

UNIFORM CIVIL CODE AND GENDER JUSTICE: AN ANALYSIS UNDER CUSTOMARY LAW

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ABSTRACT

Article 15 of the constitution of India lays down a guarantee to every citizen that consists of 'No discrimination on any ground only of religion race, caste, sex, place of birth or any of these. Article 15 (3) provides that for women and children special provision can be made by the state, women empowerment enjoys constitutional protection of this Article 15 (3). Article 39 (a) (d) and (e) lay down certain principles of policy that are to be followed by State. Men and Women citizens shall enjoy equal right to an adequate means of livelihood. There shall be equal pay for equal work for both men and women and that the health and strength of worker's men and women shall not be abused. Article 42 provides for just and humane condition of work and maternity relief. Article 44 also provides that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'.

KEYWORDS: Central Law, Politics, Women Empowerment

INTRODUCTION

Women empowerment in core areas like social status, gender bias, health, security and empowerment are of urgent necessity. The Indian state has in fact encouraged codifying tribal customary laws. But there are inherent problem with codification as tribal laws have historically evolved and are still changing. Article 44 expects from the State to secure a Uniform Civil Code for all citizens of India. There is no Uniform Civil Code in India but a Uniform Criminal Code exists. The Criminal law is equally applicable to all citizens irrespective of their religious affiliation. However in the case of civil law particularly in the matter of personal laws there is no uniformity.

The law relating to marriage, divorce, maintenance, guardianship and succession governing the Hindus, Muslims and Christians etc., is different and varies from one religion to other. This paper will discuss all the personal law of every community with the various judgements of the Supreme Court of India where the apex court has suggested to the Central Government for the enactment of a Uniform Civil Code. A uniform civil code will help the cause of national integration. It is the humble opinion of the researcher that a Uniform or common civil code is possible only when the governments consider the gender justice as the ultimate goal

There are different laws like the Hindu Marriage Act; the Hindu Succession Act; the Hindu Minority and Guardian ship Act, the Hindu Adoption and Maintenance Act governing the personal matters of Hindus. The Shariat Act, The Dissolution of Muslim Marriage Act and the Muslim Women (protection of Rights on Divorce) Act etc., which are based on the tenets of Holy Quran, govern the personal matters of Muslims.

Similarly the Indian Christians are governed by the Indian Christian Marriage Act, the Indian Divorce Act and the Cochin Christian Succession Act etc. Parsis are governed by a different set of laws Thus it is clear that there is no uniformity in all personal laws as they confer unequal rights depending on the religion and the gender.

PERSONAL LAWS AND DISCRIMINATION AGAINST WOMEN

On a clear analysis of all these personal laws, it becomes obvious that the women have been conferred on inferior status in most of the personal matters compared to the men. The following examples justify the statement.

Hindu Law

Till the codification of Hindu Law in 1955 and 1956 the Hindu Women did not enjoy equal rights along with the Hindu men. Before 1955 polygamy was prevalent among the Hindus. The Hindu women could not hold any property as its absolute owner except in the case of Stridhana. She had only limited estate which was passed on to the heirs of the last full male owner called reversionary on her death. In the matter of adoption a Hindu woman had no right to adopt a child on her own. She could not be the natural guardian of her children during the life her husband. These examples are only illustrative in nature and not exhaustive.

Even though the Hindu law has been codified, certain discriminatory provisions still exist even today. For example a Hindu woman is not a coparcener in Hindu coparceners except in a few states like Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu. Consequently she is not entitled to claim a share in the coparcenary. Similarly she has no right to partition of a dwelling house even though she is a legal heir. Thus it is obvious that the codification of personal law of Hindus has not succeeded completely in eradicating the gender inequality.

Muslim Women

In the Pre-Islamic Arabia, the women enjoyed a secondary status in all respects when compared to men. The advent of Islam has contributed much for the amelioration of Muslim women and alleviation of their problems. The Holy Quran gives equal rights to men and women and places women in a respectable position. However there are certain aspects in Islam that render the position of Muslim women especially the wives insecure and inferior.

A Muslim male is permitted conditionally to marry as many as four wives at a time. It is important to note that the polygamy among Muslim men is only permission but not a compulsion. The Shia Muslim male can contract muta marriages for an agreed period of time. There is no ceiling on the number of muta marriages that may be contracted by a Muslim male. In the matter of divorce the position of the Muslim women is the most inferior and insecure compared to others. Particularly the method of divorcing the wife by the husband by pronouncing triple 'Talak' is highly discriminatory. This is in spite of the clear message of Holy Quran.

Recently the Allahabad High Court has held that the practice of the triple talak is unlawful and void. In the matter of succession, a Muslim woman is discriminated against despite the assertion of certain Muslim scholars that the Islam in this regard is more progressive and liberal. The legal position is that when two scholars or residuary of opposite sex but of the same degree inherit the property of the deceased, the Muslim male gets twice the share of the female. For example if brother and sister inherit the property as successors, the brother gets two shares whereas the sister gets only one share.

In the matter of maintenance also the divorced Muslim wife is not required to be maintained beyond the 'Iddat' period. The Criminal Procedure Code which imposes an obligation on a husband to maintain his wife including divorced wife until she maintains herself is a secular law and is applicable to all. There is a controversy as to whether a Muslim husband can be directed to maintain his divorced wife even beyond the Iddat period under the provisions of Section 125 of Cr. P.C. In the famous case of Mohd Ahmed Khan Vs. Shah Bano Begum AIR 1985 S.C. 945 the Supreme Court speaking through Y. V. Chandrachud, the then Chief Justice held that Section 125 Cr. P.C. is applicable also to the Muslims and that even a Muslim husband also is liable to maintain his divorced wife beyond the Iddat period. Because of the controversy,

the parliament has passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to overrule the judgement in Shah Bano case. The effect of this Act is that a Muslim husband is not liable to maintain his divorced wife beyond the Iddat period, unless both the spouses submit to the court at the appropriate time that they would like to be governed by Cr. P.C. However, in the case of Danial Latif Vs. Union of India, (2001) 7 SCC 740, the Supreme Court Constitution Bench held that, "where the constitutional validity of the Act of 1986 was challenged, and upheld that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well even beyond the Iddat period must be made within the iddat period under section 3(1) (a) of the Act. It was therefore categorically held that the liability of a Muslim husband to his divorced wife arising under section 3(1) (a) of the Act to pay maintenance is not confined to the Iddat period.

Similarly, among the Christians and Parsi Women also, there is disparity in the rights of the women as compared to the men.

Uniform Civil Code and Indian Constitution

The Indian Constitution, in its part IV, Article 44 directs the State to provide a Uniform Civil Code throughout the territory of India. However, it is only a directive principle of state policy; therefore it cannot be enforced in a court of law. It is the prerogative of the state to introduce Uniform Civil Code. The Constituent Assembly Debates clearly shows that there was a wide spread opposition to the incorporation of Article 44 (Article 35 in the Draft Constitution), particularly from the Muslim members of the

Assembly. Naziruddin Ahamed, Mohd. Ismile Sahib, Pocker Sahib Bahadur and Hussain Sahib etc., made a scathing attack on the idea of having a Uniform Civil Code in India on the grounds that the right to follow personal law is part of the way of life of those people who are following such laws, that it is part of their religion and part of their culture, that it would lead to a considerable amount of misunderstanding and resentment amongst the various sections of the country and that in a country so diverse it is not possible to have uniformity of civil law. However, one of the most illustrious members of the Assembly, K.M. Munshi strongly felt that if the personal law of inheritance, succession etc is considered as a part of the religion, the equality of women can never be achieved.

The Chairman of the Drafting Committee Dr. B.R. Ambedkar stated that in our country there is practically a Civil Code, uniform in its content and applicable to the whole of the country. He cited many instances like Uniform Criminal Law, Transfer of Property and Negotiable Instruments Act which are applicable to one and all. However he conceded that the only province, the civil law has not been able to invade so far is marriage and succession. He also dispelled the arguments of certain Muslim members that the Muslim law is immutable and uniform throughout India. He cited the example of the North-West Frontier Province which was not subject to the Shariat law prior to 1935 and until then followed the Hindu Law in the matter of succession etc. Similarly, in the North Malabar region of Kerala, the Murumakkutayan law applied to all, not only to Hindus but also to Muslims. Until 1937, in the rest of India, the various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu law of Succession.

Some of the learned members however predicted that a stage would come when the Civil Code would be Uniform and stated that power given to the state to make the Civil Code uniform is in advance of the time. Dr. Ambedkar also opined that it is perfectly possible that the future parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage, the application of the code may be purely voluntary.

The foregoing discussion clearly establishes that the framers of the constitution were aware of the gender injustice and sexual inequality of women and they incorporated Article 44 in the constitution hoping that it would be introduced in future at the appropriate time.

Judicial Opinion and Uniform Civil Code

The judiciary in India has taken note of the injustice done to the women in the matters of many personal laws. It has been voicing its concern through a number of judgements indicating the necessity to have uniformity in personal matters of all the citizens. In the case of *Mohd Ahamed Khan vs. Shah Bano Begum* AIR 1985 SC 945 pertaining to the liability of a Muslim husband to maintain his divorced wife beyond iddat period, who is not able to maintain herself, the Supreme Court held that Section 125 Cr. P. C which imposes such obligation on all the husbands is secular in character and is applicable to all religions.

In *Ms. Jordan Deigndeh vs. S.S. Chopra, D Chinappa Reddy, J.* speaking for the court referred to the observations of Chandrachud, C.J. in *Shah Bano's* case and observed as under: "The present case is yet another event which focuses on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of uniform civil code is exposed by the facts of the present case.

Again in *Sarala Mudgal vs Union of India* AIR, 1995 1531, a division bench of the Supreme Court consisting of Kuldip Singh and R.M. Sahai, JJ strongly advocated the introduction of a Uniform Civil Code in India. In this case the Supreme Court held that conversion of a Hindu male to Islam only for the purpose Of contracting bigamous circumvents Section 494 of Indian Penal Code. Such marriages have been declared as bigamous and void by the court. The court after referring to various precedents on the point, categorically held that till uniform civil code is achieved for all the Indian Citizens, there would be an inducement to a Hindu husband who wants to enter in to second marriage while the first marriage is subsisting to become a Muslim. Here the Court was pointing out the injustice done to the first wife, legally wedded.

The Bench noted the failure of successive governments till date, to implement the constitutional mandate under Article 44 of the constitution of India. It was suggested that the personal laws of the minorities should be rationalized to develop religious and cultural amity preferably by entrusting the responsibility to the Law Commission and Minorities Commission. The Bench further directed the Government of India to file an affidavit indicating the steps taken and efforts made to have a fresh look at Article 44 in August, 1996. However, the latter direction was treated as "obiter dicta" by the court subsequently.

In a recent judgement, *Lily Thomas vs. Union of India*, AIR 2000 SC 1650, while dealing with the validity of the second marriage contracted by a Hindu husband after his conversion to Islam, the Supreme Court clarified that the court had not issued any directions for the codification of a common Civil Code and that the judges constituting the different Benches had only expressed their views in the Facts and circumstances under these cases. It appears that the Apex Court in India, which showed great judicial activism initially with regard to uniform civil code, has taken a backward step with this clarification.

CONCLUSIONS

Thus it is clear that, Article 44 states that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. This provision was made to promote unity and integrity which is the cherished goal enshrined in the preamble to our constitution. Hindu laws of marriage, succession, etc., have been drastically changed in

the first decade of the commencement of the constitution but there has been resistance from Muslim community in this respect and for avoiding any resentment on their part political parties in power remained reluctant to enforce a Uniform Civil Code. The present situation is open to misuse and is inhuman and unjust for it permits inhuman and undignified treatment to women by providing legal cover to polygamy. Justice Kuldeep Singh, in his leading judgement in *Sarala Mudgal vs. Union of India* (1995) 3SCC 635, rightly observed that Article 44 is based on the concept that there is no necessary connection between religion and personal laws. Marriage, succession and the like matters of a secular character cannot be brought within the guarantee of religious freedom in articles 25-28. Practice of polygamy has been treated as injurious to public morals in USA and many Islamic countries have also abolished polygamy. The Court, therefore, requested the Government of India to secure Uniform Civil Code for all citizens of India. No gender justice could be rendered in its comprehensive sense, unless we have a uniform civil code containing the best provisions taken from all the religions, with the sole aim of doing gender justice. Unless the women, irrespective of their religious affiliation have been conferred equal rights on par with men in personal matters, the constitutional mandate of right to equality of status and opportunity cannot be implemented. However, adequate care should be taken to see that only the rights are made uniform and not the rituals which are inherent part of the culture and religion as otherwise it would violate the basic structure of the constitution viz. secularism.

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