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FAMILY LAW OF INDIA
IN SOCIAL CHANGE

contents

Introduction

Family Laws in India have been founded on the basis of the personal laws of the religious diaspora which forms Indian society. Lawmaking and adjudication of private laws was seen as a crucial part of the 'rule of law' in India since colonial times. Hence, as the nation and society evolved, family law has undergone a sea of changes. These changes have been in response to a variety of stimuli - from efforts at modernisation and nation building to secularisation. This paper attempts to analyse the trends in the changes in family law through an analysis of case law and legislation. Further, the paper attempts to analyse the debate surrounding the Uniform Civil Code and show, through analysing historical and judicial subtext, how the reforms which UCC advocates have been calling for are being implemented without compromising on the constitutional principles of secularism.¹

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Anglo-Hindu law

The first phase of Anglo Hindu Law (1772–1864) is characterized by three main features: 1) the collection and translation of important Dharmaśāstra texts by British administrator-scholars (e.g., Jones, Henry Thomas Colebrooke, Sutherland, and Borrodaile) in order to apply the rules of such texts to Hindus, 2) the employment of Court Pandits in British courts to aid British magistrates in the interpretation of classical Hindu law, and 3) the proliferation of case law that resulted eventually in the "redundancy" of Court Pandits.

In 1864, just after India became a formal part of the British Empire, Anglo-Hindu law entered into a second phase (1864–1947). One in which the Court Pandits were dismissed due to the extensive case law that emerged during the first phase as well as growing suspicions of corruption. During this time, a series of parliamentary acts were passed to fix certain aspects of Anglo-Hindu law and to provide it with a legislative foundation. With the disappearance of Court Pandits, continual growth of case law on topics involving questions of Anglo-Hindu law combined with the new legislative foundation diminished the relevance and interest in Dharmaśāstra as the source of law also diminished. The gap between the idealized legal system of Dharmaśāstra and the diversity of customary law throughout British India led to the fixing of regional customary laws by British officials. This was done through interviews, observations, and discussions with locals. Massive volumes of customary rules that were in

theory² being enforced were collected throughout British India and became part of the consultative resources of the courts.

Christian Personal Law

Christian Personal Law or family law consists of Adoption, Divorce, Guardianship, Marriage and Succession. The provisions of canon law concerning marriage are recognised as the personal law of Catholics in India (except in the state of Goa). Indian Christians (except in the state of Goa) are governed by the Indian Christian Marriage Act 1872.^[1] Christian Personal Law is not applicable in the state of Goa. The Goa Civil Code, also called the Goa Family Law, is the set of civil laws that governs the residents of the Indian state of Goa. In India, as a whole, there are religion-specific civil codes that separately govern adherents of different religions. Goa is an exception to that rule, in that a single secular code/law governs all Goans, irrespective of religion, ethnicity or linguistic affiliation.

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Adoption

Christians in India can adopt children by resorting to section 41 of the Juvenile Justice (Care and Protection of Children) Act 2006 read with the Guidelines and Rules issued by various State Governments.

Divorce

Both husband and wife can seek a divorce on the grounds of,

1. Adultery
2. Cruelty
3. Desertion for more than seven years
4. Insanity for more than two years
5. Incurable leprosy for more than two years
6. Conversion to another religion
7. Willful refusal to consummate the marriage
8. Not being heard of for 7 years
9. Venereal disease in communicable form for two years
10. Failure to obey the order for restitution of conjugal rights.

However, the wife has been permitted to sue for divorce on additional grounds if the husband is guilty of:³

1. Rape
2. Sodomy
3. Bestiality

Guardianship

Christians in India are governed generally by the provisions of the Guardians and Wards Act (Central Act No 8 of 1890) in matters relating to guardianship of minors in respect of their person and property.

Marriage

The law regulating solemnisation of marriages among Indian Christians is laid down in the Indian Christian Marriage Act of 1872.

Succession

The Indian Succession Act of 1865 was comprehensively amended and consolidated by the Indian Succession Act of 1925. Neither the Indian Succession Act of 1865, nor the Act of 1925 was to apply to Christians in the whole of India

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residents ⁷of the Indian state of Goa. In India, as a whole, there are religion-specific civil codes that separately govern adherents of different religions. Goa is an exception to that rule, in that a single secular code/law governs all Goans, irrespective of religion, ethnicity or linguistic affiliation.

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Dowry law in India

The payment of a dowry gift, often financial, has a long history in many parts of the world. In India, the payment of a dowry has been prohibited since 1961 under Indian civil law. Subsequently, Sections 304B and 498A of the Indian Penal Code were enacted, making it easier for the wife to seek redress from harassment by the husband's family. Anti-dowry laws have been criticized by men's rights groups and Supreme Court of India, who accuse women and their families of misusing the laws.

Dowry

Section 2. Dowry Prohibition Act, 1961

Definition of “dowry”.—In this Act, “dowry” means any property or valuable security given or agreed to be given either directly or indirectly— (a) by one party to a marriage to the other party to the marriage; or (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before 1[or any time after the marriage] 2[in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies. ⁸

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Stridhan

Stridhan is, generally speaking, what a woman can claim as her own property within a marital household. It may include her jewelry (gifted either by her family), gifts presented to her during the wedding or later, and the dowry articles given by her family.

Gifts given by the parents of the bride are considered "stridhan", i.e. property of the woman, traditionally representing her share of her parent's wealth.^[2]

The Dowry Prohibition (DP) Act

Introduced and taken up by then Indian minister Ashoke Kumar Sen, this Act^[3] prohibits the request, payment or acceptance of a dowry, "as consideration for the marriage", where "dowry" is defined as a gift demanded or given as a precondition for a marriage. Gifts given without a precondition are not considered dowry, and are legal. Asking or giving of dowry can be punished by an imprisonment of up to six months, a fine of up to Rs. 15000 or the amount of dowry (whichever is higher), or imprisonment up to 5 years. It replaced several pieces of anti-dowry legislation that had been enacted by various Indian states.

IPC Section 406

This section, for offences related to Criminal Breach of Trust, is usually applied in investigation of stridhan recovery from the husband and his family.⁹

Offences under this section are non-bailable and cognizable.

Section 406.

Punishment for criminal breach of trust

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

IPC Section 304B

This Section of the Indian Penal Code was inserted by a 1986 amendment. The wording of the law states:

Section 304B. Dowry death

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.

⁹

IPC Section 498A

Section 498A was inserted into the Indian Penal Code in 1983 via an amendment. It protects the wife from harassment by the husband or the husband's family in cases where an illegal dowry is sought. The section reads:

498A. Husband or relative of husband of a woman subjecting her to cruelty.

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Goa civil code

The Goa Civil Code, also called the Goa Family Law, is the set of civil laws that governs the residents of the Indian state of Goa. In India, as a whole, there are religion-specific civil codes that separately govern adherents of different religions. Goa is an exception to that rule, in that a single code governs all Goans, irrespective of religion, ethnicity or linguistic affiliation.^[1]

History

The Goa civil code is largely based on the Portuguese Civil Code (Código Civil Português) of 1867, with some modifications based on the Portuguese Decrees on

Marriage and Divorce of 1910, the Portuguese Decrees on Canonical Marriages of 1946, and the Portuguese Gentile Hindu Usages Decrees of 1880.¹⁰

Gullipilli Sowria Raj v. Bandaru Pavani

Gullipilli Sowria Raj v. Bandaru Pavani is an Indian Supreme Court ruling in a lawsuit involving the legality of the marriage to a Hindu woman of a Christian man who had represented himself as Hindu. The court ruled that the marriage was not valid.

Early in December 2008, a Christian, had misled her by pretending to be a Hindu, and tried to blackmail her parents for money or any other assets in the form of gold. He locked her in a room and didn't allow her to talk to her parents. He took some pictures and asked for more money. Section 5 of the Act makes it clear that it may be solemnized between any two people if the conditions (such as age eligibility) contained in the said section were fulfilled. In other words, in the even said conditions are not met.

Allegedly, Raj had misinformed everyone about his social status and she filed a case.

The High Court upheld her plea and said the was void as the Act postulated only between Hindus; following this, Raj, filed a special leave petition (SLP) in the apex court. He claimed that the Hindu Act does not preclude a Hindu from a person of another faith.

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However counsel argued that each religious community has its own form which excludes members of other communities. Christian and a non-Christian, but only under the provisions. Dismissing the Christian appeal, the apex court upheld the High Court's view that the not valid under the, specifically pointing to the fact that Section 5 of the Act makes it clear that may be solemnized between any two Hindus if the conditions in the said Section were fulfilled.

Hindu Adoptions and Maintenance Act (1956)

The Hindu Adoptions and Maintenance Act was enacted in India in 1956 as part of the Hindu Code Bills. The other legislations enacted during this time include the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Minority and

Guardianship Act (1956). All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to codify and standardise the current Hindu legal tradition. The Adoptions and Maintenance Act of 1956 dealt specifically with the legal process of adopting children by a Hindu adult, as well as the legal obligations of a Hindu to provide "maintenance" to various family members including, but not limited to, their wife or wives, parents, and in-laws.

Adoptions

Who can Adopt?

Under this Act only Hindus may adopt subject to their fulfilment of certain criteria. The first of these asserts that the adopter has the legal right to (under this Act that would mean they are a Hindu). Next, they have to have the capacity to be able to provide for the adopted child. Thirdly the child must be capable of being adopted. Lastly, compliance with all other specifications (as outlined below) must be met to make the adoption valid.

The Hindu Inheritance (Removal of Disabilities) Act, 1928

The Hindu Inheritance (Removal of Disabilities) Act, 1928 was enacted to abolish the exclusion from inheritance of certain classes of heirs, and to remove certain doubts

regarding their ability to inherit property. The Act specifies that persons who are diseased, deformed or physically or mentally handicapped cannot be disqualified from their right to own or share joint-family property unless the law specifies otherwise. This Act essentially abolishes the ancient Hindu legal practice that those who are handicapped are ineligible to inherit property from their family.

Hindu Marriage Act

The Hindu Marriage Act is an Act of the Parliament of India in 1955 as part of the Hindu Code Bills. Three other important acts were also enacted during this time: the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956), the Hindu Adoptions and Maintenance Act (1956).

Hindu Minority and Guardianship Act

The Hindu Minority and Guardianship Act was established in 1956 as part of the Hindu Code Bills. Three other important acts were also created during this time and they include the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and

the ¹¹Hindu Adoptions and Maintenance Act (1956). All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to modernize the then current Hindu legal tradition. The Hindu Minority and Guardianship Act of 1956 was meant to enhance the Guardians and Wards Act of 1890, not serve as its replacement. This act specifically serves to define guardianship relationships between adults and minors, as well as between people of all ages and their respective property.

Introduction

This act is one of four Hindu Code Bills that were codified by the Nehru Administration in 1956. The other three Acts include the Hindu Succession Act, Hindu Adoptions and Maintenance Act, and Hindu Marriage Act. The Hindu Minority and Guardianship Act delineates the policies regarding minorities according to Indian Hindu personal law.

Important definitions

A. A minor is a person under the age of 18

B. A guardian is the caretaker of a minor, his or her property, or both. Categories of guardians include: a natural guardian; a guardian chosen by the mother or father; a guardian appointed by the court; and a person who qualifies as a guardian according to the Court of Wards.^[1]

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Extent of Act

This Act extends to all of India with the exception of the state of Jammu and Kashmir.^[2]

This Act is intended to be an addendum to the Guardians and Wards Act of 1890, not its replacement

Hindu Succession Act, 1956

The Hindu Succession Act, 1956 is an Act of the Parliament of India enacted to amend and codify the law relating to intestate or unwilled succession, among Hindus. The Act lays down a uniform and comprehensive system of inheritance and applies to persons governed by both the Mitākṣarā and Dāyabhāgaschools. It is hailed for its consolidation of Hindu laws on succession into one Act. The Hindu woman's limited estate is abolished by the Act. Any property possessed by a Hindu female is to be held by her absolute property and she is given full power to deal with it and dispose it of by will as she likes. The Act was amended in 2005 by the Hindu Succession (Amendment) Act, 2005.¹²

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