Stimulating Reform, Not Forcing it

Uniform Versus Optional Civil Code

Madhu Kishwar

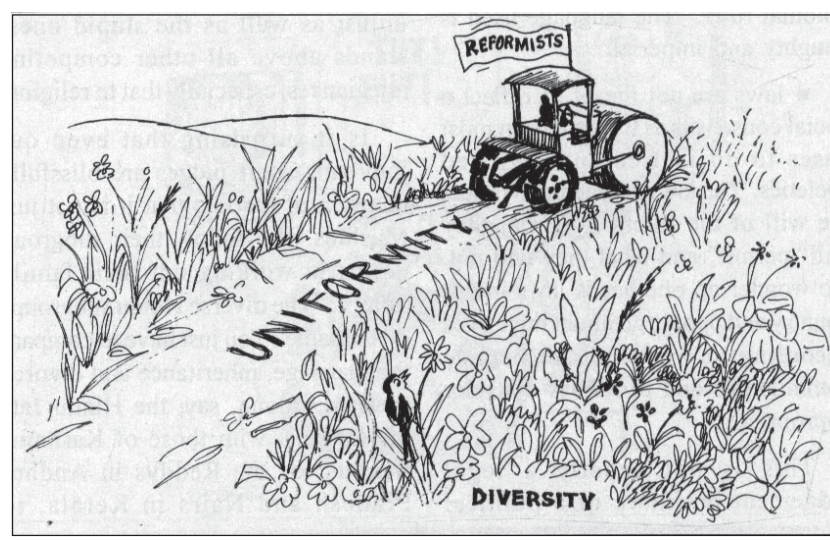
The recent Supreme Court judgement by Justice Kuldip Singh and Justice R. Sahai which strongly recommended to the Central Government that it enact a uniform civil code for all citizens irrespective of their religious faith, has received wide acclaim as an example of judicial activism. It is widely perceived as a laudable attempt to undo the harm done by the Muslim Women's Protection Act of 1986, passed by the Rajiv Gandhi government following the Supreme Court judgement by Chief Justice Y.V. Chandrachud in the Shah Bano case. Even though the Supreme Court decisions in both these cases were ostensibly meant to protect Muslim women against male tyranny and oppression, a close reading shows that the judges have let other considerations influence their concern for gender justice.

Justice Chandrachud and others had concluded the Shah Bano case judgement with the same kind of regret expressed by Justices Singh and Sahai that Article 44 of our Constitution (promising that the State shall endeavour to secure for the citizens a uniform civil code throughout the country) has remained a dead letter. They noted: "A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies."

The recent judgement by Justices Singh and Sahai goes much further. It has very little to say on the issue of gender justice. The judges seem more worried about Hindus converting to Islam than the injustice done to wives whose husbands convert to Islam in order to enter into another marriage without obtaining a divorce. Even while discussing the illegality of a second marriage after such a conversion, Justice Singh concentrates mainly on denying legitimacy to the conversion. There is hardly any mention of the impact of bigamous marriages on the women and children who are abandoned. After that he goes on to devote disproportionate attention to the other supposed benefits of enacting a common civil code. In the opinion of the judges a unified code is imperative "both for the protection of the oppressed and promotion of national unity and solidarity".

The judges seem to be harbouring a curious misconception that "the traditional Hindu law _ personal law of the Hindus _ governing inheritance, succession and marriage was given a go by as far back as 1955-56 codifying the same." Therefore, they argue that there is no justification whatever in delaying indefinitely the introduction of a uniform civil code in the country. "The Hindus, along with Sikhs, Buddhists, and Jains, have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a 'common civil code' for the whole of India."

It needs to be understood that Hindu personal law was not secularised in 1955-56. It was merely codified and "reformed" not necessarily for the better as far as women's rights are concerned. The reformed Hindu law is a shabby, impractical piece of legislation and has failed to provide justice to women



whose rights continue to be flouted by their own families. (see my article, Codified Hindu Law: Myth and Reality, Economic and Political Weekly, Vol XXIX No.33, August l994.)

The judges make it clear in their judgement that they have another agenda in recommending a uniform civil code. "Those who preferred to remain in India after the Partition fully knew that the Indian leaders did not believe in two-nation or three-nation theory, and that in the Indian Republic there was to be only one nation — Indian nation — and no community could claim to remain a separate entity on the basis of religion. It would be necessary to emphasise that the respective personal laws were permitted by the British to govern the matters relating to inheritance, marriages, etc., only under the Regulation of 1781 framed by Warren Hastings. The legislation — not religion — being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/ supplemented by introducing a uniform civil code."

Two things stand out in this statement:

- that our administrators and judges define their relationship to the people they "govern" in the same manner and form as did our erstwhile colonial ruler. The language used is haughty and imperial.

- laws are not meant to reflect a social consensus as they strive in most cases to do in free and civilised societies. The laws are meant to reflect the will of the rulers — what they will "permit" and what they will not. No wonder no one heeds laws in our country and people go about their lives according to what their respective communities and biradaris consider appropriate.

This is not exactly a legal judgement but more of a political sermon on how the Muslim minority should learn to behave and what ought to be its relationship to the Indian state

This is not exactly a legal judgement but more of a political sermon on how the Muslim minority should learn to behave and what ought to be its relationship to the Indian state. It is tempting to pick up cudgels with it as a case of judicial impropriety if one did not realise that the judges are echoing a very broad-based concern which cuts across the entire mainstream political spectrum in our country. The judges seem to believe and fear that the real reason for the Muslim community's insistence on their Islamic personal law is to reassert Jinnah's two-nation theory. This is a widely held fear; and parties like the BJP have been capitalising on it most aggressively. Now the BJP has declared that it is going to enact a common civil code in all the states where it is in power. The insistence on a uniform civil code is a way of subjecting Muslims to a loyalty test. It is a way of asking them to prove that their allegiance to the Indian nation state and its laws (including the unjust as well as the stupid ones) stands above all other competing allegiances, especially that to religion.

Is it surprising that even our Supreme Court judges are blissfully unaware of the fact that it is not just Muslims who follow their subgroup norms in working out their family affairs? The diverse Hindu subgroups do the same. You just have to compare the marriage, inheritance and divorce patterns among, say, the Hindu Jats of Haryana, with those of Kashmiri Pandits; or the Reddys in Andhra Pradesh and Nairs in Kerala, to understand that formal laws come into play only in those infrequent cases where families decide to go to court. By and large people settle these matters at the family and biradari level according to their respective customs and the relative bargaining power of the two sides without reference to laws. For instance, only a tiny proportion of marital dispute cases reach the courts. In a vast majority of cases, the biradari elders work out these arrangements and the terms of separation. These vary from one community to another. Dowry, for example, is supposedly not permitted by law. Yet by common consensus vast dowries are both given and taken by most people, including judges. In fact, our police and IAS officials command and demand the most exorbitant dowries in the marriage market. Clearly then it is not formal laws but social norms which govern social relations in our country. When Hindus themselves have not been able to become law abiding in such matters, why are they so enthusiastic about reforming Muslim personal law through a uniform civil code?

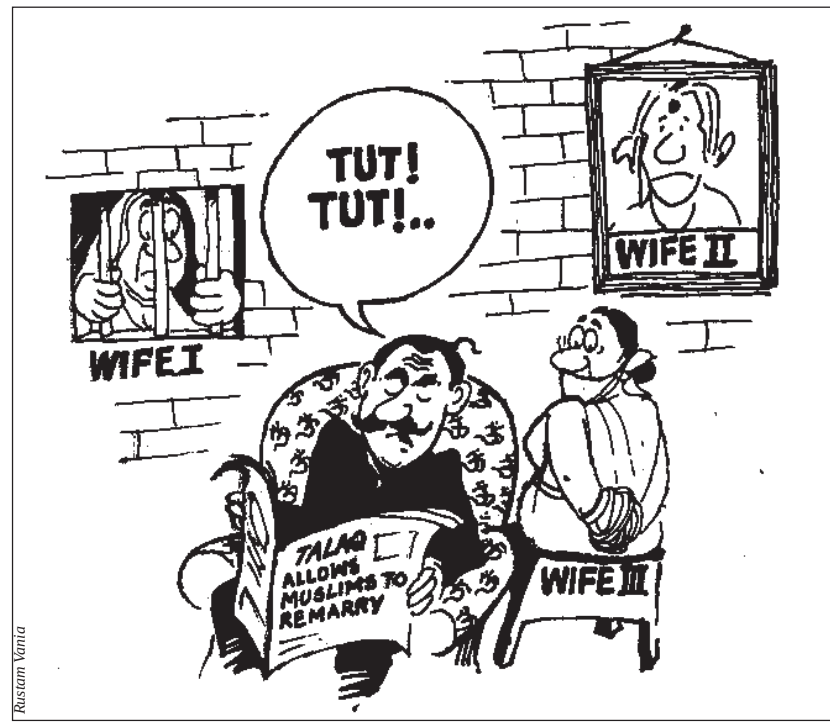
Bigamous Marriages

In the opinion of most Hindus the most offensive part of Muslim personal law is the provision of triple talaq and allowing a Muslim man to have up to four wives simultaneously. In this their real concern is not the injustice it involves for Muslim women, but the unfounded and absurd fear that through polygamous marriages, the rate of population growth among the Muslims will outstrip that of the Hindus leading at some point to Hindus becoming a minority in India. In actual fact, Muslim men do exactly what a

large number of Hindu men do — that is, beat the first wife out of the house or just marry a second time without the bother of a formal divorce and make it so difficult for the first wife that she is compelled to leave her marital home. Recently, we were approached for advice by a young woman who is the daughter-in-law of a well-known retired Delhi High Court judge. The only son of this judge has a relationship with another woman. He even brings her home and lives with her openly in the presence of his first wife. Do you think this High Court judge and his wife have assisted their daughter-in-law in suing her husband for cruelty because their son beats and abuses her in an attempt to drive her out of her marital home? Far from it. All they are doing is trying to bully her into giving their son a formal divorce so he can remarry. Needless to say, the first wife will not be getting a divorce on grounds of cruelty because she has been prevailed upon to obtain a divorce by "mutual consent".

Bigamy may have been outlawed by the Hindus, but the law against it gets to be invoked only in rare cases when the first or second wife decides to take the matter to court. Census statistics and various surveys have shown that the extent of polygamy among the Hindus is about the same as among the Muslims even though the Hindus are not allowed bigamous marriage according to Hindu Code law. We even have several bigamous marriages among Hindu celebrities such as the one between film stars Hema Malini and Dhamendra. The courts could do nothing in the matter simply because Dharmendra's first wife did not approach the courts. My own domestic help, Sushila, has been deserted by a man who married four times without divorcing any of his wives. If the bigamous marriage of Dharmendra or Sushila's husband is not a threat to "national unity", why are Muslim bigamous marriages perceived to be such? When Haryana or Punjab Jats continue the customary practice of Karewa (marrying a widow to her late husband's brother) marriages, involving bigamy in defiance of the Hindu Marriage Act, the state governments even support those measures. The Hindu and Sikh Jats are not assumed to be disloyal to the Indian nation by committing bigamy. But a Muslim defending polygamous marriages is seen as a threat to national unity — not as just another defender of gender injustice.

This is not to justify bigamous marriages but only to point out that the problem is more complex than the uniform civil code enthusiasts are willing to concede. The problem can be solved only if we focus on the gender injustice dimension of it rather than let other political considerations derail the women's rights agenda. In fact, the present Hindu marriage law against bigamy is so hopelessly ineffective that even if a deserted wife wants to take action against her husband, there is not much that she can do. The onus of "proving" the second relationship to be a bigamous marriage falls on the first wife. To prove the second marriage was bigamous, the first wife has to be able to procure witnesses willing to testify not only that the second marriage was solemnised but also that all rituals and ceremonials were duly performed. For example, a Hindu marriage is not legally valid until the ritual saptapadi (seven feras round the sacred fire) is completed. Thus if a man can get a couple of witnesses to say that he took only six feras and not seven, he would not be considered legally married to the second wife. In such cases, the first wife cannot get him punished for bigamy but only for adultery — and that too only if she can prove to the satisfaction of the court that adultery occurred. There is no real punishment for adultery except that the wronged spouse can use it as grounds for divorce. Thus it only facilitates the



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process of a legal divorce, often in the man's favour, as opposed to punishing him for the crime of bigamy.

Manushi has had to deal with several cases where a woman approached us for help in getting her husband charged with the crime of entering into a second bigamous marriage without divorcing his first wife. But despite their best efforts, they could not establish the fact of a second marriage even though the husbands concerned were openly living with second wives and had even produced children with them. A first wife is not likely to be invited to collect evidence at the time of a second marriage that was attended and managed by the man and his second wife's close friends and family. None of these people are likely to give evidence in favor of the first wife.

Since Hindu marriage law does not require all marriages to be compulsorily registered, for most people a marriage is a marriage if the families concerned and their relatives give social recognition to them as a married couple. A Hindu man may commit bigamy with impunity (as many actually do) as long as his family recognizes his second marriage and his first wife does not have the more than superhuman clout required to "prove" bigamy in a court of law. Thus, the continuing practice of bigamy is clearly not the real worry of common code enthusiasts or else they would have taken steps against maltreatment and unilateral desertion of wives by Hindu men. Their real worry is the insistence of Muslim leaders that allegiance to Shariat is more important to them than their allegiance to the Indian nation-state.

Mutual Phobias

Instead of sneaking in their requirement for assurance that Muslims are loyal to India in indirect ways, why don't the leaders of these campaigns struggle over this issue without using the well-being of Muslim women as a battering ram?

The Hindu fears spring from the fact that, especially in North India, they have neither forgotten nor forgiven the Muslim leadership of pre-Independence days for forcing Partition. Most Hindus are convinced that, given the opportunity, Muslims will force more and more partitions on India. The ongoing secessionist movement in Kashmir with the active help of Pakistan further fuels these fears.

For Pakistan, the secession of Bangladesh was no more then a political humiliation and loss of territory. That is why Pakistanis were able to get over the break-up of their country with relative ease. Most Pakistanis have no emotional attachment to the land and culture of Bangladesh. Nor did renouncing sovereignty in Bangladesh involve uprootment from their homes for West Pakistanis. For Hindus, on the other hand, Partition meant very different things. To begin with, millions got uprooted from their homes and their culture. Even though the Hindu refugees have been fully absorbed into the social and political mainstream in India, unlike what has happened to the Mohajirs who went to Pakistan, the hurt of Partition remains and is, in fact, shared by even those who were not personally affected by it. This is because Hindus see India not just as a political territory but as a civilisational entity. They are imbued with a sense that its geography is sacred, punyabhumi. Bharat Mata has, in fact, become among the most revered Hindu goddesses. Muslims are portrayed as her disloyal sons who severed her arms. Moreover, many of the important religious and historical sacred spots of Hindus and Sikhs are located in what is now Pakistan.

The inability of most Indian Muslims to feel as hostile towards Pakistan and to consider Pakistanis as enemies makes many Hindus distrust them. The trauma of the Partition might perhaps have been easily forgotten had the two nation-states evolved more civilised polities and worked out sensible norms for mutual co-existence. The leadership in both countries did the very opposite and kept their mutual phobias alive.

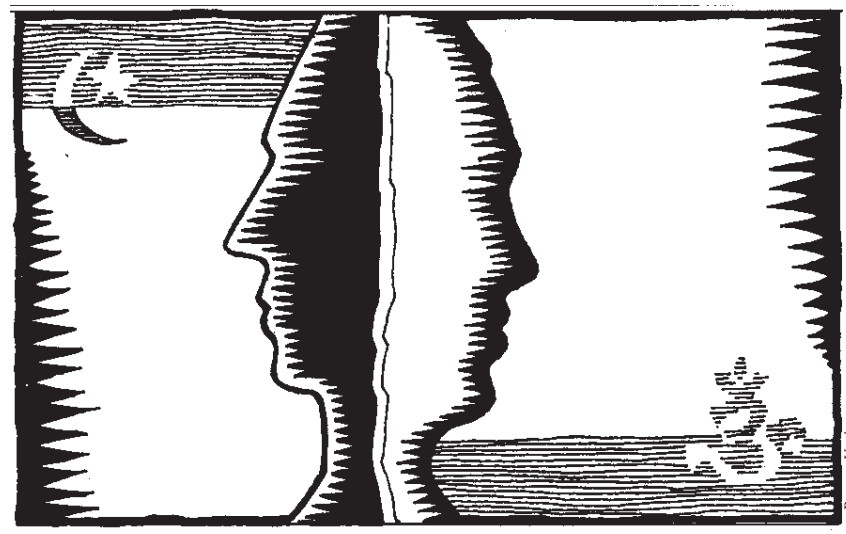
On the Hindu side there is some justification for feeling wronged because the fate of Hindus in Pakistan and in Bangladesh is even worse than the fate of Muslims in India. They are not even treated as second class citizens. Both countries have declared themselves to be theocratic Islamic states. Though in the 1940s, the Hindus constituted a substantial percentage of the population in what is now Pakistan, there is only a miniscule community of Hindus left there today. Similarly, in recent days there has been a steady and continuing decline of the Hindu population in Bangladesh. This is mainly due to forced exodus and open persecution of Hindus in these two countries. Voices like that of Taslima Nasreen, exposing the plight of the Hindu minority in Bangladesh, are far more rare than are the voices of defenders of Muslim minority rights in India. These two governments are also far more brazen in pushing Hindus out by forcible expropriation of their properties, open religious persecution, denial of jobs and political rights, as well as destruction of Hindu religious shrines.

The separatist and pro-Pakistani secessionist movement in Kashmir has reinforced Hindu fears that wherever Muslims are in a majority, they tend to

work towards the break-up of India, and that Muslim majority polities, be it in Pakistan or Kashmir, inevitably move towards driving the Hindu minorities out by sheer force. All-Muslim majority mohallas like Behrampada in Bombay and Jama Masjid in Delhi tend to be labelled as mini-Pakistans and targeted for attack like enemy territory during periods of Hindu-Muslim conflict. In this matter, Hindu leaders display the nervousness of a besieged minority rather than behave like a self-assured majority. It is indeed important to sort out the various irritants and mistrust between the Hindus and the Muslims in India. This task needs to be undertaken even more urgently than reform of Muslim personal law or bringing justice to Muslim women. Our capacity to sort this out in a straightforward fashion and work out decent norms for Hindus and Muslims to live together will decide the fate of democracy in our country.

The growing mistrust between the Hindus and Muslims cannot be resolved by imposing a uniform civil code on an unwilling Muslim community. It will suffer the fate of the anti-dowry Act and become another joke in the name of reform. Most laws have a chance to work only if enough people see them as beneficial to them. Today, by and large, even Muslim women are not enthusiastic about their personal laws being superseded by a uniform civil code. If these women are unwilling to approach the courts to seek the application of new civil laws, what good will it do to have a uniform code on paper?

This is not at all to suggest that social opinion must be the only consideration, or that patently unjust or even criminal types of behaviour must be allowed in the name of respecting social opinion. However, we need to ensure that our laws are



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respected, not despised. They should be seen and perceived as a rational way of ordering our social relations (as ought to happen in truly civilised societies) rather than an offensive imposition from above as is typical of mentally colonised societies.

For centuries, Hindus and Muslims as neighbours have been able to evolve fairly impressive norms for living together in India on the basis of shared common interests and other cross cutting identities that derive from their village, occupational, linguistic, cultural and regional characteristics. Today those traditional pacts are breaking down because the leaders of the two communities have stopped dealing with each other directly. Most of their communication is mediated through the instrumentalities of a venal and incompetent state. For example, if there is a Hindu-Muslim riot, the two communities expect the government to protect them from each other through the use of state police and other arms of the government. There is little attempt to independently and directly work out mutually acceptable arrangements between the two communities at the local levels for their mutual safety, removing the irritants by mutual accommodation. Similarly, those who become upset about the vulnerable position of Muslim women rarely take the trouble to initiate a dialogue with members of the Muslim community as concerned fellow citizens or neighbours. Instead, they begin to yell at the government and demand that Sarkari danda be used to reform the Muslim community. This facilitates the rise of those politicians who seek power by playing a divide and rule game, leading to escalation of ill-will and conflict between the two communities, rather than any real improvement in the condition of women.

Voices for reform in Muslim law would have been much stronger by now had our law makers and law courts shown that they are capable of making just laws and implementing them honestly and competently. The majority of Hindu, Sikh and other women who have knocked at the doors of our courts for justice have come out feeling disillusioned and bitter. Not only are the marriage and inheritance laws governing Hindus patently unfair to them but the way our courts malfunction only adds to the misery of the already aggrieved. A meaningful

attempt at reform in any system of laws must first begin by making our legislators, courts, and police behave lawfully, fairly, efficiently, and competently. Had our courts been able to demonstrate their ability to effectively protect the rights of Hindu women there would have been a much bigger ferment among Muslim women for demanding a reform of Muslim personal law through judicial intervention.

Not Really Shariat

Moreover, there is a real misunderstanding about the real nature of "personal laws" in India. What goes by the name of Muslim personal law is not really based on Shariat, and conforming to it is not a religious requirement. Even triple talaq as practiced in India has as little to do with Quranic injunctions as the present day Hindu marriage laws have to do with the Code of Manu, or the diverse practices of various Hindu communities. The Muslim leaders' position is based on a misunderstanding that what is called Muslim personal law is based on the teachings of the Quran and, therefore, any attempt to change it amounts to an attack on the religious identity of the Muslim community. In actual fact, what goes by the name of Muslim personal law is actually Anglo-Indian-Islamic law as it developed in the 19th and early 20th centuries under British rule, in British courts, administered not by Muslim Qazis but by Christian judges. It is now being administered by Indian (mostly Hindu) judges who slavishly hang on to this colonial legacy. The Anglo-Indian-Muslim (as also the Anglo-Hindu) personal laws are a mish-mash of British court officials' records of customary practices with interpretations of the Quran and the Shariat by European judges who neither understood Islam nor the actual customs of Indian Muslims. Yet their judicial verdicts on these matters have come to acquire the force of law because British (and now Indian) jurisprudence allow court judgements to acquire the force of binding precedents, enforced first by the colonial and now by the post-Independence Indian state. Ironically enough, the Muslim leadership rallies around this Anglo-Indian-Islamic law and defends it as though its judgements conform to the words of Allah in the Quran. In actual fact, it is no more than the word and interpretation of British judges and their inheritors.

The Real Agenda

If we want India's diverse communities to feel a sense of loyalty and good will toward each other, if we want all our people to have a stake in building a well-knit society, we need to build a decent civilized polity based on consensus rather than confrontation. This task can be performed better if we build on the following premises:

Every person — Hindu, Muslim, Sikh, Christian, man or woman — ought to feel more secure about their citizenship rights and be able to count on them as their legitimate due in this society. The Indian state has so far failed to perform satisfactorily the task of protecting and safeguarding rights such as those enshrined as fundamental rights in the constitution. This has led to a growing sense of alienation, especially among socially and economically vulnerable groups. We need to understand that in a democracy, only those states and governments evoke loyalty from their citizens which are able to provide people with a sense of security and safety and are known to behave in a lawful and non-partisan fashion. Thus, it is far more important to ensure that our law courts and police function lawfully and efficiently, that they are capable of delivering justice, and that people feel secure about their rights as citizens than to have one poorly devised and poorly implemented uniform law for all citizens and communities for governing family relations. Meeting these requirements is the only effective route to genuine national unity.

Those of us concerned with women's well-being need to understand that social peace is an absolute pre-condition for strengthening the rights of women. Whenever violence and bloody conflicts come to dominate a society, women tend to get marginalised and their lives become more vulnerable. At such times they are less able to resist their oppression or effectively protest against abuse. As long as the Muslim community continues to face the brunt of riots, as long as they continue to be ghettoised and feel despised and mistrusted, voices of reform within the community will continue to be marginalised and silenced. It is important to remember that after having fought her husband in the court for 11 long years, Shahbano finally decided to withdraw her claim, as she felt her case had been "misused" for creating fasad (conflict) and for whipping up anti-Muslim sentiment.

Muslim women can be strengthened to fight for their rights as women only when they stop feeling insecure about their rights as Muslims. They will assert their rights as women more vigorously when they do not feel threatened on account of threats to their religious identity. Therefore, all those interested in the welfare of Muslim women ought to focus their energies on building effective communication channels between Hindus and Muslims so that they can resolve their mutual differences

directly and amicably and build an atmosphere of mutual trust and peace. This is as much in the interest of Hindus as of Muslims. Those societies where minorities feel unsafe finally end up being unsafe for all. Safety is indeed indivisible, as the example of Pakistan shows. By forcibly driving out the Hindu majority, the Pakistani politicians have not built a strong and united Pakistan but a nation-state which is dominated by criminalised politicians within various ethnic groups (Punjabis, Mohajirs, Sindhis, Baluchis, etc.) at war with each other.

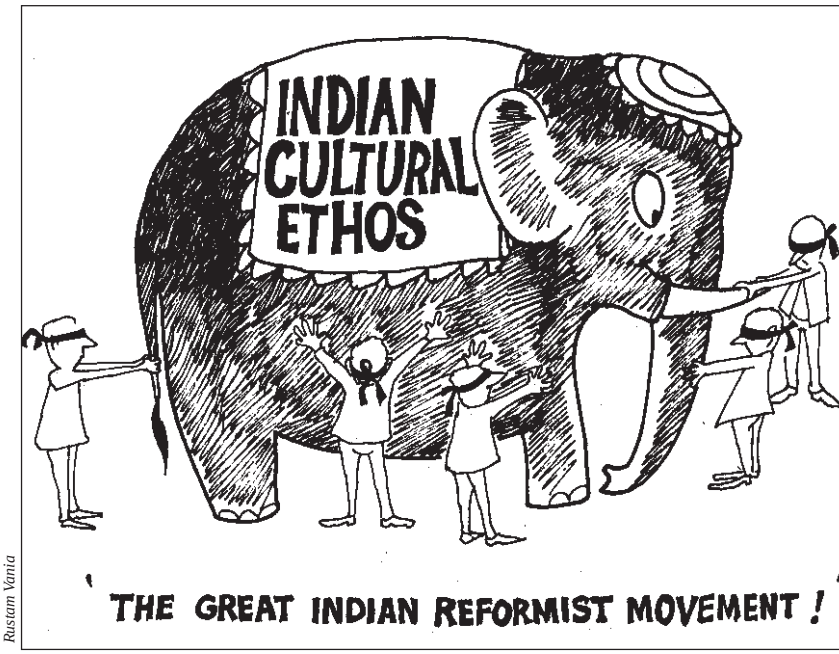
A genuine democracy must have genuine safeguards against majoritarianism. Those who identify themselves as the majority community must not be allowed to run rough-shod over the sentiments of the minorities even when they are doing so ostensibly in the latter's interest. While one important component of a democracy is majority vote or opinion as the basis for determining policy, an equally important principle in well-functioning democracies is that majorities, no matter how they are constructed, no matter how preponderant, ought not to have the right to make certain decisions that affect minorities such as deciding whether the minority has the right to live within the boundaries of the territorial state, or to make decisions regarding curtailment of the latter's citizenship rights. Pakistani or Bangladeshi democracies are dysfunctional and authoritarian precisely because they do not provide respectful space for religious or other ethnic minorities. By imposing a uniform civil code on the unwilling Muslim minority, we would be legitimizing the majoritarian authoritarianism of Pakistani and Bangladeshi politics, as well as that of the Kashmiri Muslim separatists.

In actual fact, what goes by the name of Muslim personal law is actually Anglo-Indian-Islamic law

The ongoing secessionist movement in Kashmir is a good example of the dangers inherent in resorting to majoritarianism even when the majority has a legitimate grievance. The Kashmiri Muslims are undoubtedly right in complaining that the central government crushed their democratic rights by repeatedly denying them the right to freely elect their own governments. Instead the Congress party kept imposing puppet regimes or the central government's military rule on them. However, their struggle for self-determination is not presently taking a democratic route not only because they resort to terrorism but also because their demand for secession is based on a majoritarian premise. They have disregarded the sentiments of the substantial Buddhist and Hindu minority (36 percent) in the state of Jammu and Kashmir who do not share the aspirations of the Kashmiri Muslims and whose right to self-determination the Kashmiri Muslims do not respect. There is an element of crude majoritarianism in the insistence of the Hindu leaders that Muslims prove their loyalty to India.

By creating further disgruntlement in the Muslim minority in the rest of India, we will only strengthen the majoritarian politics of Muslim separatists in Kashmir. A secure and confident Muslim community in India is the best refutation of the poisonous legacy of Jinnah with his two-nation theory _ both as practiced in Pakistan and as being currently exported to Kashmir through Pakistan-trained terrorists.

By resisting reform of many of its outdated social practices, the Muslim community is only harming itself. However, by insisting that the Muslim community be forcibly "reformed", the Hindu leaders are harming the entire society because they are using this issue to whip up anti-Muslim hysteria and promoting social strife and



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violence in the country.

In reality, diverse Muslim communities follow diverse customary practices, depending on their regional, class and caste status. Just as Urdu is not the language of all Muslims in India, the customs of Kerala or Assamese Muslims, for instance, are substantially different from those of Punjabi or Uttar Pradesh Muslims. By demanding a uniform civil code, the Hindu chauvinist leaders are only facilitating the task of obscurantist Muslim leaders who can then mobilise the diverse Muslim subgroups using the cry of "religion in danger", and pretend to lead them as an all-India monolith. Like the Hindu nationalists, the Muslim leaders are also averse to acknowledging that the Muslim community is as rich in cultural diversity as is the Hindu community.

Allegiance by Choice

It seems pretty certain that most uniform civil code enthusiasts would lose their enthusiasm for a common civil code if it was optional for all citizens, genuinely egalitarian, and actually implemented. If the Muslim leadership in our country were not as short-sighted as they presently are, they would take the lead in the matter and find that the nationalist chauvinists are not really serious about strengthening the rights of women.

In a country like India, where people do not live atomised lives, where community identity (based on caste, jati, religion, language, village and so on) matter a great a deal, social opinion and customs determine social behaviour more effectively than government enacted laws.

The anti-women cultural patterns among various communities need to be combatted urgently and effectively. But this task can only be undertaken by those whose real concern is gender justice rather than groping for any weapon that can be used for settling political scores with the Muslim community. The cause of gender justice can best be served by:

Members of Muslim Satyashodhak Mandal,Kothapur on a fast demanding changes in Muslim personal law

- sustained dialogue and discussion within each community as well as among various communities.

- providing viable options to women who feel they are being treated unjustly by their family or their community, as well as for those who simply do not wish to be governed by religious laws.

This latter purpose can be better served by enacting a genuinely non-discriminatory civil code which is available as an option to any citizen on demand. The nation's secular courts should not be handling cases involving religious personal laws — be it those of Hindus, Muslims, Sikhs or Christians. Those who wish to be governed by their respective religious laws or biradari norms on civil matters should made their own arrangements and choose proper experts within their community for voluntary mediation or arbitration of disputes. If a group or community has the confidence to command the voluntary allegiance of its believers who wish to be governed by their religious customs and laws, the state or other communities have no business to intervene, even if the mutually accepted settlement or judgement is not what the state would consider fair or egalitarian. It is important that the community concerned not be able to use the might of the State to enforce the allegiance of those who are unwilling to abide by their community leaders' or biradari elders' rulings and decisions.

Our secular civil courts must not entertain or decide disputes involving personal laws such as the Hindu Marriage or Succession Act nor Muslim or Christian personal laws. The jurisdiction of the secular state starts when a citizen chooses to exercise her option to present her case to be judged under the common civil code. This option should especially be available to persons who feels dissatisfied with the dictates of their

community's religious laws or customs.

Many people have responded to Manushi's original proposal of a non-discriminatory optional code (Manushi No. 32, 1987) by saying that it is impractical and will only create further confusion. Far from it. Before clarifying the principles on which an optional civil code can function, let me explain some of its obvious advantages:

It starts with the realistic premise that in actual practice most people in India — Hindus, Muslims, Sikhs, or Christians — continue to govern their family affairs according to their prevailing community norms. The state can do nothing if the women concerned do not approach it for help. Thus, a common civil code, even if it gets enacted, will come into effect only for those who seek its adjudication. However, by presenting it as an option available to any citizen — man or woman — on demand, rather than something forced on unwilling communities, the opponents of reform will have less legitimacy in opposing the enactment of an optional civil code.

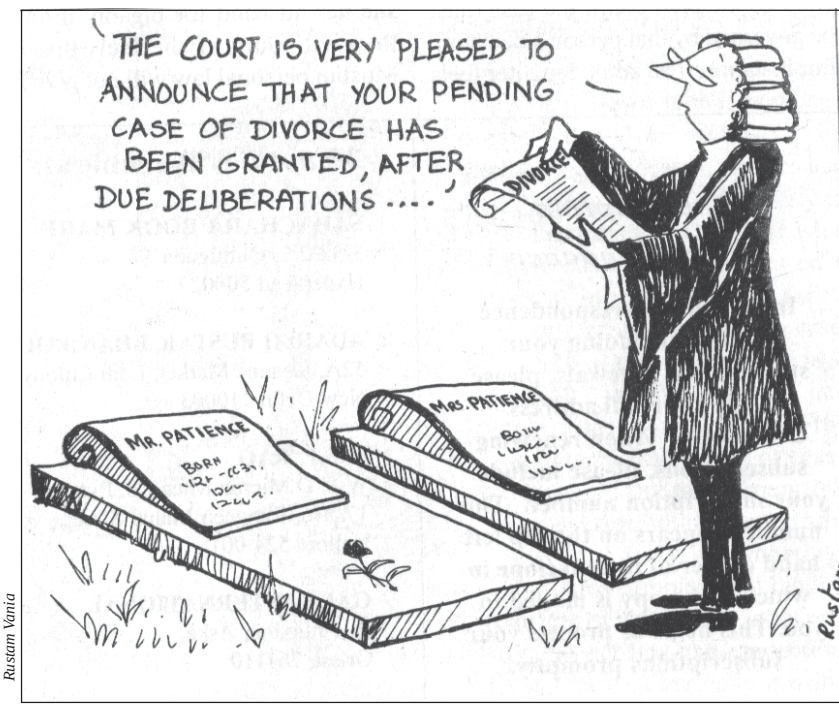
Our courts will be freed of their overload to some extent if all those desirous of being governed by their religious or customary laws have to make their own arrangements and cannot demand that our secular courts adjudicate their religious laws. This will make it more likely that those who come to seek protection under the non-discriminatory civil code get speedier justice and better attention from judges. While enacting such a code we need an in-built provision limiting the amount of time the court is allowed to take to reach a decision. Today, the money and time wasted in judicial delays and corruption keep women frightened of getting involved in legal battles.

If our civil courts actually begin to offer justice to those who opt for the non-discriminatory civil code, various communities will have an incentive to attempt to provide women with a better deal within customary religious laws, or else they will find women opting for the non-discriminatory civil code. The availability of this option would create a continuing pressure for reform within each community to adapt their personal laws to be more fair to women. At present too many women are forced into surrendering their rights due to lack of viable options.

A Working Proposal

The broad principles of the code would be as follows:

When one argues that different communities should be allowed to retain the right to decide issues of personal law among believers who voluntarily accept their jurisdiction, one does not thereby imply that women be left at the mercy of men in their respective communities who are allowed to tyrannise women into submission in the name of upholding community customs or religious traditions. No one giving a judgement regarding a case in customary or religious law will have the right to invoke sanctions using the power of the State, or enforce their personal laws through physical violence or even threats of violence. For example, issuing of death threats through fatwas would clearly not be allowed. Threatening or administering punishments by any other authority but the country's criminal courts is considered a criminal act and would be punishable as such. Similarly, the enforcement through violence of certain taboos among various Hindu communities regarding who one can or cannot marry would be impermissible. For example, there are a number of instances of daughters being done to death by their own fathers and other male relatives because they dare to marry a man of another caste or religion. This power to kill, maim, or cause bodily harm



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cannot be allowed to biradari panchayats. In case physical violence is used on a dissenting member to ensure submission, the State would treat it as a cognisable offence — even without the person concerned complaining about it.

The common civil code would have to rule out gender discrimination, starting with the rights of daughters, and not just focus on relationships between spouses. For example, a father's will disinheriting a daughter would be considered an invalid legal document under the common civil code. Nor would the secular law courts be permitted to discriminate against women in the inheritance of joint family property — women will be equal co-sharers in their property and daughters have full coparcenary rights.

What happens if a wife seeking divorce and child maintenance comes to civil court and the husband chooses to turn to his religion's personal laws? When any party to such a dispute chooses the civil court, the case must be governed by that person's decision. For instance, if an adult daughter feels

aggrieved at being excluded from Hindu joint family property, she would have the option to come to court and demand that property distribution be made according to an non-discriminatory civil code so that her interests are protected. However, if she voluntarily commits herself to some other system of inheritance, and does not approach the court, the courts cannot interfere.

Similarly, a Muslim woman could sue her husband for bigamy through the civil courts if she feels that the Muslim personal law will not give her justice and that for her, it is more important to get justice than to submit to the decisions of her community's religious leaders. Thus, law would not be indiscriminately forced on all but will be applied only when the community is unable to satisfy both the parties in a dispute. This is bound to generate pressure within each community to adapt their personal laws to be less discriminatory and acceptable to resolution by consensus, rather than allowing women to be coerced into self harming situations due to lack of real options. ❐