NOTES AND COMMENTS

Uniform Civil Code - A Challenge to Minority Rights?

People belonging to different races, innumerable castes and religious beliefs showing no similarity whatsoever live in the subcontinent of India. Fissiparous tendencies, separatist attitudes, secessionist demands, divisive elements of casteism and communalism have not therefore been uncommon.

A common civil code has been suggested as one of the steps to achieve national integration. The code should apply to all irrespective of any differences in race, religion or caste. Marriage, divorce, succession, guardianship and adoption may come within the purview of the code.

Article 44 of the Constitution directs the state to endeavour to secure a uniform civil code. The provisions in Article 44

1. As to the root of communalism, see Mohammed Ghouse, Secularism, Society and Law in India, Delhi (1973), pp. 21-45.
2. B. M. Gandhi, V. D. Kulshreshtha's Landmarks in Indian Legal and Constitutional History (1989), pp. 298, 446. The author feels that “India now is in dire need of a Common Civil Code without which the whole nation might disintegrate. Such a need was never felt before”. However, he holds the view that the question whether “it is the panacea for all our ills” is a debatable issue. Ibid.
3. Such an application can justifiably be based on single citizenship. K. M. Munshi, in connection with the minority problem, rather the muslim problem, referred to the way in which similar problems have been solved in Albania, Bulgaria, Greece, Rumania, Yugoslavia, and U.S.S.R. and viewed that the problem could have been solved by bringing the Muslims “to accept equal and free citizenship, if necessary by the operation of a just and effective rule of law”. K. M. Munshi (Ed.), Indian Constitutional Documents, Vol. 1, Pilgrimage to Freedom (1967), pp. 62-63.
4. Constitution of India, Article 44 reads: “Uniform Civil Code for the citizens: The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”.

are not justiciable, nevertheless Article 37 provides that "they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".

Though 40 years have elapsed after attainment of independence no positive effort has been made by the state for securing uniform civil code. There is a glaring apathy and unmindfulness on the part of the state to implement this constitutional mandate. The tendency of government to bring reforms solely on electoral considerations, is glaringly revealed.

The founding fathers of the Constitution sought to create a secular state. However, the special safeguards of the mino-


7. "Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion. The Constitution at the same time expressly guarantees freedom of conscience and the right freely to profess, practise and propagate religion. The Constitution-makers were conscious of the deep attachment the vast masses of our country had towards religion, the way it had on their minds and the significant role it played in their lives". St. Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389, per Khanna, J. at p. 1414. See also Mohammad Ghouse, op. cit., pp. 1-14.

8. Article 25 of the Constitution of India guarantees freedom of conscience and free profession, practice and propagation of religion. (f. n. contd.)
rities in Articles 29 and 30 were provided for securing equality between the majority and the minority groups,\(^9\) to remove any sense of insecurity on the part of the minorities,\(^{10}\) to make them fit to play their full part in the national life,\(^{11}\) and to mingle in the mainstream without maintaining their difference or aloofness indefinitely so as to help the process of national integration.\(^{12}\)

The demand for sanctity of religion of the minorities had come up for discussion in the Constituent Assembly. Shri R. K. Sidhwa argued that no law or custom governing the Parsi religion should be changed without the consent of the community.\(^{13}\) The Jains also wanted that their religious or socio-religious institutions should not be interfered with.\(^{14}\)

The minorities especially the Muslim minority felt that a common civil code would be tyrannical. K. M. Munshi, while meeting this charge pointed out that in none of the advanced Muslim countries the personal law of the minority was sacrosanct to prevent the enactment of a civil code. Referring to the draft Article 26 guarantees freedom to manage matters of religion in institutions established by religious denominations. Article 27 prohibits religious instruction in institutions wholly maintained out of state funds. Article 28 guarantees freedom from compulsory instruction and related freedoms.

Article 29 guarantees the conservation of any language, script or culture of any minority whereas Article 30 guarantees the right of religious and linguistic minorities to establish and administer educational institutions established by them. K. T. Shah condemned the exclusive privilege given to the religious minorities as reactionary for the felt that it would be a great hindrance to progress. See B. Shiva Rao, *Framing of India's Constitution*, Vol. 2, New Delhi (1967), pp. 380-381.

9. Article 29 guarantees the conservation of any language, script or culture of any minority whereas Article 30 guarantees the right of religious and linguistic minorities to establish and administer educational institutions established by them. K. T. Shah condemned the exclusive privilege given to the religious minorities as reactionary for the felt that it would be a great hindrance to progress. See B. Shiva Rao, *Framing of India's Constitution*, Vol. 2, New Delhi (1967), pp. 380-381.


12. T. K. Tope, "Minorities and their Integration" in Mohammed Imam (Ed.), *op. cit.*, at p. 100.


of Article 44 he said that it was intended to divorce religion from personal law so that rights of parties may be delinked from social relations.\(^{15}\)

The debates reveal that religious freedom does not immunize the personal law. A proposal to this effect brought by the Muslim members was finally rejected.\(^{16}\) The Muslim community stoutly oppose\(^{17}\) any change in its personal law, on three grounds, namely, right to freedom of religion guaranteed under Article 25 of the Constitution, the right to conserve their distinct culture guaranteed under Article 29 and the immutability of religion being ordained by God and the Prophet.\(^{18}\) Justice Tulzapurkar in his revealing study has convincingly proved all the aforesaid three grounds “unsustainable” since they are “irrational, fallacious or invalid”.\(^{19}\) Those who oppose any change in the personal law have to take note of the fact that already the Hindu Code has been modernised by introducing comprehensive changes.\(^{20}\) The view is expressed that no noticeable resistance to a common civil code is possible from Christians and Parsis.\(^{21}\)

Muslim law also cannot be considered so sacred as to be beyond state regulation. For, even the existing Muslim law may not be the Quranic law of Islam.\(^{22}\) Besides, legislations have

---

18. Supra n. 5 at p. 20.
19. Id. at pp. 20-22.
20. See D. K. Srivastava, Supra n. 16 at pp. 560-569.
22. Tahir Mahmood, Supra n. 6 at pp. 238-239.
made inroads into it.\textsuperscript{23} Even among the elite group of the Muslim minority and others there is consensus for a civil code.\textsuperscript{24}

Rejecting the orthodox view of sanctity of personal law it is argued that reforming the Muslim personal law would not be violative of their freedom of religion.\textsuperscript{25} It is pointed out that the existing provisions relating to the Muslim wife is discriminatory and violative of Articles 14 and 15.\textsuperscript{26} Replacing the Muslim personal law by a common civil code under Article 25(2) is pleaded for as a social welfare measure.\textsuperscript{27} The view is expressed that a Muslim cannot complain of denial of the rights to profess, practise or propagate religion, if the state imposes monogamy on him or takes away his unilateral right to divorce his wife or compels him to maintain the wife he has divorced.\textsuperscript{28} Taking example from countries like Turkey and Pakistan, it is pointed out that if social or secular activities surrounding religion are regulated by state the cultural identity of

\textsuperscript{23} Supra n. 22 at pp. 563-564.


\textsuperscript{25} Mohammed Ghouse, \textit{op. cit.}, p. 229; see supra n. 2 for the views of B. M. Gandhi.

\textsuperscript{26} \textit{Id.} at p. 232.

\textsuperscript{27} \textit{Ibid.} Justice Tulzapurkar also holds that in the area of marriage and divorce the Muslim personal law is "unjust derogatory, humiliating and discriminatory against Muslim women on the ground of sex". He cites instances in the Christian and Parsi personal laws also to show how the same is unfair and inequitable to the weaker sex, see supra n. 5 pp. 18-20. Lucy Carroll, also holds the view that the Muslim law on this point is "more unfair and unjust" to Muslim women and is discriminatory. Lucy Carroll, "Mahr and Muslim Divorcee's Right to Maintenance", 27 J.I.L.I. 487 at p. 493 (1985).

\textsuperscript{28} Mohammed Ghouse, \textit{op. cit.}, p. 227.
muslims under Article 29 or their religious freedom would not be violated. 29

The Quran permits taking more than one wife on condition that the husband must not treat all of them with less than equal justice. Based on experience of history it is correctly argued that none other than the prophet himself was capable of such a feat.30 The condition stipulated being impossible of performance it has been maintained that state was competent to intervene and prohibit marriages which would prove sinful under the Quran.31.

In India the evil practice of divorce at will of the husband led to unjust divorce of innumerable poor Muslim wives and to a most humiliating and degrading life for them in society.32 The real cause of protest by Indian Muslims against the uniform civil code is attributed to their wrong notion that it would affect their religion. This view is held by a section of Muslims who are politically based and conservative in their outlook. They misguide the poor and the ignorant masses that once their personal law is changed their religion will also be slowly replaced. The conservative section of muslims oppose any change because they desire certain privileges from the existing system of personal law. Apprehending loss of such privilege they develop a sort of vested interest for its continuance. Therefore, they take the stand that any change will be a deviation from the Islamic path resulting in disintegration of the Muslim society. 33

31. Justice Tulzapurkar, supra n. 5 at p. 23.
32. Zafar Ahmed Khan, Supra n. 30 at p. 63.
33. Id., p. 64.
Almost all the traditional Muslim countries such as Turkey, Egypt, Syria, Morocco, Tunisia, Algeria, Iran, Iraq, Indonesia and Pakistan have effected changes in Quranic law and abolished polygamy and restricted the right of unilateral divorce granted to the Muslim husband. Yet India continues the evil practices of polygamy and divorce at will of the husband.

It is high time that matters of religion are separated from personal law. Definitely, social relations will have nothing to do with religion. What has inheritance and succession to property got to do with religion? Matters relating to religious belief, faith and worship have to be identified. Once that is done rest of the matters not connected with religion in the strict sense can be unified and modified by State.

For this purpose religion under Article 25 must be defined. Religious freedom should be given a restricted scope limiting its application to individual’s faith and belief and his personal relationship with God. The external aspect of religious freedom whether of an individual or group as far as possible, shall be confined to places of worship, namely temple, mosque or church. Any sect will be having a place of worship of its own. No one should be allowed to carry his religion, rather God, from his place of worship or private residence to public office, transport, road or street. When one carries his religion or religious practices, outside one’s place of worship or private residence, he exceeds the limit of enjoyment of this freedom. Therefore, State may regulate the external aspect of religious freedom. This is necessary to achieve a secular society in the true sense of the term in which equal enjoyment of this freedom is guaranteed to the followers of all religions and religious faiths. Such a situation would ensure the peaceful co-existence of all


35. See supra n. 5 at p. 20. See also T. K. Tope, supra n. 12 at p. 101.
religions and religious faiths. Religion *stricto sensu* may be delinked from matters surrounding religion so as to enable the ground for establishment of a common civil code for all citizens alike.

Further, it has to be noted that a citizen or a group of citizens will have the right to propagate his religion or their religions even without the expression “propogate” in Article 25. This is secured by virtue of the right to freedom of speech and expression and of assembly and the right to move freely. Therefore, freedom of speech and expression, of assembly and the right to move freely for the purpose of professing or practising religion publicly in public places may be subject to state regulation.

A uniform civil code will not be violative of the religious freedom or of the rights of the religious minorities. Adoption of the code can be justified under Article 25 (2). It is necessary to define religion as one connected with faith and spiritual relationship of a person with God. External aspects of religion should be amenable to regulation by state so as to achieve a secular society.

— N. Kanakaraj*

36. Under the colour of religious worship, religious processions are taken out through the highways and public paths by the Christians, Muslims and Hindus. This has become a common feature of the day. These processions often result in road blockades causing great inconvenience to the public. Besides, they often are the causes of communal problems, tension and disharmony among the different religions communities. Therefore individual’s right to profess and practise religion publicly in public places and the collective right to practise religion like worshipping publicly in places, as for example in a highway should be regulated.

* Professor of Law, M. K. University, Madurai-21.