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UNIFORM CIVIL CODE: AN INSTRUMENT FOR GENDER JUSTICE

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Abstract:

The Constitution of India enshrines the philosophy of an egalitarian society. The dream of the framing fathers of the Constitution of India was to establish India a state where all people irrespective of their religion, caste, sex, place of birth shall have equality before law and equal protection of law. To secure these objectives, various provisions have been made so that India, as an independent state shall not make any discrimination among its citizen on the ground of religion, race, sex and place of birth. The directive principles of state policy are another set of example where this constitution itself gives some direction to the state to implement these policies towards the attainment of the goal of an egalitarian as society.

Although, the constitution says about equality and justice among all, do women have equality in true sense of term? In India, nearly, half of the population consists of women and suffered from patriarchy which is supported by tradition, religion and culture. Tradition, religion and the culture of Indian society subordinated women to men. Women had to struggle for equality, liberty and justice. Women are often victimized, ignored, Religion, has however, proved to be a formidable barrier to recognize the rights of women within family as well as in society. Women suffered from gender based prejudices and therefore they are marginalized. Gender equality is embodied as ideal in the constitutional provisions and that is to be achieved by special affirmative action.

Keywords: Gender Justice, Right to Equality, Constitution

Introduction

Gender justice though firmly etched in the Constitution, seems to be an elusive dream for India as a society. India was placed in the 112th place out of 153 countries by the World Economic Forum in the Global Gender Gap Report 2020, four ranks below her 2018 position.¹ While the Index only measures economic participation, educational attainment, health and survival, and political empowerment, a factor that has major impact on the enjoyment of all other rights by women is equal civil rights. In India, the right to marry, divorce, adopts, inherent property, and other ancillary rights are vastly determined by personal laws and thereby are inherently arbitrary.

In the pillar of humanity, women are exposed to various problems and risks simply because of their gender. Despite constitutional and statutory protections, women still face difficulties and there have been no significant results in terms of their protection. Although the Indian Judiciary has made significant efforts, there are limitations on its jurisdiction, and it is unable to perform the duties of other branches of the government. In this Connection, the Uniform Civil Code, which is a constitutional requirement, is yet to be enacted into law by the Indian Legislature. Its purpose is to ensure that women, who suffer from inequalities in personal laws, are granted equal status. The tyranny of India is that women are prima facie identified and governed according to their religion and personal law, such as Hindu, Muslim, Christian, Jew, or Parsi. This way of thinking is the fundamental reason for our underdevelopment, prejudice, and numerous societal problems. It is necessary to understand the importance of having a Uniform Civil Code, which is a tool used to bring together the various laws related to personal matters in order to achieve gender justice. In today's environment giving women equal rights, independence and the capacity to make their own life decisions is more crucial. It is essential to modernize our views on gender equality as society advances in other areas and not to force one's own beliefs and traditions onto other people or groups. The pursuit of justice and equality for women frequently intersects with contemporary concerns about freedom, secularism, and religion. To empower women in all areas including social status, gender bias, health, and security, is needed. Article 44 mandates that the state must establish a Uniform Civil Code for all citizens in India

The Constitutional drafters were well aware of this problem and weren't complacent of the same. They proposed the Uniform Civil Code (UCC) as the solution but chose to put it in the Directive Principles of State Policy so that the same may be implemented at a later date.

The authors content that the Code is the way forward to ensuring gender justice in the context of family law not only for women, but also for gender minorities. While the enactment of the Code alone cannot ensure the attainment of gender justice, without it, no gender equity is attainable. To this end, the paper analyses some of the gross arbitrary provisions in personal laws to highlight the need for Uniform Civil Code. The paper will go on to establish how Uniform Civil Code could act as an instrument of gender justice by bringing into life provisions for marriage, divorce, succession, inheritance, adoption, amongst others that apply to all irrespective of religion and without distinction of gender.

1. UCC: What is it?

India is a plural, diverse, multicultural society which follows different personal laws. At the moment, there are different personal laws that apply to different persons based on their religious background. These laws even vary based on ethnic background, for example, Khasi Hills Autonomous District (Khasi Social Custom of Lineage) Act, 1997, or regional customs, for example, Tamil Nadu amendments to Sec. 7 of the Hindu Marriage Act, 1955 recognising Suyamariyadhai marriages. While these laws respect the diversity of the land, they also authorize the perpetuation of inequities in these laws. But this was not be a permanent system. Art. 44 of the Constitution directs the State to “*endeavour to secure for citizens a uniform civil code throughout the territory of India*”.

The word “Uniform” in Art 44 means that all communities must be governed by the uniform personal laws. Read in light of the Equality Code [Arts.14-18], this Code must further principles of gender justice and human justice. A Civil Code in this contest refers to the set of laws that govern matters relating to marriage, divorce, adoption, property, succession, and inheritance, etc.

2. History

The Uniform Civil Code (UCC) has been a central part of several legislative and political debates for over 150 years. The movement began with the Second Law Commission Report of 1835. It stressed the need for uniformity in codification of Indian law relating to contracts, crimes, evidences, but excluded personal laws of Hindus and Muslims, thus enabling the indigenous people preserve their practices and customs. This leniency was more out of condescension than respect. The British cite three main reasons for the decision to not interfere

in the customs of the Indians:

- i. The fixed habits, and long-established customs were contrary, both in principle and in practice to that of England
- ii. The English laws, that would be written for this people would be both complex and alien to the locals
- iii. “suitable to the genius of the people and all the circumstances in which they may be placed”.²

The trouble with this approach is that it made codification of these laws very difficult. But tacit codification was happening through the judicial process. Though the British did not pass any laws, they did resolve civil disputes between the natives. And by virtue of the operation of the doctrine of *stare decisis*, the courts crystallised several customary practices. Though the Courts might not have always captured the Scriptures correctly, the British continued with this approach after the Queen took over the sovereign administration of India from the Company.³

But the need to further the case of Hindu women who suffered from several discriminatory practices like sati, prohibition of widow remarriage, inheritance, divorce etc. was felt by the British administrators as well as the Indian aristocrats. A spew of legislation were passed to protect the interest of the Hindu women including the Hindu Widow Remarriage Act, 1856, Hindu Wills Act, 1870, Married Women's Property Act, 1874, with its Amendment Act, 1923, Indian Majority Act, 1875, the Hindu Inheritance (Removal of Disabilities) Act, 1928, Child Marriage Act, 1929, Hindu Women's Right to Property Act, 1937. This momentum led to the setting up of the Hindu Law Committee headed by BN Rau. The Committee recommended the codification of the Hindu law for both marriage and succession, in line with the Scriptures. And thus, the draft Hindu Code was proposed in 1942, and again in 1947. But as the implementation of the Code proved to be difficult, it had to be broken down into smaller fragments. And thus, the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 were passed within the span of a few months.⁴

But why were the personal laws of Hindus alone codified? The answer lies in the annals of the Constituent Assembly debates. The directive to secure a uniform civil code had originated as a suggestion from M.R.Masani, for its inclusion amongst the justiciable rights. However, the Fundamental Rights Sub-Committee decided by a majority of five-four that the provision was outside the scope of fundamental rights. Several members of the Constituent Assembly put

forth arguments for and against the UCC. Naziruddin Ahmed contented that that which the Muslim rulers in their 300 years of rule, and Britishers in their 175 years of domination did not interfere with, should not be interfered with by the Constitution.⁵ India is a diverse country, said Hussain Imam, making Her unfit for UCC.⁶ Personal laws being an integral part of the person's way of life, culture, said Mohd. Ismail, the right to pursue one's personal laws is a part of their fundamental rights. He further pressed that non-interference with personal laws is a component of minority rights.⁷

Supporters of UCC like KM Munshi argued that UCC is not opposed to religious freedoms as freedom of religion, minority rights etc. are well protected in the Constitution. Further, European countries, Muslim majority nations like Turkey, Egypt follow uniform laws. Also, the Hindu Code did not stay true to the dictates of Manusmriti and Yajnavalkyasmriti, but opted a modernised law.⁸ Personal laws often discriminated between persons on the grounds and the same is impermissible under the Constitution. Thus, it was pressed that religion must be separated from legal regulation of life and the need to modernise the civil laws etc.

Dr. BR Ambedkar, who favoured the UCC argued that not all Muslims followed Shariat, before 1935. He pointed out that the North West Frontier Province, Northern Malabar, etc. did not follow Shariat succession, but Hindu laws of succession, and matriarchal laws respectively. He also assured that just as certain aspects of Hindu law would make it to the UCC, it would also include Muslim laws.⁹

But even before the Hindu Code came into force, the Special Marriage Act, 1954 was in place. It allowed civil marriage between any citizen irrespective of religion, beyond the boundaries of any religious personal laws. It extended certain benefits like divorce, prohibition of polygamy etc., that Hindus enjoyed to members of other communities particularly the Muslim women.¹⁰

The Assembly hoped that the successful implementation of such neutral laws and the Hindu Code would pave way for a similar exercise for all the communities.¹¹ Unfortunately that was not to come by, yet. Thus, came to into existence the non-justifiable directive to the Stateto "endeavour to secure for citizens a uniform civil code throughout the territory of India".

But that is not the only provision in the Constitution dealing with this subject. Matters governed by personal laws are scattered across the Three Lists of Schedule VII. Marriage, divorce,

adoption, succession etc. are in the Third List,¹² whereas succession to agricultural lands, and burial related matters are within the purview of the State legislature.¹³ The Center, however, governs Hajj and Ziyarat pilgrimages.¹⁴

3. Judiciary and UCC

The question that differential personal laws violate the Equality Code of the Constitution has been raised several times before the Courts. In the landmark case of *Narasu AppaMali*,¹⁵ the Bombay High Court resolved this concern by holding that personal laws are beyond the scope of Art.13. References to Art.44 were merely made to point out the existence of different personal laws. While the Court has decided in favour of the law abolishing bigamy for Hindus, it did not do it with the intention of furthering gender justice.

But by the 1980s, the tides changed and the Courts strongly pressed for the implementation of the UCC. *Shah Bano Begum v. Mohd. Ahmed Khan*¹⁶ is a case of the 73- year-old Muslim mother, who moved Court claiming maintenance against her husband of 40 years who divorced her by instant triple talaq, was a sensational legal development of the 1980s. While granting Shah Bano her relief, the Apex Court commented on the larger issue of the need for a uniform code to counter gender discrimination in personal laws. The Court expressed anguish over Art. 44 lying in cold storage. It also pressed that as noble as waiting for the communities to come forward and give upon their personal laws and agree to follow a common civil code, it is inevitable that the State begins the process in interest of those who suffer from the discriminatory personal laws. This sentiment was reiterated in *Ms. Jorden Diengdeh vs. S.S.Chopra*,¹⁷ and *Sarla Mudgal vs. Union of India*.¹⁸ In fact, in *Sarla Mudgal*, the Court expressed that UCC would further national integration by removing ideology based conflicts. The Apex Court once more pressed for UCC in *ABC v. The State (NCT of Delhi)*¹⁹ and *Jose Paul Coutinho v. Maria Luiza*²⁰

4. UCC and Gender Justice

UCC is not welcomed by all across the political and religious spectrum. The debate has two sides: If, ‘non implementation of the provision contained in Art.44 amounts to grave failure of Indian Democracy’ represents one side, the other side claims that “logical probability appears to be that the code would cause dissatisfaction and disintegration then serve as common umbrella to promote homogeneity and national solidarity.”²¹

While many argue that UCC is neither necessary nor desirable,²² there are several reasons why UCC must be brought into effect. The prime reason behind this being gender justice. Personal laws are invariably inherently patriarchal. In innumerable instances like *Thota Sesharathamma and Anr v. Thota Manikyamma*,²³ *Gita Hariharan v. Reserve Bank of India*,²⁴ amongst others, the Courts have had to step in and nullify the gender discriminatory effect of personal laws. But this is not always especially in situations where the wordings are blatant and unambiguous.

Further, even the Hindu Code is not equal amongst genders. While interstate succession of male has been rectified with time, intestate succession to female continues to reek of patriarchy. Thus, time is ripe to bringing gender just UCC is a must. The UCC's importance for gender equality cannot be denied and in a country like India, where women's rights are daily contested and often denied, this is of special significance. UCC will certainly help in improving the condition of women in India. Indian society is undoubtedly extremely patriarchal. By legitimising old religious rules to continue to govern our families, our post-independent legal system is condemning all Indian women to subjugation and mistreatment. UCC will accelerator changes in brushing these archaic misogynistic traditions that have no place in today's society, out of the backdoor.

As far as the apprehensions regarding UCC being an imposition of Hindu laws on the minorities is concerned, this is simply not true. Simply speaking, the Hindu law itself was changed when the Hindu Code Bill was drafted. For example, the Hindu marriage was originally viewed as a sacrament, but now is a contract under the Hindu code.²⁵ Thus, the question is not about Hindu majorities vs Muslim minorities at all. It is about bringing to life the Constitutional ideal of gender equality, using one of the tools provided to by the Constitution itself.

It is pertinent to bring to light Dr. Tahir Mahmood's appeal to the Muslim Community. He requested the community to focus their energies on how best Islamic jurisprudence can contribute to the UCC rather than wasting time on securing immunity to their personal laws.²⁶ His is a voice of reasonability that can apply to all the communities.

Most importantly, a uniform law would not necessarily mean a common law but different personal law based on uniform principles of individual liberty and equality. Such uniformity can sustain the diversity in law.²⁷

5. Conclusion

“There is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution.”²⁸

Gender justice is the bedrock of the Constitution as can be discerned from the wordings of the Preamble, fundamental rights like Art. 15(3), Directive Principles like Art. 39(a), and Art. 42, to political reservations in Arts. 243D (3)(4) ,243T(3)(4). While every religion undoubtedly enjoys the right to its own practices, traditions, and customs, a practice or custom that places one below or beneath another, must go. And of all the inequalities, imbalances and injustices so caused, gender issues trump. One cannot continue to avoid solving gender injustices because it coincides with other issues. It is absolutely no justification to say that gender justice cannot be achieved because it is trapped under the weight of religion, or religious freedom.

Arguably gender justice is not the only issue at stake when one takes up the cause of UCC. But that is no reason to deny or delay uniform and gender-neutral personal laws. If UCC runs the risk of offending Art. 25 of the Constitution, the right solution is to draft the Code in a manner that would further religious freedom and the State’s obligation under Art. 44, rather than to indefinitely put the entire mandate in cold storage.

Granted that UCC by itself cannot end patriarchy. But it can absolutely prevent the legal protection granted to it. And the same must be done at once because political and even economic empowerment is pointless if laws continue to grant the stamp of authority to personal laws that are manifestly discriminatory.

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