1. WILL UNIFORM CIVIL CODE BE A REALITY?

It needs to be asked if it is possible or practicable to reconcile divergent laws and formulate a uniform or common code acceptable to all the communities

Article 44 of the Constitution — which talks of a uniform civil code for all Indians — was the subject of a recent debate in Chennai.

The main argument of those who spoke in favour of such a code was that it has the potential to unite India because Hindus and Muslims had followed the "common customary Hindu civil code" smoothly till 1937 when "the Muslim League-British combine" divided them by imposing sharia on Muslims through the Muslim Personal Law (Shariat) Application Act.

But only a minuscule minority of Muslims followed Hindu customs before 1937. Even this section had the right under laws such as the Cutchi Memons Act, 1920 and the Mahomedan Inheritance Act (II of 1897) to opt for "Mahomedan Law". As for a majority of Muslims, there is enough evidence to show they followed Muslim law, not the Hindu civil code.

In 1790, when Governor-General Cornwallis introduced a three-tier court system in Bengal (which was subsequently extended to other parts of India) he included qazis and muftis as "law officers" to assist British judges. The highest criminal court of this system, Sadr Nizamat Adalat, was assisted by the chief qazi of the district and two muftis. In cases pertaining to Muslims it had to apply Islamic law as per the fatwas of these law officers, which were binding on the court. The British judges had to wait till 1817 to overrule the fatwas when a resolution was introduced to repeal their binding character (Rudolph Peters: Crime and Punishment in Islamic Law).

Before Cornwallis, Warren Hastings had decreed in 1772 that in matters of inheritance, marriage and other such religious affairs "the laws of the Koran with respect to the Mahomedans and those of the Shastra with respect to the Gentoos [Hindus] shall be invariably adhered to." (Richard Shweder & Others: Engaging Cultural Differences). Even when the Indian Penal Code was enacted in 1860, Muslim personal laws were left untouched.

However, these laws were sometimes superseded by antiquated customs that had acquired the force of law. For example, as per prevailing custom, property received by a woman as inheritance or gift was not hers and had to be given back to the heirs of the last male owner [Muhammad v. Amir (1889) P.R. 31, cited in Mulla, Principles of Mahomedan Law]. As such customs deprived Muslim women of their property rights in Islam, Muslims wanted only Muslim law to be made applicable to them.

Act of 1937

The Shariat Act of 1937 was the result of this demand. It repealed all such provisions in earlier legislation that permitted custom to override 'Mahomedan law' in cases where the parties were Muslims. But the British did not impose this Act on all Muslims. It was made applicable (per Section 3) only to those Muslims who declared in writing their intent to come under it. This explodes the myth that it sought to divide Indians on communal lines.

Nevertheless, a comparative study of the personal laws of Hindus, Muslims and other minorities will reveal that the sheer diversity of these laws, coupled with the dogmatic zeal with which they are adhered to, cannot permit uniformity of any sort. In fact, the

Plot-1441, Opp. IOCL Petrol Pump, CRP Square, Bhubaneswar-751015
Ph.: 8984111101, 8093083555. Web: www.vanikias.com, E-mail: vaniksias@gmail.com

heterogeneity of Hindu law itself is such that even the possibility of a uniform Hindu code is ruled out.

Talking of marriage alone, under the Hindu Marriage Act, 1955, marriages may be solemnised in accordance with the rites and ceremonies of a variety of people who come under the definition of a Hindu. For instance, according to the saptapadhi form of marriage that is followed mostly in northern India, the marriage is deemed to be complete and binding when the couple take seven steps around the sacred fire.

On the other hand, in the south suyamariyathai and seerthiruththa forms of marriage are followed. Under these, the marriage is valid if the parties to the marriage declare in the presence of relatives that they are marrying each other, or if they garland each other, or put a ring on each other's fingers or if the bridegroom ties a thali around the neck on the bride.

Rites and ceremonies

Also, for a marriage to be valid under Hindu law it has to be solemnised in accordance with the customary rites and ceremonies of at least one of the parties. Thus, if a Jain marries a Buddhist by performing the rites of a Sikh, the marriage is invalid (Sakuntala v Nilakantha 1972, Mah LR 31, cited in Family Law by Paras Divan). In Muslim law there are no elaborate rites or ceremonies, but Sunni and Shia practices differ.

It, therefore, needs to be asked if it is possible or practicable to reconcile these divergent laws and formulate a uniform or common code that is acceptable to all communities.

India already has an optional civil code in the form of the Special Marriages Act, 1954. This, read with similar Acts such as the Indian Succession Act, 1925, provides a good legal framework for all matters of marriage, divorce, maintenance and succession for those who may wish to avoid the religion-based laws.