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UNIFORM CIVIL CODE FOR INDIA

Proposed Blueprint for Scholarly Discourse

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M.K. Nambyar Memorial Trust

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We are grateful to Mr K.K. Venugopal, Senior Advocate of the Supreme Court of India and trustee of the M.K. Nambyar Memorial Trust, for inviting us to deliver these lectures and for the kind hospitality during our visit to this great and wonderful country of India.

The first iteration of the 2009 M.K. Nambyar Memorial Lectures was delivered in New Delhi on October 7, 2009. We are very grateful to the former Chief Justice of India, Justice K.G. Balakrishnan, for finding time in his challenging and heavy schedule to preside over the session, and we were deeply honoured to speak under his chairmanship that evening. We wish to thank our colleague and friend, the former Attorney General of India, Mr Soli Sorabjee, for his very kind introduction.

The second iteration of the 2009 M.K. Nambyar Memorial Lectures was delivered in Chennai (Madras) on October 11, 2009. We are very grateful to the Chief Justice of the Madras High Court,

Justice H.L. Gokhale, for chairing the session. We are also indebted to Mr Vijay Narayan, Senior Advocate, who helped organize the lectures in Chennai on behalf of the M.K. Nambyar Memorial Trust.

Shimon Shetreet
Mt. Scopus, Jerusalem
December 2014

Hiram E. Chodosh
Claremont, California
December 2014

PREFACE BY SHIMON SHETREET

ARTICLE 44 OF THE CONSTITUTION of India provides that: '[t]he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.' Even though over 60 years have passed, this has not been implemented. In the 2009 M.K. Nambyar Memorial Lectures, I attempted together with my colleague, Hiram E. Chodosh, President of Claremont Mckenna College and former Hugh B. Brown Presidential Professor of Law of the University of Utah, S.J. Quinney College of Law, who was a partner in this comparative study, to provide a blueprint for a possible course of action for securing of a uniform civil code for India in a comparative context.

Together with President Chodosh, I approached this study with great care and high sensitivity. This sensitivity I acquired in research and in practice. I have conducted research and offered courses on comparative law, culture, and religion in many leading universities in Europe, North America, and Israel. I have held public offices in Israel including cabinet minister of religious affairs and senior deputy mayor of Jerusalem.

Over the years, I have done extensive research on issues of law, culture, and religion. My experience includes serving as minister of religious affairs in the Israeli government, a country with a predominant Jewish population and a large Arab minority consisting

of Muslims, Christians, as well as a significant Druze community. Furthermore, I have served as Senior Deputy Mayor of Jerusalem, a city with a pluralistic religious population, of central importance to Judaism, Christianity, and Islam. The issues, and sometimes disputes, during my term in both offices had to be handled with a high degree of sensitivity.

I would like to mention two important experiences of intra-community and intercommunity disputes. The first experience was as minister of religious affairs, when I had to deal with the restructuring and reorganization of the Druze community's Religious Council, a reorganization that became necessary after the passing away of Sheikh Amin Tarif in 1993. Upon his passing away, the entire Druze religious court system remained with one single Qadi (judge), with no option to appeal. This was due to several events that occurred at the time as well as the historical arrangements in place regarding the Druze court system.[1] Several proposals were advanced as to how to deal with the situation, but all met with objections from different groups within the Druze community. The issue was brought before the High Court of Justice, which ruled on the matter and ordered the government to come up with a model regulation that will take into account the needs of different groups. This judgment was delivered three months after I became the minister of religious affairs, and warranted my extensive attention—and called for the allocation of much time and resources to deal with the delicate situation. After consulting with many representatives from the different Druze groups, as well as with experts and public figures, I finally came up with a new proposal. Though this arrangement also met with criticism, the criticism was much softer than the first arrangement, and when brought before the High Court of Justice, the appeal was denied.[2] The dire state the Druze court system was in, required a swift yet sensitive solution, and though no single solution had within it the ability to satisfy everyone involved, the one I brought forth made its best attempt at this.

[1] *See*, SHIMON SHETREET, THE GOOD LAND: BETWEEN POWER AND RELIGION 361–62 (1998) (Hebrew).

[2] *Id.* at 363.

The second experience was an intercommunity dispute over the ceremony on the Saturday of Light in Easter of 1995 at the Church of the Holy Sepulchre. As the minister of religious affairs, I had to resolve many disputes that arose surrounding the Church of the Holy Sepulchre. In 1995, my officers at the ministry of religious affairs found out that 16,000 Copt pilgrims had arrived from Egypt for the prayers of Holy Saturday (when usually only 1,000 arrive). It was feared that they would take up all the spaces in the church and so prevent the participation of the Greek Orthodox and other pilgrims from the Christian community. The Greek Orthodox patriarch, being the sole conductor of the ceremony, threatened that if that were to occur, he would cancel the ceremony, an act which would have serious impact on international and inter-religious affairs. At the time, I was on vacation, but as soon as news of the crisis reached my ears, I returned immediately to Jerusalem to attempt to resolve the situation. In an urgent meeting I called, together with representatives of the Greek Orthodox Church, the Coptic Church, and the Chief of the Jerusalem Police, we finally came to a solution after many hours of discussion. It was agreed that the development of events during the night of Saturday of Light would be monitored, and if need be, the entrance of pilgrims into the compound would be regulated. We agreed on two points of time—the first at 23:00, to determine whether fewer pilgrims should be allowed into the compound, and the second at 01:00, to prepare to remove Copt pilgrims from the common prayer area. It was also agreed that the ceremony would be broadcast on three close circuit television screens in different halls, for the benefit of those who would not be able to enter the church.[3] And so a solution was found to please everyone, and the ceremonies of Saturday of Light were conducted with no disturbances.

Equipped with the sensitivity I had acquired from my unique experience in my government and other positions, the understanding gained through much research, and a significant measure of humility, I embarked upon the study of this serious issue, the issue of a uniform civil code in India. My reflections, thoughts, and suggestions are

[3] *See id.* at 360.

addressed to the academic discourse, and intended to make a modest contribution to the scholarly debate on this issue. Hence, this study should be viewed as a proposed blueprint for the scholarly discourse on the issue of the uniform civil code for India. I do not presume that this is the only way in which a uniform civil code should be implemented, but merely to offer my unique experience to suggest one way of how this may be done. The significant contribution of my colleague, President Hiram E. Chodosh, to this volume is the study of mediation as an essential mechanism to promote the adoption of a uniform civil code for India.

The first part of the study was to learn from the experience of other nations how they resolved the challenge of introducing a civil code and keeping continued respect for community laws and social customs and how to formulate the relationship between religion and state.

As to the models of the relation between religion and state or church and state, my study shows that we can classify the countries of the world into five models of church-state relations: the theocratic model, the absolute secular model, the separation of state and religion model, the established church model, and the acknowledged religions model.

We also studied the reforms introduced in Turkey, a Muslim country, which shifted from a country based on Muslim law to a secular republic with a modem civil code in the broader sense of the term including in personal law. This took place in the 1920s under the initiative and vision of Atatürk. We paid special attention to the study of the civil code in Goa which came under the rule of India in 1961. Likewise, we studied in detail the shift of Nepal from a religious Hindu monarchy state to a secular democracy in dramatic changes in 2006–8.

Based on the comparative study and a detailed analysis of the local context of the Indian Constitution, and the social and legal environment, we arrive at a number of conclusions as to the possible recommended course of action to further the constitutional mandate to implement a uniform civil code for India.

In order to facilitate the securing of a uniform civil code, we propose a blueprint of guidelines, and proposals that should be followed. We think that these guidelines will make its application

as easily acceptable for all the citizens and communities of India, as possible.

The first guideline is that the process of preparing and implementing a uniform civil code should be the function of the legislature. The courts can resolve certain specific points but the comprehensive code is a legislative function and not for judicial resolution.

The second guideline that we propose is a parallel application of civil and religious law. The securing of a uniform civil code must not negate the possibility of citizens availing themselves of religious law—if they so wish. Moreover, the state must not merely allow for the existence of a religious law system, but must assist in its enforcement, if such intervention is required, and the circumstances allow for it. The mere existence of a civil law does not nullify the existence of a religious law system. In London, New York, or Toronto people marry first in civil marriage and then marry in a church or a synagogue. Later, if necessary, they receive a judicial remedy for religious aspects of their marriage and divorce. The same should be available in India. The main law will be civil; the parallel law will be religious.

The third guideline we suggested is a gradual application of the uniform civil code. Time must be allowed for the citizens of India to grow accustomed to the existence of a civil code. A drastic change in the civil life of the people of India cannot be put into place overnight, but must be implemented over time. The application should be done topic-by-topic and chapter-by-chapter.

The fourth proposal put forth is mediation. This mediation should take on two forms—intercommunity mediation and individual mediation. The first of these relates to a dialogue between the communities of India, to advance an agreement upon the substantive provisions of the uniform civil code. The second relates to mediation between individuals, on occasions where disputes arise in the realm of personal law.

This set of proposals should alleviate the suspicion of the Muslim community or the Hindu majority community that a uniform civil code will altogether remove their traditions. On the other hand, certain central values must be maintained by all law, whether civil or the parallel religious law, namely to prevent discrimination and practices unfair to women and daughters in a democratic country.

PREFACE BY HIRAM E. CHODOSH

IT WAS A HUMBLING HONOUR to give the memorial lectures in a tribute to the late, great constitutional lawyer, M.K. Nambyar. Hegel once observed that history bends towards justice, but it is heroic and brilliant individuals like M.K. Nambyar who help bend history. He was clearly ahead of India's constitutional curve, and we dedicate ourselves today to that inspiring legacy and ongoing process led by his outstanding son, K.K. Venugopal, one of the great constitutional lawyers of his own time, and the rest of his impressive and dedicated family.

Additionally humbling was the topic of these memorial lectures: the unfulfilled, and at times polarizing, constitutional promise of a uniform civil code. We need not inform the reader that the realization of the Directive Principle in Article 44 remains a matter of heated controversy, but we do need to be clear upfront that this is one that will not be resolved by a couple of international academics who are situated at considerable national distance from the seat of that conflict. Although we may have our own normative views on the specific issues of whether, when, or how precisely this promise should be fulfilled, the distance of viewpoint from a position on the ground risks the projection of views that may be naïve or impertinent. We both write from our own national environments and contexts in

which we struggle from one degree to another with conflicts over pluralism of law, whether the application of religious exemptions from national military service in Israel or the refusal of certain types of medical treatment to children by parents of a particular religious belief system in the United States (U.S.), questions to which we hardly hold the authoritative answer in our own societies.

In the U.S. alone, we have banned polygamy on the basis of sedition with an arguable distinction between belief and practice, and then with a swing of the historical pendulum allowed an Adventist to recover unemployment benefits when he was fired for not working on Saturday, allowed the Amish to be exempt from compulsory education, and allowed a discrete native Alaskan community to violate hunting laws since killing moose is an integral part of their funeral ceremony. The pendulum has since swung back in the other direction to allow restrictions on religious dress in the military, to reject religious objections to land use law, and to allow exclusions of certain devotional education from public scholarships. Navigating freedom of religion and uniformity of civil behaviour through law follows no straight or easy path, and the path forward in our own societies is far from clear. These are legal questions, to be sure, but they are tied into a dense ball of political string, and it would be sheer folly for us to make any meaningful claim to the unravelling of it. So if you have come to find magic solutions to the uniform civil code controversy in India, we will surely disappoint you.

More modestly, what we seek to achieve through the publication of these lectures is to open up some fresh channels of thinking about the nature of the problem and alternative approaches to resolving it. We cannot pretend to advance any dispositive recommendations or decisions on the matter in India, but we can help, with humility, to connect the issue to a more general, shared set of experiences and a series of strategic, conceptual, and process-based approaches to the highly heated conflicts over the uniform civil code.

That was our project in this book, but we cannot succeed without the active help of the listening and reading audience. Understandably, we are going to presume that readers come to this conversation with strong views. No one at a bare minimum likes to tolerate the non-implementation of a constitutional principle. Some may be for the

promulgation of a uniform civil code—others against it. Some are for it, with conditions. Others are against it, based on presumptions of exactly what such a law would contain or require. Indeed, the underlying disagreements about the code are at the core of why the promise has not been fulfilled for over sixty years. That is, notwithstanding the constitutional directive, uniformity of personal law is in sum a source of great conflict. Without resolving the basic underlying conflict, a uniform civil code is unlikely to become law, and the non-realization of Article 44 will leave future generations vulnerable to endless chapters of the struggle over India's personal and family law.

This book is about stepping back from the hot kitchen of this conflict without getting out of it entirely. Whereas Shimon Shetreet takes a comparative view of other kitchens, I focus on how to cool the driving heat. Accordingly, we focus our modest contributions on the models, principles, and processes that might help work through this difficult conflict of ideals, laws, reforms, communities, and individuals that strike at the core identity of the individual, the family, the community, and indeed the nation of India.

TABLE OF CASES

TABLE OF LEGISLATION