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GENDER BASED DISCRIMINATION, SEXUAL CONTRACT AND PERSONAL LAWS

Author: Jerine George

INTRODUCTION

Patriarchial notions are deeply rooted in today's social order.Patriarchial notions have also penetrated the private life of Indians. The beliefs of Indians on familial relationships are majorly shaped by age old convictions which demands a modern assessment.Family being the basic unit of society is plagued with patriarchial norms that visibly or invisibly bolster gender based discrimination.Law that governs familial relationships are also strenthening patriarchal misconceptions.

In family matters like marriage, divorce, succession, adoption, maintenance etc, different laws govern different communities.Hindus, Buddhist, Jains and Sikhs are governed by Hindu Marriage Act, Hindu Succession,Hindu Adoption and Maintenance Act.[1]

All the Muslims in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937.The Dissolution of Muslim Marriages Act, 1939 deals with the circumstances in which Muslim women can obtain divorce and rights of Muslim women who have been divorced by their husbands and to provide for related matters.Christian Marriage in India is regulated by the Indian Christian Marriage Act of 1872. The Indian Divorce Act 1869 governs Christians in matters like divorce.The Indian Succession Act governs matters of succession when it comes to the Christian community.

On a plain reading of the statutes and analytical readings of the interpretations provided by the judicial bodies, personal laws are anti-feminine.But the efforts of the judiciary to bring in changes and make the laws gender neutral cant be overlooked either.Going to the roots of patriarchy is also essential when dealing with the problem of gender based discrimination.Sexual Contract theory is a convincing political theory on the origin of patriarchy and its manifestations.[2]

SEXUAL CONTRACT AND GENDER BASED DISCRIMINATION

Social Contract theory is one among many theories that undertake the task of explaining the origin of State and Governance.The influence of this theory was so immense,it led to modern revolutions that marked the beginning of modern participatory democracies.Similar to social contract theory,Carole Pateman in her best selling book "The Sexual Contract" introduces the concept of a contractual obligation between men and women .The author calls this contractual obligation as the trigger for the origin of patriarchy and gender based discrimination.[3]Patriarchy is defined as a system of social structures and practices in which men dominate,oppress and exploit women.[4]Similar to the social contract theory and its several variations,the sexual contract theory is also a fictional contract.But while the social contract theory is a covenant between men among themselves or between man and the sovereign.This covenant was between man and woman.The social contract is a story of freedom; the sexual contract is a story of subjection.Men's freedom and women's subjection are created through the original contract.

Before the contract,in a state of Original Position,there existed a egalitarian society in which both men and women engaged in hunting and gathering.Even during the inception of the agrarian society,the responsibilities of women were similar to that of men.If there is any difference,its the biological differences alone.The Contract changed the male-female relationship forever.Family became the primary institution to enforce and empower the contract.Women in the name of protection were restricted to the household chores and looking after the husband and his children.On the other side men got civil and political freedom through which he acquired power to further subjugate women.[5]Every social institutions like culture,religion,law,military and ideology aid to reinforce the patriarchial norms.

When we look at Ancient laws like Dharmasastras or Corpus Juris Civilis,[6] women are regarded as someone who desperately needs protection.Religions too treats women as treacherous if not suppressed.[7]The political philosophers like Plato and Aristotle regards women as second class citizens.[8]One idea that echoes through all this institutions is the necessity to subjugate women.

Fast forward to the birth of Capitalism and Liberalism, the maximisation of wealth became priority over conservative or traditional values.To generate surplus value for the bourgeoisie, not just men but women and children were made to work in the factories which led to the weakening of social contract and birth of liberal feminist ideas which later paved way for marxist and radical feminist ideologies.

PERSONAL LAWS AS THE MANIFESTATION OF SEXUAL CONTRACT

The root of personal laws lies in ancient religious scriptures.When it comes to Hindus,it can be traced to ancient Hindu texts called Shrutis(Vedas) and Smritis(Manusmriti,Yajnavalkya Smriti etc).In case of muslims,the personal laws can be traced to The Quran, The Sunnah (the traditions or known practices of the Prophet Muhammad), Ijma' (Consensus), and Qiyas (Analogy). These are basically laws out of time and remnants of old Superstructure from the ancient regimes.

Histories of pre-colonial India reveal an agrarian society in which very strict, but often diverse, customs developed in the multiple tribes and castes. Smritis, or commentaries, that developed over the centuries to govern marriage and family relationships were quite varied, some giving women rights to inherit property, for instance, while others did not.' The Brahminical-Aryan customs that governed the upper castes of northern India were decidedly anti-woman and patriarchal. Many of the customs governing the lower castes and the Dravidian regions were more liberal towards women mainly because women engaged actively in productive labor. Many of these customs were administered by family or caste councils or village panchayats that were not affiliated with a centralized state. There was a great diversity of customs among every caste and subcaste, and only the upper caste women in certain regions were rigidly governed by the heavily patriarchal Sanskritic customs.[9]

A complicated caste system, an agricultural culture with a diversity of land rights, a pluralist religious system, and customary rules set India distinct from other British colonies in the early decades of colonial authority. Because the British saw India as a country driven by religion and culture, it was assumed that incorporating religious principles into fundamental parts of colonial governance would help imperial changes go more easily and without native resistance. The British handed up control of private family relationships to religious authorities in the area. In cases of

disagreement, British arbiters used the aid of pandits and qazis to reach a settlement based on religious principles.

Because of the diversity of practises, pandits frequently expressed opposing viewpoints, leading to scepticism in their advice. The administrators believed that if the 'original' texts were made available, they could adjudicate without the assistance of corrupt pandits and qazis.[10]Because texts were recognised as the "source" of both Hindu and Muslim laws, the English administration prioritised the translation of scriptures. Translation of ancient texts was seen as a necessary precondition for successful government. The Anglo-Hindu and Anglo- Mohammedan laws in India were based on these translated scriptures.

At a time when there was no real uniform understanding of the term "Hindu," the codification movement of the 1880s brought castes and tribes that were traditionally outside the Varna system into the Hindu fold, thereby broadening the scope of Hindu law and eventually replacing customary laws with a scriptural Hindu law.[11]Muslim political and religious leaders also wanted to unite the Muslim community, and one way to do so was to enforce Shariat law consistently across the board, resulting in the "Islamization" of the various Muslim communities.It was believed that the source of Hindu and Muslim laws were their religious texts. Hence, a wide range of customs that had no scriptural authority met with the disapproval of the administrators.

The unification and reform of law during the British Era was arguably a result of the negotiations of the colonialists with the native elites. At a time when new systems of economy and administration were being implemented, these elites wanted to secure for themselves the newly available resources.This made the Conservative Hindu and Muslim leaders co-conspirators in matters of social reform related to women as they were resisting imperialist efforts to redefine Indian society.

Britishers also undertook the task of civilizing oriental culture.Infact,Britishers were between the conflicting interests of appeasing native orthodox elites on one hand and civilizing “barbaric” culture on the other.After 1858, the Indian Parliament passed legislation concerning personal and family matters for those persons not within the monolithic Hindu or Muslim communities-namely

Christian immigrants and converts, Jews, and Parsis-which were remarkably similar to those enacted in England. Thus, when divorce was introduced in the 1869 Indian Divorce Act, the grounds were fault-based and premised on an adversarial structure of blame and innocence, which contradicted many of the local customs of marital dissolution by community-based arbitrations.

As English family law was imported through legislation as well as through judicial procedures and professional training of lawyers and judges in England, disparities between Hindu and English family law were highlighted.[12] Battles between colonial British interests and native elites focused heavily on the status of Indian women and matrimonial rights and obligations.The supposed "barbaric" state of Indian family law, however, was, in large part, a product of the colonial attempts to codify private family relations and customs.Many supposed "settled infallible principles of Hindu and Muslim family law" were actually recent constructs that arose out of English translations of certain religious texts made more patriarchal through concessions to native elites and religious authorities in the eighteenth and early nineteenth centuries.

WOMEN'S RIGHTS AND PERSONAL LAWS

During British Era, one important arena where women lost their rights was the realm of stridhan property, a traditional concept under Hindu law, recognised by both customary and scriptural law. The decisions of various High Courts as well as the Privy Council granted women limited rights over their stridhan property and reverted the property back to the male heirs of their husbands, in contrast to scriptural dictates, which awarded a line of succession to stridhan property through the female line of descendants. The British administrators, familiar with the system of denial of property rights to married women in England, could not grasp the complex system of stridhan property and caused great harm to women's rights. To undo the harm caused by these adverse rulings ofthe Privy Council, in 1937, the Hindu Women's Rights to Property Act was enacted, which awarded a limited right of inheritance to Hindu widows.[13]

Around this time other important statutes which were enacted were the Muslim Personal Law (Shariat) Application Act 1937, presumably to protect the property rights of women enshrined in the Quran, the Dissolution of Muslim Marriages Act 1939, which granted Muslim women the right

of statutory divorce, and the Parsi Marriage and Divorce Act 1936, a re-enactment of the earlier statute enacted in 1865 to widen the grounds of divorce. After the coming into force of the Indian Constitution in 1950, the first laws to be enacted along a religious identity were the Hindu law reforms of the 1950s. The main focus of the reforms were to transform sacramental Hindu marriages into contractual obligations by introducing divorce and other matrimonial remedies along the lines of the English matrimonial laws, and to grant women equal inheritance rights.

The reforms met with severe opposition from conservative nationalist leaders, who opposed the notion of divorce as well as the concept of granting property rights to women, but the reforms were pushed ahead, foregrounding the liberation of women as its primary plank.Since the political impediment to reform the Hindu law was grave, several balancing acts had to be performed by the State. Crucial provisions empowering women had to be constantly diluted to reach the level of minimum consensus.

ANTI-WOMEN PROVISIONS IN PERSONAL LAWS

1. Practice of Polygamy

Under Hindu law, bigamous marriages are void and punishable offense under Section 11 & 17 of the Hindu Marriage Act, 1955 read with Section 494 & 495 of the Indian Penal Code, 1860.Practice of Polygamy is permitted in Islamic law but only to the men.[14]

2. Adoption

In the matter of adoption, originally according to Section 8 of The Hindu Adoptions and Maintenance Act, 1956, women had no right to right to adopt a child even with the consent of the husband.After 2010 amendment,situation has changed . Now women can adopt with the consent of the husband.Man also need to obtain the consent of the wife if he wishes to adopt a child.There is no gender inequality since both need consent of the spouse

3. Guardianship

Section 6 of the Hindu Minority and Guardianship Act, 1956 discusses who can be the natural guardian of a minor as well as their property. The section appoints father and after him the mother as the natural guardian of a boy and unmarried girl. In the case of Ms Githa Hariharan v. Reserve

Bank of India, [15] the court held that: Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word ―after in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor.

In the Muslim law the mother might have custody of the child but the father has the guardianship. Entitling him for the right to take any decision for the future of the child. He has the ultimate authority to decide matters regarding the future of the child be it his/her education, or contracting marriage.[16]

Among Sunnis, the natural guardian of a minor in order of priority are as follows:
Father >Executor of father>Paternal grandfather> the executor of Paternal grandfather. (An executor in the context of law is the individual who deals or handles the execution of the words framed in the will of a person. The executor deals with the issues related to the estates, or the testaments prepared by the person at present who is dead. In short, executor carry out the desires of the deceased)

Mother is no natural guardian of a minor Muslim child.However she can be a testamentary guardian

4. Succession

Self-acquired property of Hindu female dying intestate (without will): If a female widow dies intestate without children, as per the present position of law, her property would go to her husband's heirs. Thus, in case the mother of her husband is alive, the deceased Hindu female's entire self-acquired property would devolve on her mother-in-law. If the mother-in-law is also not alive, it would devolve as per the rules laid down in the case of a Hindu male dying intestate. Thus, if the father of her deceased husband is alive, the next in line to inherit the property will be her father-in-law, and if the father-in-law is also not alive, then her property would devolve on the brother and sister of the deceased husband.The primacy of agnates over cognates on devolution of property is also an example of gender inequality.[17]

CONSTITUTIONALITY OF PERSONAL LAWS

The face-off between provisions of equality and non-discrimination enshrined in the Constitution and the prevalence of gender-discriminatory personal laws has led to confrontation between individual claims to equality, and the right of religious communities as collective units of a democracy. Personal laws are not 'laws in force' under Article 13 and that they cannot be tested against the fundamental rights was the judgment of the Bombay High Court delivered in 1952, by Chagla CJ and Gajendragadkar J, in State of Bombay v Narasu Appa Mali.[18] Though this ruling is of a High Court, and not of the Supreme Court, it dominated all subsequent judicial discussions on the constitutional validity of personal laws. For several decades, it became a stumbling block to test the constitutionality of personal laws, because several courts followed the principle laid down by this ruling .After several decades ratio of Narasu Appa Mali gradually started wearing out, with courts increasingly testing personal laws against the touchstone of fundamental rights.

In 1986 in case of Mary Roy v State of Kerala,[19] the Travancore Christian Succession Act 1916 was challenged on the ground of discrimination against women. Under the Travancore Christian Succession Act 1916, the share of the daughter was limited to one-fourth share of the son or Rs 5,000, whichever was less. Adopting the harmonising approach, the Supreme Court struck down the discriminatory provisions, based on a technical ground that after Independence, the laws enacted by the erstwhile Princely States, which were not expressly saved, had been repealed.

According to Section 10 of Indian Divorce Act, the only ground for divorce was Adultery.In the case of husband, simple adultery of the wife entitled him to divorce.But in the case of wife,husband's adultery has to be something more-it should be incestuous adultery,adultery couple with cruelty or coupled with desertion for more than two years .In case of Ammini EJ vs Union of India,[20] this provision was held to be discriminatory and liable to be struck down as ultravires of Article 14,15 and 21.

The right of Hindu women to execute a will in respect of the property acquired or possessed by them, under section 14 of the Hindu Succession Act 1956, was at issue in C Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil.[21] Adopting a liberal- rights-based approach, the apex

court ruled that the right of women to eliminate all kinds of gender-based discrimination, particularly in respect of property, is implicit in Articles 14, 15, and 21 of the constitution.

The stipulation under the Hindu Minority and Guardianship Act 1955 that the father is the natural guardian of the child was challenged in Githa Hariharan v Reserve Bank of India.[22] Rather than delivering a finding of unconstitutionality, the Supreme Court used the interpretive tool of 'reading down' the law to include the mother also as the 'natural guardian' of a child.

In Shamim Ara v. State of UP,[23] court invalidated arbitrary divorce and laid out clear guidelines as per Quranic injunctions for pronouncing talaq,so that Muslim women are not deprived of their right of maintenance while proceedings are pending in court.The Supreme Court upheld the Quranic stipulation and overruled the interpretations of various legal texts of Muslim law, as well as the rulings of colonial courts, in defence of gender justice.

In Shayara Bano v Union of India,[24] a Constitution Bench has declared that the practice of instantaneous Triple Talaq is unconstitutional.The Union of India and the women rights organizations like Bebaak Collective and Bhartiya Muslim Mahila Andolan (BMMA) supported Shayara Bano's plea that these practices are unconstitutional. The All India Muslim personal Law Board has argued that uncodified Muslim personal law is not subject to constitutional judicial review and that these are essential practices of the Islamic religion and protected under Article 25 of the Constitution.Rejecting the argument,the 5 Judge Bench pronounced its decision in the Triple Talaq Case, declaring that the practise was unconstitutional by a 3:2 majority.

Initially Under the Mitakshara school of Hindu law, only a son, and not a daughter, has a right to ancestral joint family property by birth. Such an individual is termed as a coparcener.The Hindu Succession (Amendment) Act 2005 (2005 Amendment) to the HSA introduced sweeping changes to the inheritance of coparcenary property with effect from 9 September 2005. Primarily, the 2005 Amendment granted daughters of a coparcener equal rights as compared to sons in coparcenary property.But the daughters had no coparcenary rights on the property of their parents if the latter died before the Hindu Succession (Amendment) Act, 2005 came into force.On August 11th 2020, in Vineeta Sharma v Rakesh Sharma,[25] the Supreme Court's three-member bench of Justices Arun

Mishra, S. Abdul Nazeer and M.R. Shah held that the amendment to section 6 which treats daughters on par with sons would apply retrospectively and settled the lack of clarity on the matter.

CONCLUSION

A UCC may appear to be a solution,but in a pluralistic society implementation of UCC will have far reaching consequence.There is a chance for UCC to turn out into a MCC(Majoritarian Civil Code).Another strategy is to enact specific legislation, which will apply to women uniformly across communities.The Prohibition of Child Marriage Act 2006 is a good example .The act didnt render the marriages of minor girls invalid, nor deprive women of their right of maintenance and legitimacy,but deterred the parents and husband from engaging in the archaic practice of child marriage by penalising the act.The present trend of closing the gap between personal laws and constitutional values while accommodating the different belief systems should also be welcomed.

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