CONSTITUTIONALISATION OF FAMILY LAWS IN INDIA

Generally speaking lawyers divide the laws into public law and private law. While the laws dealing with general public irrespective of any class are referred as public laws, laws dealing with interrelationship of individuals taking part in various transactions are described as private law. In this scheme Constitutional law, Administrative law, Criminal law, Criminal Procedure etc, come under the public law. Contract law, property law, labour law, family law etc. can be classified as private law.

Of late this distinction is getting blurred, the need for developing objective standards through the instrumentality of law even in the fields traditionally earmarked for private law to govern, has compelled the courts to read the various laws through the provisions of the constitution. In other words, interpretation of the various provisions in the private law in the light of the constitutional values has helped constitutionalisation and through this widening the contours of law. This widening has resulted in obliterating the distinction between the private law and the public law. The courts were tempted to adopt this line as it gave them enough opportunity to extend the law expanding its reach to even those areas which remain out of reach by the law and officials. This process helped the Constitutional Courts - both the High Courts and the Supreme Court - to have enough freedom to interpret the laws freely in the light of higher ideals transcending class interests. This process helped law to inspire and inculcate uniformity in values and approaches. In other words the whole process helped to achieve standardisation of laws approach to the myriad problems faced by the society.

It is interesting to see that our system has been very lib in reflecting new ideas emanating from different quarters. The Comm law tradition of falling back on the case law produced by the court Anglo-American countries has tremendously helped us to keep our laws pace with developments that take place elsewhere. Added to this is obligations the nations developed for adopting international norms.

The United Nations and its various agencies have been deve ping international norms by way of agreements, covenants, convention or declarations and obligating directly or indirectly the member sta to adopt them. In certain cases these agencies make it compulsory f the states to adopt certain measures. For example Art. 55 of U.N. Char ~~13~~ makes it obligatory on the part of member states to protect human rights. In some cases the obligation may not be imposed directly. However, the system as a whole may make member states to accept certain values in course of time. The adoption of ILO standards by member states is an instance where the international norms-setting may have indirect impa

The trend was so tempting that even the contract law could not withstand the pressure from the Supreme Court to get standardised In Central Inland Water Transport Case[1] the court commanded to its aid the constitution to interpret section 23 of the Indian Contract A

In India every branch of public law is replete with instanc of incorporation of international and constitutional norms. The prac of awarding compensation to the victims of police atrocities as part public law has emanated from the India being signatory to the ~~Internat~~

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1. Central Inland Water Transport Corporation v. Brijonath. A.I.R. 1986 S.C. 571

international convention on civil and Political Rights.[1A] The Supreme Court's decision in Visakha v. State of Rajasthan,[2] an instance where the Supreme Court tried to incorporate international norms into the body of our municipal law.

This trend is however unfortunately not to be seen in the arena of Family laws. This becomes evident if we examine the Hindu Law, Muslim Law or Christian Law. Neither the Constitution nor the international documents is relied on in interpreting the provisions. This is so despite the constitutions' containing Article 44 obligating the state to adopt a uniform Civil Code.

Indeed there was an attempt to bring in the constitutional provision in Saritha.[3] In this case Saritha against whom was there an order for restitution of conjugal rights under s. 9 of the Hindu Marriage Act challenged this order under Article 21. It was challenged on the ground that it involved compelling her to subject her body to another person - her husband - and that it was wrong. Though the A.P. High Court upheld her contention in a subsequent decision the Supreme Court struck it down.[4] In other words the trend for constitutionalisation resorted to by a party was discouraged.

In Luxmi Devi v. Satyanarayana,[5] however the Supreme Court confronted with a situation wherein it could not punish the husband

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1A. Nilabati Behra v. State of Orissa, A.I.R. 1993 s.c. 1960

2. (1997) 6 s.c.c. 241.

3. T. Sareetha v. T. Venkata Subbaiah, A.I.R. 1983 A.P. 356.

4. Saroj Rani v. Sudharshan Kumar, A.I.R. 1984 s.c. 1562.

5. (1994) S.C.C. (Cri) 1566

who contracted a second marriage on the ground that there was some defect in the second marriage: the Supreme Court awarded a compensation of Rs. 2000/- There was thus a slight recognition of constitutionalization.

Muslim law has been persistently resisting the tendency of constitutionalisation or for that matter securisation. This is so despite the provision, of a seperate and independent article like Article 44 which again makes it obligatory for the state to come up with a uniform civil code. Our Supreme Court's experience with the interpretation of the Article is a sad commentary on our lack of will to raise a secular state with the help of Democratic Constitution. The apex Court which usually indulges in theoretical discourses on various aspects of law at times relating them not only to the constitution but also the vibrant international law shows reticence when it comes to the incorporation of progressive concepts and ideas into the body of family laws. This is evident from the discussions in Sarla Mudgal[6] and Lilly Thomas.[7] And it is an unpleasant experience to notice the great retreat Supreme Court made with reference to its own directions in Sarla Mudgal. It is not understood why the Supreme Court shows this reluctance, inability or cowardice in grappling with the socio-legal problems in the Family Law Sector in India.

It is refreshing in this context to read the following reasoning in Daniel Latifi,[8]

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6. Sarala Mudgal v. Union of India, (1995) 3 s.c.c. 635
7. Lilly Thomas v. Union of India, A.I.R. 2000 S.C. 1650
8. ~~(2001) 7 s.c.c. 740~~ Daniel Latifi v. Union of India, (2001) 7 S.C.C. 740

"It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as heirs who were likely to inherit the property from her or the wakf Boards. Such an appraoch appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question."

The Supreme Court does not show its vigour with which it reasoned out its conclusions in Visakha[9] or Nilabati Behera[10] updating our law with international norms. A student of Indian Law would expect the apex court tom show more vigour and dynamism in breathing progressive ideas into otherwise moribund area so that the law may be enlivened

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9. Supra n. 2.

10. Supra n. 1.

and the discussions on them invigorated. After all it is discussions and deliberations ever on conflicts created by law - case law included that the heuristic science of law gets extended by its luminosity even to the dark recesses of religious beliefs and practices of traditional societies. The Supreme Court should therefore show more vigous, dynamism and initiative in standardising our Family Laws so that we may not have such difficulty in achieving the Constitutional imperative - the Uniform Civil Code.

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