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The Conflict Between Tradition And Modernity

I

The desire for a common civil code in India is a thrust towards modernity in a traditional society which seeks to weld the mutually exclusive communal and religious groups into a united and viable society. It is a laudable but difficult attempt at laying the foundations of secularism which is envisaged by our Constitution and, in the context of a religiously pluralistic society, means an equal respect to all religions, though this is not the meaning in which westerners understand the concept. The process of modernizing the Indian society began with the establishment of the British imperial rule in the old Indian dependency when the alien rulers introduced the Westren liberal ideas of administration and politics with which they had been familiar. The Cornwallis Code of 1793 was the first deliberate administrative effort on the part of the British to grant civil rights of property and persons to all Indian subjects without any religious or communal distinction. This process of bringing the Indians of different religious persuasions under a common civil and criminal law continued during the British rule. The Civil Procedure Code, the Criminal Procedure Code, the law of contract, tort and evidence and the Indian Penal Code are the imperialist legacy to free India ; and they constitute the base of a common civil and criminal code in free India that makes no distinction between a Hindu or a Muslim, or a Christian, or a Parsee in the administration of justice. In other words, equality before law which our Constitution enshrines is the priceless gift of the British rule. It was unknown both to the Hindus of ancient India who observed inequality based on the differences of caste (*varnabēda*), and to the Muslims of mediaeval India who regarded the non-Muslims (*zimmis*) as second-class citizens.

India is a religiously pluralistic society. Her religious pluralism is the outcome of her historical experience. However much ardent modernizers

seek to wean away Indians from the predominant influence of religion, they will not succeed. For modernization cannot achieve the complete eradication of traditional beliefs. From the point of view of their religious persuasions, Indians are broadly divided into Hindus, Muslims, Jains, Sikhs, Parsees and Christians. Of these religious communities the Hindus constitute the dominant religious community and the other religious communities are minorities ; the Muslims form the largest religious minority. Except in the Kashmir valley, in Malapuram in Kerala, and in Murshidabad in Bengal, the Muslims form a minority of voters in the rest of India, though they constitute the largest minority. In this respect, the Sikhs are better placed than the Muslims for they, concentrated in Punjab, form the ruling community in that state.

The anxiety of the religious minorities, especially the Muslim minority, about their future in a Hindu-dominated state is natural. The activities of the Bharatiya Janata party which seeks to unite the Hindus of India under one banner and to give the primacy of place to the values of the Hindu culture in the political system, reinforce the fears of the religious minorities about their future. But they can be assured that their fears are unfounded. For the dominant Hindu majority poses no threat to them. The contemporary political trends do not indicate the possibility of a Hindu reaction. The Hindu majority is linguistically divided and the nationality consciousness of the Tamilians, Telugus, Malayalis, Bengalis and Assamese is too powerful to succumb to the Hindu religious consciousness. Regionalism in Indian politics derives its impulse from the nationality consciousness of the people and appeals to the men of all religious persuasions. Besides, the cultural differences between the Hindus of the north and those of the south are salient. The operation of the political factors must be taken into account when the future prospects of secularism in India is assessed. The present political trends point out that the chances of the Hindu reaction are remote in spite of the strenuous efforts of the Bharatiya Janata party. Such chances will become more remote if we strengthen the forces of secularism in our country. By fostering the secular democratic values of liberty, equality and fraternity which form the ideological basis of our Constitution, we can build an integrated nation. One of the practical means of strengthening the bond of political unity between the different religious communities is to lay the firm base for an integrated Indian society. It is in this context that the framing of a common civil code assumes great significance. For such

a code reflecting the secular spirit of the Constitution would strengthen the existing social bonds and foster the political integration of the different religious communities by subjecting them to a common judicial procedure in respect of the personal law.

India is still a traditional society in spite of the clear signs of political modernization. The process of modernization has generated a conflict between the deeply ingrained social beliefs and customs associated with tradition and the new efforts of social change associated with modernization. The opposition to the common civil code is the sign of such a conflict of values in a transitional society. It brings home the unresolved conflict between the loyalty to the nation and the loyalty to the religious community.

II

The Indian predicament is how to evolve an agreement on a common civil code in a religiously pluralistic society. The characteristic of a religiously pluralistic society, such as ours, is the existence of moral disagreements, since the traditional moralities of the Hindus, Muslims, Parsees and Christians, deeply influenced by their respective religions, differ in many respects such as the attitude to women, inheritance of property, and marriage. Differnces arise not only on account of particular moral questions but also on account of the nature and scope of morality itself. As Hinduism, Islam, Christianity and Zoroastrianism have influenced the moralities of the people who practise those religions, the role of religion has to be taken into consideration. We are not only a religiously pluralistic society but also a democratic society. Whereas the morals of the Hindus, Muslims, Christians and Parsees differ, these people, as Indian citizens, accept the secular values of the Indian Constitution and practise a common public morality. In such a peculiar context where traditional morality governs the personal law and a common constitutional, civil and criminal law determines public morality, we have to face boldly and with an open mind the issue whether the law can be neutral where differences arise over particular moral questions as well as the nature and scope of morality. Like an ostrich, we cannot ignore the question how in a democratic society the content of law should be determined in respect of controversial matters raised by ethical diversity.

There is a further consideration. A democratic society, even if socialist, sets a fundamental value on freedom and seeks to preserve ethical diversity, since the people living in such society follow a variety of conflicting ideals of life. In other words, there is no harmony of ends. This is the case with the Indian democracy in which there are variant moral environments. As the intrinsic value of ethical diversity is the basis of our democratic society which is liberal in seeking to preserve the different moral environments, and as this ethical diversity is the consequence of our religious pluralism, the issue resolves itself whether the effort to frame a common civil code embracing the different religious communities in India will be destructive of the ethical diversity valued by our democratic system. It is the contention of the writer that such a common civil code resting on an enactment of the Union Parliament cannot destroy our religious pluralism which is protected by our Constitution. Let us examine the relevant constitutional provisions.

Art. 25 of the Indian Constitution guarantees freedom of religion and conscience[1] and Art. 26 permits every religious denomination to "have the right (*a*) to establish and maintain institutions for religious and charitable purposes ; (and) (*b*) to manage its own affairs in matters of religion". "Articles 25 and 26 guarantee the right to practise and propagate not only matters of faith or belief but also those rituals and observances which are regarded as integral parts of a religion by the followers of a doctrine".[2] Articles 27 and 28 preserve the secular character of the State though it is dominated by the Hindus. Hinduism, the religion of the majority community, shall not be the religion of the State in India as Islam is the religion of the State in Pakistan. In other words, there is no State religion in India. "The

1. Not only Indian citizens but aliens have the freedom of religion under Art. 25. The freedom to profess religion means the right of the believer to state his creed in public and the freedom to practice religion means the right of the individual to express it in private and public worship. (vide *Commissioner, Hindu Religious Endowments. V. Lakshmindra,* (1954) S. C. R. 1005).
2. D. D. Basu, *Constitutional Law of India,* Prentice-Hall of India, New Delhi, (1983), p. 74 (vide *Commr. H. R. E. V. Lakshmindra* (1954) S.C.R. 1005. (It is clear that judicial interpretation has widened the scope of the freedom of religion guaranteed by Art. 25 and Art. 26.)

State will neither establish a religion of its own nor confer any special patronage upon any particular religion. It follows from this that —

a) The State will not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution (Art. 27) ;

b) No religious instruction shall be provided in any educational institution *wholly provided* by State funds ;

c) .....While religious instruction is totally banned in State-owned educational institutions, in other denominational institutions it is not totally prohibited but it must not be imposed upon people of other religions without their consent (Art. 28)."[3]

The Constitution protects the cultural and educational rights of the minority religious communities. Art. 29 and Art. 30 ensure that the State shall not impose the culture of the dominant Hindu community on the minorities. When India secured freedom, the minorities living in a predominatly Hindu society might have entertained the legitimate fear of losing their cultural individuality, since the attainment of independence gave the Hindus the deciding voice in the matter of framing the Constitution of their country. To allay their fear the founding fathers who were committed to the secular political values of democracy, designed Articles 29 and 30. Their object was to preserve the religious pluralism of the Indian society by safeguarding the cultural and educational rights of the religious minorities. "These two articles confer four *distinct* rights :

i) Right of any section of citizens to conserve its own language script or culture (Art. 29(1).

ii) Right of all religious or linguistic minorities to establish and administer educational institutions of their choice (Art. 30 (1).

(*iii*) Right of an educational institution not to be discriminated against in the matter of State and on the ground that it is under the management of a minority (Art. 30(2).

3. D. D. Basu, *Introduction to the Constitution of India*, Prentice-Hall of India, (New Delhi : 1983) pp. 107-108.

(*iv*) Right of a citizen not be denied admission into State maintained or State-aided educational institution on grounds only of religion, race, caste, or language (Art. 29 (2).[4]

The examination of Articles 25-30 reveals that our Constitution preserves the religious pluralism of our society since it protects the religious minorities. Constitutional protection is extended not only to a religious minority but to a cultural and linguistic minority which seeks to maintain its identity its own culture and language; and the State cannot impose on it any other culture belonging to the majority or the locality. Even the constitutional directive to the State to promote Hindi as the national language cannot curtail the cultural and linguistic safeguards of a minority community assured by Articles 29 and 30.[5] The power of the State to determine the medium of instruction in primary and secondary schools cannot over ride the right of a minority community to impart instruction in it own language.[6] The right of a minority, whether linguistic or religious, to establish educational institutions (Art. 30 (1) "implies the right of a minority community to impart instruction to the children of its own community in institutions run by it and in its own language and if such right is infringed, an institution run by the community may seek relief for violation of the fundamental right."[7]

The toleration of different moralities of the Hindus, Muslims and Chirstians is the cultural characteristic of our democratic and religiously pluralistic society; and it will not be abandoned if we go in for

4. D. D. Basu, Constitutional Law of India, pp. 79-80. Vide *St. Xavier's College vs State of Gujarat*, A. 1974 S.C. 1389 (paras 6, 73, 124).
5. *State of Bombay vs Bombay Education Society*, (1955) 1 S. C. R. 568. The Government of Bombay in an order directed that in a State-aided school where English was the medium of instruction, none, other than Anglo-Indians and citizens of non-Asian descents should be admitted. The immediate ground for denying admission was that English was not the mother-tongue of the pupil. The Supreme Court held that this was a denial of the fundamental right guaranteed by Art. 29(2) only on the ground of the language of the pupil. The Court rejected the contention of the Bombay Government that the object of denial was the promotion of Hindi as immaterial to the issue. Further, the promotion of Hindi could not be realized by any means contravening the rights conferred by Art. 29 and Art. 30.
6. *Ibid.*
7. D. D. Basu, *op. cit.*, p. 81 (Vide *State of Bombay vs Bombay Education Society*).

a common civil code. The common civil code presupposes our acceptance, as citizens, a common social morality which will strengthen the secular forces working for the national integration of our country. It will not compel us to abandon our religious pluralism which is safe-guarded by our Constitution. It will be based on whatever obligations that we, as Hindus, Muslims, Christians and Parsees accept as necessary for the preservation of those values which our Constitution seeks to foster and preserve in the interest of national unity. The acceptance of those obligations will constitute the common social morality in our democratic society. The common social morality will darw its strength from the individual ideals of the Hindu, the Muslim, the Christian and the Parsee. For, in spite of their individualism, Hinduism, Islam, Christianity and Zoroastrianism share certain universal value such as respect for life, truth and righteousness, assistance to the needy and keeping faith. Upon such a structure of universal values the common social morality will rest. Such a morality is universal and utilitarian and the common civil code will express its spirit.

III

The common social morality is the shared morality of all Indians who have compacted through the instrument of the Constitution to follow secularism in the conduct of their public relations. Shared morality has two meanings: "It may mean either that there are certain moral principles (which could be listed) such that any society must recognize these principles in order to exist; or that any society in order to exist must have some shared moral principles, though not any particular ones)."[8] The Indian predicament warrants the acceptance of the second meaning. Shared morality is "some common agreement about what is right and what is wrong" and it is "an essential element in the constitution of any society without it there would be no cohesion."[9] This is the reason why such a shared morality should inform the common civil code so that the law may be used to guard the common moral beliefs. Ours is a heterogenous society and social forces, like caste, community and religion with their primordial loyalties,

8. Basil Mitchell, *Law, Morality, and Religion in a Secular Society*, (Oxford University Press, London, 1967), p. 16.
9. Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, Oxford, 1978), p. 114.

make it a fragmented one. We need a common civil code based on a shared morality in order to make it socially cohesive.

There are hurdles on the way. Most Indians to whichever religion they belong are very much traditional in their approach to religion and morality and they are reluctant to give up their traditional moves. For example, even educated Hindu women hesitate to go to the court to seek divorce, even if injustice has been done to them by their husbands. There is no consensus on the need for a common civil code. In our democratic society there are both conservatives and radicals who do not see eye to eye. "The radicals want the law to move from what it is to what it ought to be;. the conservatives are anxious not to lose the good that has already been won. But neither is indifferent to the rational acceptability of the standards embodied in the law."[10] In our society the cleavages between the conservatives and the radicals are deep and the difference between the two is reflected in their respective attitude towards the common civil code; but both insist on the need for social cohesion. The conservatives view that social cohesion is achieved by leaving the moralities of the different religious communities to be at a tangent and a common social morality is an Utopian venture that flies in the face of the moral conservatism of the Indian people. The radicals believe that the moralities of the different religious communities tend to divide the Indian people into watertight compartments and to make them forget their common humanity as well as their common citizenship, and a common social morality requiring them to follow a uniform behaviour is essential to social cohesion. The traditionalists in our society who are moral conservatives are of the view that the enactment of a common civil code will be harmful to the *de facto* positive morality of the present society; and they do not contemplate the possibility of a change in the law, because such a change is not productive of good. On the other hand, the radicals who are moral progressives want to move from the existing, *de facto*, positive morality which in their view does not conduce to the social cohesion of different religious communities, to the common social morality which will promote national integration. Hence they plead for a common civil code.

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10. B. Mitchell, *op. cit.*, p. 45.

IV

The latent tussle between the conservative and radical points of view regarding the changes in law has broken out into the open by the Supreme Court's decision in the Shah Bano's case on April 23, 1985.[11] This significant decision which the former Chief Justice of India Mr. Y. V. Chandrachud who delivered the judgement, hailed as a land-mark in the "march of law towards social reformation" and "the common passport to human right of women also",[12] has caused controversy in the country and brought to the fore the demand for a common civil code. For the Supreme Court itself in the course of its judgement recommended to the Union Government to frame a common civil code for all citizens on the ground that "a common civil code will help the cause of a national integration by removing disparate loyalties to laws which have conflicting ideologies".[13]

The judgement stirred up a hornets' nest among the Muslim community, because the Supreme Court entered into the realm of the Muslim personal law deriving its sanction from the holy *Quran* and held that Section 125 of the Criminal Procedure Code overrode the divine injunctions of the Quran in respect of matrimony and divorce. The Supreme Court rejected the contention of the appellant that he was bound by the Islamic law to maintain his divorced wife for the period of *iddat* only (i.e., the period of three menstrual cycles), and he had no obligation to maintain her after that period, even if she did not remarry. The Court held that under Section 125 of the Criminal Procedure Code, a divorced Muslim woman did not cease to be a wife so long as she remained unmarried and her husband was

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11. *Mohammad Ahmed Khan V. Shah Bano,* (1985) 2 SCC 556.
12. *Indian Express,* November 28, 1985, p. 9.
13. *Mohd. Ahmed Khan V. Shah Bano,* (para 32) The Court observed: "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter . . . There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law . . . No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so."

bound to maintain her. In other words, the right of the divorced Muslim wife to claim maintenance is not affected by the personal law, since she is unable to maintain herself.

The reasoning of the Supreme Court in Shah Bano's case reveals its constructive role in shaping the law of our country.[14] The judges who were trained in the individualist common law tradition of England have shown commendable grasp of the social and economic realities of our country and have, in a liberal spirit, interpreted the progressive laws enacted by Parliament. Such an interpretation has been in tune with the democratic socialism that India has been pursuing in accordance with the Preamble to the constitution. One significant departure from the common law tradition is the acceptance by the Supreme Court of the Public interest litigation which dispenses with the common law maxim that the affected party must sue to seek judicial remedy from wrong. It is, perhaps, in consonance with its liberal and progressive tendency that the Supreme Court courageously chose to decide a vital point of the personal law of the Muslims, probably knowing well the oppoistion its judgement might engender in a minority community. Though strict canons of judicial probity were observed in interpreting the law in Shah Bano's case, it could not be denied that the informing spirit of that interpretation was secular. For the Court preferred the

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14. The Supreme Court observed: "These provisions (Sec. 125 (1) (a) and (1)(b) are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus, or Muslims or Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that Section 125 is a part of the Code of Criminal Procedure, not of the civil laws which define and govern the rights and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves . . . The liability imposed by Section 125 to maintain close relatives who are indigent is founded on the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Clause (b) of the Explanation to Sec. 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope. Sec. 125 is truly secular in character (vide (1985)2 SCC 556 (para 7).

enactment of a secular body to the divine injunction in the matter of interpreting the personal law of a minority religious community.

Undoubtedly, the radicals will welcome a progressive step on the part of the highest judicial tribunal of our land ; for the plea of the Supreme Court for the framing of a common civil code strengthens their demand for it. We can be sure that the enlightened section of the Muslim community will approve of the judgment, though their influence over the masses bound by tradition, by and large, is not significant. But Muslim fundamentalists, especially the Ulemas who wield great influence over the masses, are certain to oppose the decision tooth and nail. For the Court's interpretation of the relevant *Aiyats* was by a bench of Hindu judges who could not be expected to understand the ethos of the Islamic society with sympathy.[15] Representing the orthodox point of view, Mr. S. R. Ansari, the Minister of State for Environment, lambasted the learned judges of the Supreme Court for their temerity in having interpreted the Muslim personal law and described the judgment as "prejudiced, discriminatory and full of contradictions". Speaking, perhaps, for the liberal section of the Muslim community, Arif Mohammed Khan, the Minister of State for Energy, pleaded for the reform of the Muslim personal law.[16]

The decision of the Supreme Court in Shah Bano's case, even if judicial in nature, has political implications. It has produced something like a consternation among the Muslims. They are a religious minority.

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15. With due humility and reverence to the learned judges of our Suprem Court the writer wishes to point out one in appositeness which is apt to anger the *Sunni* Muslims. In justification of their decision the learned judges quote *Aiyats* from the *Quran*. They are welcome to do so. Among the quotations in the judgment there is one quotation from the English version of the two *Aiyats* (*Aiyat* No. 241 and No. 242 in Mohammed Zafrullah Khan's *The Quran* (p. 38) Zafrullah Khan belonged to the Ahamadiya sect regarded as a heretical sect by the orthodox. (Vide (1985)2 SCC 556 (para 16).

16. *Indian Express*, December 21, 1985, p. 1. Both Mr. Ansari and Mr. Khan were ministers of the Union Cabinet. They spoke in a debate in the Lok Sabha on a private member's bill seeking the exemption of Muslims from the scope of Section 125 of the Criminal Procedure Code. Mr. Ansari urged Mr. Banatwala to withdraw his bill, since the Prime Minister assured the Muslims that the Government would not interfere with their personal law.

Their primary concern in a Hindu-dominated State is to maintain their identity and individuality as a religious community. They have to stick to Islam and the Urdu language in order to preserve their religious identity and their cultural individuality. The Constitution, as we have noted earlier, assures them religious and cultural freedom ; it even grants them the right to convert non-Muslims to their faith. But the Constitution can only speak through the mouth of the judge. Our learned judges of the Supreme Court gave a judgment regarded by the Muslim as offensive to their religious sentiment; they also remarked that our Parliament had the legislative competence to frame a common civil code. Under the circumstances the Muslims would naturally feel worried about their future. Their fear is that a common civil code would extinguish their religious identity ; for in their view the uniformity of law would alter the character of their personal law. They need have no such fear. For the Supreme Court was careful to point out that in determining the applicability of Section 125 of the Criminal Procedure Code in the Shah Bano's case, it went by the objective criteria, viz., the neglect by a person of sufficient means to maintain his wife, child or parent and the inability of those persons to maintain themselves. The Court allayed the fears of the Muslims, when it said that the provisions of Section 125 would not supplant their personal law. But at the same it maintained that religion or personal law could not affect such provisions which were prophylactic and it would, however, go by the criterion that the Constitution restricted their application to defined category of religious groups and classes.[17]

V

The framing of a common civil code in our pluralistic society is not simply a matter of judicial administration; it is a political issue of far-reaching consequence since it involves the fate of the minorities. Even though there is legislative competence to enact it, we need political courage to use the power to legislate a measure bristling with difficulties. We are a traditional people and progress will have to be slow. To bring the Hindus, Muslims, Christians and Parsees on a common platform is a Herculean task. Though the measure can be logrolled by a majority in Parliament, it would not be political wisdom to make a large and significant minority discontented with the political system. In our

17. *Mohd. Ahmed Khan V. Shah Bano*, (1985) 2SCC 556 (para 7).

predominantly traditional society the enthusiastic modernizers advocating the reform should cultivate the virtues of tact and reasonableness and rein up their rationality which would compel them to take to social engineering, heedless of the political cost. The democratic way of carrying out reforms is that discussion should precede consent. Such a procedure which sees the other man's point of view, involves delay; and those who are in favour of the radical change in the law should accept delay as the inevitable part of their job of persuading those who do not see eye to eye with them. So the modernizers and the traditionalists, the changers and no-changers, should practise the democratic virtues of understanding and tolerance, if they are to agree on a common civil code.