CHAPTER- II

PERSONAL LAW: A CONCEPTUAL FRAMEWORK

Introduction

Personal laws are those laws that govern a particular religious' community and are consonant with the belief of and apply to the regulation of that community and its adherents. These laws encompass important areas of a person's life, such as birth, marriage, death and property rights.[30] In certain cases the remedies provided by these laws overlap and often, because of their antiquated character, are rendered inconsequential to the parties in question. Requirements for the reform and update of such laws have been advocated since many decades.[31]

Personal law has a long history dating back to the time of the Romans. Freidrich Carl von Savigny, the great German legal philosopher, established two historical mode of legal administration: one based on persons' race or nationality, and another based on territoriality.[32] The first mode of legal administration, whereby which persons' race or nationality determines which laws will be applied to them, is commonly referred to today as a "personal law system."[33]In the personal law framework, the law connects to people and, as they move from one area or territory to another, a similar law will apply to them.

Savigny explained personal law in this way:

"Nationality appears in a greater extent as the ground and limit of legal community among wandering tribes, who have no fixed territory, as among the Germans in the nomadic era. Among them, however, even after their settlement on the old soil of the Roman empire, the same principle long retained its vitality in the system of personal laws, which were in force at the same time within the same state; among which, along with the laws of the Franks, Lombards, etc., the Roman law also appears as the permanent personal law of the original inhabitants of the new states founded by conquest."[34]

Conceptually, Savigny argued that territorial law "is distinguished from personal law by its less personal nature. It is connected with something outwardly cognizable, namely, the

[30] Faustina Pereira, *The Fractured Scales The Search For a Uniform Personal* Code 4 (Mandira Sen for STREE, Calcutta, 2002).
[31]Ibid.
[32]Friedrich Karl Von Savigny, Private International Law: A Treatise on the Conflict of Laws 58 (William Guthrie trans., T & T., Law Publishers 1869).
[33] Jeffrey A. Redding, "Slicing the American Pie: Federalism and Personal Law", 2 *YLS* (2007).
[34]*Id*. at 58.

visible geographical frontiers; and the influence of human choice on its application is more extensive and immediate than in nationality, where this influence is merely exceptional."[35]In other words, following Savigny, one might say that, under a personal law system, one cannot very easily escape the laws that apply to you, since one's nationality or race is something inborn and inherited. However, under a territorial system, the choice of laws is much greater, and human agency has a larger role to play in such a system, i.e. one can just move from one territory to another to escape the application of the former's laws. Thus, Savigny viewed that territorial laws have "in course of time, and with the advance of civilization, more and more supplanted personal laws. As much discussion of personal law also makes clear, many people perceive personal law to be the law that the wild, savage, and uncivilised adopt. Whether they be Germanic tribes, or just Asians and Africans, or even (in the case of India) the "pre-constitutional," people who live under personal law are often perceived to be pre-modern and non-Western.[36]

Where the term "personal law" is used, it is usually used in a positivist sense. In other words, many laws and legal procedures will operate differently for people who are differently situated, but this fact does not mean that all such laws and procedures amount to personal law -at least in the conventionally-understood sense.[37] Personal law is not facially-neutral law that implicitly distinguishes between persons, burdening different types of people disparately and indirectly.[38] Personal law is law that purposefully and on-its-face declares that one set of

[35]*Id.* at 59.

[36]Clearly, however, such a viewpoint is an ideological one. And, indeed, despite historical characterisation, it is important to remember that it was the Western colonial powers themselves who had a tendency to initiate and entrench personal law within their African and Asian possessions. Moreover, the entire colonial enterprise itself could be viewed as a meta-form of personal law: one law for the metropolitans, and one law for the colonised. Thus, if anything, one might suspect that with the "weakening of Western influence," that one would see a revival of territorial administration of laws, instead of the expansion of personal laws. *See,* Edoardo Vitta, "The Conflict of Personal Laws", 5 *ILR* 351 (1970).

[37] For example; A tax system which applies to all of a country's citizens, but which sets different tax rates for waged versus salaried income, is not a "personal law" system - unless it is operating in a social context which considers how one earns one's living as particularly salient to one's personhood. Similarly, a criminal law system that defines rape as the "penetration" of one person by another person's body part is not (part of) a "personal law" system, even to the extent that such a system essentially immunises women from rape charges.

[38] Facially discriminatory" laws versus those laws which "disparately impact" raises the question of whether personal law is really just another term for "discriminatory law." Indeed, it goes without saying that, both historically and contemporarily, there have been many instances of states applying explicitly different laws to different social groupings. Moreover, when blacks, for example, have been (harshly) governed by one set of laws and whites (leniently) by another set altogether, or when women have had one set of (explicit) rules and expectations legally applied to them and men another, these situations typically have not been called "personal law systems," but "discriminatory legal regimes." That being the case, it might be problematic, then, to understand things like Jim Crow laws as "personal law," especially to the extent that any effort to utilise complex non-American debates concerning pluralism could obscure an all-too-easy refutation of these bigoted laws.

rules and norms applies to one politically- or socially-relevant type of people, and that another set of rules and norms applies to a different type.

While, in any given society, there are many aspects that might be relevant with respect to personal law-making, the aspects that one most often finds personal law systems using to distinguish between people are those premised in religion and ethnicity. And, indeed, in many former British colonies, religion was the primary aspect of personhood that the British deployed in defining and administering family law. While this might suggest that personal law is not just any kind of law that facially distinguishes between persons, but only law that distinguishes between people with different kind of communal or kinship ties (religion and ethnicity being two prime examples of such ties), the term "personal law" has not been strictly restricted (either historically or contemporarily) to such legal situations.[39]

2.1. Personal Law in India

In Indian legal terminology, "Personal Law" is a very familiar expression, an expression not difficult to understand but not easy to define. Its denotation has been fairly established by the authorities, both judicial and textual, but a clear-cut and precise definition is not readily available. Mulla has described[40] Personal Law as "the laws and customs as to succession and family relations". This has been generally accepted as a fairly workable definition or description, but it is obviously not adequate and comprehensive as the Muslim Law relating to Gifts, Wakfs or Pre-emption or the Hindu Law relating to Religious and Charitable Endowments or Damdupat, which have been treated as Personal Laws in Mulla's celebrated treatises,[41]are not laws relating to succession or family relations. Justice Bhagwati in the Supreme Court decision in *Pradeep Jain v. Union of India*[42] has referred to Personal Law as the law dealing with matrimonial relation.[43] According to Cheshire,[44] Personal Law would mean the law relating to personal status and matters which are to a greater or lesser extent governed by the Personal Law are essential validity of marriage, mutual rights and obligations of husband and wife, parent and child, guardian and ward, the effect of marriage

[39] *See*, e.g., Ramani Muttetuwegama, *Parallel Systems of Personal Laws in Sri Lanka* (Muslim Women's Research and Action Forum/WLUML, 1997), **f**or a discussion of the quasi-territorial, quasi-ethnic aspects of Sri Lankan personal law.

[40]Mulla, *Principles of Hindu Law* (N.M. Tripathi, Bombay, 15th edn., 1982).

[41] Mulla, *Principles of Mohamedan Law* (N.M. Tripathi, Bombay, 18th edn., 1977).

[42] AIR 1984 SC 1420.

[43] Personal Laws is referred to as law, "by which an individual is governed in respect of various matters, such as the essential validity of a marriage, the effects of marriage on the proprietary rights of husband and wife, jurisdiction in divorce or nullity of marriage, illegitimacy, legitimation and adoption and testamentary and intestate succession to moveables."

[44]Cheshire, *Private International Law* 150 (Clarendon Press, 4th edn., 1952).

on property, divorce, annulment of marriage (though to a limited degree), legitimation and adoption, certain aspects of capacity, testamentary and intestate succession to moveables. Cheshire has also referred to Personal Law as the law determining the questions affecting family relations and the family property." It is obvious that neither the observations of Cheshire nor of Justice Bhagwati are opposite in respect of the Personal Laws in India as they govern succession to immoveable also and regulate various matters other than family relations and family property and cover much larger areas than those referred to therein.

2.2 Public Law and Private Law

In the Anglo Indian law-language both the Hindu law and the Mahomedan or the Muslim law have been described as the personal laws. In fact, since the British period the expressions 'Hindu Personal Law' and 'Mahomedan (or Muslim) Personal Law' have been used as synonymous and interchangeable. The appendage of the expression personal to the Muslim or Hindu Law was unnecessary and is also misleading to some extent.[45] The expression is likely to lead to the impression that the relevant law is confined to matters strictly personal in nature. The impression, even though correct to a very great extent would not be wholly correct, as public wakfs governed by Muslim law or public religious or charitable endowments governed by Hindu law are not matters of personal nature. Nor the Muslim law or the Hindu law covers all personal jural relations or legal matters of the Muslims or the Hindus as their personal obligations arising from private agreements or private transfers are not regulated by these laws.[46] The expression personal law was used in Section 112[47] of the Government of India Act, 1915 and has also been used in the Seventh Schedule of the Constitution of India. Sir William Jones while advocating enactments of legislations to

[45]There is a basic contradiction in the term 'personal law'. A person is an individual. As such any right of an individual should mean that it is a personal right. But personal law connotes a set of legal rights pertaining to family affairs that an individual is entitled to not just by virtue of being an individual but by virtue of being a member of religious or ethnic group or community. *See,* Partha S. Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and The Uniform Civil Code* (Routledge, 2007).

[46] *See,* A.M.Bhattacharjee, *Muslim Law and The Constitution* 7 (Eastern Law House, Calcutta, 1985).

[47] Section 112: Law to be administered in cases of Inheritance and Succession, – The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in the matters of inheritance and succession to lands, rents and goods, and in the matters of contract and dealing between party and party, when both the parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

secure application of Hindu Laws to the Hindus and Muslim Laws to the Muslims, referred to these laws as private laws.[48]

In *Soorendranath Roy v. Heeramonee*[49], Hindu law was described to be 'in the nature of personal usage or custom' as during the preceding Mahomedan period, 'the Mahomedan was the governing power and as the Hindus were rather connived at than sanctioned by the governing power in the exercise of their religion.' In *Lucas v. Lucas*,[50] a Division Bench of the Calcutta High Court has referred that personal law of the parties to the marriage means 'the customary law of the class to which such persons belong'. These have been cited with approval in a Bombay Division Bench decision in *Saldanha v. Saldanha*.[51]

In the civil jurisdiction the expression 'Public Law' has come to mean those laws which deal with the constitution and functions of the state and also of its various departments, the relation between the state and its citizens, their mutual rights, liabilities and duties, laws relating to public order, public safety, public welfare and other matters concerning the public in general. In contradiction thereto, 'Private Law' would mean those laws relating to contract, transfer of property and the like which concern private individuals, as also laws relating to marriage, succession and other family relations. The division of law into public and private is one of the most well-known and widely recognised divisions, but as pointed out by Austin and many others the division is neither exhaustive nor accurate. In the Institutes of Justinian it is stated jus privatum quod, ad singulorum utilitatem pertinent, and this, in short, means that Public Law is mainly and mostly concerned with and directed to the State, while Private Law is mainly and mostly concerned with and directed to the individual. It is said as Markby observed[52] 'that public law comprises that body of law in which the people at large or sometimes put, the sovereign or the state as representing the people, is interested, while private law comprises that body of law in which individuals are interested'. But this division, as Markby pointed out, even though forcible and sometimes useful, is not accurate for though the interest of public or the state is conspicuous and predominant in public law, there is hardly any public law in which the interest of the private individuals is also not concerned. Both public and private element merge, mingle and co-exist in all laws, public and private. The supreme public law like the Constitution of India is the fountain head of individual legal

[48]Lord Teignmouth's Life of Jones, p. 106; also quoted in Sircar's Muhammadan Law (Tagore Law Lectures, 1873. 72, 73; also in Tan Ma Shwe Tin AIR 1949 PC 228 (233).
[49] 12 MIA 81 (95-96).
[50] ILR 32 Cal 187.
[51] AIR 1930 Bom 105.
[52] William Markby, *Elements of Law* 152-153 (Oxford, Calendron Press, 5th edn., 1896).

rights, while private laws like the law of contract or the law of transfer of properties, considerably affect the public and the state.

But even if we propose to go by the division and distinction, both Muslim and Hindu laws, as administered since the British period would appear to be wider as well as narrower than private law. They are wider than private law as they cover matters relating to, for example, Public Wakfs and Public Religious and Charitable Endowments, they are narrower as they do not cover matters relating to private contracts and private transfers of properties and the like. According to Cheshire,[53] Personal Law would mean law relating to personal status, and, the matters which are to a greater or lesser extent governed by the personal law are essential validity of marriage, mutual rights and obligations of husband and wife, parent and child, guardian and ward, the effect of marriage on property, divorce, annulment of marriage (though only to a limited degree), legitimation and adoption, certain aspects of capacity, testamentary and intestate succession to movables.

As stated above in *Pradeep Jain v. Union of India,*[54] Justice Bhagwati has referred to personal law as the law dealing with matrimonial relations such as the important conditions of a marriage, divorce, adoption, succession etc. But even these descriptions are not sufficiently comprehensive for the Muslim or the Hindu personal laws apply not only to matters relating succession to movables but to succession to immovables as well. Be that as it may, the expression status comprehends natural, domestic as well as extra domestic status and if Muslim law or Hindu law, as administered since the British period, is to be regarded as personal law for being a law relating to personal status, then it relates to domestic status or family status and to the rights, duties and obligations arising out of family relations. Muslim law as applied since the British period is to a great extent the law of such status, though some portions thereof, like the law relating to public wakfs, or pre-emption do not relate to personal status. It should however be noted that unlike under the Private International law prevailing in the West[55] the applicability of personal law depends, not on nationality or domicile, but on religion or race. As observed by the Privy Council in *Fanny Barlow v. Sophia Orde*[56], the personal status of an individual in India "mainly depended on his religion"

[53]*Supra*.
[54]AIR 1984 SC 1420 (1426).
[55]*Supra* note 1 at 179-181.
[56] (1870) 13 MIA 277 (307).

and as pointed out in its later decision in *Robert Skinner v. Charlotte Skinner*[57], it "involves the element of religious creed".

While commenting on Hindu law Mayne has observed[58] that 'it is not merely a local law', but it becomes the personal law and a part of the status of every family which is governed by it and these observations have been quoted with approval by the Privy Council in *Balwant Rao v. Baji Rao.*[59] In *Parbati Kumari v Jagadish Chunder,*[60] the Privy Council use the expression personal law 'as distinguished from geographical or territorial law'.

Mulla has described[61] personal law as 'the laws and customs as to succession and family relations'. But while this may be accepted as a fairly workable definition or description, it is not, as already noted, adequate or comprehensive as the laws relating to Gifts, Wakfs and Pre-emption, which has been covered in Mulla's celebrated treatise on Mahomedan law,[62] are not laws relating to succession or family relations. Cheshire's reference to personal law as "affecting family relations and the family property,[63] would not also be quite apposite in respect of the Muslim or the Hindu Personal Law as the Muslim Personal Law relating to pre-emption by vicinage of public wakf or the Hindu Personal law relating to public religious or charitable endowments has nothing to do with family relations or family property. In the context of various personal laws operating in India, a pragmatic definition of personal laws would be that body of laws which apply to a person on the ground of his descent from his parents and would continue to govern him until he can effectively dissociate from his parent community by change of religion or otherwise. But even that definition would not be fully comprehensive to cover the Hindu or the Muslim law relating to public wakfs or other public religious or charitable endowments as in those cases the law applies, not to any person, but to the institutions. Thus, personal law can be explained as, 'the set of laws that are applicable to a person or thing because of their belonging to a particular religion.'

[57]ILR 25 Cal 537 (546) PC.
[58]Mayne, *Hindu Law and Usage* 90 (Higginbothams, 11th edn., 1953).
[59]AIR 1921 PC 59 (60).
[60]ILR 29 Cal 433 (452) PC.
[61]Mulla, *Principles of Hindu Law* 88 (N.M.Tripathi: Bombay, 15th edn., 1982).
[62]Mulla, *Principles of Mahomedan Law* (Lexis Nexis, 20th edn., 2013).
[63]*Supra* note 1.

In Section 9 of Regulation VII of 1832, principles whereof were extended to the whole of India by the Caste Disabilities Removal Act, 1850, the Muslim and the Hindu laws were referred to as "the laws of those religions' and in *Mitar Sen v. Maqbul Hasan*[64], the Privy Council used the expression 'personal law' and 'law of the religion' as almost synonymous.

2.3. Personal Law: Groups Rights or Individual Rights

There is a basic contradiction in the term 'personal law'. A person is an individual. As such, any right of an individual should mean that it is a personal right. But personal law connotes a set of legal rights pertaining to family affairs that an individual is entitled to not just by virtue of being an individual but by virtue of being a member of a religious or ethnic group or community.[65] The distinction between 'the right of a community' and 'individually exercised community rights' would help us to resolve this contradiction.[66] A diasporic Jew is entitled to settle in Israel any time according to the country's Law of Return. It is a right given to a religious/ethnic community spread across the world but this right is exercised by the individual members of the community. Similarly, a Sikh male's right to wear a turban or a Muslim's right to take some time off from office work to pray is an individually exercised community right. There are however, certain rights which are collective and cannot be exercised individually, as for example, the right of self-determination. On another plane, for instance, the Catholic Church's right to excommunicate any of its members, or its refusal to grant a divorce, is a 'collectively exercised collective right' at the cost of an individual right.[67] The Hindu caste panchayat decision or the Muslim fatwa would fall in the same category.

Personal Law, therefore, is that set of Matrimonial, inheritance and adoption rights that individuals claim on the basis of their being members of a particular community but which they want to exercise individually. Essentially it pertains to the discourse on individual right versus group rights and the question of group identity, in most cases minority identity. From the politico-legal perspective the debate is nothing but an extension of the discourse on

[64]AIR 1930 PC 251 (252).
[65]*Supra* note 2.
[66]Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* 215-216 (Palgrave, London, 2002).
[67] Ibid.

the centrality versus the plurality of laws. The central logic of all democracies is that respect has to be shown to the majority view.[68]

2.4. Personal Law-Definition

Any one acquainted with the operation of the various Personal Laws in India would and can entertain no doubt that the applicability of these laws depends solely on religion.[69] The Christian Law as would appear from the provisions of the Act 1869 (Long Title and Preamble) also applies to a person on the ground of his or her being Christian by religion. And the Parsi Law, as would appear from Section 2(7) of the Parsi Marriage and Divorce Act, 1936 would apply to a person, not merely on the ground of his or her being a Zoroastrian by religion. As the Privy Council pointed out repeatedly, and rightly too,[70] in India the personal status of an individual and the law governing such status are "mainly depended on his religion" and involves the element of religious creed."

In Section 9 of Regulation VII of 1832, principles whereof were later extended to the whole of India by the Caste Disabilities Removal Act of 1850, and which was the first serious British Legislative interference with the Hindu and the Muslim laws (if we exclude the Bengal Sati Regulation of 1829), the Hindu and the Muslim Laws were referred to as "the laws of those religions" and in Mitar Sen v Maqbul Hasan,[71] the Privy Council used the expressions 'personal law' and 'law of religion' as almost synonymous and interchangeable.

Sum Up

Personal laws are those laws that govern a particular religious' community and are consonant with the belief of and apply to the regulation of that community and its adherents. These laws encompass important areas of a person's life, such as birth, marriage, death and property rights.[72] In certain cases the remedies provided by these laws overlap and often, because of their antiquated character, are rendered inconsequential to the parties in question.

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[68]Ibid.

[69]Hindu law, together with Acts of 1955-1956, are applicable to persons who are Hindus (including Buddhists, Sikh, and Jaina) by religion, either after birth, conversion, or otherwise it does not and cannot, apply to any person who is not a Hindu (or Buddhist, Sikh or Jaina) by religion. See Section 2 of the Hindu Marriage Act 1955, of the Hindu Succession Act 1956, of the Hindu Adoptions and Maintenance Act 1956 and Section 3 of the Hindu Minority and Guardianship Act 1956. Muslim Law also, as would appear from the Muslim Personal Law (Shariat) Application Act 1937 and also the preceding enactments commonly known as the Civil Courts Act, applies only to persons who are Muslim by religion, whether by birth, conversion or otherwise.

[70]*Fanny Barlow v. Sophia Orde,* (1870) 13 MIA 277 (307); *Robert Skinner v Charlotte Skinner*, ILR 25 Cal 537 (546) PC.

[71] AIR 1930 PC 251 (252).

[72]*Supra* note 3 at 4.

Requirements for the reform and update of such laws have been advocated since many decades.

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