# Welcome Address

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THE SUBJECT of the Seminar includes law, that is ordinary law, namely, the Special Marriage Act, 1954 and personal law which is applicable to Hindus only, namely, the Hindu Marriage Act, 1955. It is of some interest to view this dichotomy from the view-point of the Constitution. The power to make laws, namely, the legislative power is divided between Parliament and the state legislatures by the provisions of Chapter I of Part XI of the Seventh Schedule of the Constitution. Both the central and the state legislatures have a concurrent power under entry 5 of List III of the Seventh Schedule to make laws regarding the following:

> Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

The replacement of personal law including the law of divorce by statute law is thus expressly contemplated by the Constitution. The legislative powers are, however, subject to such limitations as may be placed on them by the fundamental rights contained in Part III of the Constitution. It is necessary, therefore, to construe those fundamental rights which may fetter the power of the legislatures under entry 5 of the Concurrent List. There is no fundamental right which restricts the freedom of the legislatures to make laws under entry 5. Can it be contended that personal laws or certain parts of them are immune from being changed by legislation because they are included in the religious or cultural fundamental rights guaranteed by articles 25 to 29(1) of the Constitution? If that were so, the necessary inference would be that those personal laws or parts of them so contained in these fundamental rights are not included in entry 5 of the Concurrent List. For, there cannot be a conflict between two parts of the Constitution.

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*Speech delivered at the Inaugural Session of the Seminar on the Hindu Marriage Act and the Special Marriage Act on February 21, 1975.

Like any other legislation, fundamental rights in Part III have to be construed with a view to giving effect to the intention of the founding fathers and to carry out the objectives underlying the fundamental rights as also the objectives to be achieved by the Constitution as a whole since the fundamental rights are a part of the Constitution. The Preamble which is a key to the Constitution sets out four objectives to be achieved by the Constitution, the fourth being "the fraternity assuring the dignity of the individual and the unity of the Nation". What is the meaning of "fraternity" in this key clause ? The ordinary meaning of fraternity is brotherhood. Such a brotherhood may be a narrow family, communal or religious group or it might be a society constituting the nation. Had "fraternity" been used in the narrow sense it would not have been juxtaposed with the "unity of the Nation". As Aristotle long ago said man is not only a political but also a social animal. Appropriately our Constitution is both a social as well as a political document because it seeks to promote the welfare of mankind in India as a whole. With this integral approach in mind we must include in "fraternity" all the nationals of India who are to be woven into a national unity. This fourth objective set out in the Preamble has, therefore, an appeal not only to our minds but also to our hearts. The development of a common liking for each other among the nationals of our country is indeed needed by the very opening of the Preamble by which "We, the people of India...constitute India into a...Democratic Republic". For, as has been well said, democracy is a way of life and a state of mind and heart. This is true no less about fraternity than about the other ideals set out in the Preamble.

Another instrument of constitutional construction is provided by the directive principles of state policy set out in Part IV of the Constitution. Article 37 places the duty on the state to apply these principles in making laws. To give an illustration which will appeal to lawyers it may be said that the place of Part IV of the Constitution is comparable to the place of the rule-making section in a statute. The rules to be framed under a statute are to give effect to the objects of the statute. Similarly, legislation framed in obedience to the direction given in article 37 to implement the various principles set out in Part IV is to implement the objectives of the Constitution set out in the Preamble and in Part IV. Just as the rules made under a statute "would be as efficacious as the Act itself" because of "the fundamental principle of construction that rules made under a statute must be treated as exactly as if they were in the Act and are of the same effect as if contained in the Act"[1] so also the directive principles in Part IV and the legislation made thereunder must be regarded as being a part of the Constitution and as efficacious as the Constitution. The world of the Constitution

1. See *State of U.P.* v. *Babu Ram Upadhaya*, (1961)2 S.C.R. 679 at 705.

is growing not only by judicial decisions but also by the legislation made to implement the objects of the Constitution. It would be surprising, therefore, if legislation which truly implements any of the objectives of the Constitution set out in the Preamble or in Part IV would conflict with any fundamental right at all. It would be harmonious for the court to construe such legislation as if it is a part of the Preamble or Part IV. If so construed, such legislation would not conflict with Part III for the same reason that the Preamble or Part IV cannot conflict with Part III.

Article 44 contained in Part IV requires the state to endeavour to secure for the citizens a uniform civil code throughout the territory of India. The first great example of a uniform civil code was that of Code of Napoleon which has since then become the basis of the French and the German Civil Codes. These codes include, *inter alia*, the law of domestic relations such as marriage, divorce, *etc.* In classifying different laws, one may talk of laws relating to persons, those relating to things, *etc.* Laws relating to persons may be called personal laws in this sense. In India, however, historically the expression "personal law" has obtained a narrower connotation as being law applicable only to a distinct religious community such as the Hindus. Article 44 of the Constitution, however, does not make any distinction between law and personal law. Whereas, unity of the nation is to be achieved, a uniform civil code is directed to be made by article 44.

What is the meaning of "religion" in the Constitution ? The answer is given by the relevant articles of the Constitution such as articles 25, 26 and 28. They make it clear that "religion" includes two distinct elements, namely, (1) the religious doctrine or faith which an individual may profess; and (2) religious practice according to which the followers of a particular religion may act. But personal law has never been regarded as a part of religion either as a religious doctrine or as a religious practice. The reason is obvious. Religion and law have always been separate from each other. They operate in two separate spheres, that is, the spiritual and the temporal. The sanctions of the two are different. Religion cannot be the sanction of law. Personal law may originate in religion in the sense that the religious books prescribe a certain type of conduct or religious practice which has been followed by the followers of that religion and which has become their personal law. But religion there was only the source of the conduct. The conduct became enforceable only when it became customary. It is well known that a valid custom overrides the text of the *shastras*. Even if, therefore, the origin of the custom was in religion, it did not become law till it became a valid and enforceable custom. Prior to that, it may have been regarded as a religious practice followed by the followers of that religion. But when it obtained a temporal sanction it became law and ceased to be a religious

practice. The distinction is that while a religious practice is obeyed only by the feeling that one ought to adhere to one's religion, the custom is obeyed because it must be obeyed. If it is not obeyed, civil consequences will follow. This feeling that the custom has to be obeyed is called *opinio necessitatis* and is the earmark of a valid custom which has become a part of the law. Personal law being thus subject to customary law as to its enforcement is as much as law as ordinary law. Equally it is not a part of religion just as ordinary law is not a part of religion. While religion cannot be enforced by recourse to a court of law, custom can be enforced just as an ordinary law can be enforced in a court of law. Section 9 of the Code of Civil Procedure limits the jurisdiction of the civil courts to civil causes and excludes merely religious causes from it. The definition of "law" in article 13(3) (a) of the Constitution expressly includes custom. It does not include religion for the simple reason that religion is not enforceable as law. It follows, therefore, that in Part III of the Constitution which is governed by the definition in article 13 (3) (a), religion is not included in the concept of "law" including personal law or custom. Conversely, personal law is not a part of religion. The two are distinct from each other. The question can hardly, therefore, arise of any fundamental right being contravened by legislation to transform personal law into statute law in exercise of the legislative power given by entry 5 of the Concurrent List.

Though the government prior to and after the independence followed a policy of religious neutrality in India, they did not think personal laws to be an essential and integral part of religion. This is why legislation to transform personal laws into statutes has continued to be enacted from during the British days till after the Constitution. This seems to be the reason why entry 5 of the Concurrent List recognizes the power of the legislatures to enact laws in respect of matters which were governed by personal laws prior to the commencement of the Constitution. Read with article 44 of the Constitution, the legislative power so conferred seems to include all matters governed by personal laws prior to the commencement of the Constitution. They were never regarded as included in "religion" either by the government or by the community concerned or by the courts.

Law may be regarded as an element of "culture" using the word "culture" in a wide sense. For the same reason, personal law may also be regarded as an element of "culture". Article 29 (1) gives any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own the right to conserve the same. Does this right enable the Hindus to conserve their personal laws and to prevent legislation being enacted to replace them ? Before answering this question, the construction of article 29 (1) must be made in the context of the Pream-

ble, article 44 and entry 5 of the Concurrent List in the Seventh Schedule. Fraternity and the unity of the nation would certainly not be complete so long as the different schools and castes governed by Hindu Law would insist on keeping intact their separate personal and customary laws. Entry 5 of the Concurrent List would become superfluous if all the personal laws are included in "culture" which is to be conserved according to article 29 (1). Article 44 would also be deprived of most of its contents. A progressive view of article 29 (1), therefore, would be to regard that the conservation of the language, script or culture of each section of the people should be made in such a way as to contribute to the unity of the nation and to the evolution of a composite Indian culture. Article 351, for instance, expressly states that it shall be the duty of the Union of India to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India. The culture of each section of the citizens residing in India can contribute to the evolution of a composite Indian culture if the best elements of each culture are woven together. What is to be aimed at is a unity in diversity and not a mere diversity. Further, the replacement of personal laws by statute law does not necessarily mean that the contents of the personal laws are entirely destroyed. On the contrary, they are only modified selectively with a view to evolve a uniform civil code which is the declared aim of the state policy under article 44. Just as the development of the Hindi language is to be enriched by drawing from all the other Indian languages similarly the uniform civil code will draw upon the existing personal laws.

This evolution has to come naturally and by stages. It is for the people governed by a system of personal law to ask themselves if they would like a progressive change in a personal law or a part of it by legislation. Similarly, it is for the representatives of the people to consider whether a uniform civil code or a uniform civil law would contribute towards the fraternity among the people and the unity of the nation as also towards the evolution of a composite Indian culture. It is the duty of all of us to understand each other and to do our best to promote such unity and such a salutary evolution by a gradual evolution of a common opinion and by voluntary agreement which alone can be a worthy goal. Just as the Constitution was framed by consensus of all the different shades of opinion of the people, similarly the uniform civil code should also come about by the same process of achieving a consensus.

The dichotomy between the Hindu Marriage Act and the Special Marriage Act referred to at the outset is thus explained. The Special

Marriage Act is an optional or enabling provision. It is only if the parties desire to avail themselves of it that a marriage may be contracted under the Special Marriage Act with the consequences which would be attached to it thereunder. It is a stage which is intermediate between the personal law as it exists and a compulsory statute binding on the persons to which it is applied. Statutes such as the Special Marriage Act which would be a model law the benefits of which may be availed of by such persons as may like to avail of them is a step in the right direction. It also adheres to the principle of gradualism and of providing facilities for those who would like to be persuaded to avail themselves of it rather than of enforcing something against the wishes of those who would be governed by it.