

The codification of the Hindu personal law in the independent India

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Introduction

On the 15th of August 1947 India regained its independence from the British Empire which obviously resulted in the need of the implementation of new legal regulations. One of the most controversial and disputed decision was the incorporation of the article 44 to the Constitution. This article states that the State is obliged to create a uniform Civil Code which to this day does not exist in India. Instead, Hindus, Muslims, Parsis, Jews and Christians are entitled to have their own laws, called *personal laws*, in matters such as inheritance, marriage, divorce, adoption and guardianship.

In this article I am going to present what kind of impact article 44 of the Constitution had on the Hindu personal law and what kind of changes were introduced in order to unify and modernise this law.

The Hindu Code Bill

Since the enactment of the Indian Constitution in 1950 there were no attempts to fully accomplish the goal in its article 44. Jawaharlal Nehru, first Prime Minister of independent India, was aware of the difficulties associated with the creation of a uniform Civil Code for all Indian citizens. Even though he was one of the greatest supporters of the idea of legal unification he did not try to fulfil it. Instead, he decided to pursue the reforms slowly by focusing initially on the law of the majority, meaning the law of Hindus¹.

After few years of heated discussions between Hindu politicians, the Nehru's government finally managed to enact four codes, which later were called the Hindu Code Bill². This law became to be perceived as a symbol of the changes which are taking place in India, the changes which are going to lead India towards modernity and bring it closer to the Western world without outdated customs and traditions³.

¹ T.M. Thomas, *A Uniform Civil Code in India: The Flaws of the Personal Law System and Goa as a Model for a Common Law*, International Affairs Journal, vol. 5, no. 1, 2009, p. 8.

² *Ibidem*.

³ F. Agnes, *Nation Building Through the Enactment of the Hindu Code Bill – The Nehruvian Agenda*, History and Sociology of South Asia, vol. 1, no.1, 2007, p. 68.

The idea of the unification of Hindu personal law was actually born years before independence during the British reign. The reason behind it was the increasing confusion concerning Hindu legal system. There were hundreds of different judicial decisions and legal reports. Everyday the judges were finding new solutions to individual cases which caused a situation in which Hindu case law became “*a luxuriant jungle in which it is impossible to see the wood for the trees*”⁴ as said one of the English commentators. For the British it was a complete chaos.

For example, under the traditional Hindu law divorce was strictly forbidden however, there were some places in India where a customary divorce was actually practised. In other parts of the country, there were observed fairly loose forms of marriage which offered the woman a lot of freedom. In the matter of inheritance situation was not any different. Generally, the system of succession in Hindu community was patriarchal but as it often happens in India, there were also places where the system was matriarchal. There were also some differences throughout the country in the joint family property. To be more precisely, there were different moments in the life of a son which were relevant for becoming a joint owner. Moreover, more and more women were receiving western education which led to the formation of women's movements which began the struggle for the achievement of gender equality in India. Consequently, the Indian government made a decision to take measures to harmonise the law⁵.

In 1941 the Government of India appointed a committee composed of fine lawyers to prepare an assessment of the situation. The first report was released in June 1941 and stated that the only solution which would be satisfactory is “*to avoid piecemeal legislation and take up as early as possible the codification of the Hindu Law*”⁶. The committee even prepared two draft bills and submitted it to the Indian legislature. However, they were not enacted because the decision was made that the wider terms of reference is needed. Therefore the committee went on a journey around the country to collect opinions from various individuals and communities⁷. In this state of affairs the independence came.

In the free India the idea was not abandoned. The educated⁸ part of the Hindu society wanted reforms. It is worth to point out that the lawyers, who were working on the creation of the new bill, were mostly trained in British law or they even studied in England. That is why English law became an example for the new acts⁹.

⁴ B.E.H.F., *Social Reform in India: The Hindu Code Bill*, The World Today, vol. 8, no. 3, p. 125.

⁵ *Ibidem*.

⁶ *Ibidem*, p. 127.

⁷ *Ibidem*, p. 125.

⁸ Educated according to British standards.

⁹ M. Kishwar, *Codified Hindu Law: Myth and Reality*, Economic and Political Weekly, vol. 29, no. 33, 1994, p. 2146.

First proposition of the Hindu Code (which strongly based on the previous British draft¹⁰) was prepared, already in 1948, by Mr Dr. B.R. Ambdekar. The draft Code was divided into 8 sections which dealt with matters such as marriage, adoption, guardianship, joint family property, succession and women's property. The biggest controversies arose around the right to the divorce. It was caused by the fact that the majority of Hindus considered their marriages to be indissoluble under no circumstances. What is more, this Code proposed one system of the joint family property instead of various regional systems. Widows under this new law would received the property rights which were restricted before.¹¹ There were also two types of marriage provided - sacramental and civil - and both of them had to be monogamous to be valid, hence the polygamy was forbidden under this draft Code¹².

The category of people who fall under the application of this act was very broad. The only one excluded from it were Muslims, Parsis, Christians and Jews. It is worth to emphasis that Sikhs, Jains and Buddhists were not excluded even though, they follow different religion and have their own traditions, customs and values. It can be easily imagine that they were not content about it. Despite these, Jawaharlal Nehru claimed that it was a conscious decision to define the scope of the act in such a broad sense.¹³

His statement is not surprising. The more people are covered by the new law the closer is to achieve the goal of full unification of which he was such a strong supporter. Because of those reasons the final enactment of this Code encountered many obstacles. Many people strongly opposed this new law, including a number of members of the Parliament¹⁴.

When in 1951 the Bill was presented to the Indian Parliament in order to be discussed, there were proposed 83 official amendments and 300 from private members. All of them had to be debated. The discussion was so heated that there was a threat of the split in the Congress Party. To ameliorate the situation, Prime Minister decided to suspend the debate to the next election to avoid the decay of his party. However, he made it clear that his aim is to finally enact this law.¹⁵

This lack of agreement and the decision of the Prime Minister strongly frustrated Dr Ambdekar who decided to resign from Indian Cabinet¹⁶. While leaving he said: *“To leave untouched the inequality between class and class and between sex and sex which is the soul of Hindu society and to*

¹⁰ B.E.H.F., *op. cit.*, p. 128.

¹¹ T.M. Thomas, *op. cit.*, p. 8–9.

¹² B.E.H.F., *op. cit.*, p. 129 -131.

¹³ T.M. Thomas, *loc. cit.*

¹⁴ M. Kishwar, *loc. cit.*

¹⁵ B.E.H.F., *op. cit.*, p. 131.

¹⁶ T.M. Thomas, *op. cit.*, p. 9.

*go on passing legislation relating to economic problems is to make a farce of our Constitution and to build a palace on a dungheap*¹⁷.”

Despite those problems the new Hindu personal law was finally enacted after the next election. The Indian Congress Party has won with a large advantage over other parties. This advantage made it possible for Nehru to come back to the issue of the codification of the Hindu Code Bill. To make the enactment easier it was divided to four separate acts: Hindu marriage act, Hindu succession act, Hindu minority and guardianship act and Hindu adoptions and maintenance act which will be discussed below.¹⁸

Hindu Marriage Act

Hindu marriage act was finally passed in 1955. The first important change introduced by it is the lack of requirement for spouses to be from the same caste to conclude a valid marriage. Another one, is the prohibition of polygamy which was extremely difficult to pass because Muslims can still legally¹⁹ practise it in India.²⁰

However, this prohibition is often not respected. One of the reasons for the lack of compliance with that rule is that the idea of monogamy is based on the western and Christian standards and it is not always suitable for the Indian reality. At least not right now. The provision which supposed to ameliorate the position of women did actually something quite the opposite. This is due to the fact that nowadays it is not uncommon for Hindu women to live in relationships which are considered to be marriages among their communities but not under the new formal law which introduced stricter rules for the conclusion of the valid marriage. That caused the situation in which woman is actually deprived of her rights while the man can live in a polygamous relationship and be obliged by law to fulfil his obligations only towards one woman. If the case would end up in court the husband would do everything to prove that one of the marriages is actually not valid to avoid the prosecution for polygamy which results in deprivation of woman of her status of wife²¹.

However, the most vital discussion was about the conditions for dissolution of marriage. There were even some voices which claimed that divorce is completely against Hindu tradition and hence it should not be possible for Hindus. It is impossible to agree with this statement because actually there were Hindu communities in which the panchayats²² were dissolving marriages for years. Others were

¹⁷ B.E.H.F., *op. cit.*, p. 131 – 132.

¹⁸ T.M. Thomas, *loc. cit.*

¹⁹ M. Kishwar, *op. cit.*, p. 2150-2152.

²⁰ Although it may soon be changed concerning the latest interest in that matter of the Supreme Court of India.

²¹ F. Agnes, *Nation Building*, *op. cit.*, p. 69.

²² Local self-government in India, the gathering of elders.

criticising not the possibility of divorce but the fact that the authors of this act rely too much on the British law. They accused them that instead of looking for the solutions in the Hindu law they automatically rewrite provisions from English law because they are supposed to be more advanced where in fact they would just make the whole process of dissolution of marriage harder. From now on the court proceedings is obligatory to obtain a divorce which makes it impossible for poor people who would never be able to afford it.²³ Because of that, there is a good chance that the customary divorce would still be practised but it will not be considered valid on the level of state level.

Despite all these arguments the dissolution of marriage was made possible by this act for all Hindus. The act provided three different possibilities of ending a marriage - nullity, divorce and judicial separation. The distinction on void and voidable marriages was another novelty for Hindus, the same as the rule of "fair trail" which means that the spouses can apply for divorce only after the period of three years (right now it is one year²⁴) from the day of the isolationism of marriage.²⁵ The impact of the English law is incredibly visible here and it is surprising that there was such a reluctance towards culture specific solutions. This is the result of thinking, by the educated part of Hindu society at that time, that only English law can bring India closer to modernity.

As to the form of marriages only sacramental was introduced. The idea of civil marriage did not find enough supporters. However, this form was not completely abandoned because it was provided for all Indians, despite their religious affiliation, in the Special Marriage Act which was enacted in 1954.²⁶

In 1964 the amendment was introduced which added some new grounds for divorce. However, it has not avoided criticism for worsening the position of women. The reason for that was the introduction of the provision which stated that the person can apply for divorce on the basis of not returning to the cohabitation between the spouses for a period of two years (shortened to one year now) after the announcement of judicial separation. The problem is that it is not uncommon that the husband who wants to get a divorce will not let his wife to come back to their house even if she would want that. This is possible for a husband because in most cases it is his familial house where the couple is living after the marriage.²⁷

In 2013 one of the newest amendments to this act was passed which added another ground for divorce. From this time it is possible to obtain a divorce on the basis that marriage has broken down

²³ M. Kishwar, *loc. cit.*

²⁴ *Hindu Marriage Act*, 1955, Act No.25 of 1955, [18th of May, 1955].

²⁵ P. Diwani, *The Hindu Marriage Act*, *The International and Comparative Law Quarterly*, vol. 6, no. 2, 1957, p. 270.

²⁶ P. Diwani, p. 263-264.

²⁷ W. Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, *German Law Journal*, vol. 09, 2008, p. 233-234.

irretrievably. The marriage will not be considered to be irretrievably broken by the court without proving that the spouses lived apart for at least three years. It seems like one more time the specific position of woman was not been taken into account. However, the women were granted one right which gave them some protection. They can oppose to the petition of a husband by saying that the divorce would cause grave financial hardship or that, because of some specific circumstances, it is wrong to officially end this marriage.²⁸

Hindu Succession Act

The act was passed in 1956 and is considered to be the most controversial but also the most crucial. It is all focused around the position of women in the Indian society and the need to grant them more economic rights in order to ameliorate their status in the society²⁹. This has been emphasised by one of the members of the Parliament: “...divorce will not be really effective unless there is... an equal right of property... a woman who has no independent source of living would naturally be very chary about taking recourse to these divorce provisions... this bill will be of no consequence, and of no benefit to the women of India unless they are given an equal right to property...”³⁰

Generally, in the traditional Hindu law, and I meant here all the various schools, Hindu women were not entitled to inherit or even if they were, they had a right to the smaller share than males³¹. That is why, the subjects of inheritance and the right to property could not be avoided if the gender equality was going to be achieved which was one of the main goal behind the creation of the Hindu Code Bill.

One of the most important reforms was the recognition of females as heirs equally with men who are on the same degree of kinship. It was a huge improvement. Before, there were places in India where daughter was for example 466 in the line of succession or sometimes could not inherit at all. Of course those are extreme examples however they were not that rare. What is more, in the section 14 of this Act, it was provided that every property which woman will acquire, no matter if its movable or immovable, will be her and she will be a full owner of it without limitation unless the will, court or the person who gave her a gift decide otherwise (in the same manner as it is possible to males). This provision had a retrospective power.³²

²⁸ *The Marriage Laws (Amendment) Bill*, 2013, Bill No. XLI-C of 2013, [26th of August 2013].

²⁹ M. Kishwar, *op. cit.*, p. 2154.

³⁰ *Ibidem*.

³¹ D. Halder, K. Jaishankar, *Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, and Modern India*, *Journal of Law and Religion*, vol. 24, no. 2, 2008-2009, p. 663.

³² J.D.M. Derrett, *Statutory Amendments of the Personal Law of Hindus Since Independence*, *The American Journal of Comparative Law*, vol. 7, no. 3, 1958, p. 386.

However, the act did not abolished completely the discrimination of women. It is all because of existence of the coparcenary. Coparcenary is a legal institution which governs ancestral property as opposed to self-acquired property. Women could not be a member of this institution, only men are granted this right. Coparcenary consists of a maximum of four generations of male heirs. In the Mitakshara school the male became a member of this institution by birth.³³

Before the enactment of the act, after the death of the father his share in the coparcenary would passed by survivorship to the remaining members of the coparcenary. The discussed act has changed it a bit. Right now if the father would die leaving behind a female relative who is consider to be a class I heir (for example daughter and wife) his interest in the coparcenary would not pass by survivorship but would be distributed equally to his children and widow the same as self-acquired property. What is important, women are not becoming members of the coparcenary because their share is treated as separate from the ancestral property in a way as if there would be a partition which can be initiated by every member of coparcenary.³⁴

However, the gender equality has not been achieved by this legal change. Sons become a member of the coparcenary by birth and because of that they have their own share in it. Hence, even though the share of the father is divided equally, the sons are always having more than their sisters. Because of that, the act was often criticised for not granting a daughter the right to be a member of a coparcenary.³⁵

The situation is a bit different under the Dayabhaga school where the coparcenary actually does not exist. However, the property is mostly still kept together by the family but the share in it does not passed by survivorship but by the inheritance. Hence, the male heir does not acquire any property by birth. In this situation, since the enactment of the Hindu Succession Act, after the death of the father all his children and his wife are entitled to inherit the same shares. Consequently, under this school the sons are not privileged anymore.³⁶

The lack of recognition of the woman as a member of coparcenary of the Mitakshara school was the reason for which this act was the most criticised. From the other hand those who opposed to this solution were pointing out that daughters are leaving their family in the moment of marriage and they become a part of their husband family³⁷. If the daughter would be a member of the coparcenary by birth, her children would later also become a members of the coparcenary, gathered around the

³³ N. Chavan, Q. J. Kidwai, *Personal Law Reform and Gender Empowerment: A Debate on Uniform Civil Code*, New Delhi 2006, p. 124-125.

³⁴ *Hindu Succession Act*, 1956, Act No. 30 of 1956, [17th of June, 1956].

³⁵ L. Carroll, *Daughter's Right to Inheritance in India: A Perspective on the Problem of Dowry*, *Modern Asian Studies*, vol. 25, no. 4, 1991, p. 797-800.

³⁶ *Ibidem*, p. 802-805.

³⁷ M. Kishwar, *op. cit.*, p. 2155.

ancestral property of the mother family, even though they are considered to be more a part of the father family. Hence, that would pose a threat of the fragmentation of the ancestral property. Under the Dayabhaga there was not such a problem because there is no rule of survivorship so the children of a daughter would only inherit her share and would never get right to the rest of the familial property of their mother.³⁸

In 2005 the amendment to this act was enacted in which daughters were finally recognised as coparceners in the ancestral property in the same way as sons³⁹. However, that actually reduced the share of the widow which she gets after the death of her husband⁴⁰. That is why there are suggestions that maybe a better solution would be the abolition of the birth right to property and the rule of survivorship⁴¹.

There is not enough place in this paper to properly focus on the problems arising around the Hindu ways of management of the joint family property. The purpose of describing it here was to point out how complicated this issue is and how carefully the legal reforms concerning this subject have to be introduced.

Another concern with the law of inheritance was with the list of heirs entitled to women's property. In the Hindu succession act woman's in – laws are listed before her parents while man's in – laws are not at all entitled to inherit after him. This is caused by the fact that in Hindu tradition by marriage woman is leaving her family and enters the family of her husband. Depending on the place in India this custom has different consequences. In some extreme cases, in the north parts of India, parents of the married woman would not even agree to drink water in the village where she lives so even more they would not agree to inherit after her. Even though, it was repeatedly said that in the south India there are no such strict taboos and rules and the contacts between woman and her biological family are not broken after her marriage, the members of the Parliament, who were mostly from the North, insisted on recognising their customs as true “Hindu” tradition. That is why it was decided that in – laws of a woman would have priority in inheritance before her parents.⁴²

Hindu Minority And Guardianship Act

While the aim behind the enactment of the Hindu Code Bill was to bring India closer to the creation of the uniform Civil Code, the Hindu Minority and Guardianship Act is criticised for doing something quite the opposite because of dividing the citizens of India instead of bringing them closer.

³⁸ L. Carroll, *Daughter's Right...*, op. cit., p. 804–805.

³⁹ D. Halder, K. Jaishankar, op. cit., p. 682.

⁴⁰ N. Chavan, Q. J. Kidwai, op. cit., p. 125.

⁴¹ L. Carroll, *Daughter's Right...*, op. cit., p. 807–808.

⁴² M. Kishwar, loc. cit.

This opinion is caused by the existence of the earlier act, called the Guardians and Wards Act, which was in force since 1890. The act from 1890 was applied to all the citizens of India no matter of their religion. It is difficult to find justification for implementing a new law just for one community (while having in mind the aims behind the implementation of the Hindu Code Bill). It seems like the better solution would be just the amendment of the old one in the necessary parts.⁴³ This opinion was expressed by one of the parliament's member: *"... this is absolutely unnecessary bill and it also goes against the principle of having a common civil code... this is a mischievous bill insofar as the provisions of the Guardians and Wards Act will not apply uniformly to all the nationals... Now a Hindu minor will be quite different from a Muslim minor and a Christian minor... it creates more distinctions than are therein the present law."*⁴⁴

Hindu Adoptions And Maintenance Act

The last act of the Hindu Code was also enacted in 1956. The government claimed that this act would finally permit to adopt girls which was supposed to be completely impossible before. However, one more time different schools had different rules and different communities had different customs. Other interesting legal solutions contain in this act, for which it is actually difficult to find justification, are for example the provisions which forbids to adopt a son when the person already has a natural or adopted son and the same is in the case of a possibility to adopt a daughter.⁴⁵

Only a husband is entitled to adopt, however he needs his wife approval for that. Even though there is a requirement of wife's consent for adoption there is still lack of equality between sexes because woman has no right to adopt.⁴⁶

There are also provisions which entitled woman to the maintenance from her husband after the divorce. However, the proceeding for maintenance under this law, is a civil proceeding. Because of that it could last for ages and be extremely expensive which results in a complete ineffectiveness of this law.⁴⁷

Summation

This new law is applied to the majority of Indian citizens but was created by the minority of them which was educated, mostly in English standards or even in England. That is why the Hindu Code Bill does not exactly reflect the opinions of ordinary people. Consequently, this codification was

⁴³ M. Kishwar, *op. cit.*, p. 2152.

⁴⁴ *Ibidem.*

⁴⁵ *Ibidem*, p. 2152-2154.

⁴⁶ *Ibidem.*

⁴⁷ *Ibidem.*

often criticised for not having anything in common with the traditional Hindu law and with what was written in *dharmaśāstra*, despite the fact that it is called “Hindu”.

The goals of this codification were various. First of all, the caste system was abolished in 1947 and there was a need for a new law which would be consistent with new social reality. Another thing was the desire to stop the discrimination of women and the abolishment of the customs which were considered to be old and inconsistent with the modern times. The last goal was to bring more certainty to the law and to unify all Hindus into one, more homogeneous, group⁴⁸.

Because of the last aim, as I already wrote, the category of Hindu for legal purposes has been defined extremely broadly. Basically, only Muslims, Parsis, Christians and Jews were excluded. However, this has not brought unity and has not stopped the various communities from contesting their newly acquired Hindu status.⁴⁹

The idea of strengthening the position of Hindu women also was not fully achieved. First of all, some of the reforms were not thought through and sometimes they only worsened the situation of women because of applying the rules of English law without adjusting them to the Indian social reality. Sometimes the problem was in the lack of holistic view as in the case of recognising daughters as coparceners.

In the end it is worth to point out that the goals behind the creation of the uniform Civil Code overlap greatly with those mentioned here. The Hindu Code Bill is supposed to be the first step towards full unification of law in India. Because of that it is important to closely examine the advantages and disadvantages of this legal regulation before even thinking about the creation of the uniform Civil Code for all Indian citizens.

⁴⁸ J.D.M. Derrett, *Statutory Amendments...*, *op. cit.*, p. 381–82.

⁴⁹ F. Agnes, *Nation Building*, *op. cit.*, p. 83.

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Streszczenie

Artykuł poświęcony jest kodyfikacji i unifikacji tzw. Hindu personal law w Indiach po odzyskaniu przez ten kraj niepodległości w 1947 roku. Na przykładzie działań podjętych w Indiach łatwo można zauważyć, że rozwiązania prawne by były efektywne i doprowadzały do zamierzonych celów powinny być dostosowane do warunków społecznych, tradycji oraz zwyczajów danego społeczeństwa.

Summary

The article is about the codification of the Hindu personal law in India after this country regained independence in 1947. On the example of the actions taken in India it is easy to noticed that the legal solutions to be effective and to achieve the intended goals have to be adjusted to the social reality, to the traditions and customs of the chosen society.