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"UNIFORM CIVIL CODE:LEGAL ISSUES AND CHALLENGES"

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ABSTRACT :-

When in 1949 we enacted Art. 44 of the Constitution directing that "the state shall Endeavour to secure for the citizens a uniform civil code throughout the territory of India", we had already Uniform Codes of Laws covering almost every aspect of legal relationship excepting only those matters in which we were governed by the various personal laws. The laws of contract, if Transfer of Property, of Sale of Goods, Partnership, Companies and Negotiable Instruments, of civil Procedure, Arbitration and Limitation, of Crimes and Criminal Procedure and a host of other statutory laws were Uniform civil codes applying to all throughout the country. As Ambedkar observed during the debates in the constituent Assembly[1] on the draft Art. 35 (subsequently enacted as Art. 44), the only province which was not covered by any uniform civil code was Marriage and succession and it was the intention of those who enacted Art. 44 as part of the Constitution to bring about that change. In fact, Art. 44 could have only the different personal laws in view, the rest of the field having mostly, if not wholly, been covered by uniform civil codes.

KEYWORDS : *Transfer of Property , civil Procedure, Arbitration and Limitation.*

INTRODUCTION :-

Chief justice Gajendragadkar has observed[2] that "in any event, the non-implementation of the provision contained in Art. 44 amounts to a grave failure of Indian democracy and the sooner we take suitable action in the behalf" and that 'in the process of evolving a new secular social order, a common civil code is a must'. Justice Hegde, a former judge of the Supreme Court has also observed[3] that 'religion-oriented personal laws were a concept of medieval times - alien to modern societies which are secular as well as cosmopolitan' and that 'so long as our laws are religion oriented, we can hardly build up a homogeneous nation.

A unanimous five-judge Bench of the Supreme Court has also regretted in Shah Bano Begum[4] that 'Art. 44 of our constitution has remained a dead letter' and that 'a beginning has to be made if the constitution is to have any meaning.' In yet a later decision in jorden Diengdesh,[5] a two-judge Bench of the Supreme Court has relied on these observations and has reiterated that the time has come for the intervention of the Legislature in these matters to provide for a uniform code of marriage and divorce……"

It is, however, true that five members[6] of the constituent Assembly, all of whom were Muslims, strongly expressed[7] themselves against this Article and moved without success Amendments to this Article to secure exclusion of all personal laws from its operation and

one member unhesitatingly branded this Article as a 'tyrannous provision'[8] and a 'tyrannous measure.' A modern legal scholar has also very strongly doubted[9] any co-relationship between uniform civil code and national solidarity and has gone to the length of holding that 'a logical probability appears to be that the code in question will cause dissatisfaction and disintegration than serve as a common umbrella to promote homogeneity and national solidarity'.[10] The learned scholar has relied, among other, on Fyzee and has also quoted with approval a progressive Muslim lady law-person, who has been quite categorical in declaring that it is' naïve to imaging that such a code would cut down the number of communal riots or lead to integration, it would serve no purpose except to divide us.

It is intended to approach the question from a purely legal point of view, shorn of religious sentimentalism and political abracadabra and the question that is intended to be raised in this article is not whether, in accordance with the mandate in Art. 44, we should have a uniform civil code relating to or replacing the different personal laws operating throughout India, but whether we cannot but have such a uniform civil code to save our different personal laws, statutory or non-statutory, from being struck down as unconstitutional. To put it in other words, could we, since the inauguration of the constitution with its Art. 15 invalidating all discriminations on the ground of religion only, continue to have different discriminatory personal laws and can we in view of that Art. 15, proceed to enact such different personal laws for the different religious communities, as we have done, for example, in the case of the Hindus by the Hindu Law Acts of 1955-1956.

Both in Shah Bano Begum[11] and in Jourden Diengdeh,[12] rendered in 1985, the Supreme court while very strongly urging the state to frame a Uniform civil code for all the citizens of India as provided in Art. 44, has not considered, and in fact had no occasion to consider, this question.

DISCRIMINATIONS IN VARIOUS PERSONAL LAWS

That in respect of several important matters the provisions of the Muslim Law governing Muslims by religion and the other personal laws governing the other religious communities like those of the Hindus, the Christians, the Parsis etc., are discriminatory to one another, is apparent on and stares at the face. But even then, I may refer to some of those provisions by way of illustrations:

1) The Muslims are polygamous, but the Hindus, Christians and Parsis are monogamous.
2) The Muslims are allowed extra-judicial divorce, but the Hindus, Christians and Parsis can effect divorce only through court.
3) A wife married under the Muslim Law can be divorced by the husband at whim or pleasure, but a wife married under the Hindu, Christian or the Parsi Law can be divorced by the husband only on certain grounds specified in those laws and only though court.
4) Under the Muslim Law, a husband's apostasy from Islam results in automatic dissolution of a Muslim marriage, though a wife's apostasy does not.

Under the Hindu Law, apostasy from Hinduism by either of the spouses does not affect a Hindu marriage, though it confers on the non-apostate spouse a right to sue for divorce.

Under the Parsi Law also, any spouse ceasing to be a Parsi Zoroastrain would only entitle his or her spouse to sue for dissolution, but would not otherwise effect a Parsi marriage.

Under the Christian Law, a change of religion by one or the other spouse has no effect on a Christian marriage except where the apostate husband has married again, in which case the wife would be entitled to sue for divorce.

5) Under the Muslim Law, a divorced wife is not entitled to any maintenance, from the husband, except during the period of iddat. But the other Personal Laws allow a divorcee wife post divore permanent alimony.

6) Under the Muslim Law, a daughter inherits half the share of a son, but under the Hindu Law, a daughter shares equally with a son. (It may, however, be noted that under the Indian Succession Act governing the Parsis and also others who are not Hindus, Muslims, Buddists, Sikhas or Jainas, the position is the same as under Muslim Law).
7) Under the Muslim Law, a person cannot dispose of more than one-third of his properties by will, but the other personal laws do not impose any such limitation.
8) Muslim Law confers on a person the right to preempt any property in respect of which he is a co-sharer, or a participator in appendages or immunities or an adjoining owner. But the other personal laws do not confer any such right.

Now, if all these discriminations follow from the different personal laws and the personal laws apply to a person only on the ground of his belonging to or professing a particular religion, then these discriminations are also operating on the ground of religion only and Art. 15 forbidding discrimination on the ground of religion alone would strike down all these provisions an unconstitutional and ultra vires.

DISCRIMINATION NOT ON THE GROUND OF RELIGION ONLY

It is, however, argued that the communities governed by different personal laws like the Muslims, the Hindus and others are and can be classified into separate classes not on the ground of religion only, but on various other grounds also and, therefore, even if they have been discriminated by their respective personal laws, such discrimination cannot be regarded to be based on religion alone and to be violative of Art. 15 on that ground. It is argued that the Muslims and the Hindus, for example, are different not only in religion but also in their historical background, social habits, educational development, cultural outlook and in various other matters and if the Muslims and the Hindus are classified separately and subjected to different sets of laws, such classification if not based on religion alone. Reliance for this is placed on the well known Bombay decision in state of Bombay v Narasu Appa Mali[13] decided by Chief justice chagla and Justice Gajendragadkar, where a Bombay Anti-Bigamy law applying to Hindus alone was upheld and the challenge on the basis of discrimination on the ground of religion alone was repelled by the learned judges, as according to them the Hindus were singled out for, and the Muslims were excluded from, the operation of the law, not because the former or the latter professed the one or the other faith, but because the Legislature found the former to be "more ripe for" the reform in question in view of their social background and outlook, educational and cultural developments and various other distinguishing factors. In another well-known decision of the Madras High Court in Srinivasa Aiyar v Saraswati Ammal,[14] a Division Bench upheld the provisions of a Madras Anti-Bigamy Law applying to the Hindus alone as according to the Division Bench such different laws for the Hindus and Muslims were not on the ground of religion only but on social and other developments of and various other considerations peculiar to each of the communities. In fact, in both the Bombay[15] and the Madras decisions, the learned judges were at pains to point out that the classification of the Hindus and the Muslims into separate classes for the application of separate sets of personal laws was on extra-religious grounds also and the madras decision, in deciding the question as to whether different personal laws for the different religious communities were operative on the ground of religion only, really begged the entire question when it went to the length of observing that the essence of that classification is not their religion, but that they have all along been preserving their personal law peculiar to themselves".[16] The question as to whether different religious communities can at all have different personal laws operative on the basis of their professing one or the other religion and whether they accordingly stand classified on the ground of religion only cannot obviously be answered by saying that their being governed by separate personal laws is the basis or is also the basis of classification when the legality of the very existence of such different personal laws is in issue. A decision of the Bhopal judicial commissioner's Court in Abdulla Khan v. chandni Bi[17] and a single-Judge decision of the Mysore High Court in sudda v. sankappa Rai,[18] have also, while fully recognizing that there are fundamental differences between the personal laws of the Hindus and the Muslims, attempted to justify them on the ground that the classification

of the two religious communities into two separate classes was a reasonable classification "based upon the outlook of persons belonging to the two communities.' And their past history, difference in culture, etc. it appears that the grave apprehension that all the different and discriminatory personal laws applying to different religious communities on the basis of their respective religious ran the risk of being struck down by Art. 15 loomed so large in the minds of the learned judges that they strained their every nerve to find out and put forward any extra religious factor as a ground or as an additional ground for classifying the Muslims and the Hindus into separate classes for the application of their separate personal laws. That is why chief justice chagla, while regerring to the decision in Narasu Appa Mali[19] in his Autobiography[20] observed that when it was argued that it was discriminatory to place a restriction upon the Hindu community alone, when the Muslim community could indulge in polygamy" "all my sympathies were in favour of this argument, but that with great reluctance I had to come to the conclusion that I could not strike down the law..". And therefore what really weighed with the learned chief justice was, not so much the clear position in law, but a cautious and careful pragmatism. This is also apparent from the observation in the Madras decision to the effect that" if the argument of the petitioners were to be accepted, most of the personal law of the Hindus may have to go as there are fundamental differences on various matters between the personal law of Hindus and the personal law of the Mahomedans."[21] The same view was expressed by a Division Bench of the Punjab & Haryana High Court in Gurdial Kaur v. Mangal Singh where it was urged that a different and discrimination custom applying only to the jat-hindus as part of the Hindu Law and not applying to the other Hindus was ultra vires Art. 15 as being discriminatory on the ground of caste or race and in repelling the contention it was observed that 'if the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go to the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds and communities can be constitutional and that to suggest such an argument is to reject it.' With all respect to the learned judges of the Madras and the Punjab & Haryana High Courts, if the different sets of personal laws are in fact discriminatory and such discriminations are to be regarded to have been based on religion as the different personal laws apply to different religious communities solely on the ground of their professing one or the other religion, then they connot but be declared to have been struck down by Art. 15, even though as a result' most of the personal laws may have to go' and only one Uniform Civil code' relating to the matters covered by the personal laws may appear to be the only way out, as apprehended by the learned judges of the Madras and the Punjab & Haryana High Courts.

Gender inequality is most apparent in personal laws. The best way to remove it to enact uniform civil court but our founding fathers have included as one of the directive principles of state policy not enforceable in the courts of law. Directive principle are our goals, the fundamental rights are means to achieve them. The court decisions show that though the directive principle are not enforceable yet the courts are interpreting fundamental right in their lights. This is a sort of fusion between the two in most of the fields and the courts are in a way enforcing them, except in the field of personal laws. Many have urged the courts to take more active role in this direction as under.[22]

i. Article 13 does not make any distinction between personal law and in any other law.
ii. The Legislature is not likely to intervene to make any legislation for political reasons.
iii. Personal laws are also subject to part III of the Constitution.
iv. Many provision of personal laws violate article 14 and 15 (1) of the Constitution and should be declared unconstitutional.

The Courts made some progress in this regard in Sarala Mudgal Vs. Union of India[23] and Madhu Kishwar Vs. State of Bihar[24] but later the Supreme Court dismissed the writ petition in Ahmedabad Women Action Group Vs. Union of India[25] declaring

"The arguments involve issues of State policies with which the court will not ordinarily have any concern…. The remedy lies somewhere else and not by knocking at the doors of the Courts."

Will an activist court go into the validity of personal laws ? it is not clear, only the future will clarify.

The decisions regarding personal laws indicate that the courts are reluctant to intervene in this regard or to declare the ultravires the constitution. Nevertheless, they are willing to liberally construe different provisions in favour of women, often by reading them down or straining their natural meaning[26].

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