JYOTI SINGH, KAJORI BHATNAGAR

Uniform Civil Code, Legal Pluralism and Inheritance Rights of Tribal Indian Women

Abstract

The 42nd Amendment to the Indian Constitution heralded India as a "Sovereign, Socialist, Secular Democratic Republic". It initiated a constitutional narrative that has sparked ongoing debates and scrutiny regarding the true essence of India's secularism. With the National Democratic Alliance (NDA) led by Bhartiya Janta Party(BJP) forming government with after the 2024 general elections, the discussion on potential implementation of the Uniform Civil Code at the forefront of political discourse. In this commentary, the authors discuss legal pluralism in India and the impact of the introduction of a uniform civil code on on customary laws of tribes, placing special emphasis on the inheritance rights of tribal women. The paper also discusses the approach of the higher courts in securing property rights for tribal women in the absence of such a code.

KEYWORDS: Uniform Civil Code, Secularism, Article 44, Gender Equality, Women's Rights

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1 Introduction

The 42nd Amendment to the Indian Constitution[1] heralded India as a „Sovereign, Socialist, Secular Democratic Republic"[2]. This initiated a constitutional narrative that has sparked ongoing debates and scrutiny regarding the true essence of India's secularism. With the National Democratic Alliance (NDA) led by Bhartiya Janta Party(BJP) forming government with after the 2024 general elections, the discussion on potential implementation of the Uniform Civil Code at the forefront of political discourse. This agenda, long pursued by the current government, aims to promote gender equality and foster national integration. Embedded within the constitutional framework, Article 44, found under the Directive Principles of State Policy, unequivocally declares, „The State shall endeavour to secure the citizen a Uniform Civil Code throughout the territory of India"[3]. This provision implies that the state must actively work towards instituting a uniform civil law governing crucial aspects such as marriage, divorce, adoption, guardianship, inheritance, etc., irrespective of an individual's religious affiliation. Despite the foundational role of the directive principles in the governance of the country, it is essential to note that these principles are not legally enforceable before a court of law[4]. Currently, numerous areas of civil law are regulated by personal laws, encompassing Hindu, Muslim, Christian, and Parsi Law. Notably, communities like Sikhs, Jainas, Buddhists, Dalits, Scheduled Castes, and tribes are categorised as Hindus under the Hindu Personal Laws[5]. The adoption of the Uniform Civil Code is intrinsically linked to the rejection of these personal laws.

The Uniform Civil Code (UCC) is designed with the overarching objective of establishing a standardized legal framework applicable to all citizens irrespective of their religious affiliations. The adoption of a meticulously crafted and all-encompassing UCC holds the potential to rectify the

1 The Constitution (Forty-second Amendment) Act, 1976.

2 Ahmar Afaq, Sukhvinder Singh Dari, „Understanding Uniform Civil Code: Its Need and Challenges" *Russian Law Journal*, No. 1S (2023), https://doi.org/10.52783/rlj.v11i1S.358.

3 The Constitution of India, 1950.

4 Article 37, The Constitution of India, 1950: The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

5 See Section 2, The Hindu Marriage Act, 1955.

prevailing gender disparities perpetuated by religion-specific personal laws. Fundamental to this prospect is the safeguarding of women's rights across various domains including inheritance, matrimonial decisions, dissolution of marriages, adoption, and related spheres, thereby breaking away from entrenched patriarchal norms and fostering gender parity. Moreover, the implementation of standardized adoption laws under the UCC is poised to ensure equal entitlements for all children irrespective of gender or religious categorization. In addition, the UCC can create gender-neutral paradigms for guardianship and custody issues that prioritize the best interests of the child. It also has the potential to reform intestacy laws to ensure equitable distribution of assets, thereby mitigating discriminatory practices that disadvantage certain demographic groups[6].

However, the imposition of a uniform legal approach may inadvertently dilute the distinctive cultural identities of religious communities and potentially undermine cherished traditions and practices therein. Notably, concerns are articulated regarding the internal diversity prevalent within religious communities, exemplified by the coexistence of over 200 different tribal communities in the Northeast region each adhering to their own customary laws. The constitutional recognition and safeguarding of local customs in certain states underscore the imperative to uphold cultural practices while simultaneously advancing gender equality initiatives. The UCC encounters substantive challenges pertaining to facets such as mandatory marriage registration, legal age of marriage, and tax and financial legislations. Discrepancies in personal laws on issues such as child marriages and age of consent engender complexities in effectuating a uniform legal framework. Furthermore, the existing tax and financial systems do not adequately recognize and provide for families belonging to religious denominations other than Hinduism, raising pertinent concerns about equitable treatment and parity. In the absence of a testamentary disposition, succession laws govern the distribution of a deceased individual's assets among legal heirs. Under Hindu succession law, assets of a deceased man are primarily bequeathed to his class I heirs – comprising the widow, children, and mother – equally[7]. In the absence of these, class

6 Ashish Sinha, „Uniform Civil Code: The Impact it Will have on India's Religions, Sects and Communities" *The Sunday Guardian*, 25th June 2023, https://sundayguardianlive.com/news/uniform-civil-code-the-impact-it-will-have-on-indias-religions-sects-and-communities.

7 Mayank Mohanka, „The Implications of Uniform Civil Code for Taxation and Inheritance" *Mint*, 11th July 2023. https://www.livemint.com/money/

II heirs, including the father, grandchildren, siblings, and other relatives, may claim the property. Conversely, if the deceased is a Hindu woman, her assets are transferred to her husband and children in equal proportion, or in their absence, to her husband's heirs, followed by her parents. According to Muslim law, heirs recognized by Shari'ah inherit the estate as tenants in common in predetermined shares. Christian mothers are excluded from inheritance under the Indian Succession Act of 1925, with the father inheriting all property. Sikhs, Jains, and Buddhists follow the inheritance laws outlined in the Hindu Succession Act, 1956.

From a taxation standpoint, the Income Tax Act, 1961 exempts ancestral property acquired through inheritance from capital gains or income tax. Furthermore, upon an individual's demise, the tax liability is assumed by legal heirs. Similarly, under the Central Goods & Service Tax (CGST) Act, 2017 in the event of a sole proprietor's death, the business can either be transferred to legal heirs or a new owner, involving the transfer of assets and liabilities, and the transition of input tax credit. Personal laws intersect with taxation matters, necessitating clarity on the rightful legal heir's identity for tax purposes and the discharge of the deceased's tax liabilities. The proposed implementation of the Uniform Civil Code (UCC) would revise established inheritance laws governed by personal laws, thereby requiring amendments to the Income Tax Act, 1961, and the CGST Act, 2017. Additionally, the impact of the UCC on the distinct legal status of Hindu Undivided Families (HUFs) raises concerns. Currently, HUFs enjoy separate legal personality, entitling them to tax benefits akin to individuals. The enactment of the UCC could challenge this status quo, affecting numerous HUFs and necessitating amendments to tax legislation. Thus, the UCC's ramifications extend to tax policies, demanding meticulous consideration from policymakers to address potential implications effectively.

The Supreme Court has wielded considerable influence in the discourse surrounding the Uniform Civil Code, providing discerning insights into the subject matter. Emphasizing the imperative of a judiciously balanced approach, the court has underscored the necessity of reconciling the pursuit of egalitarianism with the preservation of cultural heterogeneity. Acknowledging the pivotal significance of reforming reforming family laws for different communities without merging all family laws, the court has advocated for measures geared towards fostering gender equity and

personal-finance/governments-proposed-uniform-civil-code-in-india-implications-for-taxation-and-inheritance-laws-116890975176 64.html.

safeguarding women's entitlements, all while upholding the tenets of cultural pluralism.

2 Background

The absence of a uniform civil code has been scrutinised since before the independence. During the Constitutional Assembly Debates, several scholars recommended the exclusion of personal laws within the uniform civil code provision[8]. This was mainly to protect those civil laws which were inseparable from religious customs and practices. Having guaranteed freedom to propagate and practice religion, establishing such a civil code would have been an anomaly. However, not all civil laws are associated with essential religious practices such as the law of contract, transfer of property, evidence law, etc. Many including Ambedkar also objected to the amendments excluding personal laws. In 1951, Dr Ambedkar resigned from Nehru's Cabinet and stepped down from his position as the country's first Law Minister after the Hindu Code Bill faced opposition from orthodox parliamentarians and the public and could not be passed in 1951. This was a historic moment in the Indian women's rights movement[9]. Ambedkar believed that the passage of the bill was essential as a means of unifying Hindu society and making one law applicable to all Hindus irrespective of caste or class. He believed it could be a tool to introduce absolute equality between men and women by placing both sons and daughters on an „equal and balanced ground"[10]. Later, the bill was divided and passed by the Nehru Government as The Hindu Marriage Act, 1955, the Hindu Adoption and Maintenance Act, 1956, The Hindu Minority and Guardianship Act, 1956 and the Hindu Succession Act, 1956[11]. The issue of the Uniform Civil

8 Samaraditya Pal, Deepan Kumar Sarkar, *India's Constitution: Origins and Evolution: Constituent Assembly Debates, Lok Sabha Debates on Constitutional Amendments and Supreme Court Judgments* (Gurgaon, Haryana, India: LexisNexis, 2017).

9 B.R. Ambedkar, Sharmila Rege, *Against the Madness of Manu: B.R. Ambedkar's Writings on Brahmanical Patriarchy* (New Delhi: Navayana Publishing Pvt. Ltd, 2013).

10 B.R. Ambedkar, Vasant Moon, *Dr. Babasaheb Ambedkar: Writings and Speeches* (New Delhi: Dr. Ambedkar Foundation, 2014).

11 Komal Rajak, „Trajectories of Women's Property Rights in India: A Reading of the Hindu Code Bill" *Contemporary Voice of Dalit*, No. 1 (2020): 82-88. https://doi.org/10.1177/2455328X19898420.

Code was again widely discussed in 1986 in the matter of Mohd Ahmed Khan v. Shah Bano Begum[12] before the Supreme Court of India. In this case, the appellant was an advocate with an annual income of Rs. 60,000 and the respondent was his wife of many decades and the mother of his five children. After being driven out of her matrimonial home in 1975, after 43 years of marriage, the respondent had filed a petition before the Judicial Magistrate Class I, seeking maintenance of Rs.500 per month under Section 125[13] of the Criminal Procedure Code. In 1978, the appellant divorced the respondent through an irrevocable talaq and refused to pay any further maintenance on the ground that she had ceased to be his wife and he had already paid „dower or Mahr" as per Muslim law during the period of „Iddat". The Judicial Magistrate directed the appellant to pay Rs.25 per month as maintenance. The High Court of Madhya Pradesh increased the amount to Rs. 179.20 per month in response to a revision application. Hence, the appellant filed a special leave to appeal before the Supreme Court of India. Dismissing the appeal and upholding the judgment of the High Court of Madhya Pradesh, the SC observed,

> It is also a matter of regret that Article 44 of our Constitution has remained a dead letter [...] There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.

The application of Section 125 to Muslim personal law led to massive public outrage from the Muslim community, especially due to political mobilisation by several Muslim organisations such as the Muslim League,

12 1985 AIR 945, 1985 SCR (3) 844.

13 Section 125 of the Criminal Procedure Code mandates any person having sufficient means to maintain his wife who is unable to maintain herself unless she is living in adultery or refuses to live with him without any sufficient cause or they are living separately by mutual consent. Section 125 is a secular provision and can be applied to any person irrespective of the existence of personal laws on the matter.

All India Muslim Personal Law Board and Jamaat-e-Islami. To quickly appease the community, the Rajiv Gandhi government passed the Muslim Women (Protection of Rights on Divorce) Bill, 1985 which reserved the gains of the Shah Bano Judgment. A minority section of Muslims vehemently supported the judgment; however, their voices were suppressed. Securing the support of the Muslim vote bank in the forthcoming elections took precedence over ensuring the rights of Muslim women.

3 New movement for uniform civil code vis-à-vis legal pluralism in India

The emergence of the UCC is a major part of the agenda for the 2024 elections. This raises several questions and contradictions relating to the state of multireligious secular India and its dynamics with the women's rights movement. Legal pluralism is the acceptance of the coexistence of multiple legal realities within a normative universe. Narratives of right or wrong are often shaped by commonalities, practices, usages, obligations and commitments of communities which form a part of the normative universe as formal laws and legal institutions. Once we begin to understand these narratives and the meaning they give to law, law becomes not merely a system of rules we ought to observe and abide by but a world for us to live in[14]. Despite the immense growth of legal pluralism, especially since the 1970s, the term itself has been met with much confusion. For the most part, legal pluralism is used to refer to the recognition given to customary laws and the institutions associated with them within the realm of state law[15]. In other words, it also refers to the „independent coexistence" of customary laws and their institutions alongside state law[16]. Legal pluralism became

14 Line Engbo Gissel, „Nomos and Narrative in International Criminal Justice" *Journal of International Criminal Justice*, No. 1 (2022): 117-138, https://doi.org/10.1093/jicj/mqac004.

15 Michael Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975).

16 Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York Evanston San Francisco: Harper & Row, 1971).

a central theme in socio-legal studies[17] and penetrated other social science disciplines steadily but in a limited manner in the late 1980s[18]. However, the idea of legal pluralism was never uniform and was used for different purposes with different motivations. The core challenge in reaching a uniform definition of legal pluralism is the inability to resolve the question of „what is law?"[19]. Legal scholars have often defined law as a normative regulation to maintain the social order. Since all societies or groups (large or small) have normative regulations that govern how they sustain their social order, they all have laws, irrespective of whether law and legal institutions established by the state exist or not. Bronislaw argues that a savage follows a custom automatically and submits to its authority through what he calls „mental inertia" working with fear of punishment from God or other supernatural powers or public opinion[20]. Another crucial factor in obedience to laws is group sentiment or what is often referred to as „primitive communism"[21]. However, a different approach has been adopted by some others such as Hoebel, Hart and Weber, where they refer to law as enforcement of norms in an institutional manner. In this regard, one example is the primary and secondary rules established by Hart. Primary rules refer to laws that are duty-imposing in nature and secondary rules include power-conferring rules such as the rule of recognition, the rule of adjudication and the rule of change[22]. This approach is often closely associated with the system of rules through which the state now enforces the law. However, both the approaches have their inherent flaws such as the first approach is plagued by a lack of stability of sanctions. The second approach does not take into account that many societies have had no institutionalised form of law enforcement for centuries. It also fails to define which institutional enforcement agencies would be deemed to be „public" and therefore, law. Hence, there is lack of agreement on what is law. In this regard, Griffiths

17 Sally Engle Merry, „Legal Pluralism" *Law & Society Review*, No. 5 (1988): 869, https://doi.org/10.2307/3053638.

18 Boaventura De Sousa Santos, „Law: A Map of Misreading. Toward a Postmodern Conception of Law" *Journal of Law and Society*, No. 3 (1987): 279, https://doi.org/10.2307/1410186.

19 Brian Z. Tamahana, „Understanding Legal Pluralism: Past to Present, Local to Global" *Sydney Law Review*, 29 (2007).

20 Bronislaw Malinowski, *Crime and Custom in Savage Society* (NJ: Rowman & Allanheld, 1985).

21 W.H. R. Rivers, *Social Organisation* (Stephen, Austin & Sons Ltd., 1924).

22 H.L. A. Hart et al., *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, Incorporated, 2012).

in seminal work on legal pluralism[23] reiterates Moore's idea that there are several legal orders in society and multiple „semi-autonomous social fields" which create and enforce these rules[24]. However, Galenter points out that Merry's theory is flawed as it fails to distinguish between social life regulations and law, implying that every regulation governing social life of individuals is not necessarily law[25]. However, scholars such as Griffith and Woodman have concluded that social regulations are also legal in nature to a certain extent and can be found in everyday encounters of human life[26]. Despite these theoretical complexities, legal pluralism continues to grow and evolve. In India, while there are statutory laws governing most areas of human behaviour, there is no single set of laws governing family life. Different aspects of social life such as age of marriage, divorce, adoption, guardianship, maintenance and alimony, succession and inheritance are all governed by personal laws. These personal laws have their roots in religion and customary practices. Thus, they vary according to, among other things, the religion, tribe, place of residence, community, sect, marital status and type of marriage of the parties involved[27]. Personal laws and its diversity are rooted in the religion and practices of different communities. These customs grew threw practice and imitation and are considered representative of the values of the community. Due to continued practice by society over long periods of time, usage becomes custom. These customs are passed on from generation to generation and are accompanied by enforcement methods and sanctions[28]. The leaders of these tribal communities often

23 John Griffiths, „What Is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law*, 24 (1986).

24 Sally Falk Moore, „Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" *Law & Society Review*, No. 4 (1973): 719, https://doi.org/10.2307/3052967.

25 Marc Galanter, „Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" *The Journal of Legal Pluralism and Unofficial Law*, No. 19 (1981): 1-47, https://doi.org/10.1080/07329113.1981.10756257.

26 Griffiths, „What Is Legal Pluralism?"; Gordon R. Woodman, „Ideological Combat and Social Observation: Recent Debate about Legal Pluralism" *The Journal of Legal Pluralism and Unofficial Law*, No. 42 (1998): 21-59, https://doi.org/10.1080/07329113.1998.10756513.

27 Gitanjali Ghosh, „Gender Preference in Customary Inheritance Laws of the Khasi Tribe in India: Myth or Fact?" *SSRN Electronic Journal*, (2021), https://doi.org/10.2139/ssrn.3793397.

28 *Tribal Ethnography Customary Law and Change*, ed. K.S. Singh (New Delhi: Concept Publishing Company 1993).

use customs as means of social control[29]. These customs are practised even without formal recognition as they help the communities balance their interests and that of the nature and environment[30]. Several changes were introduced through legislation to the tribal customary laws when colonialism became a reality in India. The application of provincial laws was restricted to the tribes in different parts of the country, including Northeast India unless the Governor was of the opinion that such application was necessary for the maintenance of peace[31] and good governance[32]. Later the Sixth Schedule to the Indian Constitution was introduced to recognize the tribal community ownership and protect the livelihood of several tribes. In the North-Eastern region of the country, there are numerous tribes such as the Khasis, Garos, Jaintis, Mizos, Kukis, Nagas and Bodos whose customary laws regulate inheritance. The Indian Constitution under Part XXI, Temporary, Transitional and Special provisions provide protection to the tribal customary laws of some states such as the state of Nagaland under Article 371 A and the state of Mizoram under Article 371G[33]. There is no such protection to customary laws of Meghalaya. Even where such protection is accorded to states, the State Legislative Assemblies or the Governors or the President of India (as the case may be) have been empowered to apply the Act of the Parliament or the State Legislature through a resolution or by notification (as the case may be). Under the Sixth Schedule which provides for the „Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram", under Clause 12A, Acts of the Parliament and that of the Legislature of the State of Meghalaya can applied to the State of Meghalaya, even though the District Councils have the primary law-making power in the State. Further, in pursuance to the

29 Lucy Zehol, „The Tangkhul Women Today", [in:] *Women in Naga Society*, ed. Lucy Zehol (New Dehli: Regency Publications,1998), 20-29.

30 *The Customary Laws and Practices of the Angami Nagas of Nagaland*. ed. M.C. Goswami (Guwahati: Law Research Institute, Eastern Region, Gauhati High Court 1985).

31 Samantha v. State of Andhra Pradesh (19970 8 SCC 191.

32 J.B. Ganguli, „The Sixth Schedule of the Constitution of India and the North-East India", [in:] *Antiquity to Modernity in Tribal India: Vol. II: Tribal Self-Management in North East India*, ed. Bhupinder Singh (New Delhi: Inter-India Publishers, 1998), 64-90.

33 Jyoti Singh, Kajori Bhatnagar, „Evaluating the Categorical Exclusion of Khasi Women from Inheritance and Property Rights: A Case of East Khasi Hills" *International Journal on Minority and Group Rights*, 30 January, (2024): 1-22, https://doi.org/10.1163/15718115-bja10143.

Article 13 of the Indian Constitution, all laws in force in the territory of India immediately before the commencement of the constitution, including customs and usages, which are inconsistent with the provisions of the Part III of the constitution are to be void to the extent of such inconsistency[34]. With respect to customs existing in India, including customs of tribal communities, which continue after the commencement of the Constitution, if challenged, they shall yield to fundamental rights and, in some cases, to statutory law.

4 Impact of the Uniform Civil Code on property rights of tribal women with special reference to Khasi Tribe of Meghalaya and the Approach of Higher Indian Judiciary

One of the most contentious issues has been that of inheritance rights of women in India, especially that of tribal women. Provided that the Indian Succession Act, 1925 and the Hindu Succession Act, 1956 do not directly apply to the tribal communities. The Indian Succession Act, 1925 regulates inheritance among Christians and does not explicitly exclude the tribes but provides the power to exclude tribal communities under Section 3 of the Act. The Hindu Succession Act, 1956 categorically prevents the application and extension of the law to the members of the scheduled tribes unless the contrary is notified by the Central Government. The HSA, 1956 only applies to completely or sufficiently Hinduised tribal communities, forcing the adoption of Hindu traditions and customs on the tribes. The implication of the same has been to exclude other non-hinduised tribal women from the right of survivorship, denying them any share in the father's property, unlike their Hindu and Christian counterparts. Such discrimination denies a tribal woman the right to socio-economic development and the right to live with dignity. Given the transformative nature of the Indian Constitution, the Supreme Court of India in Kamla Neti v. Special

34 C. Masilamani.

Land Acquisition Officer (2022)[35] observed that the State must review the exceptions and exclusions and act as levellers in the society.

However, the tribal women in India are divided between the traditionalist and positivist views. Traditionalists and positivists differ in their approach to understanding the role of customary laws in defining the rights and liabilities of women in modern societies. Traditionalists idealise the customary law's oral and indigenous beginnings and transmission, as well as its conservative role and identity implications derived from its consuetudinary sources. Additionally, they argue that tribal women can legitimize their existence by preserving the traditions of their forefathers. Further, institutions established by customary laws are accessible easily geographically and economically[36].On the other hand, positivists argue that customary laws in existence create a division between men and discriminate against women on several grounds. In many tribal societies, women have no access to any property and perpetuate inequality in order to maintain social order. Positivists also argue that customary law is not law at all[37]. Tiput Nongbri in her work on discussing Khasi Matrilineal societies takes note of two prominent theories[38]. The „disintegration model" posits that matrilineal inheritance systems are fundamentally unstable and cannot persist in economies based on market principles. Conversely, the „resilience model" emphasizes the fortitude of matrilineal societies and advocates for the empowerment of women within such societies. Nongbri expresses apprehension regarding the lack of mutual exclusivity of these theories. Despite the benefits afforded by matrilineal structures, susceptibility to disruption within a male-dominated capitalist society cannot be discounted. Nongbri cites the illustration of two terminologies prevalent in the Khasi communities. The term „u rangbah" signifies the bearer or carrier, commonly used to refer to adult males. In contrast, „ka kynthei ka-khynnah" translates as „the woman, the child" implying that women

35 Civil Appeal no. 6901 of 2022 before the Supreme Court of India. https://main.sci.gov.in/supremecourt/2017/520/520_2017_5_1501_40564_Judgement_09-Dec-2022.pdf.

36 Ranga Ranjan Das, „Gender, Customary Laws and Codification- The North-Eastern Perspectives", [in:] *Gender Implications of Tribal Customary Law: The Case of North-East India* (North Eastern Social Research Centre; Rawat Publications, 2017).

37 Hart et al., *The Concept of Law*.

38 Tiplut Nongbri, „Khasi Women and Matriliny: Transformations in Gender Relations" *Gender, Technology and Development*, No. 3 (2000): 359-395, https://doi.org/10.1080/09718524.2000.11909976.

are akin to children. In Khasi societies, it is a widespread belief that men possess twelve units of strength while women have only one. Such ideologies are rooted in the notion that men are natural protectors and guardians of women who are incapable of maintaining themselves, thus establishing a firm ideological base of male dominance and supremacy.

Further, all customary laws survive on the hegemony of patriarchal norms. Re-Ryiad and the Re-kynti lands were acquired by men despite the prevalence of matrilineage in the state of Meghalaya. The land laws of Meghalaya were first codified in 1925 by the Khasi Darbar. It defined ri kynti (private land), ri shnong (village land), reid (land belonging to a member of the vicinity), Re seng (undivided and undistributed lands from predecessors), Ri lyndoh (land owned by the siem (priest or his family), Re lapduh (Unclaimed land which can be kept or disposed of by the siem). All these lands came to be ruled by men[39]. Even the clan lands are managed by the maternal uncle of the youngest daughter called the Kni. No land can be alienated by the ka-khaduh without the consent of the men-manned durbar. This flawed matrilineal system would have never survived had it been against the nobility which also consisted of male members[40]. Despite the non-existence of structures which coerce women into being socially controlled such as chastity, purity, pollution, and restrictions on divorce or re-marriage, male control over women was real amongst the north-eastern tribes and hence, gender inequality persisted[41]. The position of authority in a Khasi household is shared between the husband of the youngest daughter and her eldest maternal uncle. The Ka Khadduh is bound by the responsibility to mainatin exemplary moral conduct and to preserve Khasi customs and traditions. Any deviation from these norms or inappropriate behaviour may result in disinheritance. Within Khasi matrilineal society, gender asymmetry is apparent in various spheres of life. Although the Ka Khadduh inherits ancestral property, she seldom has the liberty to act of her volition. She is relegated to the role of a custodian, while the absolute control and management of the property remain in the hands of her male kin from the mother's side. This gender dynamic renders her bereft of an autonomous identity. As Mukhim observes in her work on the Khasi community:

39 Bani Prassana Misra, „Agrarian Relations in a Khasi State" *Economic and Political Weekly*, No. 20 (1979): 888-892.

40 Ibidem.

41 Aparna Mahanta, „Understanding Politics of Identity and Ethnicity in North East India: A Gender Perspective", [in:] *In Souvenir: North East India History Association* (Dibrugarh: 29th Annual Session, 2008).

> It is not just about property and who inherits it. It is about who does what and who has access and control over what resources. A woman has no right to decide how to use that property unless she gets a green signal from her husband and children [...] If a Khasi woman is still following a clear-cut routine based on the gender division of work and is unable to break free of that social liability, how can their society be called gender equitable? [...] Decision-making by women is restricted to what is perceived as less important matters. Gender awareness is a very new concept and it has not been caught up among the urban population. In fact, women themselves negate their strengths when they say, „Let men take care of activities outside the home, let them attend the durbar. Why should women interfere". This sort of remark from educated, well-placed women like college teachers and professors reveals that Khasi women are understanding gender equality[42].

Women were only granted concessionary rights relating to gift, inheritance, etc. In some tribes such as the Karbi and Riang, women were entitled to inherit their deceased husband's property, but they lost the same upon re-marriage or becoming unchaste. In other tribes such as the Ao Nagas, the grant of property to the daughter was conditional on the payment of a fee to her father to acquire the right to property or its reversal to the male heirs of her father upon her death[43]. The legislaton introduced by the British did not affect the concessionary rights of the tribal women nor did it uphold individual property rights for women. Instead, it introduced communal lands and coparcenary rights in favour of men. Writers of the time also legitimized the men's right over land such as Raja of Manipur was defined as the „absolute proprietor of the soil" and so did Das about the Kachari rulers[44]. Customary laws, therefore, began to make the men comfortable and tribal women were sequestered. The emergence of a paradigm shift was triggered by the efforts of tribal women to challenge the gender subordination prevalent in phallocentric customary laws. In order to achieve this, women turned to the Anglo-centric vertical law for assistance. However, it was observed such a positive law, despite its attempt to challenge the notion of men as the norm and women as deviations from

42 Patricia Mukhim, „Crisis of Authority in the Khasi Matrilineal Society", [in:] *The Dynamics of Family System in a Matriliny of Meghalaya* (Tribal Research Institute, 1999).

43 Temsula Ao, „Land, Ethics and Economic Management among Ao Nagas" *Institute of Northeast India Studies*, 1 (2010).

44 J.N. Das, *A Study of Land System in Manipur* (Law Research Institute of Guwahati High Court, 1989).

the norm, still upheld patriarchy. Consequently, it became imperative to shift the focus of inquiry from the definition of custom to examining the impact of customs[45]. This shift was pivotal because tribal men were able to gain political and economic authority through customary law, while women in their communities were marginalized and excluded[46].

In the case of Langa Manjhi & Ors v. Jaba Majhian & Ors[47], the High Court of Patna discusses whether the aboriginal community of Santhals fall within the purview of Hinduism and hence should be governed by Hindu Law to allow the only daughter of the deceased to inherit his property instead of the agnates who were the appellants in the instant case. The court observed that the word „Hindu" is used in a theological sense and in determining whether a tribe falls under the sway of Hindu law, one must determine if the tribe has absorbed Hinduism and has become sufficiently Hindu. Under such circumstances, it is necessary to enquire if they have abandoned their tribal custom relating to inheritance and if they have been Hinduised, which school of Hindu Law they adhere to[48]. In most cases, even where tribes are completely or sufficiently Hinduised, they do abide by their customary laws of inheritance. The Court held that aboriginal non-Hindu can therefore become 'sufficiently Hinduised' and would be subjected to Hindu law in matters of succession and inheritance unless the existence of a custom contrary to such law is proven[49]. The burden of proving the existence of custom is on the party who claims that such custom exists. The appellants in this case had failed to do so. The court held that the Santhals were in fact governed by Hindu law in matters of Inheritance and Succession and not the Santhals tribal law. Hence, the appeal was dismissed. In the landmark case of Madhu Kishwar & Ors v. State of Bihar[50], a writ petition was filed before the Supreme Court of India challenging the constitutional validity of Sections 7 and 8 of the Chota Nagpur Tenancy Act, 1908 which provided for succession through

45 F. Ahmmed, „Challenges of Aging and Coping Mechanisms among the Khasi and Garo Tribal Groups: An Ethnographic Observation" Journal of International Social Issues, No. 1 (n.d.): 23-38.

46 Valentina Pakyntein, „Gender Preference in Khasi Society: An Evaluation of Tradition, Change and Continuity" *Indian Anthropologist. Indian Anthropological Association*, 30 (2000): 27-35.

47 AIR 1971 Pat 185, https://indiankanoon.org/doc/782755/.

48 See Krittibash Mahton v. Budhan Mahtani, AIR 1925 Pat 733, https://indiankanoon.org/doc/1746832/

49 See Chunku Manjhi v. Bhabani Majhan, AIR 1946 Pat 2181.

50 1996 AIR 1864, 1996 SCC (5) 125, https://main.sci.gov.in/jonew/judis/15685.pdf.

the male line. Neither the Hindu Succession Act nor the Indian Succession Act or the Shariat Act were applicable in the instant case and the customs prevailed. However, the customs varied from region to region and people to people. Sections 7 and 8 recognised the historical method of identifying an agricultural family through the male head of the family. The court observed, „Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the ethers harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil". Therefore, when the male head dies, it is necessary to protect those dependent on him including the female heirs and their right to livelihood. If right to inherit is made to be exclusively through the male descendant, then the other females of the family such as the mother, widow, daughter, daughter-in-law, granddaughter would be rendered destitute. Hence, while the court did not strike down the law being in violation of Article 14 as the same would „bring about a chaos in the existing state of law", the court suspended the exclusive right of male succession until the female descendants chose other means of livelihood and thereby abandon or release existing right in agricultural property. The Court also directed the central government to examine the withdrawal of exemptions made for scheduled tribes under the Hindu Succession Act and Indian Succession Act. However, in the case of Matius Tirkey v. Jusuphin Lakra[51], the court accepted the custom through which widows and married daughters were barred from inheriting property. Only where a man dies without a male heir, the widow and daughter hold property as sum of maintenance. However, they only have a life interest and are limited owners of the property. This was reiterated in Sinta Munda & Others v. Junathan Munda[52].

In another case before the Jharkhand High Court, Prabha Minz v. Martha Ekka[53], the plaintiff a woman of the Oraon tribe challenged customary laws that denied her the right to inheritance. One key argument in the case was that a custom cannot be valid if it is „illegal, immoral, unreasonable or opposed to public policy"[54]. The plaintiff also argued that given that

51 AIR JHAR R 375, 2008 (1) AIR JHAR R 375, 2008 A I H C 1144, (2007) 4 JLJR 539, https://indiankanoon.org/doc/1638512/.

52 1968 (1) PLJR 215., https://app.supremetoday.ai/judgement/00800037660.

53 S.A. No. 127 of 2014, High Court of Jharkhand, https://www.livelaw.in/pdf_upload/display66-415845.pdf.

54 See Laxmibai v. Bhagwantbuva (2013) 4 SCC 97, https://indiankanoon.org/doc/115367233/.

the custom was of „remote antiquity" and that was not much evidence to its uniform and continuous usage, it could not be recognised. Several tribunals and High courts have passed order not accepting such customs[55]. It was also noted that where a custom is judicially recognised, it need not be proved again[56]. However, such custom must be proved properly and satisfactorily[57]. The High Court of Jharkhand held that the defendants had failed to prove the uniformity of application of custom through which property is transferred only in the male lineage. Hence, the court cancelled the orders of the subordinate and first appellate court to accept the appellate petition in favour of the appellant. In Khetro Bhumij @ Krishna Chandr vs Smt.Gurubari Bhumijani & Anr[58] the Jharkhand High Court again dealt with the question of whether a tribal female can inherit deceased husband's landed property. The court observed that even if the wife cannot inherit the property of the husband as per the customary law, she had every right to be maintained out of the income from her husband's property till her death. Again, in Nr. Soren & Ors. Ranjan Murmu[59], the Jharkhand HC dealt with the question of whether a widow from Santhal Community can adopt if her husband dies issueless and whether under such circumstances the property would be inherited by the surviving agnates. The Court cited the U.N. Report 1980, „women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundredth per cent of world's property" to emphasis on the discrimination and silence faced by women throughout the world. It observed that the Indian constitution through its multiple provisions prohibits such discrimination on the grounds of sex[60] to uphold the decision of the trial court and the appealed court stating given that all customs and ceremonies were performed, a Santhal widow can in fact adopt a child in the absence of her husband.

55 See Joseph Munda v. Most Fudi, AIR 2009 Jhar 115, https://indiankanoon.org/doc/1409829/.

56 Section 57 (1), Indian Evidence Act, 1872.

57 Effuah Amissah v. Effuah Krabah, AIR 1936 PC 147; T. Saraswathi Ammal v. Jagadambal, AIR 1953 SC 201, Siromani v. Hemkumar, AIR 1968 SC 1299.

58 C.R. No.031 of 2011, HC of Jharkhand, https://www.casemine.com/judgement/in/56093093e4b0149711203eab.

59 AIR 2009 JHARKHAND 23, 2009 (2) AKAR (NOC) 299 (JHA) (2009) 1 JCR 262 (JHA), (2009) 1 JCR 262 (JHA), https://indiankanoon.org/doc/890826/

60 See Article 13, 14, 15 and 16, The Constitution of India, 1950.

In the case of Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors[61], the Supreme Court examined the constitutionality of a law that prohibited women between the ages of 10-50 (menstruating age) from entering the Sabarimala Temple. This rule was based on an ancient custom that barred the entry of women into the temple of Lord Ayyappa, a celibate deity, as their presence could affront his celibacy. The respondents contended that the devotees of the lord constituted a religious sect and, therefore, should have the authority to govern their own affairs in accordance with Article 26 of the Indian Constitution. The Apex Court held that the devotees constituted no such religious denomination and there was not enough evidence on record to justify the exclusion of women as an essential practice. It was further held that that such exclusion based on notions of „purity and pollution" was a form of untouchability. In Surjotin And Ors vs Chamrin Bai[62], the Chattisgarh High Court held that since the plaintiffs failed to establish that women belonging to the Scheduled tribe, Halba, are excluded from inheriting the property of their fathers as per the custom, the court dismissed the second appeal stating there is hence no substantial question of law to be determined by the court. In Babulal S/O Bapurao Kodape v. Sau Reshmabai Narayanrao[63], the Bombay HC, in a dispute between brothers and sisters belonging to the Gond Community, held that the legal protection of customs within the Scheduled Tribes community is unequivocal. It is worth noting that customs can diverge significantly between various geographical regions, castes and tribes. Consequently, it becomes imperative to substantiate the customs prevalent through compelling pleadings and supporting evidence. In the instant case, the defendants failed to proffer any evidence that would substantiate the customs observed within their community. Given the dearth of evidence regarding tribal customs, the principles prescribed in Hindu Law shall govern the property inheritance. Thus, relying upon the principles enshrined within Hindu Law, the court held that the plaintiff's sisters possess a right to inherit property and are not excluded from inheritance as per the Gond Customary Law. Further, the plaintiffs are under no obligation to prove

61 2018 SCC OnLine SC 1690. Summarised at: https://www.scobserver.in/cases/indian-young-lawyers-association-v-state-of-kerala-sabarimala-temple-entry-background/ Full judgment accessible at: https://www.livelaw.in/pdf_upload/pdf_upload-366587.pdf.

62 Second Appeal No. 162 of 2008, High Court of Chhattisgarh, https://indiankanoon.org/doc/143003651/.

63 Accessible at: https://indiankanoon.org/doc/51827725/.

that they were not excluded from inheritance as per the Gond Customary Law as per section 101-103 of the Indian Evidence Act. The burden of proof is on the defendants to prove the same through clear and cogent evidence. The judgment in the present case has been reiterated by the High Court of Chattisgarh in Bhuneshwar vs. Munna[64] and is persuasive.

From the above discussion, it can be concluded that the approach of the Indian courts has also been to use the law as an instrument of social transformation and to ensure the right of tribal women to inheritance and succession. According to Article 13(1), the pre-constitutional laws including customary laws which are inconsistent with fundamental rights are void to the extent of such inconsistency. Nonetheless, there cannot be a general resistance against customs for offending fundamental rights, especially Article 14, Article 15 and Article 21 of the Indian Constitution. Each case brought before the courts has to be examined carefully in light of the evidence produced support such custom. However, under no circumstances, customary laws should be used to deny tribal women the right to development, right to life with dignity and right to livelihood.

Recently, on 14 June 2023, the Law Commission of India issued a public notice inviting comments from the public on the introduction of a Uniform Civil Code within 30 days from the date of the notice. No reference was made to the Law Commission of India's 2018 Consultation Paper on Family Law Reform[65], in which the Commission had stated:

> While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.

The Commission failed to acknowledge its earlier recommendation, which emphasised the priority of ensuring gender equality within

64 Second Appeal No.265 of 2007, Chattisgarh HC, https://indiankanoon.org/doc/137639614/.

65 Published by the Government of India, https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf.

communities over the introduction of a unified civil code. In addition, the Commission trivialised the need for a comprehensive discussion on the code, reducing it to a mere procedural requirement. This approach disregarded the expectations of many individuals who were eager for a substantive and meaningful discourse on the matter. The notice issued also lacked clarification on the application of the Uniform Civil Code (UCC). Sushil K Modi, Chairperson of the Parliamentary Committee on Law and Justice, countered the notion of uniformity by highlighting the exemption of the UCC for Christians and States covered by Article 371 of the Indian Constitution in his statement.

5 Conclusion

Although legal pluralism in India is an obvious phenomenon, protected and promoted by the Indian Constitution itself, the Uniform Civil Code is also a constitutional imperative. Given the immense polarisation on the issue, a consensus on this transformative paradigm is yet to be achieved. If a Uniform Civil Code is to be established, it must be established consistently in line with the other provisions and goals set by the Constitution of India[66]. Advocates of the Uniform Civil Code often characterize it as a plea for „legal equality for women" and intimately associate it with the women's rights movement. Without a comprehensive draft of the Uniform Civil Code specifying whether it will supersede personal laws, supplement them, or exist as an optional civil code, a definitive assessment of its potential to alleviate the challenges faced by tribal women is unattainable. This top-down approach to the code carries with it the responsibility of being a secular law that safeguards the interests of minority religious groups without producing adverse effects. Nevertheless, if the code remains optional, given the prevailing power imbalances and resource disparities against women, it is highly probable that the code will prove ineffective. Despite this, an optional Uniform Civil Code appears to be the most viable solution in harmony with the principles of legal pluralism. An optional uniform civil code not only aligns with the constitutional mandate but also instigates

66 M.P. Singh, "On Uniform Civil Code, Legal Pluralism And The Constitution Of India" *Journal of Indian Law and Society*, Vol. V (2014).

progressive reforms in the personal law framework. Consequently, the decision lies between adopting a secular legislation adhering to principles of gender equality or introducing amendments to varied areas of personal laws. While some advocate for incremental yet noteworthy changes in personal laws rather than the comprehensive and overarching nature of a uniform code, historical precedent reveals that the initiation of a secular law has been instrumental in catalysing substantial transformations within communities in India. The creation of a code based on the principles of gender equality has the potential to revive faith in social democracy and facilitate what Ambedkar called the 'structural repair of the society'. Such a code could confront patriarchal norms and entrenched systems of female oppression under the guise of religion and customs. However, as the parliament undertakes the drafting of the Uniform Civil Code, careful consideration is essential. The aim should be to replace glaring inequalities with meaningful equity, and the code should remain free from gender bias and religious affiliations at its core. The provisions of the Indian constitution seek to create an egalitarian order of the society by removing social, economic, political and cultural inequalities. This has led to the establishment of the Indian Constitution as the „Grund Norm". wherever, in a hierarchical system a subordinate law violates or is repugnant to the Grund Norm, it is to be struck down. This helps in removing legal disadvantages which are primary causes of disempowerment or other disadvantage to weaker and vulnerable sections of the society, helping in social engineering to remove all biases and discriminations, including gender-based discrimination.

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