CHAPTER 1

Concepts, Constraints, Policies, Principles, Perspectives, Methods and Prospects

The Uniform Civil Code is, by and large, a child of Independent India. The British Indian Government did pass a few laws which governed family relationships irrespective of the religion of the partners, to wit, the Special Marriage Act, 1872, Married Women's Property Act, 1874, Indian Minority Act, 1875, the Guardians & Wards Act, 1890, Indian Succession Act, 1925 and the Child Marriage Restraint Act, 1929. But these were the exception rather than the rule. Their policy was to legislate in the area of family law at the behest of the concerned community. This did not mean that the entire community had to ask for the reform. It was enough if a few but enlightened members of that community pressed for it. Otherwise, the Suttee Regulation of 1829 would never have been passed, nor the Hindu Widow's Remarriage Act, 1856.

The following is the list of legislations passed by the British in the area of personal laws:

Hindu Law : Suttee Regulation, XXVII of 1829,
Caste Disabilities Removal Act, 1850.
Hindu Widow's Remarriage Act, 1856.
The Hindu Gainful Employment Act, 1930.

Muslim Law : Muslim Personal Law (Shariat) Application Act, 1937.
Dissolution of Muslim Marriages Act, 1939.

Parsi Law : Parsi Marriage & Divorce Act, 1936.

Christian Law : Native Converts Marriage Dissolution Act, 1866.
Indian Divorce Act, 1869.
Indian Christian Marriage Act, 1872.

The Constituent Assembly and the Uniform Civil Code

The idea of a Uniform Civil Code was mooted in the Constituent Assembly in 1947. The Sub Committee on Fundamental Rights had included

Uniform Civil Code as one of the Directive Principles of State Policy. Clause 39 of the Draft Directive Principles of State Policy read: "The state shall endeavour to secure for the citizens a Uniform Civil Code."

Debating the Draft, the Sub Committee on Fundamental Rights decided to recommend that clause 39 should be drafted to make it clear that while a Uniform Civil Code for all citizens was highly desirable, its application should be made on an entirely voluntary basis.[1] Three members of the Sub Committee recorded their minute of dissent in clear and ringing words. They were Shri Minoo Masani, Raj Kumari Amrit Kaur and Smt. Hansa Mehta. They said-

> We are not satisfied with the acceptance of a Uniform Civil Code as an ultimate social objective set out in Clause 39 as determined by the majority of the sub Committee. One of the factors that has kept India back from advancing to nationhood has been the existence of the Personal Laws based on religion which keep the nation divided into watertight compartments in many aspects of life. We are of the view that a Uniform Civil Code should be guaranteed to the Indian people within a period of five to ten years in the same manner as the right to free and compulsory primary education has been guaranteed by Clause 23 within ten years. We, therefore, suggest that the Advisory Committee might transfer the Clause regarding a Uniform Civil Code from Part II to Part I after making suitable modifications in it.[2]

When the provision for a Uniform Civil Code was debated in the Constituent Assembly, Art. 36 (as Clause 39 was renumbered) was strongly opposed even though it was only amongst the Directive Principles of State Policy, by members representing the Muslim Community. Shri Mohammed Ismail Sahib, Shri Pocker Bahadur Sahib, Shri Mahboob Ali Baig Sahib Bahadur, all from Madras; Shri Naziruddin Ahmed from West Bengal, Shri Hussain Imam from Bihar pleaded for amendments that would allow a community to keep its personal law. Shri Mahboob Ali Baig Sahib wanted a categorical proviso that "nothing in this article shall affect the personal laws of a citizen."[3]

Other amendments suggested were, "Provided that any group, section

1. Shiva Rao, *Framing of India's Constitution*, Vol. II, Select Documents, 206. Tripathi (1969), *Debate* of 19 April 1947.
2. *Id.* at 177.
3. VII *C.A.D.* at 543 (23 November 1948)

or community of people shall not be obliged to give up its own personal law in case it has such a law."[4]

And further, "Provided that the personal law of any community which has been guaranteed by the state shall not be changed except with the previous approval of the community ascertained in such a manner that the Union Legislature may determine by law."[5]

The members proposing the amendments argued variously that they were speaking on behalf of not only Muslims but other communities as well; that this provision would run contradictory to Art. 19 which guaranteed freedom of religion; that European countries, for example, the Serbo-Croatian empire, had guaranteed freedom on matters of personal laws. It was even argued that India was too vast a country and had attained very unequal levels of progress in different parts of it for the entire country to be brought under one law. It is worth noting that of the three members of the Sub Committee who wanted the Uniform Civil Code to be a justiciable fundamental right, Shri Minoo Masani was a Parsi, Rajkumari Amrit Kaur was a Christian from the Royal House of Patiala and Smt. Hansa Mehta was a Hindu. Shri K.M. Munshi (Bombay: general) pointed out that Art. 19 permitted legislation covering secular activities. In Islamic countries, like Turkey or Egypt, the presence of minorities did not prevent the enactment of a Civil Code. Moreover, the Shariat Act of 1937 sought to enforce the Shariat upon the Khojas and Cutchi Memons who had till then followed the Hindu laws of succession. Shri Munshi demanded, "where were the rights of the minority then?" When you want to consolidate a community, Shri Munshi said, you have to think of the benefits that may accrue to the whole community. As to Europe, any one who went to a European country had to abide by the laws of that country. He felt that a Uniform Civil Code was essential if we wanted a unified and secular country.

Dr. Ambedkar said that he was surprised by the argument that India was too vast a country to have *one* law. This is precisely what we did have. We had a uniform Criminal Code, uniform property Acts, practically a uniform Civil Code in all matters save those of marriage and succession. He added that it was not true that Muslim Law was immutable and uniform throughout India upto 1935. The Shariat Law did not apply to North-West Frontier Provinces. It followed the Hindu Law for succession and other matters so much so that in 1939, the Central Legislature had to abrogate the application of Hindu Law to the Muslims of North-West Frontier Provinces and apply

4. *Id.* at 540 (Mohammad Ismail Sahib).
5. *Id* at 541 (Naziruddin Ahmed). Also see Appendix 2 for the transcript of Debate.

Shariat Law to them. The same was true of Muslims in various parts of United Provinces, Central Provinces and Bombay where Muslims were largely governed by the Hindu Law for succession. In North Malabar, Marumakkathayam, a matriarchal law of succession, applied to Hindus and Muslims.

Dr Ambedkar concluded his argument on this point by saying :

> It is, therefore, no use making a categorical statement that the Muslim Law has been an immutable law which they have been following from ancient times. That law as such was not applicable in certain parts and it had been made applicable ten years ago. Therefore, if it was found necessary that for the purpose of evolving a single Civil Code applicable to all citizens irrespective of their religion, certain portions of the Hindu Law, not because they were contained in Hindu Law but because they were found to be the most suitable, were incorporated into the new Civil Code projected by Article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the Civil Code had done great violence to the sentiments of the Muslim Community.[6]

He then went on to say that the Muslim members had probably read rather too much into Art. 35,

> which merely proposes that the State shall endeavour to secure a civil code for the citizens of the country. It does not say that after the code is framed, the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage, the application of the Code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat Law which should be applied to Musalmans provided a Musalman who wanted that he should be bound by the Shariat Act should go to an officer of the State, make a

6. *Id.* at 551.

> declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors. It would be perfectly possible for Parliament to introduce a provision of that sort; so that the fear which my friends have expressed here will be altogether nullified. I, therefore, submit that there is no substance in these amendments and I oppose them.[7]

There the matter rested. Art. 35 was carried without any amendments, as it stood. It was later renumbered as Art. 44, and read

> The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.

This is how it is enshrined in the Constitution.

After Independence, the process of codifying Hindu Law was carried on further under the helm manship of India's first Law Minister, Dr Ambedkar. It is only too well-known that Dr. Ambedkar had very much wished to enact a comprehensive Hindu Code. Because Dr Rajendra Prasad, the President of India was implacably opposed to it, the Code had to be truncated and passed piecemeal as Hindu Marriage Act, 1955, Hindu Adoptions and Maintenance Act, 1956, Hindu Minority and Guardianship Act, 1956 and the Hindu Succession Act, 1956. Dr. Ambedkar was bitterly disappointed by Dr. Prasad's attitude and resigned from the Cabinet. The first round for the Uniform Civil Code had already been lost in the Constituent Assembly where, though no amendments to Art. 35 were allowed, verbal reassurances of the kind demanded by dissenting members had been given by Dr Ambedkar. With his resignation the second round was lost, for the man who had a clear vision in matters legal and constitutional, had departed from the scene.

No other personal law was codified until 1986 when the Muslim Women's (Protection of Rights on Divorce) Act was passed.

Who are the minorities

There are many minorities in India; in the order of their proportion to the total population today they are, Muslims 11.4%, Christians 2.4%, Buddhists 0.7%, Jains 0.5%. The Sikhs at 2.0% are now being perceived as a minority. Then there are very small minorities - the Bahai's who number

7. *Id.* at 551-2.

approximately one million, the Parsis who are 80,000 and the Jews whose number fell rapidly with migration to Israel and who have now stabilised at 5,500. There are also the Anglo Indians, a small community.

The minorities that were represented in the Constituent Assembly were the Muslim, Christian, Parsi and Sikh (one member). There were also Scheduled Caste and Scheduled Tribe members. The Anglo-Indians were given a separate representation. The Buddhists and Jains were subsumed under Hindu (general constituency). It is to be noted that with the exception of Muslims all other minorities either acquiesced silently to the notion of a Uniform Civil Code or vigorously supported it.

For the purposes of the Uniform Civil Code, it is the religious minorities that are regarded as being affected. The Scheduled Tribes have not been taken into account though at 7.0%, they form the second largest minority of India. This is perhaps because both for religion and culture, the Scheduled Tribes are not a monolithic group. They are predominantly Animists but not exclusively so. Tribals throughout India have been known to convert to Christianity. In Kerala, Ladakh and North-East India, they follow Buddhism. In some areas, tribals have accepted Islam and in Arunachal, tribals are Vaishanavas by religion. Even though Buddhist, Animist and Vaishnava tribals have been exempted from the application of Hindu personal law statutes, they are perceived as Hindus just as Christian tribals are regarded as Christians and Muslim tribals as Muslims. But the fact remains that whatever their cultural, linguistic and religious differences, the tribals share one feature and that is their vulnerability to exploitation by non-tribals, whatever may be the religion of either side. Nor can it be denied that taken together, the tribals have a way of life quite distinct from non-tribals.

The second ignored minority is even larger. These are the children of India. 38.4% of our population consists of children between 0-14 years.[8] Even more than the scheduled tribes, children cut across all religions. They are the weakest and the most vulnerable group. They are also the most neglected and ill-used. What adds poignancy to the situation is the fact that the future of this country lies with them.

There is one other minority. It forms a little less than half the population of the country, cutting across all religions and classes and is everywhere exploited. It has begun to impinge upon our awareness though not for purposes of Uniform Civil Code. It consists of the women of India.

8. *Census of India 1981*, Series 1. India. Part II.