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Uniform Vs Common Civil Code in India*

I have been a pilgrim in pursuit of legal knowledge, especially in the area of personal laws, for the past over two decades. During this period I have written and spoken a lot on the issue of personal law reform and uniform civil code. The twenty-year record of the response of my fellow country-men to the views and opinions that I have humbly ventured on the subject has been rather chequered. In 1968 when I published my first book *Changing Law of the Hindu Society*, commenting on the book in a prominent legal periodical of the time a leading legal luminary of the day generously borrowed poet Bhartendu's verse to say about me. "This Musalman-Harijan deserves the sacrifice of lakhs of Hindus".[1] Eight years later in 1976 when my anthological work, *An Indian Civil Code and the Islamic Law* was published, writing the foreword to the book an eminent jurist-judge of the country graciously found in me "a pioneering jurisprudent and a socialogist-cum-jurist with a bee in his bonnet." Another ten years have since passed and now certain critics have thought it fit to contemptuously confer on me appellations like "fundamentalist, obscurantist and somersaulter." Eighteen years ago this "Musalman-Harijan" deserved sacrifice of lakhs of Hindus for his forceful plea that certain aspects of the traditional Hindu Law be protected against the increasing onslaught of the western legal culture. My 1976 book earned the prefatory panegyric from a great judge for my exposition of the potential of true Islamic law to become the major constituent of the future civil code of India. The labels of fundamentalism and obscurantism etc. now stuck on me by some so-called naticnalists are attributable to my assertion that a uniform civil code cannot

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1. इन मुसल्मान हरिजन पर कोटिन हिन्दुं वारिये।

mean abondonment of even of those parts of the Islamic personal law which by all standards are superbly humane, in favour of highly westernised laws imparted from Britain, Scandinavia or the Soviet Union.

This chequered record of my readers' reaction to my views furnishes a rather sad commentary on where the air is blowing. If I sing the glories of the traditional Hindu law — which I always have proudly done — I deserve a big pat on the back. If I plead for the merger of Islamic law into a composite Indian Civil Code I still deserve applause. But the moment I speak of the beauties of Islamic law and suggest that they be at least preserved for the Muslims if not nationalised, I am branded as a fundamentalist guilty of stabbing in the back of the Constitution. All this makes me sore and disillussioned.

It is with a sad and broken heart that I plead with you to get alarmed at how wide-spread ignorance, abysmal bigotry, deep-rooted prejudices, die-hard bias, grave misconceptions and concealed communalism have eclipsed the true meaning, object and scope of the directive principles of the Constitution in respect of uniformity of the Civil Code. It is unfortunately a bitter reality that today among the advocates of reform and uniformity in the personal laws noble souls having unprejudiced brains and uncorrupt thinking are only a handful. Most of those who are now talking about a uniform civl code and demanding its early enactment have, by their speech, conduct and deeds, left it no secret what they are aiming at. Integrity of the advocacy of and the object behind the directive principle of uniform civil code has been badly damaged by such elements of the society. The slogan of a uniform civil code seems to have been adopted by them as a camouflage to attempt wiping off the cultural traditions of all the religious minorities in India. Those in the forefront of this game are organisations and individuals who have never digested the wisdom of our pragmatic leaders of the past in not allowing creation of a theocratic state in India. Utterly despaired by the stress of our Constitution on an absolute equality of all religions, these elements are now giving us their own lessons in secularism which in their opinion means nothing but the dominance and imposition on all of one chosen culture. Finding that the Constitution has guaranteed to all religious communities in the country freedom of religious belief and practice and of managing their own affairs in religion, these elements find themselves under heavy

constraints of their vested interests to give their own definitoin and explanation of the meaning and scope of the religion of each of the minorities, while reserving for themselves the right of unduly stretching out the limits and scope of their own faith. And here lies the real trouble. Total want of uniformity in the standard of tolerance to different religio-cultural traditions of the country has drowned all talk of uniformity in the civil laws into the mud of serious misgivings.

The demand of a uniform civil code made in the language which is being spoken now has moulded the response of the religious minorities into grave suspicious and serious apprehensions. And it is these suspicions and apprehensions of the minorities, which instead of being viewed with sympathy and understanding, are generally misrepresented as their obscurantism, orthodoxy, shying away from the wholly illusory national mainstream and even anti-nationalism.

How can the sensitive brains, perception and attitude of the leaders and spokesmen of the minority communities can be expected to remain unaffected by these hard facts of contemporary Indian life ? How can they remain wholly oblivious to the way the Constitutional directive relating to uniform civil code is being not only misunderstood but deliberately misused as an umbrella for vituperating against all those religio-cultural traditions of India as are believed to have originated outside the national frontiers of the present day, albeit in the distant past. In a country where a visiting charismatic religious head commanding devotional respect of nearly half of the world can be greeted with the burning of his effigy and where a High Court judge may find it advisable to admit a writ petition demanding proscription of the Holy Book of a community accounting for over 40% of the population of the globe, there in such a country demand for a uniform civil code made by the majority community in the name of secularism is bound to be received with serious misgivings. When politico-religious organisations having a consistent record of theocratic militancy and individuals known to the nation for their profanity towards the religious faiths of the minorities have the audacity to call for the implementation of a uniform civil code, the call is bound to boomerang. When eminent journalists and distinguished academicians of the majority community begin openly talking nonsense about the basic religious beliefs of the minorities, the deep suspicions of the minorities regarding

the demand for a uniform civil code are bound to be fortified and strengthened. When in a multi-religious society, one particular community insists on projecting its own mythology as national history, its own religion to the exclusion of all others as the perfect embodiment of secularism and a highly westernised law, which it has accepted in theory but seldom follows in practice, as the glittering model of a uniform civil code — all other communities may find it difficult to continue offering a blanket support to any of those national goals.

It is an unfortunate fact that the Constitutional directive of article 44 is currently being grossly misunderstood and gravely exploited by elements obstinately intolerant to the religious minorities. To understand this, let us see what article 44 in reality says and what are being wrongly asserted to be its meaning, aims and objects. The actual wording of the article is "the State shall endeavour to secure a uniform civil code for the citizens throughout the territory of India." A deeper analysis of the language brings forth the following elements :—

1. The directive principle is addressed to the "state" and not exclusively to the legislature.

2. The State is being asked to "secure" the code which does not necessarily mean enacting it either by parliamentary legislation or by judicial law-making.

3. What the state is being asked to secure is that the civil code of India be uniformaly applied to all the citizens of the country.

4. The application of the code is required to be uniform throughout the length and breadth of the nation.

It is indeed a mystery why and how the lofty ideals of secularism and national integration have come to be read in between the lines of the simple and clear provision of article 44 which merely speaks of territorial uniformity in the application of the civil laws. The interpretation that this provision basically requires a dramatic abolition of the personal laws of all the religious minorities in the country and the enactment in their place of an entirely novel code is based on faulty foundations. The directive speaks of a civil code to be uniformaly

applicable all over the country and, as such, it casts no aspersion on any personal law. Nor does it indicate any preference whatsover for any of the personal law now in force. The aim and objects behind this constitutional provision, which are to be read into its historical background and the relevant Constituent Assembly Debates, surely do not fix up as its goal either secularisation of the Indian social life or what is being called national integration. Secularisation of the social life, from the clear indications that we may gather from the personal laws enacted in post-independence India, seems to be nothing but their mere westernization. An aimless westernization of any walk of life could surely not have been desired by our great nationalist leaders who gave us the Constitution. Presuming that they so desired would be an insult to those noble souls. As regards the notion that national integration may be achieved in any degree by enforcing rigidly common laws, let everybody remember that as many as 66 entries are there in the State List and 47 in the Concurrent List under the scheme of distribution of legislative powers in our Constitution. If strictly the same laws were the *sine qua non* of national integration, the very existence of the State List and the Concurrent List of subjects for law-making in the constitution would have been questionable. The fact is that a country which has adopted the principle of politic — democratic pluralism in the form of a federal structure of polity could not have pinned its hopes for national integration on the commonness or uniformity of laws.

In reality the constitutional directive on uniform civil code has nothing to do either with the ideal of political secularism or with the goal of national integration. Many great communities of the world which have fully or largely introduced secularism in their society and are also nationally integrated in the fullest sense of the term, continue having variformity and diversities in different branches of their legal system. Evidence of their examples and also of experiences and experiments elsewhere in and outside India wholly shatter the myth that national integration can be achieved through, or that its achievement essentially requires, a uniform civil code. To be more concrete let us ask ourselves, has a common personal law in fact succeeded in any degree in integrating the Hindus and the Sikhs of India ? And has the uniform Sharia laws been able to keep the two original wings of Pakistan united and integrated ? Above all, I want to ask, are we

really lacking in national integration ? My own answer to this question would be an emphatic no. If national integration means patriotism, common feeling of being Indian and the desire of peaceful co-existence in the Indian common-wealth of communities, all the sections and groups of citizens do subscribe to each of these ideals. But those who think that we still lack national integration, let them coolly and dispassionately ponder over the question whether this is actually due to the want of a uniform civil code or is attributible to mutual intolerance of one another's socio-religious values and traditions ? I have a convinced opinion that those who have unnecessarily linked the issue of a uniform civil code with political secularism and national integration have awfully weakened the case for such a code.

Over a period of three and a half decades of the post-constitution era irresponsible, irrational, illogical and irrelevant talk about the uniform civil code, by persons concerned, unconcerned and ill-concerned, has drowned the provision of article 44 into the mud of such awful and frightful complexities from which it is indeed difficult for it to emerge. The meaning now being given to it has the dangerous potential of causing rapid national disintegration. A fresh thinking in the matter therefore is inevitable. And by no standards will a fresh thinking on this extremely sensitive issue be a sacrilege to the Constitution or blasphemy to nationalism. In a constitution which has been, within thirty five years of its life, subjected to not less than fifty amendments — most of them in its mandatory provisions — a mere Directive Principle need not be so rigidly, literally or otherwise universaly construed as to ignore both its past history and present communal overtones.

As regards the historical background of Article 44, it will be unrealistic to forget that in its formative stage it was opposed by nearly all Muslim members of the Constituent Assembly by all their might. Going far beyond opposing the proposal for a uniform civil code, they had clearly demanded express safeguards for the personal laws of all the minorities. The argument made in the Constituent Assembly that the secular Constitution of a secular state could not expressly protect the traditional personal law of any section of citizens had flabberghasted them when they found that the Constitution eventually did protect in express terms certain religious traditions of various groups within the majority community — the venerated cow and the sacred

kripan — much more flabbergasted they were to see late, how easily the constitution could protect the Naga customary law and how readily every family law statute enacted after 1950 could safeguard not only all the tribal laws but also numerous local, caste and family customs of all those whom they governed. Were the considerations behind protecting the religious tenets and legal customs and usages of those chosen sections of citizens more weighty than the Muslim community's deep veneration for the Shariat? The question was awfully puzzling for the Muslims. In the Constituent Assembly their protests were, however, simply drowned in the then prevailing general atmosphere of anti-Muslim feelings generated by the partition of the country and its aftermath. The near unanimous Muslim dissent from the directive of article 44 is, however, a part of authentic history of our Constitution which cannot be overlooked by the present-day interpretors and implementers of the Constitution.

A searching analysis of our constitutional history and a close scrutiny of the family law Statutes enacted after 1950 cannot but lead us to the irresistable conclusion that the provision now enshrined in article 44 could not have aimed at a galvanic abolition of the personal laws of the minorities. But ever presuming that at its inception the directive did so aim, can we remain wholly oblivious to how effectively each of our national minorities have demonstrated, consistently thoughout the 36-year span of the post-constitutional era, their total inability to reconcile to its said supposedly original aim ? Minorities are after all equal partners with the majority community in the composite Indian nationhood. Their response to the principle of article 44, both before and after its amendment, should be a strong stimulus for us to re-interpret its meaning and redefine its scope so as to make its repeal or amendment unnecessary.

It is in this background that I have, of late, presented to the nation my theory of a possible difference between the terms "common" and "uniform". Lexicons and dictionaries of the English language do make a room for a meaningful differentiation between these two expressions. Article 44 may certainly be interpreted and applied so as to bring about uniformity within each of the personal laws now prevailing in the country with their perplexing intrinsic diversities and territorial and inter-personal variformity of application.

Let me illustrate, taking the example of Hindu law, we find that Hindus in Goa, Daman and Diu are governed by an outdated Portguese law, in Pondicherry mostly by the old French law, in Kerala by at Marxism — oriented local version of the 1956 Hindu Succession Act, and in various other parts of the country in respect of numerous matters by the traditional customary law derogating from the Hindu Code of 1955-56. Coming to Muslim law, we find that under the provisions of the Shariat Act of 1937 itself all over the country the Muslims are governed by their Sharia-based personal law in some matters and by the indigenous customary law in others. In the State of Jammu and Kashmir, their domestic life is regulated by a wholly un-Islamic customary law and in Goa and Pondicherry like their Hindu brethern, by the old Portuguese and the French law, respectively. In the three South Indian States of Andhra Pradesh, Tamil Nadu and Kerala, by virtue of local legislation on the subject the scope of the Muslim personal law is much wider than elsewhere in the country. As regards the Christians, Kerala has got its own custom-based regional laws while in the rest of India they are governed by the laws centrally enacted in the latter half of the last century. The diversities within each of our personal laws are thus indeed awful — each divided into various schools and subschools, each modified or codified, wholly or partly, both centrally and locally, each allowing customs to supersede the written law.

Let it be understood that Indian Civil Code is at present the name of the totality of all the personal laws now in force in the country — each of them being an important constituent of that composite code. Article 44, according to the interpretation that I am suggesting, would mean that this composite civil code of India — which is already in existence and is not to be enacted wholly afresh — should be applied all over the country with a complete inter-territorial and inter-personal uniformity.

Acceptance of such an interpretation of Article 44 and its implementation along the lines suggested here will mean one and the same law for all Hindus all over the country, one and the same Muslim law for all Muslims from Kashmir to Kanyakumari, the same Christian law for all the Indian followers of Jesus Christ and a common personal law for all the Parsees of India. Taken together, these personal laws — of course, each one of them suitably reformed wherever necessay in pursuit of social and economic justice would be the constituents of the multiple

Civil Code of India. By uniformly applying that multiplex civil code throughout the length and breadth of the nation we shall have, in my opinion, adequately answered the call of Article 44 of the Constitution.

Let me now conclude. If national integration is in fact the only or even the major goal behind the directive principle of article 44, who will have the audocity to deny that the end is much more sacred than the means ? As experience has shown that interpreting or translating that noble directive principle of state policy into hasty action in a particular way has the potential of putting the pace of national integration into the reverse gear, we must think of other possible dimensions and parameters of its interpretation and implementation. What is most important is the unity of the nation and not how we achieve it. And nothing can be more prejudicial to the unity of nation than disgruntled minorities. I have explained to you, to the best of my capability, my theory regarding a safe re-interpretation and a wise implementation of the directive principle of article 44. And I assure you with utmost sincerity that it is only my deeply patriotic concern for the unity of nation that has urged me to build up this theory. Long live Unity of India.