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*The Indians' Impossible Civil Code**

Abstract

The Uniform Civil Code which, as written in the 1950 Constitution of the Indian Union, should be enacted, still does not (and will probably never) exist. This paper examines the tactics used by the opponents in the Constituent and Legislative Assembly (1946-1951) who succeeded to wreck a proposed ''modernisation'' of the *Hindu Personnal Law*, which could have been a first step towards that Uniform Code. In a very clever way, they never claimed to defend the *dharma* treatises which had codified and legitimated a *Brahmanical Social Order* for centuries, but only wanted to maintain the multiplicity and diversity of customs and usages of the Hindu people.

Keywords: India; Constitution; Personnal Law; Customs; Ambedkar.

THE CONSTITUTION of the (independent) Indian Union provides (Article 44) that '''The State shall endeavour to secure for

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I have read Werner Menski's *Hindu Law, Beyond Tradition and Modernity* (New Delhi, Oxford University Press, 2003) and listened with great interest to his lectures in May 2007 at the *École des Hautes Études en Sciences Sociales*. Both his interpretation and my own of the mishaps of the uniform Civil Code and of the debates relating to the *Hindu Code Bill* show a gap not in knowledge (his knowledge being clearly far more extensive than mine) but in interpretation and possibly in ideology, as well (and with astonishing clarity) as in radically different traditions and ''schools of thought''. From this point of view, I take full responsibility for being a ''positivist'' and ''continental'' social anthropologist, possibly with a slight touch of ''elitist thinking'', to quote Werner Menski's criticism of Robert Lingat (MENSKI 2003, pp. 126-127, 130, 143). As a sociologist, I cannot conceive what a ''common Hindu'' (*ibid.*, pp. 125-126) could possibly be.

I really do apologise for not having quoted Tanika Sarkar's excellent work, *Hindu Wife, Hindu Nation* (SARKAR 2001). For entirely inexplicable reasons I forgot to mention this work when writting this paper. Annex 3 is to be found only in the electronic edition: ''Short Glossary for a better understanding of the Hindu society''.

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the citizens a uniform civil code throughout the territory of India''. This clause was debated and adopted on 23 November 1948 (Clause 35 of the bill).[1] The Constitution, as a whole, was adopted on 26 November 1949 and came into force on 26 January 1950.

1. *The historical and legal context*

The Constituent Assembly (C.A.) did not end its work at this date. Its members, who had been elected through indirect suffrage in March 1946 (stemming from the provincial Assemblies elected the same year) started their work on 9 December and continued it – although no longer as constituents, but as members of the Legislative Assembly, or *Dominion Legislature* – until 1952. The *Indian Independence Act*, adopted by the British Parliament on 18 July 1947 (with immediate effect) had indeed provided that the same Assembly would be both constituent and legislative (the *Government of India Act* of 1935 thus remained valid – but for the adjustments to the new conditions of independence as proclaimed on 15 August 1947, with the creation of two states, namely the Indian Union and the Islamic Republic of Pakistan). Hence, there was no legal void when independence was proclaimed, and this despite the tragedies of the Partition. All that was left to deal with was the departure, and replacement, of a number of elected members representing regions which had become Pakistani; hence, B. R. Ambedkar himself, who had been elected (by the Scheduled Castes and with the support of the Muslim League) in July 1946 (via partial elections) in East Bengal, was chosen by the *Bombay*

[1] Throughout the Constituent's debates, a distinction is made between ''Articles'', when referring to the Constitution, and ''Clauses'', when referring to the Hindu Code Bill. Volume 14 (2) is thus dedicated to a ''*Clause by clause discussion*''. Volume 13, *Dr Ambedkar the Principal Architect of the Constitution of India*, provides (pp. 220-1230) a table of equivalence between the ''Article(s) in the Constitution of India'' and the ''Corresponding clause(s) in the Draft Constitution''.

Legislative Congress Party for a partial election of the C.A. in July 1947 (Keer 1981, p. 395).[2]

These very specific conditions were not without providing ammunition to those, within the Parliament, who were opposed to the *Hindu Code Bill*; they thus claimed that insofar as they had been elected by indirect suffrage for the sole purpose of giving the Indian Union a constitution, they were neither representative nor authorised to reform society with this type of law (this, however, did not seem to prevent them from considering that they could rightfully legislate on the organisation of the dentist or notary professions).[3]

These very brief political and chronological elements must be kept in mind in order to fully appreciate the remarkable work achieved by the members of this Constituent Assembly, a number of which were brilliant lawyers and ferocious *debaters* – starting with Ambedkar.

The objective of the present article is to explain why the Indian Union, fifty years later, still does not have a uniform Civil Code, and to expose the opponents'[4] arguments. It will thus expose:

– quasi-universal arguments (those of a patriarchal society frightened by the prospect of ''modernity'' granting women rights that might possibly be the same as those granted to men);

[2] Bhim Rao Ambedkar (1891-1956) was born in Maharashtra in a Mahar family (Untouchables). With the support of the Baroda Maharaja, Sayaji Rao, he left to study in Columbia University (New York) in 1913. After having obtained a doctorate in economics, he completed his training with legal studies in Great Britain. Having returned to India in 1917, he immediately entered into politics, representing the Untouchables, and this until the end of his life. On 25 December 1927, he burned *The Laws of Manu* in public. In 1931, during the second *Round Table Conference* of London, he succeeded in persuading the British to confer on the Untouchables the status of a political minority with a separate electorate. Gandhi, who considered this unacceptable, started a ''fast unto death'' (this is the only time Gandhi used this weapon against a fellow Indian). Ambedkar therefore had to go back on this point (*Poona Pact*, 24 September 1932). A fervent anti-Nazi, he supported the British. Appointed as Minister of Labour in July 1942, he opposed the Congress Party's *Quit India* movement. In August 1947, Nehru appointed him Minister of Justice in his government and Ambedkar would go on to play a fundamental role in the drafting of the Indian Union's Constitution. When confronted by the impossibility of reforming Hindu personal law, he ended up resigning in September 1951. He and his party, allied with the socialists, were defeated in the *Lok Sabha* elections in January 1952; two months later, he was elected in *Rajya Sabha*. Tired and sick, politically isolated, he converted to Buddhism – a conversion he had been considering for over twenty years – in October 1956, two months before his death. The only quality biography of his life, in English, is that by D. Keer. For the essence of the thoughts of this great political man, see Herrenschmidt 2004.

[3] The first general elections, with universal suffrage, occurred between 25 October 1951 and 21 February 1952. The Assembly (*Lok Sabha*, lower house of Parliament) in place at this time was the first independent one and had been elected by an electoral body five times larger than that of the 1946 elections (Morris-Jones 1971, p. 93).

[4] Unless otherwise specified, the ''opponents'' referred to are those within the Assembly.

– a historical, sociological and political situation which India shares with other States: a multiculturalism characterised by the aggressive religious references of each community, *communalism* being the political expression of the confessional differences;[5]

– Hindu specificities – in particular the acknowledgement of custom by the religious treaties, or *dharmashastras*,[6] which overbear even their prescriptions.

2. *Impossible French Civil Code? Impossible Indian Civil Code*

In a nation in the making, the problem of the unification of ''personal and property'' laws within a Uniform Civil Code is doomed to be confronted by local non written traditional customs or written laws.

The French monarchy, in its numerous (as of the 16th century) Ordinances, was careful not to encroach on the various patrimonial laws of the kingdom. For their part, the Revolutionaries announced, as early as 1790, their intention to draft a ''Code of the Civil Laws of the Kingdom''. After a number of aborted drafts, this Code (known, rightly, as the *Code Napoléon*), was finally adopted in 1804. This Code is still in force and has been amended a number of times.

The difficulties met during the fourteen years that proved necessary to elaborate this Code led the historian Jean-Louis Halpérin to speak of an ''Impossible Civil Code'' (Halpérin 1992) . . . which turned out, after all, to be possible.

One can compare the fourteen years needed for France to unify its patrimonial law to the fifty years that have elapsed in India, from the first expression of the desire to create such a code to current times where this *Uniform Civil Code* still does not exist. Indeed, Nehru's India is not Revolutionary France or Bonaparte and Napoleon's France, and India's political practice remains of British inspiration. The comparison does, however, illustrate and confirm that the drafting of a uniform civil code is anything but straightforward.

Portalis (1746-1807), author of the ''Preliminary Speech'' of the 1801 draft Civil Code, noted, after having evoked France's historical construction process, that: ''it seemed that France was a Society of societies. The motherland is common; but the States, specific and

[5] Catherine Clémentin-Ojha brought to my attention the fact that the Moguls ''invented'' the Hindus' personal law.

[6] For this Sanskrit term, as for all others quoted, see the *Glossary* in the annexes.

distinct: the Territory is one, but the nations are diverse'' (Portalis 1999, p. 14). He then raised the fundamental question:

> How can one give the same laws to men who, despite being subjects of the same government, do not live under the same climate and have such different habits? How can one eradicate the customs to which we were attached as if they were privileges, and which we considered as so many barriers against the versatile will of an arbitrary power? (*Ibid*.)

In this context, what could be said of India which, in 1947, was divided into the provinces of the British Empire, 554 ''Princely States'',[7] some Portuguese and French enclaves, but also divided into religious ''communities'' (Hindus, Muslims, Sikhs, Christians, Parsis, Jains, Buddhists), into ''castes'' and ''tribes'' (outside the caste society), into 179 languages and 544 dialects?[8] This was nevertheless the task that the Constituent's Indians in the middle of the 20th century set themselves: giving the Indian Union a Uniform Civil Code. Otherwise said: giving each individual, whatever his confession, history, tradition and language,[9] the same ''personal laws'' and ''property laws'', as Portalis would say.

It is probably relevant to note that, unlike France during the Revolution, all the States which, nowadays, seek to ''modernise'' their personal law – and even, like India, to make it uniform – are States where the different existing laws are of a confessional nature (such is the case, for example, in Morocco with the *Moudawana*). If one reads Portalis' speech carefully, it appears that this dimension is completely absent from the picture that France presents.

In the Indian context, the task of creating a Uniform Civil Code was, from the start, an impossible one, if only by reason of the division of India into different religious groups.

Hence, for more than two centuries, the Muslims had their own personal law, based on the *sharia*, with multiple local customary variations. The British had no desire to touch it. As for the nationalists, in Congress, they needed the Muslims too much in their fight for independence to oppose them. The Parsis have also kept their own laws, but – despite the importance of a powerful Parsi nationalist figure, Dadabhai Naoroji (1825-1917) –, this was without political consequence considering their limited number. As for Jews, like

[7] Menon 1956.

[8] *Report of the Official Language Commission*, 1956. This figure, provided on p. 19 of the *Report*, comes from *Linguistic Survey of India*.

[9] And, one should probably add for the most orthodox, two different traditional legal systems, dealing with succession and inheritance, the *Mitakshara* and the *Dayabhaga*.

Christians, they ''do not have a personal law as such'' but marriages and divorces had been codified since 1869 and 1872.

More importantly, within the ''Hindu community'' itself, regional differences are substantial. Hence, not only is the social organisation in the North different from that in the South (for example, ''preferential marriages'', including avuncular marriages between a man and his sister's daughter, which are common practice in the South but are considered as quasi incestuous in the North), differences which were sometimes endorsed by British laws; in addition, there are considerable differences in customs and usage from one caste (*jati*) to another.

In this respect, the numerous Brahmins of the Constituent Assembly, when they refer to the *Dharmashastras* texts – and in particular to the most famous of them: the *Manavadharmashastra* (or ''*Manusmriti*'', meaning the *Laws of Manu*) –, seem to neglect the fact that these treaties do not concern the *Shudras* nor, *a fortiori*, the Untouchables (that is, over three-quarters of the Hindu population), who live according to a different set of rules. Hence, for example, although the *Dharmashastras* prohibit divorces, for the vast majority of the *Shudras* or Untouchable castes, except the ''dominant castes'', divorces are common practice (and in fact, very often initiated by women).

In the same line, long before the Constituent met, the anti-Brahmanical opposition had already had a long history, in particular in the Bombay and Madras Presidencies.

In addition to the above, one must also bear in mind the Jains and the Buddhists, two ''heresies'' which firmly reject most of Brahmanical Hinduism.

Lastly, there is the Sikh community, which voluntarily dissociated itself from Hinduism at the end of the 15th century (Guru Nanak, 1469-1539) in order to create this religion of a ''syncretistic'' nature. As we will see, however, in Punjab, Hindus and Sikhs jointly defend their history and culture.[10]

To add to and conclude on the paradox of the Indian situation, Article 25 of its Constitution (on the freedom of conscience and religious practice and proselytism, adopted on 6 December 1948) requires that all public Hindu religious institutions be accessible ''to all classes and sections of Hindus'' and specifies that ''Hindu'' refers

[10] The *Sardar* B. S. Man, one of the seven Sikhs of the Assembly, was – like other Sikhs – totally opposed to this Code, despite his affirming ''I am not a Hindu. I have never followed the Hindu Law'' (Ambedkar, 14 (2), p. 1071). Ranbir Singh, a Jat Sikh, adopts the same stance: ''The martial race of the Jats [...] did not yield to the Brahmanic rules. [...] I regard myself as a non-Hindu'' (*id.*, 14 (2), p. 1284). Both Hindus and Sikhs, prevail themselves of *Punjab Customary Law* of 1872 (*Rattigan law*).

to people ''professing the Sikh, Jaina or Buddhist religion''. Consequently, Hindu temples remain closed to Muslims, Parsis and Christians (clearly, only a very white-skinned social anthropologist born into the Christian culture would have had the curiosity to be taken to a temple, only to be refused entry![11]).

3. *The British reforms*

Despite their reluctance to interfere with private and religious affairs, the British were nevertheless forced, under the pressure of the most progressive Indians (essentially a Brahmanical elite), to intervene and adopt an important number of laws.

Stronger even then their reluctance to intervene was the resistance from the most traditionalist Indians and, in particular, the open opposition from the most important Brahmins of the Congress Party, such as Lokamanya Tilak (1856-1920), a political hero of Independence and a socially very conservative Brahmin. The fracture between the Hindu conservatives and reformers was fully achieved in 1895: the *Indian National Congress* (created in 1885), which had always held its annual meetings jointly with the reformers of the *National Social Conference* (its emanation), refused, that year, to let them siege in the same place.

A few brief comments suffice to highlight the main characteristics of the legislation of this colonial period:

i) It concerns both personal and property law and always intervenes in order to protect women, or under-aged and physically handicapped persons, and to define their rights.

ii) Only one of these laws (besides, of course, the *Criminal Code*), the 1929 *Child Marriage Restraint Act* (*Sarda Act*), is applicable to all Indians. Muslims and Christians alike had been opposed to its adoption and the Government had resisted the Hindu reformers almost twenty years.[12]

[11] See Herrenschmidt 1989, pp. 60-63.

[12] The government, united with the orthodox Hindus, had regularly opposed it since 1911. On 18 September 1951, N. V. Gadgil, followed by G. D. Bhatt (Bombay States) recalled that this law, applicable to all *Indians*, had met the opposition of all Muslims (who found support in their religious authorities), except for Jinnah, who had threatened to resign if his electorate rejected the law (Ambedkar, 14 (2), pp. 1035, 1063, 1052; and pp. 1064-1065 for the Christian opposition as well as for the subsequent restrictions: these marriages are no longer declared invalid and those involved in them are only punished by the law). The fervent Muslim protector of orthodox Hindus, Naziruddin Ahmad, noted that the *Sarda Act* is still not applied, and maintained that children's marriages, like polygamy, were fully justifiable (*id.*, 14 (1), pp. 526-527).

iii) A number of them concern heterodox groups or reformist Hindu movements. For example, the Brahmo Samaj was created by the first major Hindu reformer, the Bengali Ram Mohun Roy (1772-1833) who, as early as 1818, campaigned against the immolation of widows (law of 1829). The 1872 law, adopted by the British, was thus tailor-made for these Brahmos ''about 75 years ahead of their time'' (Heimsath 1964, p. 94, n. 46) and was therefore called the *Brahmo Marriage Act*.[13] Another example is the Arya Samaj, a Hindu movement of social reform that ''high jacked'' lower caste Hindus (essentially Untouchables) who had converted to Islam or Christianity. They obtained the 1937 Act.[14]

[13] The story of Ram Mohun Roy's inheritance is a complex one (Heimsath, 1964, gives a clear picture of this, in particular in Chapter IV). A movement will be created, with and after him, whose most important campaigns will concern the condition of women. It will lead to the adoption of the important legislation mentioned above, and to which one must add the *Hindu Widow's Remarriage Act,* 1856. This had little impact in reality but had a substantial symbolic value. The *Brahmo Samaj* was created in 1850 by Debendranath Tagore (Rabindranath's father). As of 1864, it had a strong reformist activity, under the impetus of Keshub Chandra Sen (a non Brahmin, strongly opposed to the caste system) that took him beyond the frontiers of Bengal. In 1865, a small fraction of its more conservative members (following Debendranath Tagore), split away from him; their movement died in 1905. As of 1875, K. C. Sen neglected the reform and became a mystic, married his under-aged daughter to a Maharaja of Gujarat, also under-aged. The *Brahmo Samaj* continued to exist for a small number of Bengalis. It was not the most remarkable of reformist movements, but it is undeniable that it was at the origin of an important trend according to which there can be no political progress without social reform. For that reason, this trend will often be in conflict with the growing trend of nationalism. It is difficult to place this trend in relation to Hinduism (as a ''religion''): it can be seen as a sect, in the Hindu sense of this term, despite a monotheistic aspect which, according to Ram Mohun Roy, was already present in the Vedas (especially the *Upanishads*); with D. Tagor, it came nearer to the Christian model; as for K. C. Sen, this became one of those devotional movements constituting the *bhakti*. Throughout 20th century political history, the Brahmos were often considered as ''non Caste Hindus''. Some, however, found their place in very traditionalist Hindu movements such as the *Hindu Mahasabha*: this was the case of Ramanand Chatterjee, an eminent representative of the Bengali ''Caste Hindus''. In the discussions which in 1933 followed the signing of the Poona Pact (1932), it is mentioned that Ramanand Chatterjee is a Brahmo and, as such, ceases to be a Brahmin, and that ''when he marries he has to describe himself as a non-Hindu'' (Ambedkar, 2, pp. 715-716). In this respect, Ambedkar himself said something similar on 6 February 1951: the Brahmo Samajistes ''are Hindus, but [...] do not profess the Hindu religion in the theological sense'' – like the Arya Samajistes (*id*., 14 (2), p. 880). This was when discussing Clause 2, which defines the Code's field of application. Its final draft provided that it applies ''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'' and, as was highlighted, also to the Buddhists, Jains and Sikhs. One can see here the political importance of these issues of definition, which are not reserved to scholars only.

[14] It was adopted by the central legislature and recognised the legality of intercaste marriages between Arya Samajistes. It was the result of the efforts made by Bhai Parmanand, one of the founders of the Jat Pat Todak Mandal (Heimsath 1964, p. 304). The Pandit Thakur Das Bhargava mentions this Act on 11 February 1949 (Ambedkar, 14 (1), p. 231).

iv) Minority ''communities'' are granted specific personal rights. For example:

– recognition of the Sikhs' traditional practice with the 1909 *Anand Marriage Validation Act*;[15]

– for the Parsis, whose reformers played an important role, the 1865 *Special Parsi Marriage and Divorce Act,* prologue to the *Age of Consent Bill* of 1891;[16]

– for Christians, a *Christian Marriage Act* and the protection of converts (1850 and 1866 Acts) followed by the laws on their divorce and marriages (1869, 1872).

> On the other hand, there is no intervention with respect to Muslims' personal law; quite on the contrary, the British adopted the *Muslim Personal Law (Shariat) Application Act,* 1937, which guaranteed Muslims their legal independence for any private law issue, ''save questions relating to agricultural land''.

The legislation adopted before the proposal for the *Hindu Code Bill* is thus consequential and will, for the most, be kept, amended (as is the case for the *Special Marriage Act* of 1872) or set aside on the grounds that it is wholly or partly taken up in the propositions made by the *Select Committee.*

4. *An essential stake for India's modernism. A fierce refusal of modernism*

It seems legitimate, for a new and grand democracy, to equip itself with a Uniform Civil Code. The opposition between progressives and conservatives, however, made this an arduous, if not impossible, task.

As one can see in Annex 1, the structure of the Bill for the reform of Hindu law was nothing original, be it in its principle or its construction. Hence, its opponents' arguments and delaying interventions were clearly linked to its substance.

Nehru's intentions were sincere and there were enough ''progressives'' in the Assembly wanting to give India a personal and property law that would no longer be ruled by traditional religious texts, nor by

[15] This Act recognises the validity of a very simple form of ceremony of marriage, specific to Sikhs. Ambedkar (20 September 1951) reassured the Sardar Hukum Singh and his community that this form of marriage would not be repealed (Ambedkar, 14 (2), p. 1174; *id*., 14 (1), p. 743).

[16] Heimsath 1964, pp. 148 *sq*. for the importance of Parsi reformers in the 19th century. It is in fact a Parsi, Behramji Malabari (1853-1912), who will find the ''unifying theme'' which will lead to the *Age of Consent Bill* (1891).

far too diverse customs. It is, however, not excessive to consider that what was about to become one of the greatest political campaigns for the social reform of India was led – and lost, in his view – by Dr B. R. Ambedkar, Minister of Justice of Nehru's government and President of the Committee in charge of drafting the Constitution. He was the one fighting day after day. Nehru, quite busy elsewhere and aware of the political danger which this Code represented, considering the numerous demonstrations held outside of Parliament and the loud (but not majority) opposition within the Parliament, only moderately supported him. He rushed things on 17 September 1951 by deciding to split the examination of the bill into two parts, in order to first vote on the ''Preliminary'', divorce and marriage, leaving the rest for later, if there was time for it. After the adoption of Clause 4, on 25 September, Ambedkar, tired, resigned from government.

The first part suggested by Nehru was not even examined during this Parliamentary session and was to be picked up only in 1952 with the new Assembly. In the letters they exchanged before this resignation, Nehru recommended, as early as 10 August, to proceed cautiously and, on 27 September, he wrote to Ambedkar: ''although I had not been intimately connected with this Bill, I have been long convinced of its necessity and I was anxious that it should be passed.'' Unfortunately, he writes on, ''fates and the rules of Parliament were against us'' (Ambedkar, 15, pp. 825-826). At other times, Nehru had shown more determination and had had more convincing arguments.[17]

As one can see, the parts of the Code that were voted by the next legislature (elected in 1952)[18] were those which concern personal rights (marriage, divorce, adoption, minority and guardianship) and the main rules of inheritance. In some cases, this legislature proved to be more daring than the previous one: the legal age for marriage was thus moved from 18 to 21 for men and from 15 to 18 for women; it became possible for all women, including widows, and thus no longer men only, to adopt; and adoption was no longer limited to boys only: both boys and girls could now be adopted.[19]

[17] As early as 7 February 1951, Shri Biswanath Das expressed doubts as to the government's ''sincerity'' when it claimed that it is necessary to adopt this law. As proof of this, it did not even dedicate three days of discussion to it. As for S. P. Mookherjee, the very reactionary head of the *Hindu Mahasabha*, as early as 17 September 1951, he understood that Nehru did not believe that the rest of the Code would be examined during this session (Ambedkar, 14 (2), p. 1001).

[18] *Cf. supra* note 3.

[19] The *Hindu Mariage Act* abolished certain customary practices, such as those concerning Sikh marriages, which Ambedkar had promised to maintain (*cf. supra* note 15).

Property rights, however, and more specifically joint ownership of coparcenary property, which were governed by the traditional *mitaskhara*, were left untouched, as resistance to anything that could tend towards equality between men and women remained strong. It was thus not until December 2004 that the Minister of Justice presented a bill to Parliament with a view to amending the *Hindu Succession Act* of 1956, giving women the same rights as men, in particular by amending Article 6 which concerns *Hindu joint property*.

The Act was adopted on 29 August 2005. A leading article in the *The Hindu* of 7 December 2004 highlighted that none of the previous legislation adopted in the 1950s to amend the Hindu law had touched coparcenary property, the son alone (and not the daughter) having a right by birth to this property, as provided for in the *Mitakhsara* rule, which applied in most of India (Kerala alone having definitively abolished all rights by birth to family property[20]). The article concluded that, from there, it will be necessary to review all personal laws which discriminate against women and, consequently, to work again towards the Uniform Civil Code. The problem, as will be seen in more detail in the conclusion, is that the fundamentalists of the *Bharatiya Janata Party* (BJP) and the *Hindutva* used the demand for this Code only as a weapon against the Muslim minority.[21]

That same month (*The Hindu* of 21 December 2004), the Government presented another bill to the *Rajya Sabha*, *The Prevention of Child Marriage Bill*, whose purpose was clear but which confirmed all existing doubts as to the efficiency of the laws adopted at least since 1929.[22]

Going back to earlier times, the first obvious proof of the lack of priority given to the examination of the *Hindu Code Bill* is the fact that its analysis was extremely spread over time and that very few sessions

[20] The four Southern States and the Maharashtra had added a paragraph to some of the articles (6, 7, 29) in order to give "equal rights to daughters in coparcenary property": Kerala (1958), Andhra Pradesh (1986), Tamil Nadu (1989), Maharashtra (1994) and Karnataka (1994) (PANT 2005, pp. 397 *sq.*). Other articles of this 2005 Act are very important: this is for example the case of Article 4.2 which, for the first time ever, subjects "agricultural land" to the same (equalitarian) successional rules as all other properties (the text of this Act and others concerning Hindus' personal law are gathered in HINDU LAW 2005, a publication slightly posterior to Pant). In a short analysis of this Act, which represents true progress, Bina Agarwal, Professor of Economics, Delhi, regrets that the legislator did not go all the way by totally abolishing the *Mitakhsra* system (*The Hindu*, 25 September 2005).

[21] On BJP – in power from March 1998 to May 2004 – and the Hindu fundamentalist and ultra reactionary organisations that support it, see JAFFRELOT 2006.

[22] This bill was not discussed in the *Lok Sabha* until December 2006. It was published on 11 January 2007, as *The Prohibition of Child Marriage Bill*, 2006. After numerous equivocations, the text adopted is clear and rigorous, with heavy sanctions for any one who participates in these marriages, which are declared null and void.

were dedicated to it. While it may be legitimate that the time spent drafting the Constitution was considered a priority, the same could not be said of the time spent on ''ordinary'' legislative activity, even if this was necessary. The chronology of the analysis of the Hindu Code Bill, as highlighted in Annex 2, however, speaks for itself.

Twenty sessions in four and a half years of this legislature enabled the opponents – who, despite the fact that they were a minority, enjoyed the moral support of the President of the Assembly, Rajendra Prasad, future first President of the Indian Union – to postpone a reform which, for more than one person, was seen as proof that ''a conspiracy is being hatched to disrupt the Hindu Society''.[23] If their delaying tactics and repetitions led to the lengthening of debates on the taking into consideration of the Bill, once the vote was taken, they were beaten on the first four clauses which, in principle, they disliked the most. After the vote of Clause 2, the President of the session believed he could consider that ''the major contentious clause is over'' (Ambedkar, 14 (2), p. 1186). On that same day however, that is 21 September 1951, the Pandit Thakur Das Bhargava, one of the leaders of the opposition, considered for his part that it was Clause 4 that was ''the most contentious clause in the whole Bill'' (*id*., 14 (2), p. 1250). From that point of view, the most traditionalist opponents lost the battle, even though they had succeeded in gaining time and in pushing Ambedkar out of government (the latter being anything but negligible for them).

The two essential points, contained in the first four clauses, could be summarised in one sentence: from now on, the *Hindu Law* no longer rules. The Brahmanical treaties thus cease to be the foundation of personal and property law in modern independent India, and so do the various customs, no matter how diverse they be, that these treaties give priority to over any other written rule. This is what resulted from the definitions contained in Clauses 2 and 3 and from the principle of prevalence of the Code, as set out in Clause 4.[24]

[23] Babu Ramnarayan Singh, 28 February 1949 (Ambedkar, 14 (1), p. 388).

[24] This Clause 4 does not abolish any specific prior law but refers to the entirety of anything that may have prevailed before the Code: ''Save as otherwise expressly provided in this Code, any text, rule or interpretation of Hindu law, or any custom or usage or any other law in force immediately prior to the commencement of this Code shall cease to have effect as respect any of the matters dealt with in this Code'' (Ambedkar, 14 (1), p. 55). Some exceptions were to be eventually negotiated and conceded but for the rest, and all the rest, meaning everything that is religiously sanctioned, it was abolished. As concerns the prior legislation (namely that dating from the British colonial period), annexes set out the provisions that were maintained, taken up or amended in the Code, and those that were rejected: subject to some exceptions, any *ad hoc* law which concerns a community or a particular religion not called upon to become generalised.

Ambedkar's will is unaffected by the diehard opposition. Hence, in response to Shri Jhunjhunwala who suggested an outright amendment of draft Clause 4 as follows:

> Provided however, that this Code shall not override any text, rule or interpretation of Hindu Law, or any custom or usage or any other law in force, immediately prior to the commencement of this Code which has the sanction of Hindu religion or any other religion to the followers of which religion or religions this Code will apply: Provided further that this Code shall not override such existing text, rule or interpretation of Hindu Law, or any custom or usage or any other law in force which has sanction of morality behind it. (*Id*., 14 (2), p. 1234)[25]

Ambedkar never ceases to reiterate that Clause 4 clearly seeks to legally disqualify –''eradicate'', as Portalis would say – all customs (but for some specific and identified exceptions):

> There is no custom which this Bill proposes to recognise. [...] On that point there ought to be no doubt. There is not the slightest intention to allow custom to override in a general way the provisions of this Code. (*Id*., 14 (2), p. 1202)

Ambedkar's aggressiveness against everything belonging to the customary field is only one aspect of his efforts to ruin the *Hindu Social Order* or *Brahmanical Social Order*. It is his experience as an Untouchable which inspired his entire life and led to his public burning of the *Laws of Manu* on 26 December 1927. This was justified by the fact that he considered, rightly, that these Brahmanical texts, which are the *dharmashastras*, gave official recognition to the Untouchable's condition. His unfailing opposition to ''customs'' and ''usage'' will be legitimised, if there was such a need, by the mediocre response that Dr P. C. Mitra gave him on 6 September 1954 in the *Rajya Sabha* (the higher Chamber).

On that day (and this was one of his last interventions in the political arena), Ambedkar had challenged the silence of the *Commissioner for the Scheduled Castes and the Scheduled Tribes*' report on the issues of tyranny and attacks perpetuated in villages by the ''Caste Hindus'' against Untouchables (S.C.) (of which he gave a few examples). He repeats the statement often made elsewhere, that

> Untouchability ... is a kind of mental disease of the Hindus ... Every Hindu believes that to observe untouchability is the right thing ... All must realise that

[25] This Bihar elected member had, before that day, insisted a number of times that the Code should apply ''to all citizens of India [...] irrespective of their belonging to or professing any religion'' (Ambedkar, 14 (2), pp. 798, 825, 829). He had already asked that the different *varnas'* customs be maintained – but he was told that customs were not linked to the *varnas* but to the caste, the family, the religion (*id*., 14 (2), p. 1209). One can see how opponents piled up their arguments, even when they were contradictory.

> untouchability is founded on religion . . . For thousands of years, by the teaching of this dirty law [of Manu] they [the Hindus] have got inc[ul]cated in their mind the doctrine that untouchability is a most sacred thing. (*Id.*, 15, p. 909)

At this stage, Dr P. C. Mitra interrupts him by stating that ''Untouchability is only a custom and usage'' (*id.*, 15, p. 910).

What can one add to this? The Brahmanical culture has spoken . . . the Brahmins and their devotees fought for the defence of ''customs'' and ''usages'' for over four years at the *Lok Sabha*. As will be detailed below, they attacked on different fronts.

5. *To defend custom . . . while quoting written tradition (smriti)*

By now, it is clear that this is essential, but one needs to understand what lies behind this sympathetic bond to each and every one's good old traditions and practices.

On the surface, it could seem surprising that this is not, first and foremost, linked to a need to reaffirm the absolute priority of the ''sacred'' texts, the Veda and the *dharmashastras*. The explanation can, however, be found in Robert Lingat's stupendous (though still not re-edited) book, *Les sources du droit dans le système traditionnel de l'Inde*. With a rare intelligence, Lingat recalls the essential role of customs (*acara*, *sadacara*, *caritra*,[26] showing the original differences between these terms) as a source of law and, for more than one school, as an ''interpretative criteria'' of the *smriti* rules (Lingat 1967, p. 191). He thus recalls that one of the verses of the *Laws of Manu* (I, 108, ''The rule of conduct, the highest law''[27]), ''served as the basis for the Anglo-Indian jurisprudence which hallowed the primacy of custom over written law'' (*ibid.*, p. 220).[28]

Although using different quotations, all coherent, a number of opponents refer to the *smriti*, in order to assert that custom is supreme.[29] In this way, everything remains in the Brahmanical universe of sacred texts.

[26] The definition provided is Katyayana's: ''Everything that a person practises, be it conform or not to the dharma, for the [sole] reason that it is a constant usage of the country'' (Lingat 1967, p. 197).

[27] Doniger 1991, p. 14.

[28] In footnote 4, extract of an 1868 case: ''Under the Hindu System of Law, clear proof of usage will outweigh the written text of the Law.''

[29] The Pandit Lakshmi Kanta Maitra is the first to quote the *smriti*, on 1 March 1949, although not without having first mentioned the extract from the 1868 case, quoted in the footnote above. All his auditors, Brahmins and/or lawyers, are probably familiar with it, but he does not provide its reference (Ambedkar, 14 (1), p. 424). Others will follow, with varying quotes (*id.*, 14 (1), pp. 601, 612, 651; *id.*, 14 (2), pp. 1264, 1270 etc.).

Each will thus defend his own traditions – first as concerns the forms of marriage, the modes of transmission of property, the unique importance of the son – and compare them to his neighbour's. By so doing, all these Brahmins perpetuate the tradition of the authors of the *dharma* treaties, of Baudhayana who ''enumerates the absurd practices specific to the Brahmins of the North or of the South'' but without judging anyone in the name of the *smriti*: ''he is of the view that the Brahmin of the North or of the South who follows the customs of his country cannot be blamed, says he, for local usage deserves respect'' (Lingat 1967, pp. 218-219). The tone is sensibly different in the mid-20th century Assembly. Here, if each defends his customs, he is far from honestly respecting those of others, whether Brahmanical or not. In fact, there is a rather general incomprehension of each others' practices and customs and the Northern Indians' abhorrence for Southern Indians is hardly disguised.[30]

Pattabhi Sitaramayya, a very pro-Gandhi member of Congress, when protesting against the possibility which could be given to a very young woman to choose her husband by herself, started by recounting an anecdote: ''The other day I asked my wife's sister's husband's sister . . .'', but had to interrupt himself in order to explain ''No, that is not a distant relationship, you know, my wife's sister's husband is my brother-in-law. . .''.[31] Further on, though, when defending his colleague from Malabar who was demanding the conservation of the *marumakkattayam* system, he explains to the Assembly that it is a ''beautiful system'' but that ''For three years you may study it and still you will never understand its secret'' (Ambedkar, 14 (1), pp. 678-679).

The Punjabi Pandit, Thakur Das Bhargava, was hostile not to divorce itself but to the forms suggested as well as to the 1869 Act, which he believed was made for Christians ''who were of the same caste as the then rulers'' and highlighted the differences between North and South; marriages between a man and his mother's brother's daughter (matrilateral cross cousin) were frequent in certain areas of Bombay and Madras.[32]

[30] The deputy of the *Central Provinces and Berar*, the Brahmin P. S. Deshmukh, soon gave an example of it. On 29 August 1947, he called out to a representative of the Madras Presidency: ''Mr Alladi Krishnamaswami Ayyar or Ayyangar – I am afraid I am not able to pronounce his long name correctly, but whether Ayyar or Ayyangar probably it makes no difference!'' (Constituent Assembly Debates (CAD), V, p. 302). Any Indian, however, knows that these two names are those of two major Tamil Brahmin castes, one shivaite, the other vishnuite.

[31] For a social anthropologist who is familiar with Dravidian India, this specific kind of brother-in-law is even more than that: he is a ''co-son-in-law'', a classificatory brother. On this technical question, see Herrenschmidt 2009.

[32] This will be mentioned a number of times – for example, Ambedkar, 14 (2), p. 1220.

In Punjab, however, it is ''highly incestuous'' and men who did this may be killed (*id*., 14 (1), p. 341).[33] He did not really understand what two women were asking for, concerning a particular form of marriage, and asked his colleague Sri L. Krishnaswami Bharati, whom he believed to come from the same region. The latter, however, exclaimed ''Luckily I do not come from that part. I come from Tamilnad and they come from Malabar'' (*id*., 14 (1), p. 351). A deputy from Madras, also from Malabar, intervened to protest against the envisaged general prohibition of marriages between *sapinda*[34] people, which would make marriages between cross cousins impossible (*id*., 14 (1), p. 621).

The same Pandit, still, is totally hostile to the possibility of a woman inheriting both from her father and her husband. The son is and must remain the sole heir and one may even, notably through adoption, customarily designate ''an appointed heir'' (*id*., 14 (2), p. 1226).[35] In Punjab, not only is village exogamy the rule (*id*., 14 (1), p. 345), but it is in fact out of the question for a father to go to his son-in-law's house once he has given him his daughter. Father and mother should ''not even want to touch water from the house of the daughter''. (''Why?'' asked a Tamil Brahmin – ''You cannot understand this''). There are parents who will not even go the village where their married daughter lives (*id*., 14 (1), pp. 349-350). Hence, if she were to be widowed and without children, would her parents inherit from her?

He also defended the levirate practice (remarriage between the youngest brother and his eldest brother's widow), simple and frequent in Punjab (*id*., 14 (2), p. 1251). Although this made a number of

[33] S. P. Mookerjee read the letter sent to him by Telugus, recalling that a marriage between a man and his sister's daughter is a very frequent practice in Andhra, even amongst Brahmins, and that the proposed degrees of prohibition would make it impossible (Ambedkar, 14 (2), p. 996). A Sikh from Punjab asked, in the same way, that an exception be made for practices that owe nothing to the *dharmashastras* and which were admitted by the British, in Rustomji's 1872, *Customary Law of the Punjab* (*id*., 14 (2), pp. 1094-1095; also mentioned pp. 853, 872, 892, 1101, 1258).

[34] According to the Brahmanical rule, are considered as *sa-pinda* two individuals who, in their domestic cults, make an offering to the same ancestor (and thus have, in their close ascendance, a parent in common). *The Hindu Marriage Act, 1955*, prohibited marriages between individuals who have a *sapinda* relationship ''unless the custom or usage governing each of them permits a marriage between the two''. The drafting is the same for marriages between uncle and niece (Clause 5, IV and V).

[35] Ambedkar had already commented on 24 February 1949: ''Adoption is purely a religious affair. The getting of property by the adopted son is a secondary matter'' (Ambedkar, 14 (1), p. 272). He quoted a decision of the Vice-Roy's *Privy Council*. He also recalled that according to the latter, ''custom will override law'' and, maliciously, that he regretted this as ''our own Smritis'' had recognised a daughter's right to one-quarter of the paternal inheritance (*id*., 14 (1), p. 281).

representatives laugh, he reminded them, the next day, that the *Ramayana* and the *shastras* accept this practice (*id.*, 14 (2), p. 1253). He did, however, admit that, infanticide of young girls, which is a frequent practice of Rajputs, is ''unnecessarily wrong'' (*id.*, 14 (1), p. 345).[36]

Custom is thus sacred, since the *smriti* affirms its absolute prevalence. If, as we saw, the British acknowledged this prevalence, what was the problem?

6. *The British petrified customs and texts*

For the opponents to the Code, this was a true calamity. For them, the British had never understood the flexibility and adaptability of the *smriti* throughout time; the British believed, that the *dharma* treaties were rigid, fixed for eternity. On this issue, the fiercest opponents, those who accepted the reform on the condition that it be postponed, meet those who defend the Code[37] and intend to prove that it is not, in any manner, contrary to the Hindu ''religion'': Hindu law and the texts of the *smriti* had always been able to adapt and evolve, until the British came along.

It was Pattabhi Sitaramayya who, as early as 9 April 1948, right after Ambedkar had asked for the bill to be entrusted to a *Select Committee*, spoke up (Ambedkar, 14 (1), pp. 12-22).[38] The British, out

[36] This was in response to an intervention by Renuka Rai, a fervent partisan of this *Hindu Code Bill*: ''Daughters should not be born in this country.''

[37] Shrimati [Mrs] Sucheta Kripalani, a Gandhian and future Chief Minister of Uttar Pradesh (1963-1967), supported Ambedkar and the proposed reforms. She did not see why the religion was endangered: ''Continuous adaptability has been the strength and essence of Hinduism'' (Ambedkar, 14 (1), p. 305). Sita Ram S. Jajoo, who spoke in the name of the Marwari youth who supported the *Hindu Code Bill*, did not see why, after 137 or 138 *smritis*, there should not be a new one, mixing the old and the new. He is amongst those who, very explicitly, considered that, having obtained political independence, it was also necessary to change the social order (*id.*, 14 (1), p. 627). Dr [Justice] Bakshi Tek Chand noted that ''each time when the structure of society changed a smritikar appeared'' to adapt the law to modern times, that this was abundantly perpetuated by the British in order to correct the flaws of *Hindu Law*, starting with the abolition of the *sati* under the influence of Ram Mohan Roy, and that, consequently, the Assembly clearly had the power to continue reforming Hindu religion (*id.*, 14 (1), p. 708). He was, however, amongst those who, while supporting this law, nevertheless believed that it was not well designed and still needed to be referred to public opinion or to the *Select Committee* (*id.*, 14 (1), p. 495).

[38] His rhetoric is, from the start, that of the polite and skilful opponents (not that many are, far from it). After having raised criticisms and reserves, he concluded by stating ''I welcome every aspect of this Bill'', which he in fact absolutely did not want.

of political prudence, refused to touch the sensitive socio-religious structure of this country. The High Courts judge therefore merely registered the centuries-old customs but never what could have been a change or an improvement: ''Thus custom became petrified and when custom became petrified, progress became impeded altogether.'' The missionaries themselves who began by encouraging young Hindus to rid themselves of their orthodoxy, ended up worrying about the critical and progressive effects of this British education, and even *Brahmoism* appeared suspect to them; in turn, they became conservatives and protected the old customs.[39]

This argument was to be reused indefinitely. Shri Krishna Chandra Sharma was more specific and condescending than the others: ''What is Hindu Law? Decisions of Englishmen given with the help of or at the suggestion of demoralised creatures'', namely the *pandits* who accepted to work with and for them, ''not representative of Hindus'' (*id.*, 14 (1), p. 615).[40] The *pandit* Lakshmi Kanta Maitra had preceded him:

> The Ancient Hindu law, when the British came here, was interpreted with the help of Indian Pandits. They used to call them Judge Pandits who ransacked all the *Smritis* and *Dharma Shastras* and interpreted the law. (*Id.*, 14 (1), pp. 409-410)

He praised this *Hindu Law,* which had ''the oldest pedigree of all the known systems of jurisprudence in the world''. Having been interrupted by an Untouchable, an elected representative of West Bengal, who protested that ''It is unjust'', the *pandit* answered him, condescendingly, ''Whether the system is good or bad, it is for the society to judge; it is not for disappointed or disgruntled persons to judge''. He raised as proof of this its capacity to survive throughout the centuries, a point that was often ridiculed by Ambedkar, here or elsewhere (*id.*, 14 (1), pp. 409-410).

[39] Pattabhi Sitaramayya (1888-1959) later gave some elements of his itinerary: his studying amongst Christians, to whom he owes his reformer mindset; the substantial influence, after this, of the Brahmo reformers; his then very unreligious attitude and his reverting to a certain form of Hinduism revisited by Gandhi, all of which can be found in his 1938 book, *The Hindu Home Rediscovered*. He summed up his past: ''As I entered life as a heretic, brought up in Christian traditions and western heresies, I began to discover in every festival, in every ceremony and every religious observance of Hindu society there was something deeply religious, uplifting, inspiring and ennobling'' (Ambedkar, 14 (1), p. 671).

[40] He gave historical precisions. The institution of *pandits* ''as official referees of the courts'' was abolished in 1868; then there was the ''case law'' of the *Privy Council* and the *High Courts*.

According to them, what the British and their creatures had denatured was a magnificently flexible system, capable of adapting to all changes in society; so much so that the multiplicity of *smritis* (137, maybe 138), far from reflecting the irreducible contradictions of Brahmanical society (since it is this society which is concerned), on the contrary illustrate its amazing capacity to adapt to changes.[41] Firstly, they all rest on the *Veda*; they are merely comments and do not ''create'' law. In this respect, as the *dharma* treaties themselves indicate, and as quoted by the Pandit Thakur Das Bhargava (without specific reference): ''*Sruti* says something and *Smriti* another. There is no sage whose word can be taken as final. The secret of Dharma (duty) is very deep. Follow the path traversed by the great'' (*id.*, 14 (2), p. 1259). Hence, Kameshwar Singh insists, in terms that Indian specialists and sociologists would not denounce, that ''Unity in diversity is the chief characteristic of the Hindu life and religion and we should not take the seeming diversity as an evil which must be instantaneously removed'' (*id.*, 14 (1), p. 665). But, he added, the authors of these treaties only made the necessary changes when they had ''the popular support'' since ''the bulk of the people had abundant faith in their learning, in their foresight, in their purity of purpose and above all in their conduct''. It is obvious, he went on, that

> the diversity perceptible in different parts of the country goes a great way in establishing the fact that popular acceptance and not imposition from any central political authority has been the sanction behind the personal law of the Hindu. (*Id.*, 14 (1), p. 665)[42]

Clearly, none of this – neither the wisdom of the legislators nor popular support – was to be found there. This explains why, as demanded by a Southern Brahmin, only a *Pandit Parishad* (*i.e.* an assembly of *pandits*) could be entitled to reform the *Hindu Law* (*id.*, 14 (1), p. 708).

Ambedkar did not share this view on the multiplicity of *smritis*. On 24 February 1949, he mocked the Brahmins who had managed to write 137 of them despite probably having better things to do

[41] Several interventions: 583, 612, 708, 1050.

[42] This is indeed the same argument as that raised by Portalis, quoted above: respecting customs is a guarantee against the arbitrariness of a centralised power. The Brahmanical conservatism is allied here to Gandhian ''anarchism'', in a common refusal of a strong centralised power, a necessary condition of a modern State that Nehru, like Ambedkar, wanted to build.

(*id.*, 14 (1), p. 280).[43] Seth Govind Das[44] willingly agreed that the *rishis*, authors of these *Smritis*, had written many different things and that it is not prohibited to make reforms but later, and such reforms should not be made by ''reformers'' influenced by a Western education and who do not care about our heritage (*id.*, 14 (1), pp. 297-298). The reference to the *smritis* was appreciated. The next day, V. Kamath came to sincerely congratulate Ambedkar for having written the 138th *smriti*.[45] But on the following 2 April, the Muslim Bengali deputy, Naziruddin Ahmad, considered that nothing in this ''138th *smriti*'' was good. The Pandit Lakshmi Kanta Maitreya straight away agreed: ''It is *vismriti*!'' (*id.*, 14 (1), p. 546).[46]

At the end of the year, on 12 December, the Pandit Mukut Bihari Lal Bhargava started the most lyrical and Gandhian of his verses, singing ''the supreme beauty of Hindu Law'' (*id.*, 14 (1), p. 583). It is this law that enabled India to go through centuries, with its customs and usages.[47] Of course, ''The India of ours does not reside in urban

[43] That day, Ambedkar was in a more combative mood than usual. He recalled that the '''regenerated' classes'' (*i.e.* the *dvija*) constituted at best 10 % of Hindus and that the *Shudras*, the remaining 90 % of the population, had customary divorce; the law of 10 % of the population should not be imposed on the whole of society. This is, however, what the defenders of the *Hindu Law* would like to do, as with the *Smritis*, which we know were only written for the twice-born. In this respect, he went on, *Naradasmriti* and *Parasharasmriti* recognise that women have the right to divorce. One can read in the minutes of the session: ''I shall read to you some extracts from your shastras to show. (A honourable member: ''Your Shastras''.) Yes, because I belong to the other caste'' (Ambedkar, 14 (1), p. 270).

[44] ''The champion of the cow'', as Shrimati Hamsa Mehta had called him on the preceding 22 November (Ambedkar, 13, p. 1181). He spoke in Hindi.

[45] Kamath suggested that it could be called ''Bhim *Smriti*'' – by reference to the name of Ambedkar, Bhimrao, which is also the name of the hero of the *Mahabharata*, or, even better, ''Bhim Narasimha *Smriti*'', as a tribute to Sir B. N[arasimha] Rau, President of the *Hindu Law Committee* of 1941 (Ambedkar, 14 (1), p. 372). It is true that this discrete man played a fundamental role in the reforms and the Constituent.

[46] ''*Vi*'', Sanskrit pre-verb, ''bad''. One should bear in mind that the Constituent Assembly, at the end of its work in November 1949, had nicknamed Ambedkar ''the new Manu''. This Naziruddin Ahmad was one of the most radical opponents of the *Hindu Code Bill* and probably one of the most gifted when it came to obstructing and delaying tactics. Hence, on 9 April 1948, he assured the Assembly, with magnificent hypocrisy, that ''Personally I would fully support the Bill''; considering, however, that the Bengali opinion ''is clearly against the Bill'', he was to oppose it. He quoted with equal ease both the *dharma* treaties and the *Quran*. Later, on 7 February 1951, a Hindu representative having mentioned that the non-Hindus could not find any interest in their discussion, Ambedkar recalled that this was not the case of Naziruddin Ahmad. This was an exception, he was told in response, ''He only reflects the opinion of his clients'' (Ambedkar, 14 (2), p. 915).

[47] If the Pandit Mukut Bihari Lal Bhargava limited himself to recalling that ''the Rig Veda is the oldest book in the world'' and that the *smritis* are based on the Vedas (Ambedkar, 14 (1), p. 550), Pattabhi Sitaramayya, for his part, was more generous and did not hesitate to recall that ''our society and ancient civilisation'' is, as generally admitted, 5,000 years old, if not 13,000 or maybe even 30,000, ''because there are all these three versions about the age of the Mahabharata and the Vedas'' (*id.*, 14 (1), p. 669).

towns like Allahabad and Delhi. The real India lives in the five lakhs [500,000] of villages'' and its villagers, with all their strength, oppose that proposed Code, considered as unacceptable for any Hindu, and which can only satisfy ''a few disgruntled persons'' (*id.*, 14 (1), p. 584). This apology of the village living harmoniously under the Brahmin's law is a sensitive issue: that village was considered as the malediction of the Untouchables and hated by Ambedkar who described it as ''a sink of localism, a den of ignorance, narrow-mindedness and communalism'' (*id.*, 13, p. 62, on 4 November 1948, at the Assembly).

Lastly, and still on this issue of the admirable longevity of Hinduism which proves its unique truth, Ambedkar never ceased to claim – as early as 1918 in response to Bertrand Russell (*id.*, 14 (1), p. 487)[48] – that ''There are many modes of survival and not all are equally commendable''.[49] Again, on 20 September 1951, he asked ''Is survival enough or whether it is necessary for us to consider whether the plane on which we survived is more important than the mere survival itself?'' (*id.*, 14 (2), p. 1159).

It will be clear by now that this is the heart of the opponents' argumentation. They must not be confused with the truly reactionary rigid traditionalists, who demonstrated outside the Assembly in the defence of written tradition. The aim here is to reasonably defend ancestral customs and usages, about which the wise tradition of the authors of the *dharma* treaties say that they prevail over any general principle set down by a written text. In substance, we will not object to reviewing these customs, since our long history proves that legislators have always known how to adapt to society's new conditions. But we will not reform it now, on the basis of a Code which we deem completely insufficient and which endangers our religion and the traditional harmony of our society.

7. *Why reform only the Hindu community?*

In order to show that they also had a sincere will to reform, the opponents never ceased to question why they were being proposed

[48] Herrenschmidt 2004, p. 43.

[49] In 1936 too, at Sarvepalli Radhakrishnan, Tamil Brahmin (1888-1975), future second President of the Indian Union (1962-1967), great national and moral historical figure (Ambedkar, 17 (2), p. 19). *Annihilation of Caste*, contemporary to this declaration, uses the same ''dialogue'' (*id.*, 1, p. 66). The same counter argument can also be found in *What Congress and Gandhi Have done to the Untouchables* (*id.*, 9, p. 286).

a law that only concerned one community – the Hindu community. Why not make this Code a Uniform one, as provided for in Article 44 of the Constitution? Also, and this was a ''formal'' argument, though of a strong moral value: our election system does not authorise us to deeply reform Indian society; let us leave the next legislature to do that. The opponents, as mentioned above, had the explicit moral support of the President of the Assembly, Rajendra Prasad, about whom a deputy said that ''he gave the warning that the Constituent Assembly constituted as it is to-day, ought not to discuss a legislative measure of this nature'' (Ambedkar, 14 (1), p. 431). In fact, the enormous work undertaken in five years (1947-1951) was carried out by about three hundred deputies of this Constituent (and legislative) Assembly. Sometimes, less than one hundred of them were present – as for example on 22 September 1951, to vote the end of the discussion on Clause 4 (*id*., 14 (2), p. 1304). One should never forget that all this was done in the midst of the turbulence and dramas of Independence and Partition.

These members of the Constituent Assembly had been elected by members of the lower chambers (only) of the Provincial Legislative Assemblies, for their part divided into three colleges (Muslims, Sikhs and ''general''), elected in proportion to the population – the Indian States also had their representatives (Basu 1999, p. 18). The Pandit Lakshmi Kanta Maitra gave his own example: elected from Bengal, he would not have been there but for the vote of four deputies of the Bengali Provincial Assembly (elected in 1946), which certainly did not mandate him, said he, to allow them to divorce or to ''scrap up the law of inheritance'' (as it results from the *Mitakshara* or the *Dayabhaga*). He was elected only to lead India to independence, like all his colleagues. He was thus not empowered (Ambedkar, 14 (1), pp. 431, 425).

In conjunction with this question of the legitimacy of the constituents – a question that was considered as relevant only by the opponents – came another, of importance for any representative democracy, in particular one elected by indirect suffrage: do the people's representatives have the legitimacy to transform society according to what they see fit and necessary, or is their mandate limited to acting in accordance with their electorate's desires, feelings and state of mind?

The statements made about the *Indian Independence Act* at the beginning of this article were enough for Ambedkar to refute the claims of lack of empowerment. He was vigorously supported by

N. V. Gadgil, who had been hearing this same antiphony for fifteen years, each time a social reform was proposed (*id.*, 14 (1), p. 434). On 18 September 1951, he perfectly expressed what, within the nationalist militants and Party of the Congress, had been for sixty-five years an obvious fact that marked the limit of their will to modernise and "regenerate" India: "You praise us and praise yourselves for having done something great in the political sphere. Why are you afraid of achieving something in the social field?" (*id.*, 14 (2), p. 1038).[50]

The opponents suddenly discovered how interesting the laws previously adopted under British rule could be: they could be of interest for a Uniform Civil Code and would thus avoid being "community-specific". The main diversion was made by the Pandit Thakur Das Bhargava, as early as 26 February 1948 when he asked permission to present a project, "a Bill to provide that marriages between Hindus, Sikhs, Jains and their different castes and sub-castes are valid" (*id.*, 14 (1), p. 4; see, pp. 229 *sq.*, 11 February 1949). He thus intervened after Ambedkar's request (17 November 1947) and before the H.C.B. was sent to a *Select Committee* (9 April). On 11 February 1949, he presented a draft which only concerned "Hindus" but, of course, indicated that he wanted "a civil code for the whole of India" (*id.*, 14 (1), p. 352). Six days later, the discussions "to take into consideration" a "Bill to amend and codify certain branches of the Hindu Law" (meaning, the H.C.B.) began. The Pandit's law was voted before the end of 1949 with a unanimous vote, but for Ambedkar's voice, as he had denounced this delaying tactic, on the grounds that it was only "a part of the Hindu Code which I am

[50] N. V. Gadgil (1896-1966) was Minister of Works, Production and Supply in Nehru's government. This Brahmin from Poona, alongside the Untouchables since the 1929 *satyagraha* for the opening of the Parvati temple (Keer 1981, p. 135), supports Ambedkar without fail, to the point that (says he on this very same 18 September 1951): "my accusation against my friend and colleague Dr Ambedkar is that he is growing old and old, he is growing less and less enthusiastic about social reform. Ten years ago, I think his language would have been more vitriolic; today he is the very soul of moderation" (Ambedkar, 14 (2), p. 1033). This was one week from the last session dedicated to the *Hindu Code Bill*. It was on 27 September that Ambedkar sent Nehru his letter of resignation. This Brahmin knew, like the others, how to quote Manu and other *Shastris*. Hence, he recalled this definition of the *sanatana dharma*: "The eternal is always new *(sanâtanah nitya nûtanah)*" (*id.*, 14 (2), p. 1039). During this same session, when asked to prove that he had thrown away his sacred thread (*jeneu*), he opened his shirt. An opponent immediately called out to the President of the session: "Sir, on a point of order. Is it parliamentary for the Hon. Minister to show the House his tummy?" (*id.*, 14 (2), p. 1038; referred to p. 1209). Gadgil indicated that it was while he was in prison, during the movement for independence, that he had realised that wearing the sacred thread was not enough to make him a good Brahmin and that he had thus thrown it away. Shri Jhunjhunwala mocked him: he who pretends to be an "outcast" and thinks he is a *pandit* (*id.*, 14 (2), p. 1298).

sponsoring'' and he refused to ''proceed piece-meal with the legislation'' (*id.*, 14 (1), p. 238). This was, however, how it was ultimately undertaken, on Nehru's initiative.

As mentioned earlier, there was one major reason for reforming, from a civil point of view, only the Hindu community. This was the same reason that had held back the British and which led to there still not being, in 2009, in the independent Indian Union, a uniform right applicable to persons and things: the political prudence required from any power as concerns the Muslim community.

What Muslims and Hindus have in common, which makes any reform of personal law very delicate, is their certainty that this law is religiously founded and thus cannot be reformed by human will. In this respect, Muslims are, probably much more than the Hindus, convinced of the sacred character of their personal law: the *Quran* is, amongst all texts, far more ''sacred'' (if one may say) than the *dharma* treaties, which is why the Hindus of the Constituent managed to behave the way they did.

One reference will be sufficient, that made by Khwaja Inayat [sometimes Inait in the text] Ullah, elected from Bihar. As a Muslim, he did not want to interfere in the debates which concerned Hindus only (*id.*, 14 (2), p. 1146). However, when the amendments seemed to want to extend to other communities (Muslims, Christians, etc.), he intervened (*id.*, 14 (1), p. 828; *id.*, 14 (2), p. 1127). When a deputy mentioned the rules for adoption in Punjab, he dryly cut in saying that ''In Muslim law there is no adoption'' (*id.*, 14 (1), p. 1228), to which the first deputy replied that ''Almost every Punjabi Muslim'' practises *customary* adoption. This Khwaja Inayat Ullah has a rigid literal approach, in particular considering that if he is ''an Indian and a Muslim also'' (*id.*, 14 (1), p. 1146), or even, according to some, ''positively a political Hindu'', he was and ''shall continue to be a Muslim by religion'' (*id.*, 14 (1), p. 1148). Interestingly, he is a convert, of Brahmin ancestors and, said he with pride, ''Brahmin blood is flowing in my veins – that pure blood which has not been mixed up so far'' (*id.*, 14 (1), p. 1148). That day, on 20 September 1951, he abandoned his position as observer and defended the ''secularism'' which, as the head of the *Hindu Mahasabha*, Syam Prasad Mookerjee, said, is not a ''disease'' but a ''cure''. The boundary of his secularist reformism was quickly reached, however, in his response to N. V. Gadgil who, the day before, had said that it was possible to change Hindu law since it had constantly been changed, and that ''in the days to come the Muslims may be included''. He warned him:

> I want to tell him that Muslim law has neither been changed for the last 1350 years, nor shall it be changed in the days to come, since Muslims believe that their laws for marriage and division of property are not made by them but made by God and as they appear in the Holy Quran so nobody on the surface of this earth has the right to change them. (*Id.*, 14 (2), p. 1147)

Once more, what can one add to this?

Whether they were being hypocritical or sincere, everyone very well knew that there was no chance, then, of achieving this Uniform Civil Code. Shrimati Jayashri was amongst the clearest on this when she stated on 18 September 1951 that

> With regard to the argument as to why we should not make this an ideal and universal Code which can be applied to Muslims, Parsees and Christians, I would like to say that we must first find out whether Members are prepared to go so far. (*Id.*, 14 (2), p. 1024)

Despite this, during the discussion and vote of the famous Article 44 (then Clause 35), on 23 November 1948 (*id.*, 13, p. 361),[51] Ambedkar, in response to doubts expressed by a Muslim as to whether one Uniform Civil Code for such a diverse country was possible and well-founded, answered very clearly that "We have in this country a uniform code of laws covering almost every aspect of human relationship", namely a *Criminal Code*, *Penal Code*, *Criminal Procedure Code*, as well as a *Law of Transfer of Property* and many other laws, which prove that "this country has practically a Civil Code, uniform in its content and applicable to the whole of the country". He then added these fundamental sentences:

> The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late to ask the question whether we could do it. As I say, we have already done it.

The tone is clear and combative. Ambedkar knew very well that the last bastion to be brought down was personal law. However, he also knew that in India, religions are not amongst those which "have no legal system at all, which are just pure matters of creed", but are religions "which have as their part a legal system, which you cannot sever from those religions" (*id.*, 14 (2), p. 887). He reverted to this later:

> In our country, fortunately or unfortunately, the profession of a particular religion carries with it the personal law of the person. You cannot get away from

[51] *Constituent Assembly Debates* (CAD), VII, 23 November 1948, p. 540.

> that position. Similarly, when you say to a Muslim that under the Constitution he is free to profess and practise his religion, we are practically giving him the right to practise his personal law. (*Id.*, 14 (2), p. 1167)[52]

This is why the Constitution allows us ''to treat different communities differently''. But if Article 25 protects them, it also provides that

> the State has retained all along in article 25 the right to interfere in the personal law of any community in this country.[53] [. . .] Let no community be in a state of mind that they are immune from the sovereign authority of this Parliament. (*Id.*, 14 (2), p. 1168)

Hence, if nothing general was to be done now, it would be one day or another. As for the time being, however, one had to tackle Hinduism. ''Unifying'' it is a first step towards this Uniform Civil Code and, this is important for Ambedkar, a progress towards equality of women and men's rights.[54]

[52] This is more general and exact than the commentary on the sentence previously quoted, which only stated: ''The peculiarity about the Hindu religion, as I understand it, is this, that it is the one religion which has got a legal framework integrally associated with it'' (Ambedkar, 14 (2), p. 887).

[53] Here, Ambedkar is making an extensive interpretation of Article 25 which (1) guarantees each person ''freedom of conscience and the right freely to profess, practise and propagate religion'', and (2) provides that nothing must prevent the State from making law ''(a) regulating any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing with social welfare and reform on the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus''. His reading of this article is the consequence of his comments on the intertwining of personal law and religion, and – as the timing of his intervention illustrates this clearly – of his will to radically reform positive law (the term *secular* in Article 25 shows this) outside the scope of any church's authority, to affirm the power of the State against that of the Church. Not a single deputy, then, intervened to contest his interpretation.

[54] He repeated more than once, outside of Parliament, that this is a good step towards the Civil Code (notably on 11 January 1950, at the Siddhartha College (Keer 1981, p. 418; Ambedkar, 17 (3), p. 396) and he sought the support of women's and feminist associations as often as possible (for example, on 24 November 1951, in Bombay (*id.*, 17 (3), p. 455); 25 December 1951, in Kolhapur (*id.*, 17 (3), p. 488). On 26 December 1950, at a meeting of the *Scheduled Castes Federation* in Belgaum, out of spirit, he bitterly noted that ''none of the prominent women leaders were really interested in the social progress of our women'' (*id.*, 17 (3), p. 411). Reading the debates relating to the H.C.B. does not, however, confirm this negative judgement. On the contrary, there were very few women who did not support him actively. In fact, one should note how clear they were in their support of this Code and how they responded to sexist and defaming speeches – hence, on 13 December 1949, Shrimati Kamala Chaudhari, a Gandhian, congratulated Ambedkar and added that ''Obscene and dirty things are said against the women's community'' (*id.*, 14 (1), p. 658). To give but two examples of such remarkable women, there was the Begum Aizaz Rasul, who supported every aspect of the H.C.B., be it on marriage, divorce, inheritance or adoption (*id.*, 14 (1), p. 34), and Shrimati Hamsa Mehta, who declared on 9 April 1948 that ''This Bill to codify the Hindu Law is a revolutionary Bill'' (*id.*, 14 (1), p. 34). In fact, this small group of women elected at the Constituent Assembly is quite fascinating, as is for example Ammu Swaminathan, mother of Lakshmi S. (wife of Prem Seghal), who led the *Rani of Jhansi Regiment* in the *Indian National Army* of Subash Chandra Bose. Some of them have written their biographies.

Ambedkar's goal is not only that of legal unification. He obviously aimed, here as elsewhere, at the destruction of the *Hindu* or *Brahmanical Social Order*[55] and the whole attitude of the opposition proved, in his eyes, the worthiness of his quest. It is indeed the Hindu community that has an urgent need for reform and one cannot apply to the Muslims (who have not been consulted) the ''Hindu Code Bill which has been professedly, deliberately, calculatedly intended to apply to what is called the Hindu community'' (*id.*, 14 (2), p. 1169). A *Committee* had gone around the Provinces and the States, informing, consulting and discussing solely with the Hindus and the Sikhs. It is true, ''the Hindu community needed the reform so badly – *it was a slum clearance*'' (*id.* highlighted here to indicate that Ambedkar repeated this phrase twice). This is precisely why, for Ambedkar, it was necessary to ''amend and codify'' ''certain branches of the Hindu Law''. For Nehru this was not a priority, and he clearly did not want, for (justified) political reasons, to endanger his political power.

8. *Prolongations. The reforms and personal law of Muslims*

The traditionalist Hindus of the Assembly energetically refused the mere idea of a Uniform Civil Code. A good portion (but not all) of the Muslims were on the watch and ready to oppose any attempt at modifying their personal law. The turn of events showed interesting changes.

The most conservative Hindus, that is the fundamentalists, are the ones who ceaselessly and loudly demand the adoption of a Uniform Civil Code today; it is one of their forms of attacks against the Muslims who, for their part, quickly organised their own defence. Hence, on 7 April 1973, they created an *All India Muslim Personal Law Board* (AIMPLB), dominated by the Deobandi (who are Sunnites of the *hanafite* school who have evolved towards a stricter approach to Islam, close to that of the Wahhabites), and where both the Barelvi (who are also *hanafites* but more open and inspired by Sufism) and the Shiites are in minority.[56] The purpose of this AIMPLB is

[55] Here again, the support of women is notable. Shrimati Renuka Ray, exasperated to hear once more the Pandit Malaviya's speech, cried out: ''And let us have the tyranny of the Brahmanical society for the next thousand years!'' (Ambedkar, 14 (2), p. 1121).

[56] In 2001, there were 138 million Muslims in India (13.4 % of the population). The Sunnites represent a large majority and there are 10 % of Chiites (Ismailians (Khoja and Bohra) and Duodécimains. On Muslims in India, see Gaborieau 2006.

clearly exposed: it is to ensure respect of the 1937 law and to prevent the adoption of a Uniform Civil Code.[57]

The AIMPLB showed its capacity to exercise pressure during the Shah Bano affair concerning the repudiation of an elderly mother of five by her husband in 1978. Left without resources, Shah Bano turned to the legal system and, in 1985, obtained a judgement from the Supreme Court: she was to receive the equivalent of an alimony in application of the 1973 *Code of Criminal Procedure*, whose Article 125 defines a man's alimony obligation towards his wife (including a divorcee who is not remarried), his under-age children (be they legitimate or not) and his parents where the latter cannot provide for themselves.[58] The Court thus recalled that this Article applies indifferently to Hindus, Muslims, Christians or Parsees. It quoted the Quran's surat 2 (242-241), claiming that the divorced (or repudiated) wife is entitled to support or alimony (*mata*). Lastly, the Court expressed regret that Article 44 of the Constitution remained, on this issue, a ''dead letter''. It even explicitly denounced the lack of political courage in this field, deploring the fact that ''piecemeal attempts of the courts to bridge the gaps between personal laws cannot take the place of a common civil code''.[59] The gap between the judiciary and the legislative powers is clear and it was not to be long before the Supreme Court was to see its opinion on politics confirmed.

After the Court rendered its judgement, the AIMPLB immediately put pressure on Rajiv Gandhi's government, and 19 May 1986 saw the adoption of *The Muslim Women (Protection of Rights and Divorce) Act,* 1986, Article 5 of which provides that unless explicitly requested by both parties, Muslim divorces shall not be governed by Articles 125 to 128 of the *Code of Criminal Procedure*. Its Article 3.1.a provides that the husband owes his divorced wife a ''reasonable and fair provision and maintenance to be made and paid to her within the iddat period'',[60] the latter being defined as ''three menstrual courses after the date of divorce'' or ''three lunar months'', depending on whether the women is still menstruating or is postmenopausal. Regardless of the political reasons, at a period which was a difficult one for the Congress Party, this action of Rajiv Gandhi was overall considered as a major step backward.

The Shah Bano case echoes the course of events in the 19th century with respect to the question of the age of consent for young girls.

[57] See his website http://www.aimplboard.org/ (last visit: 20 April 2009).

[58] Relevant extracts of this Code quoted by PANT 2005, pp. 428-432.

[59] Quotes from ENGINEER 1987.

[60] In the French version of the Moroccan *Moudawana* (*Code de la famille*), this term is translated by ''*période de viduité*''.

Beyond the acquisition of independence, this reflected the continued opposition between a modern and unifying judiciary power on the one hand and a shy political power, withdrawing when confronted with both the agitation of traditionalist Hindus and that of a reformist ''minority'' whose opposition is equally dangerous. Three times (in 1860, 1891, 1929) the British powers and the conservative high castes renewed their alliance against stubborn reformers, for the most part also Brahmins.

In 1860, an *Age of Consent Act* was adopted without difficulty, and introduced in the *Criminal Code* (section 375), which set at 10 the age below which sexual intercourse with a ''woman'' (married or not) constituted rape.[61] In the 1880s, the reformers first wanted to simply amend the *Criminal Code*, raising this age from 10 to 12. However, the conservatives, seeing that the British were about to accept this amendment, started a violent campaign to defend customary practices sanctioned by *Shastras* (insofar as a nubile girl cannot live under her father's roof, children's marriages are a recommended model). In 1890, Tilak, the great Brahmin nationalist, defended a man who had killed his ten year old wife during ''legal'' sexual intercourse, and attacked the ''exasperated rape-law reformer''.[62] Eventually, a law was to be adopted, in 1891: the *Age of Consent Bill*.[63] According to Heimsath (1964, p. 174), the violence expressed by the opposition against this law is the first explanation of the fact that no substantial social reform was voted between 1891 and 1929, date of adoption of the above mentioned *Child Marriage Restraint Act*.

The Judiciary did not disarm, legitimating its decisions with references to the Constitution (Articles 14 and 15[64]), to Article 125

[61] As a reminder, in Great Britain, at the same period, the age of consent was set at 12. In 1861, a law aggravated the sanctions incurred for rape of an under aged girl of less than ten years of age (this qualified as felony). In 1875, this age was raised to 13. It was only in 1885 that a *Criminal Law Amendment Act* tried to put an end to child prostitution and set the age of consent at 16. It took two and a half years for Parliament to finish voting this act, under the pressure of a press campaign and of public opinion. Our reference: Jennifer Payne, *The Criminal Law Amendment Act of 1885 and Sexual Assault on Minors* (http://geocities.com/Athens/Aegean/7023/Consent.html; last consulted on 20 April 2009. Regarding France, in 1863 a law fixed the age of consent at 13 (it had been set at 11 since 1832). It was only in 1945 that the age of consent was raised to 15.

[62] S. A. Wolpert quotes articles by Tilak of an extreme misogynist violence, which he – rightly – considers an ''incomprehensible apology for homicidal rape'' (Wolpert 1982, pp. 52-54).

[63] See Heimsath 1964, chapter VII, and Wolpert 1982, pp. 45-61.

[64] Article 14: ''The State shall not deny to any person equality before the law or the equal protection of the law...''; Article 15 (1): ''The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'' The Muslim reformers (in practice, essentially women) knew how to rely on these two articles which they invoked in order to obtain the benefit of laws which theoretically only concerned Hindus.

of the *Criminal Procedure Code* or by an extensive interpretation of Article 3.1.a of the 1986 Act. The Supreme Court, in 2001, relied on the Constitution (*The Hindu*, 10 August 2003) and, in 2004, authorised a wide interpretation of Article 3.1.a: a divorced or repudiated wife was entitled to alimony (or to a substantial one-off payment) beyond the *iddat* period, until she remarried (Pant 2005, p. 435).[65] There are numerous examples of States that thus granted women plaintiffs ''fair and reasonable provisions'': Kerala, Maharashtra, Gujarat, Andhra Pradesh.

Muslim civil society was deeply shaken by the needs for reform and the most conservative resistance, incarnated by the *All India Muslim Personal Law Board* (AIMPLB), whose legitimacy and representativity were strongly questioned in recent years.

Four other *Personal Law Boards* were created in a few months, including two by Muslim women. To name them briefly:[66]

All India Muslim Personal Law Board (Jadeed) (AIMPLB (*Jadeed*)), created in December 2004, by the Barelvi, a very small minority within the AIMPLB;

All India Shia PLB (AISPLB), created on 23 January 2005, immediately accused both by the AIMPLB and by Shiite non-religious organisations of being a creation of the *Bharatiya Janata Party*, the Hindu extremist organisation which supports them (*Rashtriya Swayamsevak Sangh*) and the United States;

All India Muslim Women PLB (AIMWPLB), created on 1 February 2005;

All India Shia Muslim Women PLB (AISMWPLB), created on 4 February of the same year, by women who were not able to find room in the AISPLB.

The *All India Muslim Women PLB* was immediately extremely active. As early as 27 February, the association created a ''court of

[65] The Calcutta High Court, examining a complaint filed by a repudiated Muslim wife to whom the court of first instance, in 1993, only granted alimony for a three-month *iddat*, granted her, on 8 June 2000, a pension until her remarriage. To do so, it relied on the judgements of the Supreme Court, for whom Article 125 of the Criminal Procedure prevailed over personal laws (*The Hindu*, 4 July 2000).

[66] *The Hindu*, 24 January, 31 January, 6 February 2005; *The Milli Gazette*, 16-28 February; 1-15 March 2005 (using A. A. Engineer quoted above) – *on line* edition: http://www.milligazette.com .

justice'' (*adalat*) in Lucknow. It heard 300 women, from various cities, telling of their husbands' brutality, the persecutions endured for non (or non conform) remission of dowries, forced marriages, and repudiations by ''*triple talaq*'';[67] 178 cases (or 166, depending on the source) were retained and legal proceedings were initiated (*The Hindu*, 27 February; *Deccan Herald*, 28 February).

Shortly after, in June 2005, another case came to be a centre of focus for the association: the defence of Imrana, a 28 year old young woman, mother of five children, raped by her father-in-law. A *fatwa* by the local religious authorities (a *panchayat*) – followed on 27 June with another by the Deobandi authorities – forced her to divorce her husband (whom she then had to consider as ''her son'') and marry her father-in-law. The *All India Muslim PLB* approved[68] (with two dissenting voices, amongst which the only elected woman); the AIMPLB (*Jadeed*) followed. In January 2007, these two organisations were amongst the first to demand the expulsion from India of Taslima Nasreen, because of the article she published in the weekly magazine *Outlook*, ''Let's Think about the Burqa''.[69]

The new Muslim feminist associations' longest-term actions are now against the ''triple *talaq*''. This form of repudiation is rejected by many Muslim countries (Tunisia, Turkey, Indonesia, Pakistan) but not by India, and the AIMPLB maintained it in a new marriage guide (*nikahnama*) published early in 2005. Although it is said that the husband must avoid ''*Talaq* (divorce) at all costs unless the circumstances become highly compelling. In such a case, one should avoid declaring '*Talaq*' thrice at a time''. This is in fact nothing

[67] The *First Encyclopaedia of Islam* (1987) for *Talâk*: ''Repudiation of a wife by a husband, a form of divorce, effected by his pronouncing the words anti tâlik. [then quoting surat II. 229] If the man has twice pronounced the talâk, he may still keep his wife if he treats her kindly [...] 230. If he pronounces the talâk over her for the third time, [during one period between two menstruations (tuhr) of the woman] it is not permitted for him to take her again unless she has married another husband; if the latter pronounce the talâk over her, it is no sin for the two to return to one another...''

[68] Amongst other sources: *Asian Centre for Human Rights*, 6 July 2005 (http://www.achrweb.org). This article also discusses the cases where local, village or caste, authorities punish ''unlawful'' sexual relations or marriages between castes. These cases are not considered here.

[69] Persecuted in her country, Bangladesh, for her novel, *Lajja*, Taslima Nasreen took refuge in India in 1994; she had to leave for Europe in 2008 and is currently living in France.

revolutionary as it is simply written in the *Quran* and has been repeated endlessly by the religious authorities.[70]

It is clear that the Muslim reformist organisations – essentially feminine, but not only – are currently very active. Along with similar Hindu organisations, they are the ones fighting against the upholding of these communalist personal laws. At the same time, some of them are also asking for the adoption of a Uniform Civil Code. The Supreme Court hears them favourably, with the arsenal it has built up itself (Constitution, *Code of Criminal Procedure*, wide interpretation of the 1986 *Act*). However, it acknowledges its own limits and thus, on 10 May 2006, declared its lack of jurisdiction to pronounce itself on ''the legality of the customs of polygamy, *talaq* and divorce practised by Muslims under personal laws'' and referred the plaintiff to the legislator: ''It is for Parliament to change or amend the law and judges must exercise judicial restraint'' (*The Hindu*, 11 May 2006). The separation of powers is thus fully respected. In India, the judiciary power has, for long now, always been braver than the legislative power.

The conclusion to be drawn from this is that the Uniform Civil Code seems further away each day. The conservative authorities of the Muslim ''minority'', who have the most power, continue to energetically refuse it. The most reactionary traditionalist Hindus claim to want it only to better reject anything that they consider as an unjustified privilege granted to this minority. By so doing, they move the progressive Hindus away from it and A. A. Engineer was thus right (despite an obvious exaggeration) when he wrote ''All secular forces today have disowned uniform civil code as communal forces have adopted it'' (*Secular Perspective*, 16-31 February 2005). It is necessary to further add that there was one other powerful reason for this refusal, loudly voiced for a few years, including amongst intellectuals considered as progressives: this Code is the harbinger

[70] Can be consulted on its website. The AIMWPLB, in February 2006, drafted its own *Nikahnama*, which completely prohibits the triple *talaq*. The AISPLB drafted its own in November of the same year, and had it approved by Iran's ayatollah Sistani; it acknowledges a woman's right to demand divorce in slightly more numerous circumstances than the AIMPLB, but does not prohibit the triple *talaq*. The AIMWPLB published a *Shariat Nikahnama* in March 2008. The triple *talaq* by SMS (*sic*) is forbidden; procedures for a divorce should take at least three months and the triple *talaq* ''in one go'' is forbidden. In addition, the AIMWPLB demands that official registrations of marriages be compulsory. One should remember that, in 2006, the Supreme Court instructed all the States to make those registrations compulsory and, in October 2007, required that they comply with that demand in less than three months, for all marriages of all communities (''A Nikahnama for Muslim Women'', *Economic & Political Weekly*, 43 (12-13), March 22, 2008).

of a western secularism, deeply atheist, which does not suit a profoundly religious India whose ''secularism'' means respect and protection of all religions.[71]

Hence, this article is clearly about an Impossible Indian Civil Code, despite the fact that in practice and paradoxically, the *Criminal Code* and the legislative arsenal have been increasingly unifying the rules that guide the daily lives of India's populations.

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[71] A. A. Engineer – a progressive Bohra – in this review whose title is very explicit to anyone who fully understands the meaning of the term *Secular Perspective*, wrote ''There are some rationalists and secularists who reject religion in its entirety but such rationalists or secularists are extremely few ... say they are less than 0.1 % in India'' (*Secular Perspective*, quoted by *The Milli Gazette on Line*, 23 June 2006).

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Résumé

La constitution de l'Union indienne (1950) prévoit la rédaction d'un Code civil unique qui n'existe toujours pas et n'existera peut-être jamais. Cet article examine les manœuvres des opposants qui ont fait échec aux tentatives de l'Assemblée constituante et législative (1946-1951) de « moderniser » le droit hindou des personnes et des biens, qui eût pu être un premier pas vers ce Code civil. Leur argument le plus subtil a consisté à se poser en défenseurs des coutumes et traditions diverses de cette nation nouvelle, et non des traités de *dharma* qui codifiaient et légitimaient depuis des siècles un *Brahmanical Social Order.*

Mots clés : Inde ; Constitution ; Droit personnel ; Coutume ; Ambedkar.

Zusammenfassung

Die Konstitution der indischen Union (1950) schreibt ein ziviles Gesetzbuch vor, das es bis heute nicht gibt und wahrscheinlich nie geben wird. Dieser Aufsatz schildert, wie die Gegner die Versuche der verfassungsgebenden Versammlung (1946-1951) vereitelt haben, welche eine Modernisierung des hindischen Personen- und Güterrechts, ein erster Schritt in Richtung ziviles Gesetzbuch, vorgesehen hatte. Ihr subtiler Argumentationsstrang bestand nicht in der Verteidigung der dharma, die seit Jahrhunderten das Brahmanical Social Order kodifiziert und gerechtfertigt hat, sondern in der Verteidigung verschiedener Bräuche und Sitten dieser neuen Nation.

Schlagwörter: Indien; Verfassung; Personenrecht; Bräuche; Ambedkar.

ANNEX I

THE BILL TO AMEND AND CODIFY CERTAIN BRANCHES OF THE HINDU LAW

Presented by the Select Committee to the Assembly on 12 August 1948

Part I. Preliminary

Four clauses which define (Clause 2) the scope of the Code: Who does it concern? Who is ''Hindu''; (Clause 3) ''Custom''' and

''Usage''; (Clause 4) ''Overriding effect of Code'': prevalence of this Code over any other anterior law, text, etc. These four clauses, which were the only ones to have been voted between 20 and 25 September 1951, were subsequently incorporated in separate laws that were later voted, without substantial (though sometimes nevertheless interesting) changes.

Part II. Marriage and Divorce

Clauses 5 to 51, which notably include two clauses that concern the specific regimes applicable to Malabar (Kerala) and one relating to ''exceptions'' (certain marriages contracted prior to the adoption of the law). This was to become the object of The Hindu Marriage Act, 1955 (18 May) voted by the following legislature.

Part III. Adoption

Clauses 52 to 76. These were to become The Hindu Adoption and Maintenance Act, 1956 (21 December).

Part IV. Minority and Guardianship

Clauses 77 to 85. These were to become The Hindu Minority and Guardianship Act, 1956 (25 August).

Part V. Joint-Family and Co-Parcenary

Clauses 86 to 89. This contains a chapter concerning ''Mitakshara Co-Parcenary'' (Clause 90 A-H) and another concerning Marumakkattayam, aliyasantana, Nambudiri Joint Family (90 I).

The following drafting of Clause 86 was submitted:

''Abrogation of right by birth and survivorship generally. Except in the cases and the extent expressly provided in this Part, no Hindu shall, after the commencement of this Code,

a) acquire any right to, or interest in any property of an ancestor during his lifetime merely by reason of the fact that he is born in the family of the ancestor, or

b) any joint family property which is founded on the rule of survivorship.''

Part VI. Women's Property

Clauses 91 to 93: Clause 91 provides that ''Any property acquired by a woman after the commencement of this Code shall be her absolute property'' while Clause 93 provides, and simultaneously defines, that ''any dowry given on the occasion of or as a condition of or as consideration for such marriage shall be deemed to be the property of the woman whose marriage has been so solemnized''. This was not taken up by any law of the following parliamentary session.

Part VII. Succession

Clauses 94 to 124 contain provisions on men and women who die without leaving a will or testament, as well as provisions on wills. This will become The Hindu Succession Act, 1956 (17 June) under the following legislature. It does not concern joint ownership nor the Malabar's marumakkatayam.

Parts VIII and IX

Clauses 125 to 137 concern the support or maintenance of unmarried young women, married women and widows. The final clauses, 138 to 139, are of an administrative nature.

Annex 2

CALENDAR OF THE TIME DEDICATED TO THE HINDU CODE BILL
(Assembly, 1946-1952)

1946
– 9 December: beginning of the Constituent's session.
– 13 December: Nehru presents the *Objective Resolution*, orientation and framework of the Constitution to be drafted.

1947
– 11 April: the H.C.B. is introduced before the Assembly (prior, even, to the declaration of Independence, on 15 August, and to the

Constituent deciding how to separate its dual functions and the organisation of its calendar).
– 15 August: proclamation of India's independence.
– 17 November: confirmation of acceptance of the revision of the *Hindu Law*.

1948
– 9 April: the law is referred to a *Select Committee* in charge of its drafting but, contrary to practice, no fixed date is set for it to finalise its report.
– 12 August: the *Select Committee* presents its report.
– 31 August: vote on the principle of examining the law, with no set date.

1949
– 17 February: beginning of the discussions on the ''taking into consideration''.
– 24 February-2 April: six sessions dedicated to the H.C.B.
– 26 November: the Constitution is adopted and the Assembly is thus only legislative.
– 12-14 December: three sessions.
– 19 December: one session. Nehru demands that the discussions on the ''taking into consideration'' be ended and that the Assembly proceed instead with a ''clause by clause'' review. The ''taking into consideration'' of the bill is thus voted.

1950
Following Nehru's intervention, an extra-parliamentary meeting a ''non-official Advisory Committee to advise on the Hindu Code Bill'' is held on 14 April, which gathers representatives of the *Select Committee*, some members of the Assembly and a few ''outsiders''.[72]
No debate on the H.C.B. at the Assembly that year.

1951
– 5-7 February: three sessions dedicated to Clause 2.
– 17-20 September: four sessions dedicated to the examination and vote of Clause 2. However, on 17 September Nehru decided to divide the Code into two parts, examining the ''Preliminary'' and Marriage and Divorce, leaving the rest for later, should any time remain.
– 21 September: one session for the examination and vote of Clause 3 and the beginning of the examination of Clause 4.

[72] Minutes of the parliamentary debates of 3 April 1950. Ambedkar, when asked, did not give any names and remained very vague (Ambedkar, 15, pp. 1010-1011).

– 22-23 September: two sessions for the examination and vote of Clause 4.

Annex 3

SHORT GLOSSARY FOR A BETTER UNDERSTANDING OF HINDU SOCIETY

Brahmins have codified the entire Hindu social system in texts written in Sanskrit, for the most part at uncertain dates, and have divided society into classes or estates (*varnas*), in turn divided into castes (*jatis*). It is to this system and the texts underlying it that the deputies refer throughout the debates.

The four *Vedas* and the texts that are directly attached to them together constitute ''the Veda'', which is considered as ''revealed'' (this is the *shruti*). Another set of texts, of a lesser authority but nevertheless essential to the Brahmanical tradition and to the ''Hindu social order'', constitute the *smriti*. Amongst them are the normative treaties on *dharma* (*dharmasutras*, *dharmashastras*) which explain and codify the order of the universe and of society. The most famous of these is the *Manusmriti*, *Laws of Manu* (which notably explains the appearance of the *jatis*).

Firstly, there are four *varnas*, hierarchically ordered (from top to bottom), which used to constitute the Arya society:

i) The *Brahmans* (who master the texts and rituals and who do not hesitate to qualify themselves as *pandit* (''learned'' or ''erudite'').

ii) The *Kshatriyas* (traditionally, warriors and sovereigns, very few of whom remain in contemporary India).

iii) The *Vaishyas* (a few large castes of merchants and traders, such as the *Marwaris*).

iv) The *Shudras* belong to the Arya society and their function, according to the *shastras*, is to serve the above mentioned. The majority of the current castes belong to this *varna*, including the ''dominant castes'', which hold local or regional power (for example, the *Jats* in North India).

The first three *varnas* are referred to as ''twice born'' (*dvija*): the men are entitled, before their wedding, to an initiation ritual which gives them access to knowledge of the Veda and to the practice of daily domestic rituals, and entitles them to wear the ''sacred thread'' (*upavîta* in Sanskrit). The way of life of these three *varnas* is dictated by the *dharma* texts. As for the *Shudras*, they are only ''negatively''

present in these texts, in the sense that all that is mentioned which concerns them is what they are not entitled to do.

Secondly, in addition to the castes that belong to these four *varnas* (they are referred to as *sa-varna* or as *Caste Hindus* in political language, which has conserved an incorrect usage of the term *caste*), there are also castes known as the *Scheduled Castes* (S.C.): those of the former Untouchables (referred to as *a-varna*, meaning without or outside *varna*). The S.C., like the *Scheduled Tribes* (S.T.), derive their names from the fact that they are administratively ''scheduled'' in order to benefit from reservations in public offices and education.

Any Hindu, be they *sa-varna* or *a-varna*, thus belongs, by birth, to a given caste (*jati*).

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