



The role of culture in shaping Indian laws

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Abstract

The society is made up of individuals and one society is distinguished from another via its culture which is the hallmark of any human civilization. And a civilisation to thrive, it needs to maintain order which is done through Law. The Law and Culture are incident to any human society and it can be said that they are complementary and supplementary to each other. Custom is a source of law and as per the definition of Tylor, culture includes customs. Most of the family laws which are presently codified have their origin in the culture of that particular sect. Again, it can be seen that culture and law are at loggerheads with each other, then the law supersedes the custom or culture. The Constitution recognised the importance of culture through the Fundamental rights, Directive Principles of State Policy as well as Fundamental Duties. Not only the judiciary has been proactive to discard primitive cultures and customs to set the stage for a modern society with cosmopolitan and modern culture fit for a modern world but also conscious to protect monuments with rich cultural heritage and preserve the diverse culture.

Keywords: Law, culture, family law, constitution, judiciary

Introduction

"Culture is a product of Law. And Law creates norms for society"

-Myles Munroe.

There exists an intimate relationship between Law and Culture. A human civilization cannot exist and survive without a culture of its own and without a controlling mechanism through law. Culture is the hallmark of any human civilization. Every society has its unique culture which distinguishes it from others. Culture has been defined as 'that complex whole which includes knowledge, belief, art, morals, law, custom and any other capabilities and habits acquired by man as a member of society' by Edward B. Tylor. Whereas Law can be stated as the system of rules which a particular country or community recognises as regulating the actions of the members which it may enforce through imposition of penalties.

Law and Culture Relationship

When we talk about Law, it regulates the behaviour of the human being inhabiting a society which has a distinguished culture of its own. Initially when there was no such formal means of social control, informal means such as folkways, mores, customs as well as culture used to play a major role in social control. It is based on shared norms and values that sets expectations of appropriate behaviour and attitude for the members of the society. Since both are associated with controlling mechanisms, culture has a significant influence over marriage, divorce, succession etc. Certain laws are framed keeping in mind the culture which the people follow. Most notably the Muslim Law, the Hindu Law regarding marriage, succession is governed through the culture which the people followed. These types of Laws are mere legislative manifestations of the culture which the people followed.

Supposing if we consider the Hindu Law regarding marriage, Section 7(2) of the Hindu Marriage Act 1955 states about Saptapadi which is essentially a Hindu ritual

and culture being codified into Law. Again, if we see Muslims have their own personal law, the Sharia which governs their marriage, divorce, succession, adoption etc and the Court of Law administers justice in case of any discrepancy as per their personal law based upon their culture. Thus, culture and law are interrelated to a great extent.

Constitution and Culture

The Supreme Law of the land, the Constitution of India, through Article 29 provides for preservation of cultures which includes language, scriptures, art, music, dance of any section of Indian citizens whether minority or majority. On one hand it allows the citizens to safeguard own culture and conserve it and on the other hand via article 13(1) states that any "law" which includes "customs and usage" as per Article 13(3)(a) of the Constitution, cannot violate the principles of the Constitution. Thus, one can preserve the culture which is one's Fundamental Right but again that culture which includes customs and usage cannot abridge the Constitution. If we look into clause (2) of article 13, it states that State cannot make any law that would annihilate the Part III of the constitution i.e., Fundamental Rights. So, the State cannot make any law which would interfere with the culture of a particular sect of people, or prevent them from preserving their culture.

Article 51-A(f) imposes duty on the citizens to value and preserve the rich heritage of our composite culture. Article 49 states that the State has the obligation to protect monuments and places and objects of national importance. The Supreme Law of the land, through these articles ensures that the material and nonmaterial cultures are safe since they display the rich cultural history of our country. The Supreme Court in *T.M.A Pai Foundation & Ors v State of Karnataka & Ors* and in *Ahmedabad St. Xavier's College v State of Gujarat & Anrs* have reiterated the importance of the aforesaid articles and has kept the torch of cultural tolerance high.

Hindu Culture and Law

On one hand it is seen that Hinduism has influenced law and on the other hand, Law has forced Hinduism to abandon some of its rituals and cultures. The best example can be stated that of the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956. Both are based on the Hindu Tradition recognising the schools of Hindu succession namely Mitakshara and Dayabhaga schools, streedhan, Saptapadi in marriage, prohibition in the same gotra and same sapinda marriage. Section 7 of the Hindu Marriage Act, 1955 expressly states that marriage can be solemnized through any customary rites and ceremonies of either party thereto. Though Saptapadi has been mentioned in the said section but it is not limited to thereto. It may include Kanyadaan, tying of Mangalsutra, Sindoor Daan, Pani grahana, homa etc. If we go back in time, the uncodified Hindu Law was based upon the Shrutis, Smitis, Tilaks and Commentaries each prescribing the way an individual should act and behave which is purely based on the societal acceptance of good and bad. Though such 'dos' and 'don't' gradually became a quintessential part of Hindu culture. The Supreme court in *Madura v Mootoo Ramalinga* has stated that if there is clear proof of custom then it would supersede the written text or law.

It should be noted that several changes have been brought about by the Law in the Hindu society. Once Sati was prevalent in the Hindus but through law it was prohibited by Lord William Bentick and through the joint efforts of Raja Rammohun Roy. After independence, the Sati (Prevention) Act, 1987 was enacted to make sati illegal. The Hindu Widows Remarriage and Property Act, 1989 allows Hindu Widows to remarry and own property who otherwise were debarred from remarrying or owning property as per Hindu customs and culture. Again, in succession, the old, uncodified law based on shastras stated that Stree-dhan could not be alienated but after the codification and various judicial decisions, the women were empowered to alienate the property. In *Pratibha Rani vs Suraj Kumar* and others, it stated that neither father, husband nor son can alienate the property of women on which she has absolute right or "streedan" without her consent. Women have been bestowed absolute rights over property through law.

Ganga and Yamuna as Living Entity

The Uttarakhand High Court did not shy away from declaring River Ganga and River Yamuna as living entity. In the case of *Mohammed Salim vs State of Uttarakhand*, the petitioner contended that the Rivers are highly polluted and through the court asked the government to demolish illegal encroachments along the river banks and properly manage the water and land resources. The court considered the argument since the rivers are dying away and losing their very existence. It is worth noting that both these rivers are a valuable part of our Cultural Heritage. River Ganga is worshiped as a Mother in Hinduism and is considered the holiest river. The later Vedic Civilization grew on the river bank of Ganga and Yamuna; thus, they have made significant contributions towards our non-material culture. Both these rivers are epitome of faith, belief and culture. The one of the oldest cities- Varanasi, with rich culture and diversity have been flourishing beside the river Ganga.

Though later the Supreme Court overruled the decision of the Uttarakhand High Court but it is worth noting that such a step would help to preserve the culturally significant things.

Muslim culture and law

Not only Hinduism but other cultures also have deep relationship with law. Practises and rituals like mehr, iddat, talaq-e-biddat, polygamy, and nikah-halala are personal matters under the Muslim law. But the judiciary of the country did not stand back in reforming the outdated provisions of such personal laws. The personal laws of Islam state that a woman may be given maintenance for the 'iddat' period, i.e., a period of three menstrual cycles, along with the 'mehr', i.e., the money promised to the bride, at the time of marriage. Apart from these, there is hardly any legally enforceable way of maintaining the woman for life. The criminal law of India, on the other hand, provides for maintenance for life, except some situations. But in *Shah Bano* case the Supreme Court ruled that husbands have to maintain their wife. But this judgement was not positively taken by some association on account of attack on their culture. Consequently, the government passed a legislation, named as 'The Muslim Women (Protection of Rights on Divorce), 1986', and aimed to overrule the judgement of the Supreme Court. According to this legislation, a 'fair and just' amount of money would be given to Muslim women within the 'iddat' period, after which, the husband will have no liability. This Act was challenged on the grounds that it is unconstitutional and against the secular character of the Constitution. To this the Supreme Court came in defence of the community and legislature and, thereby held that the said Act was not in violation of Article 14 and 21 of the Indian constitution as personal laws are a legitimate basis for discrimination proving time and again that law and culture have move hand in hand for the progress of the nation.

Talaq- e-biddat or triple talaq is a kind of divorce practised in Islam. Under this a Muslim man can legally divorce his wife by pronouncing the term 'talaq', the Arabic word for divorce just three times either written or orally not requiring the wife's consent. In Muslim law this form of talaq is not appreciated yet it is not invalid. Polygamy as a social practice followed in Islam which allows men to marry more than one woman at a time. nikah-halala is a practise where if a Muslim woman wants to remarry their first husband after a divorce she is required to first marry another man and later on divorce her second husband. Once again, the role of judiciary was called upon where the practice of talaq-e-biddat was declared 'manifestly arbitrary' and unconstitutional. After two years, the Parliament enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019 according to which the practice of talaq-e-biddat is a criminal act and punishable with up to three years imprisonment. Although the Act is challenged but it is notable that law has such an influence on culture that a single reform can change the face of the community.

Material culture

Culture is not restricted to religion but everything which is a symbol of our rich history. Be it the Taj Mahal, Victoria Memorial, Stupas, Jantar Mantar or any other historical monuments. And the laws have evolved recognise such material and immaterial culture. One such example is the fight to declare the entire Red Fort Complex as protected monument, which was protected, and no new construction was permitted under the provisions of the Ancient Monuments and Archaeological Sites & Remains Act 1958 and is now permitted for occupation of the Army for

performing the ceremonial duties relating to Independence Day, Republic Day and Martyr's Day etc. assigned to it. Further the Hon'ble Supreme Court also had occasion to pass orders in respect of the Agra Fort. The Court noted that the cooking or consumption of food anywhere in a private monument except under the Authority or in accordance with the conditions of a license granted by an Archaeological Officer is prohibited by Rule 8 of the Ancient Monuments Act. Thus, an expiry licensed canteen was shifted and was no longer running in the protected monument.

Our culture has also proved the need of enactment of legislations such as The Ancient Monuments Preservation Act 1904, The Indian Treasure- Trove Act 1878 and The Antiquities and art Treasures Act 1972 through which many temples, artifacts, treasures, and religious objects have been preserved and protected. To protect smuggling of these priceless articles' so that they do not become show pieces in the drawing-rooms of people laws have been enacted. But in the late 90's the question arose that that whether these priceless articles would be kept lying in the malkhanas of the State. It had been observed that mostly the trial takes time to get over, and after that nobody comes forward to claim ownership of these articles because of strict conditions laid for any individual who claims to be the owner of these articles. One such case is of Puri Malkhana where stone-sculptures and metal-sculptures were dumped unclaimed which can provide immense material for study of the Hindu and Buddhist culture in the State of Orissa. The Court opined that they should be kept in public view for the students and historians to do further study and provide valuable information, and materials which would be of great help to the upcoming generations. Thus, with a view to provide interested persons, materials for their study and research proper and safe custody of these priceless articles were handed over to the State Museum. In concurrence to this decision many State museums have now made provisions to display such crucial part of our culture.

Conclusion

Law and culture have existed parallel to each other since the past. Both have influenced each other and as required protected, reformed, evolved for the greater good of the nation. India is such a diverse country where there exists not one culture but many and in such complexities the Constitution and legislature have accommodated the growing needs of every community. On one hand where culture is peculiar and objective on the other hand law is variegated and indulging.

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