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**TOWARDS AN UNIFORM CIVIL CODE : Challenges and issues in  
framing a contemporary Uniform Civil Code on Marriage & Divorce**

The then Chief Justice of India S.A. Bobde's statement in March, 2021 extolling the **Civil Code of Goa**<sup>1</sup> has again put into focus the need for a modern Uniform Civil Code (UCC) for India. In the face of opposition by various religious groups, UCC has remained elusive despite it being a Directive Principle of State Policy under Article 44 of the Constitution and despite Supreme Court's pronouncements in a catena of decisions commencing from **Shah Bano**<sup>2</sup> case onwards.

At present, Hindus (including Sikhs, Buddhists & Jains), Christians and Parsis are governed by codified personal laws while Muslims and Jews are governed by respective religious personal laws. However, religious personal laws being of ancient origin, are based on the notion of patriarchy and discrimination against women and even some of the codified personal laws have certain provisions that contain gender bias. Further, neither the codified, nor the religious personal laws deal with contemporary topics like Transgender/LGBTQ rights, live-in relationships etc. This article examines the various challenges and issues that need to be addressed to ensure that an UCC on marriage & divorce is contemporary, non-discriminatory and future-looking.

## Challenges and issues in framing a contemporary UCC on marriage and divorce

- i. **Universal application:** UCC would lose its purpose unless it is uniformly applied to all citizens of India. Yet the vastness of area, size of the population and diversity of cultures, rites, religions and practices makes it very difficult to frame a code that would be uniformly applicable to all. Even if such a uniform code is framed, there are bound to be clamours from various religious/sectoral and tribal groups seeking exemption on ground of diversity. Hence it is of paramount importance that there be adequate political and judicial will to ensure that there be universal application of the code.

It needs to be emphasized that UCC on Marriage and Divorce should only define the personal rights of people in the sphere of marriage and divorce and the registration and regulation thereof. People would be free to undertake in addition, such religious rites/ceremonies as per their respective religions and customs, but the said religious rites/ceremonies would not be compulsory and would not have any legal effect.

- ii. **Gender Neutrality:** It is almost axiomatic that all personal laws suffer from gender bias towards women. Supreme Court through judgments such as **Shah Bano**<sup>2</sup> and **Shayara Banu**<sup>3</sup> relating to Muslim Personal laws, **Molly Joseph**<sup>4</sup> relating to Christian law and **Vineeta Sharma**<sup>5</sup> relating to Hindu Succession, amongst many others, has always struggled to reduce discriminations, especially discrimination against women, through progressive interpretation of personal laws.

While the discrimination is less palpable, albeit present, in codified personal laws, uncodified personal laws, in particular, continue to remain highly discriminatory against women. For eg. while Talaq e biddat

(instant triple talaq in Islam) has been held illegal, it is still possible for a Muslim husband to obtain a unilateral no-fault divorce through Talaq-al-baqarah whereby the divorce is finalised after the duration of three monthly periods (iddat) and can be revoked in between. There is however no corresponding unilateral right available to muslim women to divorce their husbands without concurrence of their husbands.

UCC needs to be completely gender neutral. Both parties to marriage must have equal rights, Polygamy has to be barred and Divorce must be only on specified grounds available to both parties.

Gender neutrality would have certain other important manifestations too, including Gay rights, which is discussed under a separate heading. Further, it would have wide ramifications in the field of determining maintenance pendente lite as well as alimony.

India at present is going through a transitional phase with a tussle between traditions and modernity. The country has a diverse spectrum of people belonging to different cultures, traditions, income and educational levels. UCC would have to strike a proper balance between individual rights and cultural milieu, while looking towards the future.

- iii. **Transgender/LGBTQ rights:** Supreme Court in **Navtej Singh Johar**<sup>6</sup> has decriminalised Section 377 IPC. The Transgender Persons (Protection of Rights) Act, 2019 prohibits discrimination against transgenders in nine fields, including employment, education and healthcare. Several States have setup Transgender Welfare Boards and Committees. However Transgender/LGBTQ do not have any statutory right of marriage.

Internationally, 30 countries now permit same-sex marriages, including USA, Canada, UK, France, Germany, Spain, Portugal, Norway, Finland, Sweden, Australia, Brazil, Argentina, Taiwan and very recently, Switzerland.

In India, once the Transgender/LGBTQ community stands recognized, basic human right of marriage to the community members is bound to follow sooner or later by invoking Article 21 of the Constitution. Since UCC must cater not only to the present but look forward to decades hence, it will have to look into the aspect of recognizing/legalizing transgender/LGBTQ marriages. That is to say, the very definition of marriage will have to be changed to a registered union between two individuals, regardless of sex or religion.

The issue of same sex union, while addressing individual rights, will however bring in other complexities including comprehensive issues pertaining to surrogacy, adoption, succession, child rights, divorce, maintenance and domestic violence in respect of same-sex couples. The issue needs to be openly debated in the society and inputs taken from experience of countries that have legalized such relationships, before finally deciding on the course of action to be followed. In particular, it is an issue that one cannot shut one's eyes to.

- iv. **Live-in relationships:** Live-in relationships are a reality of modern society. These relationships verily refer to relationships where the parties voluntarily shun marriage and prefer to live together.

The issue of live-in relationships has wide ramifications on the very institution of marriage and consequent balance in the society itself. Hence the rights available under live-in relationships need to be widely debated. Any law on Live-in relationships would also directly affect the law on maintenance and alimony, succession, legitimacy and custody of children, adoption, domestic violence, dissolution of relationship, bigamy and rape.

Supreme Court in **S.Khusboo**<sup>7</sup>, held that live-in relationship comes within ambit of right to life under Article 21, while in **Velusamy**<sup>8</sup> it laid

down conditions where live-in relationship was akin to marriage. In **Chanmuniya**<sup>9</sup> Supreme Court referred to larger bench the issues relating to status of marriage, claim for maintenance by woman u/s 125 Cr.P.C. and applicability of DV Act where the parties have lived as husband and wife for a considerable period or where the customary marriage is not valid as per personal laws. These issues are yet to be decided. In **Indra Sarma**<sup>10</sup> Supreme Court emphasized need for Parliament to legislate and extend ‘domestic relationships’ u/s 2(f) of DV Act to protect victims from societal wrongs in illegal relationships, especially where victims are poor, illiterate, with children and without source of income.

Any forward looking UCC will have to deal with the issue and the issues that would follow. In particular issues may arise whether live-in relationships would need to be registered to protect exploitation of one partner or whether such relationships beyond a stipulated period or having children should be recognised as ‘quasi-marriages’. Rights of children to such relationships also need to be determined. The issues are complex and will need to be debated and determined and rights and duties of the parties thereto will need to be statutorily set out.

- v. **Inter-faith marriages:** UCC must replace Special Marriage Act, 1954 as the legal platform for inter-faith marriages. It may in addition contain provisions to deter forcible conversion and marriage by concealing one’s religion.
- vi. **Irretrievable breakdown of marriage as ground for divorce:** Presently, irretrievable breakdown of marriage is not a ground for divorce, although it is often a factor considered by Courts. It should be recognized as a standalone ground for divorce.

**vii. Uniform procedure for determining maintenance:** UCC should set out uniform criteria for maintenance, especially where:

- a. The spouse claiming maintenance is working; or has high qualifications and able to earn; or has high qualifications, but not having worked for long, may not be able to support self. It is pertinent to note that maintenance is the most contentious issue in all matrimonial litigation and even accounting for status and income differences, the quantum of maintenance granted by Courts all over the country, vary widely. The Supreme Court in **Rajnish Vs. Neha**<sup>11</sup> has set out in detail the principles for computing and determining maintenance in matrimonial matters. The judgment has also set out format of affidavit of income and financial status that would be required to be filed in all matrimonial legislation. It is necessary that the same be given a statutory basis;
- b. Children between 18 and 21 years of age are studying and dependent on parents for support. At present support to such 'adult' children are not contemplated under the law but the inevitable consequence is that the parent with whom the 'adult' child continues to live, has to bear the entire burden. Often it is the wife who has to bear this burden singlehandedly. In most of the European countries, Australia, Canada as well as in some states of USA, statute permits maintenance to children beyond 18 years of age in case they are undergoing university education. The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007 contemplates support to 'adult' children for the period of university education and various signatory countries thereto have mandated such maintenance till the age of 21 and even upto 25 years.

In India, earlier, some Courts have on occasions tried to increase maintenance of the wife to help her bear the cost. Recently in a categorical judgment, the Delhi High Court in **Urvashi Agrawal**<sup>12</sup> held that –“Mother cannot be burdened with the entire expenditure on the education of her son just because he has completed 18 years of age, and the father cannot be absolved of all responsibilities to meet the education expenses of his son because the son may have attained the age of majority, but may not be financially independent and could be incapable of sustaining himself.” It is necessary that UCC should give statutory recognition to the same.

**viii. Mechanism for early disposal of matrimonial matters:** At present, matrimonial matters linger on for decades and lives of the parties involved are invariably wasted. Matrimonial matters should be disposed of within a stipulated time frame, if necessary by a separate Matrimonial Tribunal comprising of trained and sensitized Judges/Retired Judges/Members, not strictly bound by CPC or Evidence Act.

### **Taking aid of Civil Code of Goa and Special Marriage Act, 1954**

Both Civil Code of Goa and Special Marriage Act, 1954 have been accepted by people following different religions. The two Acts can provide invaluable insight and guidance in drafting UCC.

1. Civil Code of Goa is the Portugese Civil Code, 1867 as extended to Goa and includes Goa Succession, Special Notaries and Inventory Proceeding Act, 2012
2. Mohd. Ahmed Khan Vs. Shah Bano Begum: (1985) 2 SCC 556
3. Shayara Bano Vs. UOI : (2017) 9 SCC 1
4. Molly Joseph @ Nish Vs. George Sebastian @ Joy (1996) 6 SCC 637
5. Vineeta Sharma Vs. Rakesh Sharma (2020) 9 SCC 1
6. Navtej Singh Johar Vs. UOI (2018) 10 SCC 1
7. S.Khusboo Vs. Kanniammal (2010) 5 SCC 600

8. Velusamy vs. Patachaiammal (2010) 10 SCC 469
9. Chanmuniya Vs. Virendra Kumar Singh Kushwaha (2011) 1 SCC 141
10. Indra Sarma Vs. V.K.V. Sarma (2013) 15 SCC 755
11. Rajnesh Vs. Neha (2021) 2 SCC 324
12. Urvashi Aggarwal v. Inderpaul Aggarwal, 2021 SCC OnLine Del 4641, decided on 5-10-2021