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The Gender Biased Laws in India and the Uniform Civil Code

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Abstract

Throughout the history of human society, women have been subjected to inequality and discrimination in all aspects of their life and have remained subservient to men. The Indian Constitution refers to women as equal citizens under the Fundamental Rights, but the Right to Freedom of Religion, enshrined in Articles 25 to 28, provides for personal laws that reject gender equality in a range of aspects. Gender equality is hampered by personal laws which are centred on conservative religious tenets. This situation requisitions for the adoption of a Uniform Civil Code in India to promote gender equality. The objective of this paper is to determine whether Indian law manifests gender-based inequalities. The overarching aim of this paper is to ascertain the relationship between social problems and the role of law. It examines the role that law plays in perpetuating gender-based discrimination in society.

Introduction

Article 13 of India's constitution makes all laws that are incompatible with the country's fundamental rights provisions null and void. Despite this, religious personal laws that discriminate against women continue to be enforced. Religion is so deeply ingrained in our culture that whenever the government has faced a conflict between legal reform aimed at improving women's status and religious traditions and principles promulgated by religious figures, the government has compromised and mostly capitulated to the latter. India is largely governed by archaic, inherently conservative, and gender discriminatory personal laws which curtail freedom and equality. The religious personal laws of India are at odds with the secular

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KnowLaw Journal

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KnowLaw

nature of the Indian Constitution and the root cause of gender inequality. The Government of India should undertake legislative measures that safeguard the interests of women and reform the laws which warrant gender discrimination and reinforce the subordinated status of women. This paper examines some laws which reinforce deeply gendered roles and contribute to the subordinate position of women through its very construction of women's roles and identities. Moreover, it questions the feasibility of the implementation of the Uniform Civil Code to substitute the current religious personal law system. It also aims at suggesting practical measures of legal reform that examine the issue of gender inequality in personal laws.

Review of Literature

The data collected from the sources during research mainly contributed to the understanding of the research question and development of the area of research. The journal article "Women and Law: A Gender Perspective" by Mahua Bhattacharjee was extremely pertinent and relevant to this research because it demonstrates how the law has been heavily informed by the patriarchal ideology and sanctions gender inequality in India. This paper examines the statutory provisions of law regarding adultery, divorce, and maintenance which are gender-biased. "Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court." by Tanja Herklotz is another journal article that was instrumental in the research because it contributed to giving analytical points for a theme in this paper. This article answers the question of whether a Uniform Civil Code (UCC) should substitute the present religious personal law in India to secure gender equality. The book, "Women and family law reform in India: Uniform civil code and gender equality" by Archana Parashar was an extremely informative source and provided the researchers with valuable insights into the Uniform Civil Code.

Research Methodology

The main sources of this research paper are secondary and include journal articles, books, book chapters, government records, and judgments. The findings of the research were used to prove

KnowLaw Journal

Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 01 Issue 02

KnowLaw

the thesis statement. They were used to back up the claims made in the paper with evidence and to lay emphasis on the main themes of the research.

Findings and Discussion

Gender Discriminatory Laws

Historically, there were several laws that placed men in a higher position than women but these were repealed either through legislation or judicial decisions. An example of this is Section 34 of The Indian Divorce Act, 1869 which allowed only a husband to claim damages from an adulterer for committing adultery with his wife. This section, however, was repealed by an amendment because it did not allow a wife to claim damages in the opposite case (Bhattacharjee 2016, 1054). However, some laws are gender discriminatory and continue to be in practice. According to Section 6 of The Hindu Minority and Guardianship Act, 1956, the natural guardians of a Hindu minor boy or an unmarried girl is the father, and after him, the mother. It also provides that in the case of a married girl who is a minor, the husband is considered her guardian (The Hindu Minority and Guardianship Act, 1956, Section 6). Laws that favour the father over the mother in the guardianship of children discriminate against women and are founded on the stereotype that men are superior to women. Such laws often restrict a mother and give her a subordinate position in the important decisions of her own child's upbringing. In addition, a minor girl's husband would be called her guardian even though they married illegally. Section 2 of The Prohibition of Child Marriage Act, 2006 requires that a man, must be twenty-one years and a woman must be eighteen years of age to marry (The Prohibition of Child Marriage Act, 2006, Section 2). This disparity in the legal age of marriage showcases the patriarchal mind-set that dictates that a wife should always be younger than her husband. This difference in legal marital age is a direct violation of Article 14 of the Indian Constitution. A direct consequence of this is that men have more time to receive higher education and become independent before marriage while the education of women is compromised. Such persisting norms that have been guided by patriarchal notions

KnowLaw Journal

Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 01 Issue 02

KnowLaw

must not be reinforced by the law and there should be a uniform age of marriage for boys and girls instead. These laws are guided by social factors and conform to the belief that a girl should be married at an early age because she is expected to uphold family honour by maintaining chastity before marriage. The legal age of marriage should be made gender-neutral just like the age of the majority. From these examples, we can notice the blatant gender-based discrimination in Indian laws.

Marital Rape

Exception 2 to Section 375 of The Indian Penal Code provides that, “Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape” (The Indian Penal Code, Section 375). The Bill to criminalise marital rape was rejected by the Government of India because it would lead to an interference with the sacred institution of marriage and lead to its breakdown. Due to social norms, customs, religious convictions, and society's attitude to regard marriage as a sacrament, the government told the Rajya Sabha that marital rape, as defined internationally, cannot be applied in the Indian context. The Supreme Court has even declined to make marital rape a criminal offence by refusing to hear a plea to make it so (Hindustan Times, 2017). The hegemonic notions of not interfering with the marital institution are ideologically and legally incoherent. No personal law, criminal law, or civil law empowers a woman to obtain criminal redress against a husband who sexually abuses her on a regularly. The legislature has an obligation to reform such archaic laws which are the social construct of patriarchy. An Indian marriage gives a man the license to have sexual intercourse with their wives even without her assent. Marriage should not be an instrument to deny a woman her consent and sexual independence. The role of the State in a democratic society is to protect the rights of its women citizens rather than protecting the institution of marriage. Rape by a partner can be extremely traumatic since it happens within the household and there is no means of escape or legal redress available to the victim. Marital rape should be treated as a crime so that a woman can live with dignity and feel safe inside the Indian household.

KnowLaw Journal

Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 01 Issue 02

KnowLaw

State, Judicial, and Feminist Approach

The decision to amend religious personal laws is motivated by political considerations rather than the State's goals of social equality and gender justice. A democratic government will continue to be vulnerable to requests made in the name of religion as long as religion is a critical political factor (Parashar 1992, 13). While under British rule, Hindu law rituals were seen as social sins that needed to be changed, the subject of criticism later turned to Muslim law. Hindu personal law has become more secular as a result of changes, while Muslim personal law has been and continues to be portrayed as backward and discriminatory (Herklotz 2016, 154). The Uniform Civil Code has remained a dead letter and governments in the past have never worked towards or even considered its implementation. Over the years, the Indian Judiciary has demanded a UCC and even issued guidelines for its implementation through various judgments. It continues to call for a UCC each time a case of gender discrimination through religious personal laws comes up in courts. In contemporary times, the feminist approach saw a radical shift from the demand for a Uniform Civil Code to a demand for a Gender-just Civil Code. This was mainly because many feminists did not want to be associated with Hindu nationalist organisations which only supported the UCC to foist the Hindu Law on the entire country. The initial feminist demand was reconsidered, questioning the viability of an extensive UCC that is imposed with a top-down approach. Presently they offer a more holistic approach of reform of personal laws from within the communities or a provision for secular alternatives that can co-exist with the personal laws (Herklotz 2016, 155).

Landmark Judgments on Religious Personal Laws

The decision given by the Supreme Court in the case of Sarla Mudgal and Ors vs. Union of India (1995) was hailed as a landmark judgment that invoked the urgent and compulsive need for a Uniform Civil Code given under Article 44 of the Indian Constitution. In this case, a Hindu husband converted to Islam and married another woman without dissolving his first marriage. The respondent contended that after conversion to Islam, he is permitted to have four

KnowLaw Journal

Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 01 Issue 02

KnowLaw

wives, although his first wife is still a Hindu. The issue that arose in the court was whether the husband can be prosecuted under Section 494 of the Indian Penal Code, 1860 for committing bigamy. The court held the husband guilty because a change of religion does not permit a person to defeat the provisions of law and to commit bigamy. The court also held that the second marriage during the subsistence of the first marriage is void even if solemnised and conversion does not ipso facto dissolve the first marriage. The judges in the following case, read Article 44 and Article 25 to 28 of the Constitution simultaneously and gave a comprehensive argument regarding the feasibility of a Uniform Civil Code with suggestions for the Government to consider.

Similarly, in the case of *Mohd. Ahmed Khan Vs. Shah Bano Begum and Others* (1985), the appeal for a Uniform Civil Code was made once again by the Supreme Court. In this case, a divorced Muslim woman appealed for maintenance from her ex-husband under Section 125 of Criminal Procedure Code, 1973. The respondent contended that he was not obligated to pay the maintenance under the Muslim Personal Law after the *iddat* period (three months) and after he has paid the amount of *Mahr* (dower). However, the Supreme Court rejected this claim and held that Section 125 of the Criminal Procedure Code, 1973 is a secular provision that applies to Muslim women as well. The decision sparked widespread outrage among Muslims, which was exacerbated by the Muslim Personal Law Board, which saw the decision of the court as an intrusion into Muslim personal law. The court expressed deep regret that Article 44 of the Indian Constitution has remained a “dead letter” and that the government has made no endeavours for framing a common civil code for the country.

The Feasibility of the Uniform Civil Code

Even though the implementation of a Uniform Civil Code in India is highly desirable, it is essential to question its feasibility. The code, rather than serving as a common framework to foster homogeneity and national unity, seems to have a higher likelihood of causing discontent and disintegration. The case of *Shah Bano* is a classic example of the fact that even the smallest

KnowLaw Journal

Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 01 Issue 02

KnowLaw

intervention with the religious personal laws can lead to an uproar in a country like India where religion is considered sacrosanct. The issue should be seen using new approaches like reforming individual religious personal laws. The area of personal laws is extremely delicate and accepting legal pluralism as a fact is a more realistic approach towards social change. A top-down legislative approach, in this case, would be problematic and should be replaced by a system of subtle shifts on a case-by-case basis (Herklotz 2016, 162). This does not, however, imply that Article 44 is a "dead letter." Its core principles of uniformity and equality are increasingly being implemented by other methods. That is being accomplished by a gradual change in law, practice, and judicial interpretation, rather than through drastic constitutional reform (Herklotz 2016, 150).

Conclusion

In this paper, we have observed the role that law plays in legitimizing gender inequality and the potential role that it can play in challenging that inequality. It is essential that law mitigates gender-based discrimination and does not modify it. Religious Personal Laws of all communities provide women with lesser rights in comparison to men in matters of marriage, divorce, inheritance, guardianship, and maintenance. Religious freedom is the basic foundation for secularism but religious traditions that violate human rights and equality and disregard civil and material freedoms, are tyranny, not autonomy. Through this paper, I have tried to look at the relationship between the "social" and the "legal" by examining the role that law plays in perpetuating gender-based discrimination in society. Further, through my research and findings, I have questioned the feasibility of a Uniform Civil Code in India and proposed alternative measures of social change through law reform.

KnowLaw Journal

Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 01 Issue 02

KnowLaw

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