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PROGRESSIVE OR EXTANT: ADDRESSING THE ELEPHANT IN THE ROOM

(Judicial Activism towards transiting from Personal Laws to a Uniform Civil Code)

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I. INTRODUCTION

“In this din of societal rejection as well as majoritarian excess, a ray of hope in the garment of a Uniform Civil Code shall ameliorate the plight of the women and salve the wounds of the victims of injustice and discrimination.”

India is a land of legal pluralism wherein there exists a multitude of religious sects with each sect being governed by its own personal laws. While the personal laws contain various customs and essential practices intricately related to the religion that an individual professes, however, there are certain aspects of religion which although do not form an essential part of religion are still practiced vigorously by the individuals. Thus, the Constitution of India while providing for the freedom to profess religion hedges it with certain limitations.¹

Legal pluralism associated with personal laws is filled with nuances and thus, the constitution drafters intended to secure a Uniform Civil Code for the citizens.² The underlying intent behind Uniform Civil Code in the Constitution was to divest religion from personal laws *i.e.* to show there is no necessary correlation between religion and personal law in a civilized society.³ Uniform Civil Code enjoys the status of Directive Principles of State Policy and thus the State endeavours to achieve it within a measurable time, however, it has remained a dead letter,⁴ and an unaddressed constitutional expectation.⁵

While the government has failed in its attempt to bring Uniform Civil Code into force, on the other hand judiciary has time and again alluded to the significant role of the same. Judicial

¹ Article 25(2), The Constitution of India, 1950.

² Article 44, The Constitution of India, 1950.

³ John Vallamattom and Anr. v. Union of India, AIR 2003 SC 2902.

⁴ Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.

⁵ ABC v. State (NCT of Delhi), AIR 2015 SC 2569.

pronouncements have played a vital role in highlighting the role of Uniform Civil Code in a progressive society.⁶ In *Mohd. Ahmed Khan v. Shah Bano Begum*⁷ the Supreme Court criticized the passive role of legislature in framing a Uniform Civil Code and played the role of reformer by bridging the gaps of personal law. Recently, a need for UN Uniform Civil Code was again realized when the Allahabad High Court held that the practice of instant divorce by way of *triple talaq* stands unconstitutional.⁸

Consequently, need of the hour is to formulate a proper and comprehensive framework in this regard aiming towards bringing an end to legal pluralism associated with personal laws, reflective not only of Indian diversity but also of the principles and values of the Constitution. It is time to strike the iron and bring about a positive change in the narrative of the people so as to assure sustainability instead of pacifying the citizens by the placebos of promises made towards achieving a truly secular nation.

II. UNIFORM CIVIL CODE: JUDICIAL REVIEW

INTERPLAY AMONG ARTICLE 14, ARTICLE 25 AND ARTICLE 44

Personal law promotes solidarity in a community but at times also unwittingly promotes, inter alia, gender inequality and injustice which in turn is not limited to a particular sect but pervades all the personal laws. Thus, Constitution of India aims at securing a Uniform Civil Code for the citizens.⁹ However, the promise never materialized because of the fear that such a move would either kill diversity or would receive flak from minority.

Constituent Assembly discussed in detail the ramifications of having Uniform Civil Code and finally reached at a compromise wherein it was placed in Directive Principles of State Policy, which although are non-enforceable¹⁰ but at the same time the government is duty bound to positively secure them. Several amendments were also moved to keep personal law out of the reach of Uniform Civil Code and the chief argument levelled against its implementation was the violation of fundamental right to practice and profess religion if it included personal laws within its ambit.

The fundamental right to practice and profess religion is not absolute and the State can impose restriction(s) or regulate any economic, financial, political or secular activity associated with religion.¹¹ The Supreme Court in concurrence with this view held that while Article 25 guarantees religious freedom, on the other hand Article 44 divest religion from personal law and social relation.¹² Further, right to profess religion extends not to optional religious practices but only to essential religious practices¹³ and thus it must be enjoyed in constitutionally permissible parameters.

The Constitution of India also provides for equality before the law,¹⁴ however, patriarchy and unjust treatment of women are the warp and weft that pervade every personal law. If marriage,

⁶ See, *Ahmedabad Women Action Group (AWAG) and Ors. v. Union of India*, AIR 1997 SC 3614.

⁷ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

⁸ *Smt Hina and Anr. v. State of UP and Ors.*, 2016 SCC Online All 994.

⁹ Article 44, The Constitution of India, 1950.

¹⁰ Article 37, The Constitution of India, 1950.

¹¹ Article 25, The Constitution of India, 1950.

¹² *John Vallamattom and Anr. v. Union of India*, AIR 2003 SC 2902.

¹³ *State of West Bengal and Ors. v. Ashutosh Lahiri and Ors.*, AIR 1995 SC 464.

¹⁴ Article 14, The Constitution of India, 1950.

inheritance, succession are considered to be a part of religion, then, in such a the case any law in pursuance of right to equality and with the purpose of elevating the status of women cannot be passed without violating an individual right to practice religion.¹⁵ Thus, scope of religion must be limited to the practices essentially concerning religion, and rest of the practices must be unified and regulated in a manner facilitating a consolidated nation.

IS INDIA READY FOR SUCH A HUGE CHANGE?

“Well, I should like a civil code which applies to everybody but wisdom hinders. If the member or anybody brings forward a Uniform Civil Bill, it will have my extreme sympathy. But I confess I do not think at the present moment the time is “ripe” for me in India to push it through. I want to prepare the ground for it.”

~ **Jawaharlal Nehru**

In a secular nation like India, any change encompassing religious sentiments becomes the bone of contention at every juncture. India is referred to as ‘unity in diversity’ and therefore, this preservation turns out to be of paramount importance to all its citizens. Personal laws have been paving a way towards keeping this diversity intact, by not imposing a single ideology on all, which might be the result of bringing about a uniform civil code. Fundamental rights as enshrined under Articles 25-28 of the Constitution preserve the distinct identities of various religions as well as their respective practices¹⁶ and adoption of a uniform code, as per Article 44, in this respect will frustrate the ‘secularist objective’ of the country.

The fundamental right-directive principles of State policy spat is not a new ball in the court and the judiciary has, time and again, preserved the religious sentiments of the masses. The Court has acknowledged the desirability of a uniform code viz a viz personal laws, nevertheless, it remarked that such desired uniformity is possible only when the masses are awakened to accept the change and that it did not want to jump the gun and make the existing insecurities even worse.¹⁷ An issue as fragile as religion does not only need a sensitive approach but also deliberation, which is why even Dr. B.R. Ambedkar was not sure of having a uniform civil code for the citizens. He, nevertheless, stated that religion is the most intimate emotion of a person and that it should not be trenched upon; personal laws are indispensable to a person’s life as well as death. He further added that it is not possible to bring the diverse cultures of this country under a single umbrella and that we ought to wait for the perfect time when opting for the code can be made voluntary for the citizens.¹⁸

There are certain flaws in the personal laws which the judiciary has been trying to curb through its pronouncements and that reforming the personal laws in this way seem more reasonable than imposing a new law altogether. If the uniform civil code will be brought at this point, it might be misconstrued by many, especially the minority, as a justification towards ending the Hindu laws’ hegemony that has been prevailing from time immemorial. Patriarchy has been embedded in the society to such a extent that the laws also fall victim to the same, for instance, both the Hindu as well as the Muslim laws as gender biased when it comes to guardianship of a minor child and consider father to the natural guardian. However, judges have pronounced remarkable judgments

¹⁵ K.M. Munshi, VII Constituent Assembly Debate 548 (23rd November 1948).

¹⁶ Comm. Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar, AIR 1954 SC 282.

¹⁷ Sarla Mudgal v. Union of India, AIR 1995 SC 1531.

¹⁸ B.R. Ambedkar, VII Constituent Assembly of India 551 (23rd November 1948).

in mending the biases and bringing about parity in the laws as far as possible. For instance, in the case of *Ms. Githa Hariharan & Anr v. Reserve Bank of India & Anr*,¹⁹ the apex court recognised the guardianship rights of the mother irrespective of the age of the child. There have been judicial pronouncements that have aimed towards ameliorating the inequalities viz a viz maintenance and ease of dissolving a marriage under Sharia Law.

The court has not interfered into the realm of personal laws to an extent so as to hurt the sentiments of the followers but has aimed towards bringing about equity with respect to rights of Muslim women. It did so, to state one instance, by awarding maintenance, after divorce, to the wife for lifetime that is to say, a time period beyond what is mentioned under Sharia Law. The maintenance shall be given as lump-sum payment during the *iddat* period, thereby commenting upon the constitutionality of the Muslim Women Act, 1986²⁰ which was passed after the Supreme Court awarded maintenance for lifetime, in the Shah Bano case.²¹ Instead of imposing a single way of obtaining divorce, the court interpreted the Quranic verses in the correct light and held that divorce should be in the form of Hasan or Ahsan, after proper attempts towards reconciliation, else shall render the divorce null and void.²² Divorce cannot be pronounced as per the whims and fancies of the husband, rather there should be sufficient evidence of reconciliation as well as pronouncement of divorce thereto.²³

TRANSITING TOWARDS A UNIFORM CIVIL CODE

Uniform Civil Code has not been able to see the light of day because of several reasons be it pseudo-secularism or vote bank politics, but the most prominent among them is insular religious belief held by minority. It is time that such religious beliefs are done away with and the legislature instead of appeasing the minority implements the Uniform Civil Code thereby helping in consolidation of the nation. However, implementation of Uniform Civil Code would involve overcoming various barriers including, inter alia, opposition by minority and people's misconceptions surrounding it.

Minority especially Muslim community vehemently protests against any step taken in pursuance of Uniform Civil Code and the basis for those protests is the premise that Muslim personal law is immutable. Ironically, majority of Muslims from Uttar Pradesh, Madhya Pradesh and Mumbai followed Hindu Law viz a viz Succession until 1937 and it was only because of parliamentary intervention that made Shariat law uniformly applicable to every Muslim.²⁴

Similarly, reforms in Hindu Law were possible only after a turbulent phase of opposition by conservative Hindus. Debate on reforms in Hindu Law can be traced back to 19th century with the first major episode witnessed in the case of *Dadaji Bhikaji v. Rukhmabai*,²⁵ wherein a minor girl on attaining puberty refused to stay with her husband and defied the court order of restitution of conjugal rights. *Rukhmabai Case* ensued a debate between anti-reform faction and modernist on the viability of secular law adjudicating a marital dispute traditionally being governed by personal law which continued even after independence. It was only after passing of Hindu

¹⁹ *Ms. Githa Hariharan & Anr v. Reserve Bank of India & Anr*, (1999) 2 SCC 228.

²⁰ *Danial Latifi v. Union of India*, AIR 2001 SC 3958.

²¹ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

²² *Dagdu S/o Chotu Pathan, Latur v. Rahimbi Dagdu Pathan, Ashabi*, 2003 (1) BomCR 740.

²³ *Shamim Ara v. State of U.P.*, AIR 2002 SC 3551.

²⁴ B.R. Ambedkar, VII Constituent Assembly Debate 551 (23rd November 1948).

²⁵ *Dadaji Bhikaji v. Rukhmabai*, ILR 1885 9 Bom 529.

Marriage Act, 1955, The Hindu Minority and Guardianship Act, 1956, Hindu Succession Act, 1956 and The Hindu Adoption and Maintenance Act, 1956 that a unified secular law prevailed over traditional Hindu law based on scriptural laws and different schools of thought.

The debate revolving around the interplay between secular and personal law is still the same but this time with the Muslim Community at the receiving end. Sharia Law like any other personal law comprises of some notable features such as the practice of Mehr/Dawar, but at the same time it contains certain controversial features including the practice of polygamy, triple-talaq and nikah-halala. The given controversial features of Sharia Law have all been subjected to immense judicial and legislative scrutiny. The court while seeking to regulate the practice of triple-talaq termed it as arbitrary²⁶ and further went on to hold that mere pronouncement of the same shall not be considered as a sufficient ground for divorce.²⁷ Similarly, legislature too in its report on '*The Status of Women in India*' reprimanded the practice of triple-talaq and stated that the practice of triple-talaq makes the wife extremely insecure and vulnerable with respect to her marital status.²⁸

The Judiciary has continuously played the role of reformer in bringing about uniformity in personal laws. The most significant pronouncement of the court that ignited the debate on Uniform Civil Code was Mohd. Ahmed Khan v. Shah Bano Begum and Ors.,²⁹ wherein the court while dealing with the issue of whether maintenance given to divorced women under the Code of Criminal Procedure³⁰ can extend beyond iddat period or not, held that Section 125 of Code of Criminal Procedure is a secular right and any one can claim maintenance under it irrespective of the claimant's religion. The verdict created a furore in the Muslim community and to appease them, Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed which provided for a fair and reasonable maintenance to be paid to divorced women within the iddat period.³¹ Several other judicial pronouncements followed apace with the same request of Uniform Civil Code to be implemented on the ground that when 80% of the citizens are already covered under the ambit of codified personal laws then there is no justification of keeping it in abeyance.³²

Further, implementation of Uniform Civil Code will affect practices of both, the minority communities as well as those of the majority community such as the customary practice of Maitri-karaar practiced by Hindus.³³ Additionally, it will bring about certain changes long desired by minority communities such as reduction in the time limit for filing of divorce to one year for Christians.³⁴

Thus, the minority must now welcome, with open arms, any step taken by the legislature in pursuance of implementation of Uniform Civil Code and at the same time, must also realize that Uniform Civil Code is need of the hour since it will not only remove the disparity between various personal laws but will also promote equality for women thereby, helping in integration of nation by removal of contradistinctions based on ideologies.

²⁶ *Shamim Ara v. State of U.P. and Anr.*, AIR 2002 SC 3551.

²⁷ *Dilshad Begum Ahmadkhan Pathan v. Ahmadkhan Hanifkhan Pathan and Anr.*, 2007 (109) Bom LR 197.

²⁸ Report on the Status of Women in India, Ministry of Women and Child Development 14 (2015).

²⁹ *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

³⁰ Section 125, Code of Criminal Procedure, 1973.

³¹ See, *Danial Latifi and Anr. v. Union of India*, AIR 2001 SC 3958.

³² *Smt. Sarla Mudgal, President, Kalyani and Ors. v. Union of India and Ors.*, AIR 1995 SC 1531.

³³ K.M. Munshi, VII Constituent Assembly Debate 548 (2003).

³⁴ Section 10A, Indian Divorce Act, 1969.

PROPOSED MODEL: A PATH TOWARDS A UNIFORM CIVIL CODE

The passing of a progressive law like the Uniform Civil Code demands immediate attention of the Legislature in order to concretise the piecemeal approach of the judiciary to bring about reforms in the existing personal laws.³⁵ The Legislature needs to identify the mischief in the prevailing personal law. Goa has taken a step forward in this regard and acclaimed a distinct identity for being the first state in India to implement its own Goa Civil Code. Although it is not free from any sort of flaws, however, its constructive approach towards exemplifying that religion is different from secular laws cannot be given a backseat. A lesson should be learnt from this Code, especially with regard to not repeating the mistakes it encompasses. The objective of Uniform Civil Code ought to revolve around paving a way towards equality among genders, in respect of not only their biological existence but also with regards to their marriage, divorce, rights pertaining to inherency, adoption, etc. It is time to cull out the gender biasness of personal laws and set the ball rolling for uniform application of laws, especially personal laws.³⁶

There have been suggestions for making the Code optional in its initial stages, but in our view, this is not the solution to the problem at hand. The optional implementation will open the door towards an even more chaotic situation than there already is. The people accepting Uniform Civil Code will not be able to make it enforceable against those who did not opt for the same and the whole purpose of uniformity and equality shall frustrate. Additionally, women might be pressurised to not opt for the Code and that individuals will be made responsible to resolve their conflicts and the State can easily evade its duty³⁷ with respect to securing the rights of women.

The formulation of provisions of the Uniform Civil Code will mandate the makers to meticulously weave the law, owing to the fragility of the issues it is supposed to address. The making of any comprehensive law stands incomplete without proper rules supplementing it so as to leave no room for ambiguity. Even though it will bring all the religions under one umbrella it will not dust away the religious practices thereof, as is the apprehension of those opposing the Code. The uniformity that it shall portray will help curb caste based as well as gender based injustices which are deeply embedded in our society and the time has come to extirpate these norms. These are social injustices that are not privy to any religion, therefore, rooting them up will not lead to putting an end to any religious practice, hurting the sentiments of the citizens.

Further, in order to maintain the sanctity of being a democratic country, it becomes imperative on the part of the Government to take the opinion of the masses before putting such a law into force. The Government has taken a move in this respect by circulating a questionnaire so as to get hold of what the general public perceive of the Uniform Civil Code and draft a Code by keeping in mind their stance and also, get an insight of the fears of the masses, if any. Furthermore, an effective implementation of any law is back-breaking if there are inadequate resources to scrutinize the adherence to its provisions and this should be well before bringing the law into force.

III. CONCLUSION

³⁵ Ahmedabad Women Action Group & Ors. v. Union of India (1997) 3 SCC 573.

³⁶ *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

³⁷ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* 41 (2001).

The framers of the Constitution added Article 44 not only to curb the difference in status of men and women when it comes to marriage, inheritance, divorce, maintenance, etc. but also to unify and consolidate the nation. This radical approach by the members of the Constituent Assembly cannot be put into the dungeons of the past. It could not be brought to force at that time owing to the sensitivity of the matter, but now people have advanced, not only in their way of living but also in their thoughts. Further, the unwillingness of the Government to let Uniform Civil Code come into force adds fuel to the fire. The officials are busy playing their pseudo-secular cards at the cost of furthering the objective of a progressive society. It would be beneficial for the citizens as well as the legislature to realise that if they keep waiting for the right time to knock their door, they will do nothing but wait. A prompt action is what we need. This might cause inconvenience in its initial stages but will have a long term positive impact.

The judiciary has played a very significant role, while staying within its limits of judicial review, in adjudging such highly sensitive issues on a case-to-case basis rather than streamlining its approach. The Courts have meticulously reviewed cases and never tried to reform the personal laws via judicial process as this requires more than what the judiciary can provide for, and it is only the legislature which fits in as a competent authority. The people opposing the Uniform Civil Code on constitutional grounds have failed to understand that this forms an essential part of the constitution and therefore, it can never be unconstitutional.

The Drafters of our Constitution have, time and again, acknowledged the significance of a uniform civil code as a progressive step towards modernisation, especially in the field of personal laws of the country. It is time to take a leap towards a progressive society rather than laying firm grip over a static one, by uprooting the unjust notions associated with personal laws from the face of this nation. That golden day is yet to dawn when the flag of uniformity, in this respect, will fly high in our country.

“I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for?”

~ Dr. B.R. Ambedkar