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No doubt the issue of the reform of personal Laws of different communities and the enactment of Uniform Civil Code is not an easy task. It is a very controversial and sensitive issue. The analysis is also difficult. The most disturbing, rather disappointing feature of the above mentioned controversy (Debate) is that it is mostly political and sentimental, ill informed and hardly conducive to make either parties understand one another’s mind. As a matter of fact there has been no real debate at all. The protagonists express their views in the English press, the opponents reply in the Urdu press. The protagonists refer to the winds of change to the spirit of modernity and to the constitutional provisions relating to a Uniform Civil Code; while their opponents quote the Qur’an and Sunnah, emphasize the religious and cultural rights of the minority, and the long history of existing laws. Specific proposals for change are rarely debated. Bad sociology, fictious statistics and heresay accounts of what has been happening in the Muslim countries are glibly swallowed by the limited readership of a few modernists while the masses and the Ulema are generally satisfied by cursory argument
supposed by supposedly awe-inspiring authority, which in reality serves only their own complacency. Islamic injunctions such as the restricted permission to polygamous marriages or to the rules relating to divorce or inheritance are seldom explained to the citizens of modern India in terms understandable to them.

Champions of democracy shamelessly cite laws imposed by military dictators and there is no one to give them a lie as to the background and evolution of these exposed changes. No comparative study of the Islamic provisions relating to marriage, divorce, inheritance etc. and their ‘modern’ alternatives have been made so that an unbiased citizen could formulate his own views in well informed manner.

Muslim Personal Law, is in fact, another name of the cultural and social freedom of the Indian Muslims. It implies essentially that Muslims are free to maintain their cultural entity and abide by Islamic Shariah in certain specified fields and that in these fields codes of law will adjudicate in accordance with Islamic laws. In actual practise however, this freedom is limited to divorce, inheritance, endowments and other related matters. During the British period these matters were, in general, decided in the light of Islamic law and the practice continues down to this day.
The distinction between 'Personal' and 'non Personal' laws which was unknown to early India became noticeable during Muslim rule. This distinction further consolidated during the British Period because the British followed the policy of non-interference with the religious susceptibilities of the native Indians. They thought that anything could not be wiser than to ensure that the Hindus and the Muslims should be governed by their respective 'personal laws' in matters relating to succession, inheritance, marriage etc. This policy was laid down in no uncertain terms under the Regulations of 1772 and 1793. The legislative ventures in the area of 'Personal Laws', during the period, were sporadic and peacemeal, and were undertaken to meet a need here and a demand there. Most of these were corrective and reformative legislations, favoured by public opinion.

Soon after independence the question of position of personal laws got entangled into the whirlpool of national politics. Heated debates took place in the Constituent Assembly on this issue; and inspite of the best efforts made by the Muslim members, the majority of the members of the Constituent Assembly were unwilling to provide a constituional protection to the variety of personal laws for all time to come. Instead they introduced Article 44 in the Constitution, which envisages a 'Uniform Civil Code'.

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This article that asks the State ‘to endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India’, has often been used as a challenge or threat to the existence of the variety of personal laws. This article has been particularly used against Muslim Personal Law as if it is only this law which is a stumbling block in the procurement of a ‘Uniform Civil Code’. This myth does not hold water at all.\(^3\)

On the basis of above analysis, it deserve due consideration that champions of the Uniform Civil Code who believe that without it homogenity is not possible which is imperative for the unity and national integration of India. It must not be ignored that Uniform Civil Code is one of the directive principles of state policy out of a host of other directives. It possesses only a persuasive force rather than compulsive authority, as its no implementation is not enforceable by the court of Law.\(^4\)

The deep rooted multiplicity of personal law, religion, language, culture and custom are the real hurdles of in the way of the implementation of Uniform Civil Code in India. The diversities of family law of different communities, the tribal’s own laws and customs, the belief of the people that the source of law and religion is the same and that faith, law and religion are intermixed and interwoven, have prompted people to oppose the Uniform
Civil Code from its very inception. The Uniform Civil Code under Article 44 is just one of the several other directive principles of state policy, while Articles 25, 26 and 29 which deal with religious and cultural freedom are the fundamental rights and both conflict with each other. In such conflicting situation fundamental rights are mandated to prevail constitutionality.²

History bears living testimony that when great Emperor, Akbar, introduced ‘Din-e-Ilaahi’ and Ashoka introduced ‘Dhamma’ at the cost of the prevalent laws of the people it counter blasted.⁶ Mughals and British rulers of the Indian subcontinent preserved the personal laws of Hindu and Muslim communities because of the dominant view held that Personal Laws were too much identified with the religion and culture of the people. The British regime appointed various law commissions from time to time on the issue of codification. Nevertheless, the British administration was of the view that by virtue of findings of the commission that personal laws could not be codified as such exercise would amount to interference with religious and cultural matters of the people.⁷

Sometimes the proponents of the Uniform Civil Code cite the example of Muslim countries where certain changes have taken place in those areas which we, in India, call Muslim Personal Law.
They also argue that in the early days of Islam the Caliphs and Imams did certain juristic activities and changed frequently the laws introduced by their predecessors. Pages of Islamic history reveal that changes were frequently introduced in the Shariah law by the ancient jurist themselves. Caliph ‘Umar’ and ‘Ali’ had overruled many principles of law settled by their predecessors. Imam ‘Shaibani’ had set aside some of the verdicts of his master Imam ‘Abu Hanifa’; ‘Ghazali’ has deviated from certain principles of law laid down by Imam ‘Shafei’; ‘Shatebi’ had dissented from some of the opinions of Imam ‘Malik’ and so on.

The Prophet of Islam had not come with any ‘Corpus Juris’. Neither the Qur'an nor the Sunnah had furnished an exhaustive code of law. These Nasus had provided only the fundamentals of the law. Formation of detailed legal rules was left to Prophet during his life time. After his demise, the mission was taken over by the Caliphs who were the administrative cum-ecclesiastical heads of the Islamic state, and, at a later stage by the jurists and interpreters of the revealed law. Through the media of their judgements and fatwas they filled the scriptural skeleton of the law with flesh and blood.³

Muslim law, thus underwent a long process of evolution. The fabric of law was woven and rewoven with the spindle of juristic
interpretation or administration. During this period of development, Islamic law remained a 'law in the making'. In this period if a later jurist or interpreter overruled the law settled by the predecessors, it constituted a step towards the development of law. Difference of opinions, among the doctors of law in this period of Islamic legal history, in fact, form part of the process of legal evolution. All this juristic activity was based strictly on the interpretation of the mandatory laws revealed by the Qur'an or settled by the Prophet (SAW) under Divine Authority. As a result of such juristic activities, several schools of law based on the same sources but having conflicting doctrines in the matters of details, established their authority in several parts of the Muslim world. In the later phases of Islamic history, the principles of one or the other schools of law were accepted in toto by the various Islamic people.²

According to the Islamic legal theory 'Allah' is the only law giver and these exists no other basis of the legal fabric than the Divine Will. Shariah, the code of Islamic law is regarded as immutable by the Muslims. The Fundamental Principles of the Shariah are not open to reconsideration by man. The theory of immutability means what is immutable is actually the 'grundnorm' of the Shariah and not any of its varied interpretations. There are
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four schools of Sunni Law and three schools of Shia Law. These school has its own system of law. Many principles of law in one school are significantly different in the other school. In this situation as a general practise an individual should adhere to any one of the school in toto and is not allowed to make his own choice of legal rules from various schools. Nevertheless, all the schools have equilegal validity and sanctity under Islamic Law. Since none of them enjoy any superiority over others the judges, jurists and legislatures may apply the principles of a school of Islamic law other than that which may be locally prevalent. This flexible nature of Islamic law was the basis of legislative reforms, barring a few exceptions in certain Muslim countries which are often cited by the proponents of Uniform Civil Code to effect changes in Muslim Personal Law. From the above discussion we may safely derive two conclusions:

1. Muslim countries have not amended the principles of Islamic law under the influence of any western law.

2. They have not altered the basic norm of the Islamic law as the fundamental laws of Islam are sacrosanct. They cannot be altered by any man made law. They have just substituted one rule of Islamic law by substituting it from any other school of Islamic law.
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Moreover, if any state has replaced Islamic law by a secular law then this is an act of transgression. The most dangerous point of the entire controversy is that the role of Supreme Course which has time and again raised the issue of Uniform Civil Code knowing fully well that Article 44 of the Constitution is judicially unenforceable. The court expressed extremely uncalled for views about the desirability of the enactment of Uniform Civil Code in three well known cases. viz. Shah Bano, Jorden Diengdeh and Sarla Mudgal case. In these three cases the issue was never Uniform Civil Code but the Supreme Court under the garb of judicial activism inserted unnecessary, unwarranted, obiter dictas which it could have easily avoided without affecting in the least the ratio decidendi in the above mentioned cases. In this way the Supreme Court unintentionally provided inflammatory material to those who want to forcibly enforce their personal laws on minorities in the name of Article 44. But the last case decided by the Supreme Court i.e. Ahmedabad Women’s Action Group case\textsuperscript{10} has clarified the position and the ambiguities created by Sarla Mudgal’s case. In this case three writ petitions were filed under Article 32 of the Constitution challenging the constitutionality of various provisions of different personal laws. The court, in this case, quoting its observations from its earlier decision, rejected

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all the petition holding that the issues involved were the matters of state policies with which the court is generally not concerned. The Supreme Court further clarified that its earlier observations in *Sarla Mudgal's case* regarding the desirability of the enactment of Uniform Civil Code, was made incidentally. Thus, it is a welcome decision of the Apex Court of India in which the court rightly realised that while considering the sensitive matters like Uniform Civil Code, it must exercise judicial restraint. This judgement has for the time being put the controversy into the cold but no one knows for better when the controversy will arise again.

India, being a secular state must not interfere with the Personal Law of the people which was an essential and integral part of their religion, faith, culture, moral ethics and way of life. The abrogation or replacement of personal laws should not be treated as a measure of 'social welfare and reform'. It is noteworthy that the British government in India, did not endeavour to scrap or touch upon the Personal Laws. This was not a new policy which the Britisher's had followed. Infact the policy of non-interference in religious and personal matters can be traced from the days of Mohammad Bin Qasim's invasion of Sind. When after defeating the local ruler the Islamic empire gave liberty to the local inhabitants to 'worship their Gods' and 'to live in their
houses in whatever manner they liked'. This policy of non-interference in personal and religious matters was also followed during the Sultanat period with few exceptions. The Mughal rulers also followed the policy of non-interference with the Personal laws of Indians and virtually in view of the sanctity and sensitivity that Personal laws are the part, and parcel of religion and that practice of personal law establishes the cultural identity too, hence as political expediency, the Britishers did not interfere in the Personal laws of the Indians and left them untouched.

The Muslim Personal Law is constitutionally protected and exempted from any kind of interference from outside under Article 25 of the Constitution. The reason is that section 2 of Muslim Personal Law (Shariat) Application Act, 1937 states that questions relating to marriage dower, divorce, maintenance, custody, guardianship and inheritance matters are to be settled in accordance with Shariat, if the parties are Muslims. Part III of the Constitution of India is devoted to the rights which includes Articles 25, 26, 29 and 30 dealing with the freedom to profess and practise religion and establishing educational institutions to protect the cultural identity of the minorities in India. Moreover the governing, principle of the Constitution is 'Equality before law' and 'Equal protection of laws' as given under Article 14, therefore
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Muslim Personal Law being fundamental right of Muslim is as much protected by the Constitution as other personal laws of other religious communities.

Constitutionally speaking the Directive Principles of State Policy is not enforceable. Although the Supreme Court has enlarged and extended the scope of directive principles of state policy but in case of conflict between fundamental rights and directive principles the fundamental right will prevail.

Now we come to the reasons given for enforcing Uniform Civil Code. Following reasons are cited by the proponents of the Uniform Civil Code.

1. That it is a glaring example of appeasement of Muslims. The males among them are allowed to marry four wives, thus multiplying numbers and causing excessive growth rate in population.

2. That separate Personal laws contribute to separation among Muslims.

3. That the Uniform Civil Code will lead to national integration and draw the Muslims into the national mainstream.

4. Uniform Civil Code will lead to communal harmony for the
loss and, consequently, the life style of all the communities will be coloured in the same hue and tang.

5. That such a code will uplift the dignity and status of women in India.

6. That this code will strengthen secularism.

Hence the secular principles require the state to enforce uniform laws to all citizens disregarding religion. Although the argument that Muslim Personal law is causing excessive growth rate in population is the weakest as it has no basis in fact, it is this argument which has become part of the Hindu folklore. The rate of incidence of polygamy among Muslims is lesser than the non-Muslims as has been shown by various surveys conducted by the governental and non-governental organisations. But it is not the polygamous Muslim males that matters it is their women in reproductive age group who give birth to children. Wider distribution of women under monogamy will tend to increase birth rate, while polygamy decreases it. Then it is not true that muslims do not adopt birth control measures because of their religion. If any sections of Muslims do not easily take to family planning, the reasons lie in their socio-economic backwardness, especially female illiteracy and not in religion.
The next reason mentioned above arrogantly implies that Muslims are not in the national mainstream and need to be bullied into it. What exactly does this ‘being in the national mainstream’ mean? The Muslims have, despite cultural and physical invasions retained their distinctive identity and still live a different life style which is naturally bound to be at variance with others due to their distinguish philosophy of life and religion. Evidently, it is this preservation of identity and separate carriage that amounts to ‘not being in the national mainstream’ according to the emissaries of a Uniform Civil Code. This immersion into the national mainstream is also the backbone of the term ‘national integration’. But what about the facts that the terms ‘national integration’ and ‘mainstream’ are as vague as they are undefined? If the cherished identity of each community fades away into some imaginary national mainstream in the current softpush button laws will it lead to national integration or disintegration? People being humans and not machines can never be expected to part with their identity and laws without disturbing harmony and concord.

A common code anywhere can only harm national integration, for true integration in a democracy stands for tolerance and coexistence of various communities. This also answers the next reasons set forth for enforcing a common code – the communal
harmony will be achieved through a Uniform Code. Wrenching the laws and culture that are beloved to a community and deriving it to adopt alien laws can hardly create goodwill or harmony between communities.

The arguments about nationalism and secularism seeking to homogenise culture are not valid in theory or in practise. Matters like marriage, divorce, or adoption are culture bound; and any attempt to bring them under one law will cause serious damage to cultural norms and values of groups.

India is a secular state, but it is also a plural society with diversity of culture. Democracy gives full play to pluralism, in cultural matters which require a regime of legal pluralism.

Cultural autonomy and pluralism should, however, not mean right to deny women justice. *Concern for gender justice is absolutely valid, whereas concern for uniformity is not.* Muslim women, like Hindu women, suffer from a number of disabilities because of their historical backwardness and powerlessness. In certain spheres, Muslim women suffer more than Hindu women; in certain other areas it is the Hindu women who are more oppressed.

There is therefore a strong case for reforming Muslim
Personal Law to secure Muslim women justice, as it is important to reform Hindu family laws to secure justice to Hindu women.

In the case of Muslims, glaring example of injustice are instant unilateral divorce by husband and an unfettered male right to polygamy. In the case of Hindu women their disinheretence, under certain state laws, from agricultural land and non-availability of divorce on the basis of temperamental incompatibility are some examples of injustice. Thus women of both community suffer, under law, for want of provision for divorcee’s share in the matrimonial property.

Now what is the solution? The solution of the above mentioned problem does not lie in implementing the mandate of the Article 44 of the Constitution of India. We have already seen that the fate of Special Marriage Act, 1954 in which the idea of Uniform Civil Code was translated into action in 1954. While explaining the objectives of the Special Marriage Act late Prime Minister Pt. Jawaharlal Nehru expressed that it was a step to achieve the goal of Uniform Civil Code. This Act’s applicability was on voluntary basis. Muslims opposed the content and consequences of the Act through their religious scholars and their political leaders but this Act had not been popular why Indian citizens for the purpose of the marriages are not universally
adopting the provisions of this Act – for registration of their marriages. If under peculiar and adverse circumstances any marriage is registered under the provisions of Special Marriage Act, 1954. How society reacts? Are the advocates of Uniform Civil Code in India able to reply in convincing manner in Indian context?

The Hindu law reform which were enacted in 1955-56 are also an eye opener for the proponents of the Uniform Civil Code. If we go into the history of these Acts we would find that for passing these Acts many compromises were made by the government. Sometimes these compromises were to satisfy the orthodox Hindus and sometimes it was done for political expediency. Many provisions of old Hindu law were retained in the four Hindu legislations mostly injurious to women. Many practices of old Hindu law were retained which were derogatory to the women. Even the subsequent changes made in the four Hindu legislations have strengthened the religious based Hindu Personal law rather than secularising the Hindu law.

It is a common belief – and a great myth – that only the Muslims of India have a Personal law and that it is that law alone which is stalling the procurement of ‘Uniform Civil Code’ through out the territory of India’ as envisaged by the Cosntitution. It is
clear from the discussion in previous chapters of the thesis that in our country there are a variety of personal laws applicable to different communities. They are as follows:

(i) Hindu Personal Law, largely codified but partly uncodified (also applicable, mutatis mutandis to Buddhists, Jains and Sikhs);

(ii) Customary law of Hindus, Buddhists, Jains and Sikhs wherever protected by legislation are case laws;

(iii) Tribal law of Hindus and others;

(iv) Christian Personal Law – codified but archaic;

(v) Parsi Personal Law – wholly unreformed and uncodified;

(vii) Muslim Personal Law - reformed but largely uncodified.

Generally, the supporters of Uniform Civil Code project the issue in such a fashion that it appears that it will be the minorities, especially the Muslims, who will have to give up their Personal Laws. But, if the Muslims, Christians and Parsis were to give up their Personal law abruptly, what could be the substitute for them. Obviously, the Special Marriage Act, 1954, Indian Succession Act, 1925, and The Guardians and Wards Act, 1986. How could, then these minorities be expected to adopt the said laws when the majority communities has not done so. If the idea is to impose the Hindu law enactments of 1955-56 in the name of
Uniform Civil Code on the minorities then the minorities especially the Muslims are not going to accept it. Muslims being in minority are bound to be sensitive and they feel that Uniform Civil Code is one of the devises to destroy their religious and cultural identity. This sense of insecurity has increased manifold after the demolition of Babri Mosque and the rise of communal forces in the country.

Of course there are certain areas in Muslim Personal Law where the reform is urgently needed. These areas are polygamy and divorce. The solution of these problem lies in reforming these laws so that the women stop from suffering due to the consequences of these laws.

Islamic Law by its very nature and structure is amendable and changable. However, Islam being a particular way of living with certain objectives and principles guiding human activities and ambitions. It is not to say that every kind of change would be acceptable in Islam. For the purpose of reconstruction of any principle of Islamic Law, on has to make sure that:

(i) The change in issue is not contrary to the basic teaching and objectives in Islam;

(ii) Is the change really in the interest of the society, leading to its welfare, happiness and prosperity;
(iii) The change will have no evil repercussions in the near or distant future.

If the above three conditions are satisfied then one may proceed to find out the ways and means to make reforms in Islamic law. The method of *Ijtehad* is provided in Islamic Law. This method suggest that the door is still open for reassessment and revaluation of arguments based on reasoning which is called *Ijtehad*. The main task of a *Mujtahid* is:

(a) To suggest any change or amendment, if possible, in the law prescribed by the old doctors of Islamic jurisprudence, in order to meet a new situation; and

(d) To find a solution to new problems arising out of changed social and economic conditions of the world.

Thus through the medium of *Ijtehad* the problem faced by the Muslim Women may be solved. There is no need to impose an alien code on the Muslims in the name of Uniform Civil Code. Since Uniform Civil Code has resentment and discontent amongst Indian minorities especially Muslims, hence same is not wise to take up this thorny issue at the cost of annoyance of Indian minorities.
Previous discussions in the earlier chapters of this thesis lead us to suggest the following measures that, it is hoped will be helpful in solving the vexed problem of the implementation of a Uniform Civil Code throughout the territory of India. The suggestions are as follows:

(a) Although the state is reluctant to impose Uniform Civil Code on diverse people, the minimum it should do to generate those conditions that will make a progressive and broad minded out look of the people.

Education obviously can play a vital role in this regard. The solution to the problem lies in spreading education among the ignorant masses. It is the duty of the government to raise the social, educational and economic standard of the ignorant masses which will ultimately make them aware of their rights and obligations.

(b) Since the Muslims are the most backward among the minorities in India, the long term solution to the problem of reform in Muslim Personal Law lies in spreading education among Muslim masses. It is the duty of the social workers, leaders and the government to raise the social educational and economic standard of ‘orthodoxy’. It is the duty of the
Muslim intelligentia to educate the Muslim community about its rights and obligations.

The only obstacles in the reform of Muslim Personal Law are the backwardness of the community and the lack of courage and fear on the part of Muslim leadership.

(c) To gauge the feelings of the community the government should hold the referendum in the minority communities in which all adult men and women can participate. Before the referendum the government should propagate the importance of referendum through press, radio, television, internet and public meetings conducted by all the shades of opinion.

(d) The government must prepare a good environment for Uniform Civil Code by explaining the contents and significance of Article 44. It should take steps and find out means to fight obscurantists who oppose the move of Uniform Civil Code. A conservative section of the citizen must be made to understand the utility of uniformity of laws so that they do not stand in the way of implementation of ‘Article 44’ of the Constitution.

(e) The state should bring social reform slowly and in stages, and the stages may be territorial or they may be community-wise.
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(f) In deciding the kind of code that should be enacted the two possible courses of action are – an optional Uniform Civil Code enacted to coexist with the various religious personal laws, as Special Marriage Act, 1954, exists with other religious marriage law or the other option to be replaced the existing religious-personal-laws with the Uniform Civil Code. The Constitution does not indicate whether the Uniform Civil Code should be optional or compulsory. At face value, the first option seems eminently desirable, that is that the state provides a law that incorporates sex-equality but if any individual does not wish to give up their religious personal law they would continue to be governed by the religious personal law.

(g) An attempt should be made to enact a model Uniform Civil Code embodying what is best in all personal laws. It must be a synthesis of the good in our diverse personal laws. It should represent one, drawn up by consultation between the – different communities in India on the principle of give and take.

(h) The vast majority of Muslims in India are afflicted with a sense of insecurity and anxieties and this in turn has bred deep religiosity in them. A good course of action for
educated liberal Muslims to adopt would be to actively involve in the basic problems of Muslim society.

(i) There are certain areas in Islamic law which do not reflect the correct Islamic position for example ‘Triple-Divorces’ and ‘Khul’a’. The Muslims generally think that the only mode of the dissolution of the marriage by the husband is ‘Triple-Talaq’ similarly the concept of ‘Khul’a’ is misunderstood in India. The concept of ‘Khul’a’ under Islam is almost analogous to the power of divorce in the hands of husband. If these two branches are explained to the Muslims by the ‘Ulema’ and the press, television, radio by the government then the problem of ‘Triple Divorce’ may be curtailed to a large extent.

(j) In case of ‘Khul’a’ it is wrongly understood that without the consent of husband a Muslim wife can not obtained ‘Khul’a’. This erroneous concept is the result of Privy council ruling in 19th century. This can be rectified either by the Parliament or by a decision of the Supreme Court – thus giving very important power in the hands of Muslim women.

(k) The minorities especially Muslims must be assured that the government is their well wisher and does not want to impose an alien law upon them by force. The government must also
remove the feelings of insecurity and dissatisfaction among the Muslims.

(l) The reform of Muslim Personal Law should be encouraged by the government through the leading and respected Ulema of Muslim community. The solution of the problem of the Muslim Personal Law should be searched within the Islamic law. No effort should be made to cross the limits set by the Islamic law i.e. Shariat.

(m) To dispel the fear from the minds of the minority especially the Muslim the state can repeal ‘Article 44’ of the Constitution or at least to treat it as unworthy of being activised. Removal of this threat or perception of threat to Muslim identity will, it can be hoped, cause the enlightened sections of Muslims to undertake the required reforms.

(n) The government should never try to impose a uniform code of family laws on its citizens specially the minorities for the sake of ‘national unity’ or national integration. Such a move by the government will further alienate the Muslims because they would consider it to be extending the Hindu majority rule over them. This would cause discontent and rebellion in the Muslim community and would be injurious to the ‘national unity’ and ‘national integration’.

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(o) Before enacting a Uniform Civil Code throughout the territory of India the government must also keep in mind the religious freedom guaranteed under ‘Article 25’ and ‘Article 26’ of the Constitution.

The government must also take into account the legality and enforceability of ‘Article 44’ and the relationship between Fundamental Rights and Directive Principles of state policy. The state must realise that in case of conflict between Fundamental Rights and the Directive Principles of the Constitution of India must the former shall prevail over the later.

If the above measures are adopted sincerely and honestly the problem of implementation of ‘Article 44’ can be solved in India.