

The constitutions of the world



**ASSIGN
BUSTER**

In *Constitutional Identity*, G. J. Jacobsohn classifies the constitutions of the world into two categories.

The first category is of transformative constitutions and the second category is of preservative constitutions. While a transformative or 'militant' constitution seeks to change the prevailing social structure, a preservative or 'acquiescent' constitution seeks to maintain the status quo. Using Jacobsohn's classification, the Constitution of India would clearly be placed under the transformative category.

This is due to the fact that the intention of the Parliament while drafting the Constitution was to bring about 'social revolution' in the country. This claim is further substantiated by the deliberate omission of any allusion to the law on family. It was intended that matters related to family would be the domain of state to facilitate reform in the law.

Thus, most changes in laws governing family, flow from the state in the form of amendments and statutes, which are enacted to transform the society into one with more progressive values. An eminent example is the Hindu Marriage Act, 1955, which converted Hindu Marriage from 'sacrament' to a 'contract'. Nonetheless, reform needs to take place with regard to the prevailing values in society and make allowance for the demands of several cultures in a diverse country like India.

In pursuance of the same, Article 44 which was the demand to evolve a Uniform Civil Code, to govern the personal laws of every religion, was placed in the Constitution as a Directive Principle of State Policy. These Directive Principles are goals that the government should keep in mind while it

formulates policy. Article 44 reads: " The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India" However, courts too have played an important role in governing society through family.

Apart from upholding the law, they have also tackled grey areas, resolved conflicting situations through reconciliation of different statutes on the same subject and filled the lacunae. Illegalization of unlimited polygamy for Hindus, thus was, an important example of the positive influence of courts.

This was taken further when conversion for the purpose of committing bigamy was also illegalized in *Sarla Mudgal v. Union of India* (hereinafter, 'Sarla Mudgal') and later upheld in *Lily Thomas v. Union of India* (hereinafter, 'Lily Thomas'). The Sarla Mudgal Case The petitioner in this case was married for some year with three children from the wedding when she found out that her husband had contracted a second marriage with another woman, after converting to Islam.

Her husband converted for the sole purpose of contracting a second marriage and ensuring that the provisions of Section 494 of the Indian Penal Code were not attracted. He argued, however, that Islam allowed for limited polygamy - four wives - thus, he could marry a second time even though his first wife remained a Hindu.

The court held that marriage under the personal laws of one religion (here Hinduism) could not be taken to court for dissolution under the law of another different religion (here Islam) even if one of the parties embraced another different religion.

This is because such a rule would violate the rights of the first spouse.

However, the second marriage would be void because this very reason – that the first marriage subsisted, even after conversion of the spouse. Facts of the Lily Thomas Case
The Writ Petition was filed by Smt. Sushmita Ghosh who had married Shri G. C. Ghosh in 1984 in accordance with Hindu rites. G. C. Ghosh had converted to Islam in 1992 and informed his wife of the change in religion.

He stated that he wanted to marry Miss Vanita Gupta and so she should agree to a divorce by mutual consent. Change in religion is an accepted ground for divorce under section 13 of the Hindu Marriage Act, 1955. Smt. Sushmita Ghosh did not want a divorce and got in touch with her aunt and her father to intervene on her behalf.

She, her father and her relative tried to persuade her husband to not go for a divorce. However, his decision remained unchanged. He stated that his wife could either divorce by mutual consent, or she would have to put up with his second wife, Ms. Vanita Gupta. Smt. Sushmita Ghosh was thus left with no alternative but to approach the courts.

PETITIONER'S ARGUMENTS

Conversion Not Due To Faith
The first point raised by the petitioner, Smt. Sushmita Ghosh is that her husband, Shri G. C. Ghosh, had not converted to Islam a matter of faith, but had done so solely for the purpose of taking in a second wife. While unlimited polygamy was allowed for Hindus, prior to the enactment of the Hindu Marriage Act, it was abolished post 1955.

However, limited polygamy is still allowed for the male followers of Islam in India and they can have up to four wives. Thus, it had become commonplace for many male members of the Hindu faith to convert to Islam for the purpose of marrying a second woman, divorcing their first wife and then re-converting back to Hinduism.

The re-conversion was to ensure that property interests were not harmed. The petitioner proved this by referring to, firstly, a birth certificate of a son born to G. C. Ghosh from his second wife, wherein, his name appears as " G. C. Ghosh" and his religion is stated to be " Hindu". Moreover, the mother's (his second wife) name appears as " Vanita Ghosh" and she too is a " Hindu", according to the birth certificate.

Secondly, the electoral roll of the constituency indicates the same, as does the respondent's visa to Bangladesh. In fact, he signed the marriage certificate issued by Mufti Mohd. Tayyeb Qasmi, is signed by him as " G. C. Ghosh". Removal of Burden of ProofThe second contention raised was that since the judgment in Sarla Mudgal validated their case, conviction should take place without any need for proof.

However, it was held that the conviction could not be made certain based on only a statement of admission made outside the court. This was because the provisions of the Indian Penal Code demanded that proof of not only the first marriage, but also the second marriage. This is still a legal obligation and admission of the marriage by the person being accused of bigamy, is not enough to constitute the requirement. The matrimonial ceremonies needed to be shown.

RESPONDENT'S ARGUMENTS

Difference with regard to Sarla Mudgal - Article 20(1) It was contended that the law propounded in Sarla Mudgal, would not be applicable to the present case as that case was not related to people whose marriages were solemnized before the judgment pronouncing them void was passed. Even though these marriages would be violative of the law, there could be no retrospective application.

The court however, rejected this argument. It said that no new law had been introduced, but the old, existing provisions of the governing statute had been interpreted. It is a rule of law that the interpretation of a provision goes back to the date of that provision and is not, in its nature, prospective.

Thus, the second marriage would be declared void and article 21 of the Constitution which states that " no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence", would not be affected.

Violation of Article 21 and 25 The other contention raised by the counsel was that the Sarla Mudgal judgement would be violative of Articles 21 and 25 of the Indian Constitution. In the case of Article 21 which states that " no person will be deprived of life or liberty except according to the procedure established by law", the court said that this contention was misconceived.

Thus, it would be premature to say that the judgement will result in deprivation of the life or liberty of either of the parties because the Sarla

Mudgal judgement neither created a new law, nor changed the procedure for the prosecution. Another contention raised by the respondent was that the judgement would violate Article 25 of the Constitution, which guaranteed the right to freedom of conscience and the right to profess and propagate a religion.

However, such an argument does not hold when the Hindu Marriage Act, 1955, explicitly abolished polygamy in the Hindu religion and further, section 17 of the Act made void any marriages if any party had a living spouse, even after the marriage had been solemnised. Freedom guaranteed by the Constitution was to be exercised by individuals, until they encroached upon another's freedom.

Moreover, if the act fitted under section 17 of the Hindu Marriage Act, its penalty was prescribed in section 494 and section 495 of the Indian Penal Code, 1860. The court commented on the contention raised in Sarla Mudgal that "making a Hindu Convert liable for prosecution would be against Islam". The court found this argument to be 'ignorant' of the nature of the religion of Islam.

COURT'S DECISION

Applying Natural Justice Further, the court posed that conversion for the purpose of bigamy could not be squared with the principles of natural justice and equity. Natural justice constitutes in procedures or principles that are thought to be wrong, inherently. Here, the court agreed with the view of Justice M. C. Chagla in *Robasa Khanum v. Khodadad Irani*.

The judges were of the opinion that if a man converted to Islam, to take in a second wife, during the subsistence of his first marriage, the effect on both wives would be undesirable. Since the law does not recognize the second marriage as valid, the status of the second wife would be that of a concubine and children born out of that marriage would be considered illegitimate.

Though the first marriage will still persist legally, there would be practical problems with it. **Necessity of the Uniform Civil Code** The need for a Uniform Civil Code was not the primary question addressed by the judges in Lily Thomas, but it was referenced by both the judges in their separate judgments. Various cases discussing the notion of a uniform personal law were also mentioned. After a perusal of some judgments, it was commented by Justice Sahai in a separate judgment, that the Uniform Civil Code was highly desirable.

However, the 'social climate' of the society needed to be taken into account. Thus, a comprehensive Uniform Civil Code that takes into account all stakeholders and caters to everyone's interests could only be brought into existence if leaders took their responsibility of bringing about reform by changing the minds of people in their communities.

Thus, the matter was assigned to the 18th Law Commission which would examine the feasibility of the Uniform Civil Code, in consonance with the Minorities Commission. The court clarified its stance on Article 44 of the Constitution, affirming that the courts had no jurisdiction whatsoever in giving direction for the implementation of a common Civil Code for personal laws.

The Directive Principles of State Policy are not to be enforced by the courts because they do not create rights in favour of any person or persons. They are simply guidelines by the Constitution to the State, which is why they were included in the non-justifiable section by the Sapru Report of 1945.

Arguments of the person