known as *jus gentium* or from fundamental ideas of right and wrong implicit in the human mind, known as *jus naturale*.⁴²

Emperor Justinian's personal vision, after he took over the throne in 527 CE, was responsible for this Code: he set about constituting a team of law commissioners to codify all laws and statutes, decrees and writings of jurists etc. At the peak of its development, it covered personal law, family law, contractual law, the law of corporate and mercantile bodies as well as the law of property and

⁴² **dictionary.com.** jus-civile.
[<https://www.dictionary.com/browse/jus-civile>].

possession and succession as well as court procedures. In fact, Roman law remained in use in Europe – and more particularly in Germany – informing the laws of many other countries, well into the 15th century, although it had been interpreted, developed, and adapted to later conditions by generations of jurists and had received additions from non-Roman sources.⁴³

France and Napoleon's civil code

After the fall of the Roman Empire, the earliest European states that took up this difficult task were the then governments of Austria, Prussia, Bavaria, and Saxony. However, the country that codified the civil laws in a methodical and consultative manner was France. In fact, one of the most well-known and debated civil codes in the world in the modern sense, is that of France. Napoleon's civil code introduced in France as early as 1804 – though the movement for the unification of existing civil law had begun more than a decade earlier – replaced over 300 hundred local codes of civil law. It superimposed itself on both customary law and existing legal statutes and covered the vast area of property, goods, usufruct, servitudes, succession, wills, gifts, contracts and quasi-contracts.

The French code struck a balance between privilege and equality, custom and legal requirements. Napoleon's personal contribution was significant: he personally attended meetings, while ensuring that the foundations of family life were not disturbed. The general consensus is that it remains great achievement: “a single Code for the whole of France, substantially based upon the broad historical instincts of the race, while preserving the most valuable social conquests of the revolution.”⁴⁴

“It supplied a model for other countries to emulate. Later, even when the Code suffered frequent amendments and annulments, changes and deletions, it still symbolized and expressed the legal and moral unity of a great nation. Indeed, the gains made by the sword of the Revolution were washed away when Louis VIII returned in 1815, but she retained what she had conquered by ideas.”⁴⁵

⁴³ Kiralfy, A.R., Herbert Felix Jolowicz, H.F., et al. n.d. *Roman law*, Encyclopædia Britannica. [https://www.britannica.com/topic/Roman-law on 19.10.2019].

⁴⁴ Ward, A.W. Et al. 1906. *The Cambridge Modern History Volume IX Napoleon*. Cambridge University Press, pp. 162.

⁴⁵ Ilbert, C. 1905. *The Centenary of the French Civil Code*, *Journal of the Society of Comparative Legislation*, Cambridge University Press, Vol. 6, No. 2, pp. 218-231.

Plurality in British law

On the other hand, the law of UK is not a single code: it has three legal systems, namely, the English law, the Scots law and the law of Northern Ireland. Since 2007, there also exists a purely Welsh law. There is a substantial overlap between these legal systems: each legal system defaults to each area and court systems of each jurisdiction further the relevant system of law through their judgments and the process of jurisprudence. Overarching these separate systems is the law of the United Kingdom, also known as United Kingdom law. British law arises where laws apply to the United Kingdom and/or its citizens as a whole, most obviously constitutional law, as also, for instance, tax law. The Supreme Court of the United Kingdom is the highest court in the land for all civil cases and is also the final court (in the normal sense of the term) for interpreting United Kingdom law. Note, however, that unlike in other systems (for example the U.S.), the Supreme Court cannot strike down statutes, and its own cases can be expressly overridden by Parliament by virtue of the doctrine of parliamentary sovereignty.

Germany, China, Russia, and the U.S.

Mention of a few other countries as examples would suffice:

In **Germany**, *Bürgerliches Gesetzbuch* is the civil law and became effective in January 1900.

In the **People's Republic of China**, the General Principles of Civil Law came into force in January 1987.

In **Russia**, the Civil Code was passed in 1923. Consisting of 435 sections it is marked by the absence of certain topics which hold a prominent place in other codes, such as family relations, contracts of employment, real property etc. The contentious and chilling clause of Section 21 continues:

“Land is the property of the State and cannot be the object of private contract. Tenure of the land shall be permitted only under the title of use. Private property in land having been abolished, the division of property into real and personal is hereby repealed.”

Yet, the Code safeguards civil rights without discrimination in Russia.⁴⁶

⁴⁶ **Kantarovich, J. 1923.** The Civil Code of Russia. *Yale Law Journal*; Vol 32. No. 8 pp. 779-789. June.

In the **United States**, where the question of diversity may approximate more to Indian circumstances, there are multiple layers of laws, separately applicable to the nation, the State and the county, or agencies and cities. States are independent legal entities with their own Supreme Courts that follow their own practices and legal conventions. Yet there are common principles that govern these civil laws in the States in a manner that is applicable for all people across that vast country. Only matters of a federal nature or those affecting the country as a whole such as security, taxation, broad legal issues, etc., are taken up at the Federal Supreme Court.

Civil Codes in Islamic countries

What about Islamic countries? Most countries following the Islamic faith traditionally adopted Sharia law, derived from religious teachings, practices and traditions, often interpreted by qualified jurists of the faith. In the modern era, however, such laws have been modified or replaced by statutes inspired by European models.

Judicial procedures and legal education were likewise brought in line with European practice. On the other hand, many of the matters dealing specifically with family law continue to be governed by traditional Sharia laws. This has been a constant source of contestation not only within the countries which observe them, but also from other countries who see certain aspects of the sharia law as being contradictory to human rights and personal freedom.

Indeed, there is a continuous movement in progressive Islamic countries to modernize the laws without abandoning the foundations of traditional jurisprudence. In certain other countries with a resurgent Islamic revival, there is a demand to re-instate legal systems based entirely on Sharia law. Thus, the Islamic countries of the world usually have a combination of civil laws based on classical sharia laws (as may be observed in Saudi Arabia), secular systems (Turkey is an example, through there is currently pressure on its secularism) as well as mixed systems (such as are seen in Pakistan, Egypt, Malaysia, Nigeria etc.⁴⁷

⁴⁷ **Otto, J.M. 2009.** *Sharia Incorporated: A Comparative Overview of the legal systems of twelve Muslim countries in past and present*, Leiden University Press. pp. 615–16.
[<https://openaccess.leidenuniv.nl/handle/1887/21170>].

The Indian context

An international survey would reveal that, in fact, there are few countries where common civil laws do not exist, dispensing justice in a fair and neutral manner. As we have seen, in India, the nature of the structured and layered social formations, the *chaturvarna* hierarchies approved and mandated by religion and tradition which have existed for several millennia, complicates the social fabric in more ways than can be deciphered. It may be argued that the immense diversity of social customs, the plurality of social mores and traditions, the staggering variety of rituals and practices and the presence of hundreds of castes and sub-castes, all make our country so complex that to even think of a universal law that will encompass these variations, without trampling on individual freedom and the right to practice one's chosen religion.

In India, the complex mosaic of these overlapping personal, social, local and community traditions and practices make the task of implementing a UCC truly difficult. Yet, if we are to move on to a truly unified country which treats all its citizens with dignity, respect and equity, without sacrificing their basic human rights, while at the same time, protecting those individual variations and cultural practices of each community, which do not militate against basic principles of our vast and magnificent Constitution, then we would have achieved a near impossible task. This balance between general principles of civil law and specific traditions of individual religions: that is the desiderata we must aim for.

IX. THE PATH AHEAD

At present, as we approach the end of the year 2019, the possibility of the Parliament promulgating a UCC looms large on the nation's polity; perhaps there is a better chance of its getting through now, with the majoritarian government, backed by a massive recent mandate, firmly in the saddle. Efforts in the recent past have not borne fruit. In the Muslim community, the All India Muslim Personal Law Board (AIMPLB) is clear that it shall oppose any attempts to adopt a UCC. It is the AIMPLB that had organised pressure on the Rajiv Gandhi government in 1986, in the aftermath of the favourable decision in *Shah Bano*, to adopt The Muslim Women's (Protection of Rights and Divorce Act), Article 5 of which allows a paltry amount to be paid to the divorced wife for a period of a mere three months. Then, it was a major step backward for the country, though an activist judiciary had upheld significant principles of law that should have been accepted.

Yet, the recent Act of Parliament renders all declaration of talaq to be void⁴⁸, especially in the context of the talaq-i-biddat (where pronouncement of talaq thrice in one sitting by a Muslim man to his wife results in instant and irrevocable divorce), found approval in most places, including Muslim women, though clerics of the community still protest. Meanwhile, other Muslim Personal Law Boards were also created, two led by women. Some Muslim women have been vocal against these personal communalist laws and even seek the UCC. There is, however, some scepticism even amongst the majority community and these views come through when, as we have seen, the 21st Law Commission itself, the tenure of which has expired in August last year, said in its consultation paper of August 31, 2018, that it is not time yet for the adoption of the Code.

As Herrenschmidt summarises it:

“It is necessary to further add that there was yet another powerful reason for this refusal, loudly voiced for a few years, including amongst intellectuals considered as progressive: this Code is the harbinger of a western secularism, deeply atheist,

⁴⁸ PRS Legislative Research. n.d. *The Muslim Women (Protection of Rights in Marriage) Bill, 2019*. Ministry of Law and Justice. [<https://www.prsindia.org/billtrack/muslim-women-protection-rights-marriage-bill-2019>]

which does not suit a profoundly religious India whose ‘secularism’ means respect and protection for all religions.”⁴⁹

The Government of India would soon constitute the new Law Commission, the 22nd, and, it can be conjectured, would urge it to think more innovatively and courageously than its predecessor. Despite the cautious warning of the earlier Law Commission, it appears that an irreversible movement towards securing a UCC for our country has begun. The repeated exhortations of the Supreme Court, the call of the Directive Principles as enunciated in the Constitution of India in Article 44, the political determination of the ruling political dispensation steadfastly manifest now, all make it apparent that there will soon be a push towards obtaining a wide consensus in the Parliament for a UCC for “We, the people of India”.

⁴⁹ **Olivier, H. 2009.** The Indians' Impossible Civil Code, Published online by *Cambridge University Press*, Vol.50. Issue No. 2. pp. 309-347.
[<https://www.cambridge.org/core/journals/european-journal-of-sociology-archives-europeennes-de-sociologie/article/indians-impossible-civil-code/63B0AF97B897D9A065FA43CA8B73E80F>].

X. AMBEDKAR'S COUNSEL

I ndeed, when all is said and done, it cannot be denied that there are compelling arguments in UCC's favour, not the least of them being that it finds mention in the list of Directive Principles of State Policy in the Constitution. A diversity of laws with their varying entitlements for different communities, not to mention the many inherent contradictions between them, can also pose challenges to the unity and integrity of a country that is strongly democratic and secular in nature.

To think that the writer of our Constitution and the conscience-keeper of our nation, Ambedkar, resigned from the Government of India on the issue of the Civil Code, is a sobering thought for all of us. In his resignation speech he touched on the disappointment that he felt when the original intent and thrust of the Code was gradually diluted. He had special grievances against the Prime Minister Nehru, who had committed his government to the goal, but still had to make compromises in the end. In his impassioned speech he said:

“To leave inequality between class and class, between sex and sex, which is the soul of Hindu Society untouched and to go on passing legislation relating to economic problems, is to make a farce of our Constitution and to build a palace on a dung heap. This is the significance I attached to the Hindu Code. It is for its sake that I stayed on notwithstanding my differences.⁵⁰

Be that as it may, contemporary developments are moving fast. We live in another age, in another time. The world is a different place altogether: now identity and state clash, freedom and nationalism oppose each other.

In the days ahead, there will be much speculation. The Modi government, in many aspects of identity and perspective, seems to have touched a chord in the hearts of the people, especially the vast Hindu majority, who unwittingly, perhaps even unthinkingly, now support the majoritarian nationalistic juggernaut that is driving this country forward single-mindedly. A UCC will not have much impact on them, as they have already been absorbed into the embrace of the Hindu code.

⁵⁰ Moon, V. 1995. *Dr. Babasabeb Ambedkar : Writings and Speeches*, Dr. Ambedkar Foundation, December 06. [https://www.mea.gov.in/Images/attach/amb/Volume_14_01.pdf].

**UNIFORM CIVIL CODE:
THE IMPORTANCE OF AN INCLUSIVE AND VOLUNTARY APPROACH**

With the Hindu Code already in existence for almost 60 years now, any major changes in that Code for the Hindus may not be feasible or called for now.

In an age when citizens' rights are of paramount significance, and the admitted position is to move towards a society which respects human rights irrespective of caste, religion, region and gender, the imperative to legislate on a UCC cannot be denied. The moot question, however, is the manner in which the country would now take steps to introduce a UCC that will also cover the Non-Hindus who are outside the Hindu Code. There are several significant questions that will have to be simultaneously addressed in this regard. Whether it is at all desirable, and if so, what form it should adopt, is the first of such questions. The assimilation of the Hindu Code, which has stood the test of time over the last six decades, into the UCC, is another. Will the four statutes forming the Code be absorbed as such into the new UCC or will they be subject to modification? To what extent will the principles behind the Hindu Code be applied, or sought to be applied, on the non-Hindus, even as preserving the cultural and religious identities of each of the other religions will necessarily have to be kept in mind? If the Hindu Code and the proposed code for the non-Hindus are kept distinct in the new UCC, could it possibly be a uniform code for everyone, or just a compendium of laws placed into the same folder?

The real impact of the UCC will surely fall on those of the other religions and communities - yes, we may as well state it bluntly- the minorities, who have been guarding their respective traditions and idiosyncrasies within the diktats of their own holy books, religious practices and common law, formulated through practices, rituals and precedents. Their genuine fear is that the very special identities they have struggled to maintain in the last several centuries, will now be swept away into a uniform mould, to which everyone must adhere. If the Code clashes with certain special distinguishing features that a community or a society has treasured and cherished, will they be forced to give it up? And become of one hue and colour as all the rest?

Indeed, the pitfalls are many, the most important of them being the perceived need to preserve the religious and social identity of the many peoples and communities who together constitute this pluralistic and multi religious country. But this also severely tests our claim that we are a secular country that guarantees basic and common fundamental rights to all its citizens, seems to flounder in the face of the plethora of laws and practices that proliferate in this country, insofar as our many religions, sects and denominations are concerned. It will take all the skills of accomplished political and social leadership, duly supported by the religious communities and with the benevolent touch

of a crusading judiciary, for this dream to come true. But until then will it continue to be a utopian dream that will remain unrealised for years to come?

Harington's words quoted at the beginning of this monograph, though in a different context, are still relevant. Can a uniform law be suitable to the genius of the people of this country who pride themselves on their variety and diversity and who may not brook any interference in what are essentially their personal and religious matters? On the other hand, when can we hope to achieve the ideal of a country where 'we, the people' live with equity and freedom, shorn of prejudices and religious diktats that discriminate between man and man and man and woman?

Ambedkar's counsel for a "voluntary" code

The essence of their doubts can be summarised as follows: at the practical level, will the UCC oust customs and practices of marriage and divorce, succession and adoption? On a more profound level, will it destroy the diversity of our nation and violate Article 25 of the Constitution that guarantees the right to practise one's own religion. In fact, the sceptics hold that the UCC pushed through by the state, will militate against the basic tenets of democracy itself. "The secular state is, after all, an enabler of rights rather than an inhibitor in sensitive matters of religion and personal laws".⁵¹

Yet again, other voices may advise reflection and cautious restraint. They will argue that the Code is to cover only civil matters and surely, the collective wisdom of the people will not allow the spirit of intangible and undefinable things -- those traditions that are sanctified under personal law by usage and practice, which some hold to be the very essence of life itself -- to be brushed away in contempt.

Ambedkar himself had tried to soothe agitated minds when he had argued in the debates in the Constituent Assembly.

"I quite realise their feelings in the matter, but I think they have read rather too much into Article 35, which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens. **It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so**

⁵¹ **Rajagopal, K. 2018.** *What is the debate on uniform civil code all about?*, *The Hindu*, September 08. [<https://www.thehindu.com/news/national/what-is-debate-on-uniform-civil-code-all-about/article24903560.ece>].

that in the initial stage the application of the Code may be purely voluntary. Parliament may feel the ground by some such method.⁵² [Emphasis by author]

(Article 35 mentioned in the above quote is the draft number of the article as listed during the time of the Constituent Assembly discussions, which in the final version of the Constitution was renumbered as Article 44)

Should the current political leadership, demonstrating reason and maturity, wish to take a few gentle steps forward in this direction, rather than forcing the new law down unwilling throats, here then is a possible way forward: by making a beginning that the UCC shall apply only to those that are willing to adopt it; so that the application of the Code may be purely voluntary. We may finally be able to find in the voice of Ambedkar the middle ground that we can all live by.

⁵² **Lok Sabha Secretariat. 2009.** *Constituent Assembly of India Debates (Official Report)* (Fifth Reprint) Volume VII, pp. 551. November 23, 1948. New Delhi.
Available online at [http://164.100.47.194/Loksabha/Debates/Result_Nw_15.aspx?dbsl=182].



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