CHAPTER 7

Uniform Civil Code Without Tears

In view of the apprehensions of the Muslims, right from the beginning, three easy stages were envisaged in order to arrive at a compulsory Uniform Civil Code

(i) Separate codification of every personal law.

(ii) Optional Uniform Civil Code.

(iii)Compulsory Uniform Civil Code.

At the time when the Adoption Bill was being debated, the Muslim leaders once again said that they must be allowed to codify their own laws and that the demands must come from the community itself. As we have pointed out, only three Acts have been passed by way of codification of the Muslim Personal Law. It should also be remembered that the Muslim Women's Act was seen as a part of the codification of the MPL. It is significant that the Muslim Women's Act has also been seen as a move away from the Uniform Civil Code. In other words, codification does not automatically amount to the fulfilment of the first condition for a UCC. It is high time we analysed each one of these steps in order to understand them fully.

Let us take the first step, *viz.*, the codification of personal laws. What should be the minimum requirement for it so that it should lead up to the Uniform Civil Code? I think it would be fair to say that it should

(i) Endeavour to reduce the distance between the laws of separate communities as well as laws of sects within the community.

(ii) Make changes in the personal law compulsory on the followers.

(iii)Give more rights to the disadvantaged groups like the women and the children, and better protection to tribals and other oppressed groups.

(iv) Work toward achieving equality between men and women, regardless of their religion.

How far do the codified Personal Laws of the various communities

meet these tests? The codified laws of the non-Muslim communities are binding upon their followers without any right of option to follow the previous uncodified law. This cannot be said of the three Acts under the MPL. They are all optional in their content, to some extent.

In the matters of adoption, wills and legacies, the Shariat Act applies only to those Muslims who opted for the Shariat in preference to their customary laws. The Dissolution of the Muslim Marriage Act (DMMA) did give the Muslim women the right to go to court to seek divorce but the Muslim men's right to the traditional law of divorce was not touched at all. Even the Muslim Women's Act, 1986 gives the parties a choice between the Cr.P.C, Sec.125 and the Act if the husband is willing to opt for the Cr.P.C. This is so despite the fact that a Bill was moved on the specific ground that S.125 of Cr.P.C. violated the Shariat.

As to the other objectives, only the Dissolution of the Muslim Marriages Act meets them. It introduced changes which made the Muslim Personal Law more akin to other personal laws and conferred more rights on women and reduced the distance between men and women. The Shariat Act defeated the first and the Muslim Women's Act, the third and fourth objectives, for regarding codification as the first step towards the Uniform Civil Code.

The first objective of codification of personal laws is fraught with difficulties. Given that there is a large number of local traditions, not to mention the sect-specific interpretation of law and religion in existence, one can hardly say that such codification can be done without damage to the varieties of laws followed in a community. This can only be justified in the larger interests of the community, an argument that will also hold for the Uniform Civil Code.

The Muslim leaders also say that they cannot go outside the Shariat, even in areas recognised by others as secular. It is, therefore, difficult to see how codification of MPL could move in the direction of Uniform Civil Code. Indeed, in the circumstances, there is reason to doubt the possibilities of codification of Muslim laws as a genuine condition precedent to the Uniform Civil Code in the foreseeable future.

On review of the existing situation vis-a-vis codification of personal laws as the first step towards the Uniform Civil Code, one may sum up as follows:

1. The Personal Laws of the Hindus, Christians, Muslims and Parsis have been codified. The Hindu Laws which are the most recent, by and large meet the above mentioned four tests, though not in the area of succession.

2. The Christian Laws are discriminatory, both between men and women, and between Christians and non-Christians. But the Christians want to change

their laws in the direction of a Uniform Civil Code and are actively working towards this goal. The same may be said of Parsis. Both these communities have practical problems not difficulties on the score of religion.

3. The Muslim Law has been codified in such a way that with the exception of DMMA it moves away from the Uniform Civil Code.

4. The Laws of Jews, Buddhists and Scheduled Tribes have not been codified but there is reason to believe they will accept Uniform Civil Code.

It will hardly be said by any sensible person that the personal laws of Indian non-Muslims are perfect. No existing law can be wholly or uncritically put up as a model. The only difference is that some are prepared to see the imperfection and demand change, others are not. During the *Shah Bano* controversy there have been surprising shifts in the opinions of many Muslim leaders and thinkers. There appears to be a hardening of attitudes, a sense of being under fire. One wonders what exactly would have been a satisfactory response on the controversy from non-Muslims who were perceived as outsiders. Given that we are all Indians and *do* have a secular democracy, how is a segment of society expected to turn a blind eye and a deaf ear to a problem practically under one's feet? That, in turn, would mean that no non-Hindu should criticise the practice of untouchability, a situation to be deplored for it would create more social compartments and also breed complacency.

In the ultimate analysis, no community can claim exclusive rights over its members. The logical conclusion of this sort of a claim is denial of full citizenship, as had happened with slaves and women in the not so distant past of world history. And yet, those who claim such exemptions would be the least prepared to face a loss of voting rights to women and, therefore, of vote-banks.

Section 3 of the Shariat Act, 1937, clearly left adoption, wills and legacies under the customary law followed by Muslims, unless a particular Muslim formally and officially opted to be governed by the Shariat. As mentioned earlier, one has grave doubts as to whether anyone took the trouble of filling up the required forms, paying the prescribed fees and making the necessary declarations before the appointed authority and thus bound himself and his heirs to be governed by the Shariat on these three issues. Yet when the Adoption Bill was on the anvil, the whole controversy over it was precisely on the ground that not even a bad Muslim should be allowed to adopt and violate the Muslim Personal Law.

The entire debate also shows the proponents of the Adoption Bill in a poor light. Neither the government's law department, nor the Joint Committee members nor scholars referred to the Shariat Act.[123]

123. Though no scholar, I myself was guilty of the same oversight.

What the debate goes to show is quite important to this present rubric 'Uniform Civil Code without Tears'. It demonstrates that whatever little has been gained by codification can be lost within a trice.

Amongst the distinguished individuals interviewed for this paper was Mr. Syed Shahabuddin, M.P. He saw the transcript and returned it with his corrections. His views being highly relevant, I would quote them here. He said:

> The Uniform Civil Code is neither a matter of priority nor of urgency, nor a sine-qua-non for national integration. It is nothing more than a distant social objective. The movement towards a Uniform Civil Code should logically pass through three stages:
>
> 1. The first stage is the codification of the personal laws of various communities so that over a period of time there is adequate basis in terms of comparative jurisprudence to serve as the foundation to evolve common principles for a Uniform Civil Code.
>
> 2. There has also to be a transitional phase of optionality.
>
> 3. *If the Uniform Civil Code comes into conflict with the Shariat on any given point, the Muslim community should be granted exemption, when Uniform Civil Code becomes obligatory.* (emphasis added).

Such opinions give no hope that the objective of a Uniform Civil Code will be achieved by the three tier process being advocated.

One is constrained to believe that waiting for codification of Personal Laws as the condition precedent on Uniform Civil Code is not going to serve any purpose. Nor is there much point in waiting for initiative to come from within the Muslim minority for any change affecting them and their personal law. The past record, as we have seen, does not justify any such hopes. Other communities are indicating a wish for a Uniform Civil Code and they have a right to be consulted in the matter.

It is submitted that a policy decision has to be taken at this juncture on the desirability of a Uniform Civil Code without waiting for phase one which has not even begun.

Constraints on the Enactment of Uniform Civil Code

How equipped are we to take a decision on the Uniform Civil Code? What are

the constraints under which the decision-makers are likely to labour? It appears to this author that we are woefully ill prepared to undertake this task seriously.

The problems that exist in this respect can be enumerated briefly:

1. Lack of information;

2. Prejudice which arises out of ignorance;

3. No build-up of public opinion;

4. No draft bill; and

5. No basic thinking about the structure of the Code - optional or compulsory? Common Code or Uniform Code?

Some of these problems have been already mentioned earlier. The last thirty six years have been a sad waste of time. There has been no collection of relevant socio-cultural-legal information about the numberless semi-visible groups and communities; no exposure of the masses to the idea of the Uniform Civil Code. No attempt to reduce prejudices between communities or about the Code. There has been no draft bill of it after the wholly avoidable fiasco of the Indian Adoption Bill. There has, therefore, been no document around which an open debate could have taken place. The entire period has been spent on a barren controversy. Indeed to that extent opponents of the Code must be said to have succeeded!

The words Uniform Civil Code have not even been considered properly. Do we want a *Uniform* Code or a *Common* Code? Are the two necessarily the same? Do we want to put together a Common Code which borrows all that is best from existing personal laws in India, or do we wish to look for all that is good in western as well as socialist Codes? We have not put our minds to these questions. We do not seem to have studied the train of events that accompanied endeavours outside India to adopt Uniform Code of Family Law.

If we opt in favour of a Uniform Civil Code, as indeed we must, there is much to learn from experiences of other countries. For example, say the state wishes to cut away the whole mass of uncertainty that accompanies customary marriages and wishes to simplify the matter by insisting on registration as the only valid form of marriage. What is to happen to those marriages that take place without registration, until the new law is well-known? Are they to be void and the children illegitimate? On the other hand, if the marriages are accepted as valid because the fact or intention of the parties is established, then how is the impression to be created that only marriages

registered with the appropriate authority are valid? Such questions are numerous and experience elsewhere could help us with them.[124]

Either model will still give us only a *Common* Civil Code. Is this what we want, or do we want a third model, to wit a Uniform Civil Code that gives justice to women, children and scheduled tribes, whether or not these provisions are found in existing laws? If we are serious about implementing the promises in the Constitution, we will have to admit that under existing laws, hardly anywhere have the rights of women and children been acknowledged. The extent of discrimination against women may vary from country to country, but, with the possible exception of the Baltic countries, there is some discrimination between the sexes. Children are even worse off. Most countries still regard them as the property of their parents. As to the scheduled tribes, everyone seems to veer between their merciless absorption into the mainstream and the equally inexorable preservation of their culture to the point of fossilisation. Collection of family laws, whether at home or abroad, may not really meet our needs.

For example, let us take the problem of nullity in a bigamous marriage of the husband. Under S.17 of the Hindu Marriage Act, a bigamous marriage is null and void. The same is the position under S.10 of the Indian Divorce Act, which applies to Christians. But the first wife cannot get an injunction under her personal law to restrain the husband from having the second marriage performed.[125] She can only take access to "the more expensive"[126] and also more time-consuming Specific Relief Act.[127]

After the second "marriage" has taken place, the first and legal wife cannot ask for a decree of nullity for her husband's bigamous marriage. Under both the Hindu Marriage Act and the Indian Divorce Act, the decree of nullity can only be secured by parties to the void marriage, including the bigamous marriage.

The first wife has only two options. First, to start criminal proceedings against the husband for committing bigamy, under S.494, I.P.C. and S.198, Cr.P.C. If the second woman had been ignorant of the subsistence of the first marriage, she too can do the same.

Secondly, the first wife can ask for divorce on the grounds of the

124. See B.L. Johnson, *An Introduction to the Soviet System* 170-191. (1969); Max Rheinstein, *Marriage Stability, Divorce and the Law* (1972). This work gives information on four types of societies and states, as the chapter headings themselves indicate "Non-Christian Japan", "Liberal Sweden", "Catholic Italy", "Socialist U.S.S..R."
125. *Lakshmi Ammal* v. *Ramaswami*. AIR 1960, Mad. 6; *Kadar Nath* v. *Suprava* AIR 1963, Pat. 311.
126. *Lakshmi Ammal, Id.* at para 7.
127. 1985 All W.R. 410. Hindu husband can be restrained under Specific Relief Act from contracting second marriage.

husband's bigamy.

As the first wife generally does *not* want divorce, she takes no action. Indeed, to save herself, frequently she gives her "permission" - totally lacking in validity - to the second marriage.

After the husband's death, under both the Hindu Succession Act and the Indian Succession Act, the first wife can, and sometimes does, go to court challenging the second woman's status, and, therefore, challenging her right to inherit.

This author has a tentative suggestion. All marriage laws should be changed to allow the *first* spouse (wife or husband) and any one who stands to inherit if the marriage is void, to move the court for a decree of nullity of the bigamous marriage entered into by the offending partner. This would enable the wife to continue her own marriage. If this is not done, the heirs at equity, should not be allowed to file a suit challenging the second woman's right to succeed.

A similar provision should be made to apply to marriages which are irregular for any other reason - for example the one that vitiated *Chellamma's*[128] marriage. Persons who stand to gain if the marriage is held to be void should be required to challenge the marriage when it takes place. Lack of action at that time should bar them from challenging the succession of the spouse at a later date.

The Uniform Civil Code: Optional or Compulsory

The Prime Minister has announced the government's intention to enact a voluntary or (optional) Uniform Civil Code. It has been urged by many public figures that a voluntary code would be a welcome stepping stone towards a compulsory code and would also allay the misgivings of the Muslims that the code would impose Hindu Personal Law upon them.

The convention of the Bar Council of India on the Uniform Civil Code came out strongly in favour of a compulsory code. Even Mr. P. Chidambaram, (albeit in his personal capacity) who gave the valedictory address, wondered how one could have a code at once uniform and optional. Surely he was right. An optional code cannot be uniform. It can only be one more addition to the existing family laws, thus compounding rather than reducing the confusion that exists.

It thus seems necessary to ask one more set of questions about the nature of Civil Law and distinguish it from Criminal Laws.

128. See note 109.

The Criminal Laws of the land forbid certain acts. One is forbidden to steal, kill, rape, abduct, assault, cheat or obstruct a public servant in the execution of his duty. One is forbidden to evade taxes and customs or make counterfeit coins. Anyone who does those acts is liable to punishment.

On the other hand Civil Law does not forbid any action on the pain of punishment. Nor does it, equally, commend any action (like payment of taxes). One need not marry, divorce, adopt, buy property, make a will, or stake one's claim as an heir. If one chooses to do any of these things Civil Law tells us how to do them. If we ignore it there is no fine or punishment under Civil Law. But its protection is withdrawn. Thus if women do not (as is often the case) claim their share of parental estate the law does not force the brother to give the share to the sister. If one does not follow the rules for getting married Civil law simply treats the marriage as non-existent if the marriage is challenged. In case of marriage by deception, force or fraud or bigamy, the punishment lies at Criminal Law. Civil Law will simply declare the marriage void or leave it to the choice of the wronged person to have it dissolved if the marriage is voidable. But even a void marriage will pass muster if not challenged. Since non-payment of maintenance decreed by the court is punishable it rightly falls under the Criminal Procedure Code.

The Civil Law facilitates behaviour after the individuals have chosen to do a certain act. The choice is entirely optional law. Even in the extreme case of the indigent wife not being maintained by her husband who can afford to do so, if the wife does not choose to assert her right, the husband need not pay. Civil Law facilitates whatever legal actions a person chooses to do. In so far as Civil Law is facilitative it is also optional.

If Civil Law is already governing a voluntary sphere of life how meaningful is it to ask for it to be double voluntary? If I do choose to adopt or marry why should I not be governed by a clear set of rules which apply equally to all citizens and create the same rights in them at Civil Law? If a penal law may be uniformly compulsory, why not a facilitative law?

These are some of the questions to which we should apply our minds. Should the answer still be in favour of an optional code we should still have one more task left: that of separating those areas of life and law which are clearly optional from those where there may be doubt. Thus in a society like ours, given the social pressures, marriage may perhaps not be seen as truly optional. But adoption is clearly entirely an optional behaviour. And an Adoption Act is equally clearly an enabling piece of legislation.

Similarly, areas where Civil Law withdraws its protection when the action is performed irregularly may not be seen as fully optional. If I cannot choose to marry a first cousin or a married person or a child and enter into a

valid marriage with them I may feel that this law does not facilitate behaviour. It prohibits it, though not on the pain of punishment.

Should the entire code be optional including even the enabling legislation? Or, should the enabling laws be available to everyone? Should the prohibitory legislation be optional?

To whom should the options be restricted?

If retention of polygamy is desired by a minority openly and by many others privately - especially those who practice it any way - who should have the option? Should one go back on those personal laws that now demand monogamy? What about child marriage? Or the growing evil of dowry? Since it is an open secret that these laws are honoured more in the breach than in the observance, should we withdraw them? Or at least, not extend their jurisdiction until the time is "ripe"?

There are other facets to the concept of optionality. It can be understood in two ways. Either one has to opt for the entire code or one may opt for selected areas. One feels that opting for the Uniform Civil Code should be a one-way process. There should be no withdrawing. Once a person opts he/she will have opted for their future generations as well. There will be no opting out. If one spouse opts for the Code, the other will also have to do so as otherwise the option will be ineffective.

The access that the majority of our people have to knowledge of law (other than penalties) - is very poor. A voluntary Code will create its own uncertainties, confusion and misinformation. For all these reasons, the Uniform Civil Code will have to be an improvement on the existing laws in all respects and it will have to be very clear in its expression - a tall order indeed.

Administration

To begin with, the modus-operandi will have to be determined. For example, the following points will need answers. This list is by no means exhaustive.

1. What steps are to be taken to explain the Uniform Civil Code to the ordinary citizens? Special access must be devised to women and also special care must be taken to prevent inflaming of the ordinary man's passions by mischievous, rabblerousing methods.

2. What age should be specified at which one is eligible for making one's option?Who will opt on behalf of the child? Or will a minor be regarded as coming under the Uniform Civil Code? Are any grounds to be given for the

option? Should the option be exercised for personal law or for Uniform Civil Code? Should the option be for the entire Code/Personal Law or for parts of it? In consequence of not making one's option by the given date shall such a person be taken as having opted for Uniform Civil Code or for the Personal Law?

3. Who should be authority before whom the option is to be specified ? What should be the form of specification and the method by which the option may be verified at a later date?

4. The final date if any, for choosing one's option; must one opt by a given date or can one opt when the need arises?

The Shariat Act of 1937 required the Muslims to specifically opt for the Shariat, and yet even where they have not so opted, they have been brought under the Shariat. In other words, where socially powerful forces within a community choose to go against the statute they are able to do so and the people who have opted for the Uniform Civil Code may be pressurised later on to deny that they have opted for it with full knowledge and free consent. This is known to happen whenever free choice is required to be exercised by those who are under social pressures - the withdrawal of evidence in criminal cases even to the point of denying the FIR is not an uncommon happening. There is also the danger that the voluntary Uniform Civil Code may never reach stage three and become compulsory - this is indicated by our legislative history. A Uniform Civil Code that is compulsory from the beginning would by-pass all these problems and create many of its own. Voluntary or compulsory, it seems that if and when the Uniform Civil Code is introduced, there is a strong possibility of a period of deep social unrest taking place. Unless the government is prepared to ride out this period, if it then gives in to those who don't want the Uniform Civil Code, more damage will be done by introducing than by withholding the Uniform Civil Code.

A Postscript On The Convention

The differences of opinion amongst the Muslims over the Muslim Women's Act were also noticeable at the Uniform Civil Code Convention. Mr. Eunus Saleem was implacably opposed to every suggestion and some law academics notably from Aligarh agreed with him. On the other hand, Mr. Justice M.H. Beg (Minority Commission), Prof. Imtiaz Ahmed (JNU), Dr. K.S. Durrani (Indian Institute of Islamic Studies). Prof. Aftab Hussain (Siliguri) were clearly and categorically in favour of a Uniform Code. Prof. Ahmed and Prof. Durrani registered a strong protest against any attempt to put Muslims in a separate compartment.

Mr. Eunus Saleem's speeches often made the audience restive,

especially, when he spoke slightingly of Justice Beg. But the latter, as his response showed, needed no one to defend him. The only time Mr. Saleem received unexpected support was when he opposed maintenance to divorced wives on the ground that it was un-Islamic. All the men in the house agreed with him though for a different reason. They said it was economically impossible to support two families.

This author was also sorry to see that while women are claiming their rights in so far as they wish to receive, they are not claiming their right to give. The right of the daughter to look after her parents is a right not a duty. Socially it is perceived as an unwelcome situation in the absence of a son. It is not seen as a right, as a situation for which neither the married daughter nor her parents need feel apologetic.

Secondly, there was no demand for equal, if not higher claim, for guardianship of the child. At the moment, the mother may get custody, but not guardianship. So the father retains superior rights over the child who may be brought up by the mother.