The Uniform Civil Code : A Projection of Equality

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IT IS UNFORTUNATE that the question of uniform civil code has been dragged into the communal politics of 'Indianization'. It is not less unfortunate that at the government level no serious attempt has been made as yet for the implementation of the directive contained in article 14 of the Constitution, although a little over twenty-one years have passed since the adoption of the Constitution. Article 44 provides: 'The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.'

A uniform civil code is not just an instrumentality to achieve national integration or national unity. It is a different matter that incidentally it may help in the achievement of integration or national unity.[1] But it may as well not. It would not necessarily mean that after the adoption of a uniform civil code inter-religious marriages would become the order of the day. It is a different matter that it may facilitate solemnization of inter-religious marriages. For instance, to-day in our country we have one family code for the followers of four religions, viz., Hinduism, Jainism, Sikhism and Buddhism. Yet it has not led to a spurt of inter-religious marriages among the followers of these four religions. Rather, inter-religious marriages continue to be as few as they were before the adoption of one-code for them. It is also

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1. At the time of debate on article 44 of the Constitution some such sentiments were expressed on the floor of the Constituent Assembly. K.M. Munshi said:

> Our first problem and the most important problem is to produce national unity. But there are many factors—and important factors—which still offer serious dangers to our national consolidation, and it is very necessary that the whole of our life, so far as it is restricted to secular sphere, must be unified in such a way that as early as possible, we may be able to say, 'well, we are not merely a nation because we say so, but also in effect, by the way we live, by our personal law, we are a strong and consolidated nation.' 7 *Constituent Assembly Debates*, 584 (23 November 1948).

evident that it has not helped in the integration either on national or regional level of the followers of these four religions. They continue to be as close or as apart as they were before the enactment of these enactments.[2] It is also evident that by these codes the majority community—in this case, the predominant majority community—, viz, Hindus, have not been able to Hinduize the members of the minority communities. Jains, Sikhs and Buddhists continue to practise their religion and continue to be as good or bad Jains, Sikhs or Buddhists as they have been.

An another most avowedly metaphysical argument against the uniform civil code is that family laws or personal laws of various communities in India are more or less (rather, more and more) of divine origin.[3] It is conveniently forgotten that although the Hindus and Muslims have claimed all their laws as of divine origin, for almost a century they have been governed by one single law of crime, one single law of contract, one single law of evidence. Even the personal laws have been modified from time to time. These laws of crime, contract, tort, evidence, property, procedure, etc., are neither the laws of the Muslims nor the laws of the Hindus and have no divine traces in them. They are essentially civil laws—laws which our British rulers thought best to give us and which are still the laws not merely in India but also in Pakistan. Neither free India nor free Pakistan tried yet to revive their divine laws of crime, contract, property, evidence, procedure, tort or for that matter any other branch of law. Yet, we in India are clinging to our divine personal laws. Practically every community claims that its personal laws are divine laws and wants to maintain *status quo*. Although a major portion of Hindu law has been codified and reformed, yet it is still Hindu law. But the codified Hindu law is not a part of Hindu religious law. Today Hindu law applies to persons who are Hindus, Sikhs, Jains or Buddhists by religion. A Sikh is deemed

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2. The Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Hindu Adoption and Maintenance Act, 1956; and The Hindu Minority and Guardianship Act, 1956.
3. This was the argument advanced most vocally on the floor of Parliament when the Bills for the reforms of Hindu Law were introduced in Parliament. Before the Rau Committee also this was the argument. On the floor of the Constituent Assembly those members who were against the adoption of article 44 also advanced this argument. See for instance the views expressed by Pocker Sahib Bahadur and Hussain Imam and other Muslim members: 7 *Constituent Assembly Debates* 540-52.

to be a Hindu for the purposes of the statutes dealing with marriage, succession, etc., but he is not a Hindu by religion. One may still be tempted to call Hindu law a religious law since it applied to the followers of certain religions,[4] but it is obvious that codified Hindu law could hardly be called a religious law.

Article 44 envisages that there should not necessarily be any connection between law and religion. Article 25 also makes that evidently clear. Clause (2) of article 25 provides that "Nothing in this article shall affect the operation of any existing law or prevent the state from making any law (a) regulating and restricting.....secular activity which may be associated with religious practice, (b) providing for social welfare and reform....."[5] Hence imperative is the need to get over the sentiment that there is inter-linking or interlocking of religion and personal laws.

In our submission, it should be clearly understood that the question of our having a uniform civil code has nothing to do with 'Indianization' or national integration or interfering with the religion of one community or the other. It is simply a question of equal facility of laws to all sections of our people. It is a question of all Indian citizens being governed by the same set of laws. Or, to put it differently, the question is simply this that all people of India, in all matters—except the matters coming under protective discrimination—should be governed by the same set of laws. There cannot ordinarily be any justification for having one set of laws for one section of society and different set of laws for another section. The only justification for any such distinction or special law can be that one section of people needs special protection because of certain existing inequalities

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4. It may be interesting to note that a person can be a Hindu by religion as well as by birth and a Hindu by birth need not necessarily be a Hindu by religion. Even if he is an athiest, he will be a Hindu. See s. 2 of the Hindu Marriage Act, 1955.
5. Speaking on the scope of this clause, K.M. Munshi observed:
   > We want to divorce religion from personal law or from, what may be called social relations,....we are at a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are matters for purely secular legislation. 7 *Constituent Assembly Debates* 547.

(the case of women generally) or because of certain exceptional and special circumstances. For instance, backward sections of the society need special protection because of existing inequalities between them and the other sections of the people. Or, for instance, workers in coal mines may need special protection because of the hazards involved in coal-mining operations. We already have a uniform criminal law, uniform law of tort, etc. Then, why in personal matters, such as marriage, divorce, adoption, guardianship or inheritance, should different sections of Indian people be governed by different set of rules?

The fact of the matter is that the phenomenon of different personal laws for different religious communities is a legacy of British rule and is a result of their policy of divide and rule.[6] During the British rule, progressive section of Indian people clamoured for reforms in personal law, but the British rulers were not prepared for it and were not even willing to listen to such a demand. It was, therefore, natural for the free India to stipulate for a uniform civil code and we proceeded in article 44 of our Constitution as one of the directive principles of state policy. The Preamble of the Constitution records the solemn resolve of the people to secure to all citizens 'equality of status and opportunity' and 'justice, social, economic and political'. Article 15 prohibits discrimination on grounds *inter alia* of religion, race or caste. Article 14 guarantees 'equality before the law or the equal protection of the laws' within the territory of India to all persons.

By a uniform civil code what we are in fact striving for is a uniform family code[7] so that in matters like marriage,[8]

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6. The successive Law Commissions appointed during the British period expressed an opinion against the codification of personal laws. The Second Law Commission observed: "....the Hindu law and Mohammedan law derive their authority respectively from Hindu and Mohammedan religion. It follows that British legislature cannot make Mohammedan law or Hindu law...."
7. In Europe by civil code is meant an all comprehensive code with every aspect of civil relations. Recently we find a trend, particularly in East European states to carve out a separate code for family relations. The U.S.S.R. was probably the first European country to enact a separate family code. In Poland also there are two codes: the Polish Family Code and the Polish Civil Code. Most of the East European People's Democracies follow this pattern. See J.N. Hazard, *Communist and their Law* 272-73 (1969).
8. Both the Hindu law and Muslim law of marriage have been reformed by legislation from time to time. In Hindu law the

divorce, adoption, guardianship and custody of children,[9] inheritance and succession,[10] etc. all sections of our people are governed by a uniform law. An absence of uniform civil code results in many anomalies. For example, an Indian who goes abroad is free to marry, if *lex loci* permits and in most cases it does, any person of his or her choice there, wheter he/she is a Christian, Hindu, Muslim or Jew, white or coloured, a believer or an atheist. But if the same person wants to marry in India he or she will be able to do so only if the other party belongs to the same community to which he/she belongs. The Special Marriage Act, 1954 has tried to provide a way out by laying down that 'any two' persons can marry under the Act.[11] But the most curious provision of this Act is to the effect that the parties are transformed into something different which they may not like to be or for which they may not be prepared.[12] The Special Marriage Act, 1954, provides facility for inter-religious marriages only for those persons who are prepared to become rebels. It may be stated that an average individual is not a rebel, does not want to be one and it is he who needs most the protection of law. He wants to engage in the pursuit of happiness, but in a normal, routine way and not as a revolutionary. The fact that should highlight the need for a uniform family code is that an average Indian citizen should be able to establish and maintain his social and

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reform began with the Hindu Widows' Remarriage Act. 1856. In 1946, the Hindu Marriage Disabilities Removal, Act. 1946, permitted inter-sub-caste marriages and inter-gotra marriages. The Hindu Marriages Validity Act, 1949 legalized inter-caste marriages. The Dissolution of Muslim Marriages Act. 1939 laid down certain grounds on which a Muslim wife could file a suit for dissolution of her marriage.

9. The Guardians and Wards Act, 1890 lays down a uniform law of guardianship, though s. 17 specifically lays down that in appointing guardian of a child, the court should take into consideration the personal law of the child.
10. We already have an Indian Succession Act, 1925. In respect to testamentary succession the Act applies to all people of India. though in respect of Muslims certain provisions of it are not applicable.
11. Section 4 of the Act.
12. Section 9 of the Act provides that the marriage of a Hindu, Buddhist, Sikh or Jain under the Act 'shall be deemed to effect his severance from' the membership of the undivided family, and section 20 provides that the succession to the persons married under the Act 'shall be regulated by the provisions of' the Indian Succession Act. 1925.

personal relations without any strains or stresses in a normal peaceful way, without being dubbed as a rebel or without being made an out-caste.[13]

Further, can there be any justification for laying down different ages for marriage for different sections of the people living in the same area or in the same locality or *mohalla*? Should idiots, lunatics and impotent persons be permitted to marry if they belong to one community, but not if they belong to another community? Should a male or female belonging to one community have more than one spouse, unlimited or limited to four, while he if belongs to another community can have only one spouse? Should our law permit one to marry his second cousin because he belongs to one community, but not if he belongs to another community? Is there any justification for allowing a person belonging to one community to make an adoption and deny the same to another if he belongs to another community? Does it lie in our mouth to say that the guardianship or custody of a child should be differently determined just because the child belongs to one or the other religion?

It is submitted that predominant opinion among all sections of our people is that no girl below the age of fifteen and no boy below the age of eighteen should be permitted to marry—although there is a section of opinion both in the government, particularly among the family planners, and public which favours raising of age of marriage. Most people would also agree that idiots, lunatics and impotents should not be permitted to marry, or, at least, the innocent party (or either party) to such a marriage should have the right to get the marriage annulled if he or she does not wish to be bound by the marital tie. Similarly, most people would agree that polygamy or polyandry should be prohibited and that people should not be required by law to perform any religious ceremony at the time of marriage. There cannot be two opinions on the necessity of making available the facility of adoption to all sections of the people. Perhaps, there is also a unanimity of the view that a child is a child and needs the same protection, irrespective of the fact that he belongs to one community or the other and, therefore, there should be a

13. After the coming into force of the Constitution, excommunication of a person is technically not possible, but it is difficult to prevent it socially if the people of his community refuse to have any social inter-course with him.

uniform law of guardianship and custody. There can be difference of opinion over making uniform law in respect of various other areas of family law. But such differences can be narrowed down. Take for instance, there may be differences of opinion as to the grounds on which divorce should be available or whether or not divorce by mutual consent should be permitted. But if we adopt the principle of breakdown of marriage[14] as a sole ground for divorce, it is possible to secure unanimous agreement.

What is suggested here is that there are already certain areas of personal law where the existing rules or principles of law are either uniform or near-uniform. In some areas, such as prohibition of polygamy or polyandry, it is not merely desirable but imperative to have uniform and progressive law applicable to all citizens of India notwithstanding that a section of the people does not agree to such measures. It may be emphasised that a uniform family code does not merely mean application of one law to all people of India, but it also means a progressive law which is in accord with the aspirations of the people and the social needs of the country.

It seems that it is the inertia of our government which is standing in the way of a uniform family code. This inertia has been nurtured by a political argument that a uniform family code would interfere with the personal laws of the minorities and antagonise the minority communities which would not be in the national interest. This argument is intended to maintain *status quo*. It is as misleading and mischievous as the argument that certain sections of Indian people should be Indianized. This political argument proceeds on the assumption that the majority community wants to dominate the minority community and fails to take note of the fact that the uniform family code will not be the law of one community or another. It would certainly not be the law of the majority community. It may be an entirely different law.

If we want to implement the directive contained in article 44 of the Constitution then a beginning has to be made somewhere. It is not a task of politicians but of jurists to make a detailed study of personal laws of all communities of India and to say authoritatively which areas of personal laws are mature

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14. See Paras Diwan, "Breakdown Theory in Hindu Law of Divorce," *The Lawyer* 191-204 (1969).

for unification and the lines on which such laws could be unified.[15] The making of uniform family code should be undertaken in the following two stages :

(a) First a study of the personal laws of all the communities should be undertaken with a view to find out in which areas of personal laws uniformity of laws already exists and which are the areas where differences still persists and in what manner they could be resolved.

(b) Once such a study is made, the next step will be to enact the uniform family code.

15. In the opinion of the present writer such a study should have been conducted by the Universities or research institutes by now.