Gender Equality should Guide the Process of Reforming Family Laws and not National Integration

- Irfan Engineer

The Supreme Court of India has yet again asked the Union Government to file amaffidavit and state whether it intended to bring in a Uniform Civil Code (UCC for brevity). In the Shah Bano Judgment (Shah Bano v. Mohammad Ahmed Khan, 1985) the Supreme Court observed "*It is a matter of regret that Article 44 of the Constitution has remained a dead letter*". In Sarla Mudgal v. Union of India (1995), similar observations were made. Though the Supreme Court takes on the role of a reformer assuming lack of courage in the political class, it is only the legislature that can bring in the UCC. The repeated observations of the Supreme Court are on the strength of the Article 44 of the Constitution which states "*The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India*".

Article 44 is included in Part IV of the Constitution which is about Directive Principles of State Policy. Provisions of Part IV are merely guiding principles and cannot be enforced by courts. The Supreme Court has ignored other provisions of the Part IV which include, that the state shall strive to secure a social order in which justice – social, economic and political – shall inform all the institutions of national life; that the state shall strive to minimize inequalities in income; that operation of economic system does not result in the concentration of wealth and means of production to the common detriment; etc. These guiding principles are far more important today as the Government of the day is ignoring these provisions. One wishes that the Supreme Court had made the Government to file affidavit and asked what laws and policies did the state want to bring in to give effect to objectives of justice and equality in Part IV of the Constitution.

The Supreme Court wants to do away in one stroke the practices of centuries. Till the passage of *The Muslim Personal Law (Shariat) Application Act, 1937*, (hereinafter, "The Shariat Act" for brevity), Muslims in India were governed by diverse customary and religious laws. From the Sultanate period onwards, Shari'a Law was applied only to noble Muslims. However converts from amongst artisan castes continued to be governed

by their customary practices e.g. Meo from Rajasthan, Pranam Panthis and Pir Panthis in Gujarat, Sat Panthis from MP, Khojas, Bohras & Cutchi Memons. Kazi Mughis-ud-Din of Biyana was offended by the changes in Shari'a made by Allauddin Khalji, the first ruler to establish Sultanate. Khalji replied, "*I am an ignorant man and I am ruling this country in its best interests. I am sure, looking at my ignorance and good intentions, the Almighty will forgive me, when he finds that I have not acted according to Shari'a*".

In NWFP, Hindu customary law in succession and other matters were in vogue till 1939 when Central Legislature abrogated application of Hindu Laws to Muslims of NWFP and applied Shari'a Law to them. Till 1937, in United Provinces, Central Provinces and Bombay, Muslims to a large extend were governed by Hindu Law in matter of succession. *Marumakkathayam* Law applied not only to Hindus but also to Muslims in the North Malabar. *Marumakkathayam* Law is matrilineal practice.

Customary practices were too varied to comprehend for the colonial state and therefore more reliance was placed on scriptures. Manusmriti was translated in 1776. Charles Hamilton under directions of Hastings, translated the *Hedaya* (The Guide) from Arabic into English in 1791 but was abandoned halfway. However, after the 1857 rebellion, the Crown declared, that all those in authority under it would "…*abstain from all interference with the religious belief or worship of any of our subjects*". Thus the Colonial state unified the criminal laws, taxation and commercial law, but by and large refrained from interfering in family laws unless thought politically expedient.

Women leaders of nationalist movement demanded comprehensive code regulating marriage, divorce and inheritance. Kamaladevi Chattopadhyay, Sarojini Naidu, Muthulaxmi Reddy, Begum Shah Nawaz of All Indian Women's Conference supported uniform code during their convention in 1933. With Govt. of India Act, 1935, Hindu and Muslims leaders pressed for law reforms to elevate the position of women. While introducing the Bill – Hindu Women's Right to Property Act, 1937, Dr. G.V. Deshmukh said that the it was necessary to set right the Colonial interpretation of "limited estate" and "reversion" to widows. MHM Abdullah, who introduced "The Application of Shariat Act, 1937" said, "[t]he bill aims at securing uniformity of laws among Muslims in all their social and personal

relations…It also recognizes and does justice to the claims of women for inheriting family property who under customary law are debarred from succeeding to the same"

The UCC debate in the Constituent Assembly:

It is in this background that Article 35 of the draft Constitution (now included as Article 44) was debated. Mohammad Ismail Sahib and Naziruddin Ahmad wanted to amend Article 35 and include that no one would be compelled to give up their personal laws. They argued that right to adhere to one's personal law was part of their right to religion and way of life. Citizens could not be compelled to give up their personal laws in order to augment harmony (Constituent Assembly, 2003, p. 540). Ahmad argued that Art. 35 was in conflict with Art. 19 of the draft Constitution (now Art. 25) which gave citizens right to profess, practice and propagate their religion. Ahmad wanted the interference by state in matters of religion to be a gradual and slow process. Hindus too were opposed to UCC. K.M. Munshi, an ardent supporter of UCC, said, "*I know there are many among Hindus who do not like a UCC… they feel that personal laws of inheritance, succession etc. are really a part of their religion. If that were so, you can never give, for instance, equality to women.*" Munshi was in favour of UCC on the grounds of gender equality and for unity of the nation. He said, "*whether we are going to consolidate and unify our personal laws in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession.*" (p. 547). But then Pocker Sahib Bahadur (p. 545) and Hussain Imam (p. 546) asked which Hindu law would become the basis of UCC given the diverse traditions within Hinduism and differences in educational levels in the country.

Dr. B R Ambedkar said, "*It (Article 35) does not say that after the Code is framed the State shall enforce it upon all citizens merely because they are citizens.*" The future Parliament, Ambedkar opined, could bring in family laws that were applicable to those who voluntarily chose to be bound by it (p. 551). The Special Marriage Act, 1954 is such a voluntary code. Art. 35 was passed by the Constituent Assembly without any amendments that protected the citizens from being compelled to give up their personal laws.

BJP and the UCC

While the debates on inclusion of Art. 35 of the Draft Constitution were to provide for gradual extrication of family laws from religion and march towards the goal of gender justice, the Hindu nationalists advocated UCC in order to use it as a weapon to scare the minorities of impending majoritarian hegemony and to invoke their opposition. This could then be useful to demonstrate the separatist mentality of the minorities. The BJP has been demanding UCC to promote national integration. Union Law Minister D V Sadanand Gowda e.g. said that UCC was necessary for national integration (Express News Service, 2015). This is not withstanding the fact that BJP's Election Manifesto 2014 mentions promises UCC on the ground of gender justice, "*drawing upon the best traditions and harmonizing them with the modern times*".

However the moot question is, given the mind boggling diversity of traditions within all the religious communities, how painful will be the negotiations to draft such a uniform code? And, will the UCC be in consonance with the diversity? Which of the diverse traditions will form the basis of the UCC?

Regional Diversity

The Dravidian Southern regions follow various practices which are more gender just compared to the North in matters of inheritance of property. There was custom of handing over a piece of land to the daughter at the time of her marriage within Madras Presidency and the income from it was for her exclusive use and devolved on her female heir. Women could remarry if her husband's whereabouts were not known for a long time; and if the first husband returned, the woman could choose to live with either. Matrilineal practices were prevalent in Nayars, Nambudiris and Malabar Muslims. *According to Sambandham* practice, women continued to live in their natal house after marriage and children belonged to their caste and *tarawad*. *Sambandhan* marriages were loose matrimonial alliances which could be easily terminated with consent of both parties. *Tarawad* and *tavazi* were female headed joint family systems with line of descendants through female. These traditions were brought to an end with Hindu Succession Act, 1956. In Lakshadweep Islands inhabited by 99% Muslim population followed the

matrilineal system of *marumakkathayam*. Muslims in Kerala have retained their *marumukkatayam* system and Mappilla *tarawad*.

Mithakshara Joint family system was abolished in Kerala. Kerala abolished Malabar joint families of matrilineal type governed by *Marumukkatayam, Aliyasantana, Nambudiri* and other matrilineal laws but they are operative in Karnataka, TN and AP. The Christian Succession Acts of Travancore and Cochin are in vogue in Kerala with its practice of Joint family system.

Portuguese Civil Law is still applicable in Goa (Portuguese Decrees on Marriage and Divorce, 1910 and Decree on Canonical Marriages, 1946 in Goa Daman and Diu and Dadra and Nagar Haveli. However the Gentle Hindu Usages Decree, 1880 allows application of some customs. Thus different family laws are applicable to Goan Hindus than in other parts. The Law for Goan Christians and Muslims as well is different from those applicable to their fellow members in rest of the country. The Shariat Act and the Special Marriages Act do not apply in Goa.

Hindus, Christians and Muslims in Puducherry are divided into two groups – *Renoncants* and others. *Renoncants* are still Governed by French Civil Code and to others, other Indian laws are applicable.

The Hindu Marriage Act 1955 was re-enacted by J&K Assembly. J&K has its own Hindu Succession Act, without repealing the Buddhist Succession Act, 1943. Till recently, Muslim Laws were applicable but local customs prevailed in matters of inheritance. The Muslim Personal Law (Shariat) Application Act, 1937 was made applicable only recently in J & K.

Tribal customary law is protected by legislation in Meghalaya, Mizoram, Nagaland, and Sikkim. The Khasi, Jaintia and Garo tribes continue matrilineal inheritance even after their conversion to Christianity.

Mitakshara school of Hindu law has four regional variations: Varanasi, Mithilia, Dravida and Maharashtra which governs the succession.

Diversity within Religious communities, caste and Scheduled Tribes

The Hindu Family laws have been extensively amended by the three southern states in India – TN, AP and Kerala. Agricultural land is excluded from the operation of the Shariat Act. The Shariat Act was made applicable to these three Southern states only till 1963.

Marriage among lower castes is less sacramental and more of contractual (with consent of adults marrying) without the rituals of *sapatpadi* and *kandyadan*. The practice of bride price prevails amongst the lower castes (*Kanya shulka*).

Christian Tribals all over the country have been exempted from the Indian Succession Act. The four Hindu legislations are also inapplicable to the Scheduled Tribes

Specific Hindu, Buddhist, Jain and Sikh customs running counter to general statutory provisions enjoy full legal protection under the law, including those customs (i) violating statutory rules to sapinda relationship and prohibited degrees in marriage; (ii) customary marriage rites replacing saptapadi; (iii) Customary divorce and (iv) adopting major and married children.

Amongst Muslims, customs and usage relating to wills, legacies and adoption enjoy statutory protection even under the Shariat Act. Sunni Bohras and Khojas are governed by Hindu customs and usages.

One is afraid that the UCC could be a threat to this rich diversity. The legislations enacted to regulate Hindu Personal Laws have threatened the local customs and traditions, particularly those that were more pro-women. The journey towards "uniformity" is informed by Brahmanical traditions and *smriti* texts ignoring the vast body of traditions of the OBCs, SCs and STs. The Hindu community is sought to be unified around *smriti* texts.

The Muslim Personal Law is also applicable in all diversity evident from the above discussion. That is why the Muslim Personal Law Board dithers from codifying their law and one is afraid that the Wahabi-Hanafi fiqh would dictate codification, not because it is in the best interest of the community, but because they are better organized and networked to influence the process.

What we need is a “Uniform” civil code and not “Common” civil code. Dr. Ambedkar said in the Constituent Assembly, that the UCC need not be enforced on unwilling citizens. We should march towards a uniform regime of gender just family laws but drawing from the diverse traditions and allowing space for diversity. Gender equality alone should be guiding this process and the same could be achieved through gradual reforms of existing family laws.