

TOWARDS A UNIFORM, SECULAR AND NON SEXIST CIVIL CODE

by The Forum Against Oppression
of Women.

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The Bias in Our Laws

In our experience of the last 10 years of interacting with women and their numerous problems, we have found that the law, and specifically personal law, have rarely stood by women to support them in their struggle for an independent and dignified life or to redress injustices against them. All personal laws have a deep sexist bias which comes from very basic patriarchal assumptions and conceptual frameworks. The few favourable laws that do exist for women are difficult to implement. In such a situation where the status of women is secondary, where injustices against them abound and go scot free and their very existence is difficult, we need laws which will be in the interests of women and a positive force to bring equality and dignity in their lives.

To move towards the formation of such a law, we think that laws concerning marriage, divorce, maintenance, custody of children, guardianship and adoption which are civil in nature and which affect the fundamental rights of women and children should be removed from the realm of the 'religious' and 'personal' and be governed by a uniform, secular and non sexist civil law.

There have been several attempts by lawyers' groups and concerned individuals to formulate a Uniform Civil Code (UCC). These need to be shared in the form of a national dialogue between intellectuals as well as with women and their organisations. Within the Forum we undertook to study all the existing personal laws, draw up our suggestions for changes in order to put them up for discussion before the entire group and at a later stage to women and men of other groups.

We made a special effort not to simply react to the existing laws and bring out a series of amendments but to bypass familiar concepts, re-think them and formulate our suggestions. More often than not there was confusion, differing viewpoints and no consensus in the group.

The following is the gist of our discussions which lasted for several weeks.

MARRIAGE LAWS

We began by asking the question how do we define marriage? would we call it a sacrament or a contract? Between whom and why is marriage an important social event? After much debate, we accepted that marriage is a contract between two consenting persons above the age of 18 years.

However, a contract is assumed to be between two equals which is not the case between men and women. From our personal^{and} organisational experiences and from a scrutiny of the laws governing rights to the matrimonial home, custody of children, divorce settlements^{etc.} it is clear that partners within the marriage contract do not enjoy equal rights. The law should therefore be mindful of this when treating it as a contract.

All marriages should be registered. Refusal to register marriages shall be considered an offence by law. At the time of entering into such a contract neither of the parties should be a co-party to any other such contract.

It is possible that there is a lapse on part of the cohabiting partners. If cohabitation is proved, in spite of non marriage and non registration, it will be deemed to be a marriage and registered, and the rights which accrue to married partners would accrue to such partners also.

Marriage is not only for the purposes of procreation it is and can be projected as a companionship contract in which two persons are committing themselves to each other. So no prohibitory degrees will be considered here, and all marriages will be considered valid so long as they are registered, and so long as both the consenting parties are above the age of 18 years, and so long as there is no subsisting prior marriage contract. Two persons may enter into an agreement before their marriage or during their marriage while cohabiting in which they agree on their respective rights and obligations under the marriage or upon separation or dissolution of the marriage or upon death, including:

- a) Ownership in or division of property;
- b) Maintenance;
- c) the right to decide on the education and training of their children, but not the right to custody of or access to their children; and
- d) any other matter in the settlement of their affairs.

and/or property is void.

Similar rights should apply to two persons who are cohabiting but not married.

In the determination of any matter respecting the support, education or custody of or access to a child, the court may disregard any provision of a marriage contract where, in the opinion of the court, to do so is in the best interest of the child.

Rights Acquired Upon Marriage:

1. All property acquired after the date of marriage and if should be jointly owned by both the parties at the time of marriage or after the marriage, property including a residential house is purchased in the name of either of the parties it will be deemed to be the joint property of both the parties.
2. The wife should have the unconditional right to reside in the matrimonial home.
3. The husband should not be permitted to sell the matrimonial home without the consent of the wife. Any such sale would be void.
4. If the husband is a tenant, he is not entitled to surrender the tenancy except in favour of the wife. Any such surrender would be void.
5. Cohabittees will have the same rights as those under the marriage contract. If either of the cohabittees breaks the contract it will be considered an offence. The aggrieved cohabitee can claim maintenance etc.

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DIVORCE LAWS:

When for whatever reason marriage breaks down there should be a provision for divorce. Marriage should not be an unbreakable bond but neither should divorce cause misery and deprivation. Divorce should be available to both parties as an option.

1. If the consent of either party to the marriage contract is obtained by coercion or fraud, such a marriage would be void.
2. Divorce by mutual consent should be available along with safeguards which does not place any one person under a disadvantage. All the present grounds for divorce presently existing in the matrimonial laws should be done away with.
3. Irretrievable breakdown of marriage should be a ground for which divorce should be granted.
4. However, when the demand for divorce comes from the husband, he shall not be granted divorce unless he fulfills his economic obligations.
5. When the demand for divorce comes from the wife, she should not be deprived of her economic rights to the matrimonial home, maintenance or the custody of children.
6. During the process of divorce or after, in case of need, the State should provide the wife and children with housing or other basic amenities.

Settlement:

- a) the court should direct payment of a lump sum amount in cash or order the transfer of the husband's property including matrimonial home as a long term settlement.
- b) all property acquired by the couple during the marriage should be divided equally between the two.
- c) if the settlement sum and the wife's share of matrimonial property is not enough to provide for a home. She should get the unconditional right to the use of the matrimonial home.
- d) some of the other points were discussed under Maintenance.

MAINTENANCE LAWS:

With the breakdown of marriage, should a wife demand maintenance from her husband or fend for herself? Given the situation of women in general as well as the labour which she puts into the marriage, home and children we think that maintenance is the right of every woman who feels she needs it during marriage or on divorce. It should not be perceived as a handout to a destitute person.

1. Depending on the situation and financial strength in each case, there should be first priority given to maintenance being paid off in one lump sum and not in monthly installments.
2. In case it is not possible to pay at one time, an amount equal to the minimum of three month's maintenance should be deposited with the court.

3. Wherever possible this money should be cut from the husband's salary at the source, i.e. paid to the wife by his employer.
4. When a wife applies for maintenance, it should become mandatory for the husband to declare his assets and income within 7 days. After this period, the court should within the next 7 days give its verdict regarding maintenance. If he fails to declare his assets an adverse inference would be drawn.
5. There has always been a problem of the quantum of maintenance. We thought that the following points should be taken into consideration whilst deciding on an amount for maintenance.

a) the number of years the marriage has existed.

This gives an idea of the years the wife has put in her physical and emotional labour into the home.

b) the number of children and with whom they will be staying.

c) the earning capacity of the wife at the breakdown of marriage. For example in spite of being a graduate because of little work experience or breaks in career she may not be suited to find a paying position in the job market.

d) the age of the wife.

e) the career advancement of the husband during the period of marriage which is mostly always accomplished at the expense of the wife's career.

subject to an upward but not a downward revision.

- g) non payment of maintenance should be considered a criminal offence. The civil court should also have the power to attach the husband's property.

NATURAL GUARDIANSHIP AND CUSTODY LAWS:

On the issue of natural guardianship it was unanimously felt that the present concept of father as the natural guardian should be done away with. But if not the father than who should be the guardian of the child ?

1. Some felt that the mother should be the natural guardian because it challenges the commonly accepted concept of paternity. Also women as natural guardians can easily get custody of children.
2. A second alternative was that the mother should be considered the natural guardian but on separation of the parents the one who gets the custody of the child should be named the natural guardian. This it was felt was necessary to safeguard the interests of the child.
3. Natural guardianship should be shared between the two parents because no one person should have absolute right over the child.
4. Both the parents be considered natural guardians but on separation the one who gets custody should be named as guardian.

In custody of children cases, we felt that the child's welfare and interests should be taken into account because

when parents fight over them they may forget what is best for them. As far as possible children should not be taken to court but an assessment of their will should be made in their natural surroundings.

We formulated some guidelines which could be followed by the court in deciding custody cases.

a) economic status should not be the deciding factor in custody cases. A parent may not have as much money as the other but may have a lot more motivation and care to offer. Maintenance of the child should be separately provided for.

b) working mothers should not be disentitled for custody. Rather the State should provide for creches for working women.

c) alcoholism or violent behaviour towards wife, child or others should disentitle the father from getting custody of the child.

d) in case any of the conditions on the basis of which the court decided happen to change or are violated then the other party can appeal for revoking the earlier decision.

e) maintenance for the child and method of payment needs to be worked out.

f) In case the mother is granted custody, she and the child should be allowed to use the family home.

PROPERTY LAWS:

All personal laws are biased against women in relation to inheritance. Hindu laws commonly considered to be

progressive too have an inbuilt prejudice against women. Mitakshara school of law, on which most Hindu laws are based, holds that all property must remain within the bounds of the family. In actuality this means that property must remain with male heirs because it is assumed that women will marry and move to their husbands homes.

It is this concept of 'patri-locality' which is one of the main reasons for women being disinherited from family property. Male lineage is also so deeply rooted in Hindu cultural and religious practices like ceremonies related to death, shraadh etc. Parents expect their sons to whom they pass on their property to look after them in their old age.

When should a woman ask for her inheritance? There was a heated discussion on whether she should demand her inheritance at the time of attaining adulthood, at marriage or at the time of her parent's death. This question which is never raised in the case of sons becomes relevant for women for several reasons. The only way a daughter gets any share of family property is in the form of dowry and wedding expenses. This creates a pressure of marriage on women. The unmarried daughter who is assumed to be dependent on the family is not considered for inheritance. Dowry is given in the form of 'payment' to the bridegroom's family, as consumer goods and lavish feasts. Very little money or jewelry actually remains with the woman.

In opposing the dowry practice, we might be creating a situation in which the woman may not get any inheritance from her natal family. This might also make her already weak position weaker in the matrimonial home. In case of divorce or desertion the woman could if she had her

share of property choose to live independently or return to her natal home with her inheritance. One stream of thinking within the group said that ^a woman should get inheritance at the time of marriage or when she becomes an adult but not in the present form of dowry and expensive weddings. She should also have the right, in the natal family, to manage and control her own property. The law should make it compulsory that her property cannot be transferred or gifted to her husband or his family for at least 10 to 15 years. This will help in strengthening her position vis-a-vis her natal and matrimonial homes. The time of giving inheritance is very important because if delayed till after death of the parents it is possible that it can be transferred to the sons or used up.

On the other hand, parents may not be in a position to divide property or give inheritance when they are alive. At the time of marriage or when they become adults women are too young to assert for their rights. Implementation might mean conflict or going to court which would alienate them from their family and only support structure. Therefore it is better to strengthen women's inheritance laws by ensuring that no will be considered valid if it disinherits the daughter. Both sons and daughters should get equal shares of the property. Any document which waives the daughter's right to property in favour of either ^{of} her brothers etc. should be considered invalid.

The following points also emerged:

- should there be a distinction between co-parcenary or ancestral property and self acquired property ?

- in the case of the father dying intestate all property should be equally divided between the wife and children and in their absence to his parents. Similarly in the case of the mother dying it should firstly go to her children, in their absence to her husband and if neither her children nor husband are alive then to her parents rather than her husband's parents.

- women always loose out on their right to the dwelling place because they move to their matrimonial home. Is there some way in which they can be compensated ?

There are perhaps many areas we have not touched upon. This paper is not meant to be a scholarly piece on the problems of personal laws and the uniform civil code. But more as a starting point for dialogue and debate on women's vision of a truly egalitarian and secular civil code.

PROCEDURE:

No one can have any grievance about the fact that all the existing laws should be simplified. The Family Courts Act has failed to do this. By placing emphasis on the preservation of the institution of marriage, precious time is lost in attempting to patch up an already broken marriage. The only way in which cases can be hastened is by adopting certain drastic changes in the procedural law. :

1. whether a case for breach of contract is filed by the wife or the husband it is invariably the woman who is in immediate need of relief.
2. No prior notice of marriage is required to be given.

3. A case for breach of marriage contract can be filed at either the place where the contract was entered into or where the parties to the contract were residing together or at the place where either of the parties is residing.
4. A case for divorce can be filed at any time.
5. The petition should briefly state the facts. It is not necessary that any allegations be made. If maintenance is asked for details of the income and assets of the person from whom maintenance is claimed should be specified. If the wife is not aware of the husband's assets, the court should, within 7 days of the filing of the case, direct the husband to declare his assets. If he fails to do so the court should take all necessary steps to make the information available and forthwith pass necessary orders.
6. The husband should deposit the amount within 7 days of the order. If he fails to do so, upon an application being made by the wife the court should immediately pass contempt and/or attachment orders. No separate evidence ought to be led in this regard.
7. In a divorce case the court should first pass orders on the economic obligations, custody and guardianship of children and only then a divorce order.
8. The emphasis on marriage counselors should be done away with. If a woman wishes to have a representative of a woman's organisation to represent her she should be allowed to do so.