CHAPTER IV

PART III OF THE CONSTITUTION OF INDIA IN THE CONTEXT OF PERSONAL LAWS: AN ANALYSIS

The Constitution of India prescribes certain requirements which must be met by laws in order to be constitutionally valid.[142] For laws that pre-date the constitution, such as personal laws the relevant constitutional provision is Article 13(1). Article 13 (1) provides that all pre-constitutional laws shall not violate any of the provisions of Part III of the Constitution.[143]Another provision under the same Article, i.e. Article 13(3)(a) elucidates what is meant by the term 'law'.[144]These two provisions should be read in light of Article 372.[145]

Reading the above provisions harmoniously, it becomes clear that any law to be constitutionally valid must not infringe upon the fundamental rights guaranteed by the Constitution of India. Irrespective of such provisions however, the courts have been very cautious while adjudicating the constitutionality of the personal laws. The courts so far have adopted a very contradictory approach starting from Narasu Appa Mali's[146] case where the Hon'ble Bombay High Court had held that "the personal laws are not 'laws' under Article 13(3)(a) of the Indian Constitution". Although, the Narasu judgment was delivered by one of the High Courts in the country prior to the enactment of post-independence Hindu personal law reforms, its reasoning had a huge impact on the personal law jurisprudence in the High Court's as well as the Supreme Court in the post-reform era.[147]

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[142]The Constitution of India. art. 13.

[143]Article 13(1): All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

[144] Article 13(3)(a): 'Law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

[145] Article 372: "All the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority".

Further, according to Explanation 1 of Article 372, the expression 'laws in force' means:

"...a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

[146]*State of Bombay v. Narasu Appa Mali* AIR 1952 Bom.

[147] National policy on personal law material available at: shodhganga.inflibnet.ac.in/bitstream/10603/74298/10/10_chapter%204.pdf (last visited on September 01, 2018).

4.1. Constituent Assembly Debate on Personal Law

At the time of drafting of the Constitution of India when the debate on fundamental rights came before the Constituent Assembly, the members remained divided on the issue of incorporation of personal laws within the ambit of Fundamental Rights. Some of the Constituent Assembly members had desired to include the '*right to follow personal laws'* within the ambit of Article 13[Article 19 of the present Constitution]. Some of the Muslims members had aspired for including '*right to practice personal laws'* within the scope of Fundamental Rights. Shri Mohammad Ismail Khan had expressed the addition of new sub-clause after sub-clause (1) of Article 13.[148] Shri Mohammad Ismail Khan had made his arguments on this point and said that by the incorporation of clause '*h'* after Article 13(1),the right of the people to follow their own personal laws will be established. He had further argued that this clause shall not intrude into the personal laws of any other communities. Shri Ismail Khan had further said that only in matters of succession, inheritance etc., by mode of wakf and will, the people will be governed by their personal law. In other areas such as transfer of property, contract, evidence etc., the citizens will be governed by a uniform civil code.[149]

When the floor of the Constituent Assembly was open for debate on this issue, it was pointed out by Shri K.M. Munshi that in Islamic countries like Egypt or Turkey the presence of minority communities did not prevent those countries from enacting a civil code. Shri K.M. Munshi expressed his views as follows:

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[148]Shri Mohammad Ismail Khan had desired the incorporation of clause '(h)' i.e; ' to follow the personal law of the group or community to which he belongs or professes to belong'.

[149] At the time when the debate on fundamental rights was going on in the Constituent Assembly, Shri Mohammad Ismail Khan had expressed his desire to include 'right to follow personal laws' within the ambit of fundamental rights. Shri Mohammad Ismail Khan had said on the floor of the Assembly that, "This provision which I am suggesting would only recognise the age long right of the people to follow their own personal law, within the limits of their families and communities. This does not affect in any way the members of other communities. This does not encroach upon the rights of the members of other communities to follow their own personal law. It does not mean any sacrifice at all on the part of the members of any other community. Here what we are concerned with is only the practice of the members of certain families coming under one community. It is a family practice and in such cases as succession, inheritance, disposal of properties by way of wakf and will, the personal law operates. It is only with such matters that we are concerned under personal law. In other matters, such as evidence, transfer of property, contracts and in innumerable other questions of this sort, the civil code will operate and will apply to every citizen of the land, to whatever community he may belong. Therefore, this will not in any way detract from the desirable amount of uniformity which the state may try to bring about, in the matter of the civil law."*See***,** Constituent Assembly Debates on 1 December 1948, Vol VII., available at: https://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-12-07 (last visited on September 3, 2018).

"I want to remind that Turkey is under a treaty obligation. Under that treaty it is guaranteed that the non-Muslim minorities are entitled to have questions of family law and personal status regulated in accordance with their usage. That is the obligation under which Turkey has been placed and that is obtaining in Turkey now. With regard to Egypt, no such question of personal law arose in that country. But what is to be noted is that whatever the minorities in that country wanted has been granted to them: in fact more than what they wanted has been granted. And if personal law had also been a matter in which they wanted certain privileges that would also have been granted."

Irrespective of much resistance from the majority members, there were some Muslim members who supported the arguments of Shri Mohammad Ismail Khan on the issue of personal laws. One member Shri Maulana Hasrat Mohani summed up his argument on this point and had said that the personal law of any community especially the Muslims, cannot be interfered by anyone. He had categorically spoken about the Muslims and had said that the personal laws of the Mussalmans are derived from Quran and thus interference in the Muslim personal law will prove to be detrimental. [150]

Shri M. Ananthasayanam Ayyangar was not convinced with the arguments given by the Muslim members and said that the apprehension that the members had raised is unwarranted. Shri Ayyangar further pointed that the provisions in the Constitution on fundamental rights is sufficient to guarantee safeguard to every personal laws existing in the country. Shri M. Ananthasayanam Ayyangar stated his arguments as follows by saying:

"Amendments have been moved that unless a provision is made in the Fundamental Rights there is no safety and that the majority community may introduce its own personal law or flagrantly violate the personal law of any community. Let us take the communities. There are three main religions. Let us take Muhammadanism. There is absolutely no provision in the Fundamental Rights that you ought to ride rough-shod over their personal law. The law of the land as it exists today gives sufficient guarantee so far as that is concerned. But our friends

[150]Shri Maulana Hasrat Mohani had made the following arguments on the matter with regard to personal laws. He had said, "I would like to say that any party, political or communal, has no right to interfere in the personal law of any group. More particularly I say this regarding Muslims. There are three fundamentals in their personal law, namely, religion, language, and culture which have not been ordained by human agency. Their personal law regarding divorce, marriage and inheritance has been derived from the Quran and its interpretation is recorded therein. If there is any one, who thinks that he can interfere in the personal law of the Muslims, then I would say to him that the result will be very harmful. … Mussalmans will never submit to any interference in their personal law, and they will have to face an iron wall of Muslim determination to oppose them in every way." Ibid.

who moved the amendments wanted a double guarantee that their personal law ought not to be interfered with."

Shri M. Ananthasayanam Ayyangar further pointed out that:[151]

"A time may come when members belonging to the particular community may feel that in the interests of the community progressive legislation has to be enacted. But if we make a provision here that the personal law shall not be interfered with, there will not be any right to the members of that community itself to modify that law. Therefore, it is not necessary that we should introduce it as a fundamental right. There is absolutely nothing in this Constitution which allows the majority to override the minority. This is only an enabling provision. Without the consent of the minority that is affected, no such law will be framed. I therefore feel it is unnecessary to include it in the fundamental rights."

Dr. B.R Ambedkar, the Chairman of the Drafting Committee, was not convinced with the arguments made by some of the members in support of inclusion of personal laws within the ambit of fundamental rights. Dr. Ambedkar had said that religion deal with every aspects of a human being and if so much significance is given to protection of personal laws the parliament won't be in a position to introduce any social reforms in the country.[152]

Dr. B.R. Ambedkar had argued further that religion should not be given so much importance so as to cover every aspect of a human's life. Thus, such an approach will hinder the legislature from making effective laws. Unless and until the personal laws remain excluded the inequalities that exist in the society will continue to remain. Thus, he said that the state should have an authority to make laws on matters of personal laws so as to be able to achieve the constitutional goals. However, no member belonging to any community should be

[151] *See*, Constituent Assembly Debates on 1 December 1948, Vol VII, p. 781.

[152] Dr. Ambedkar had made observation on this matter was as follows:"Coming to the question of saving personal law … if such a saving clause was introduced into the Constitution, it would disable the legislatures in India from enacting any social measure whatsoever. The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion. In Europe there is Christianity, but Christianity does not mean that the Christians all over the world or in any part of Europe where they live shall have a uniform system of law of inheritance. No such thing exists."

apprehensive that the state if given that authority will instantly proceed to make laws that may be offensive to any other community.[153]

Thus the motion that was moved by Shri Mohammad Ismail Khan to include '*right to practise personal laws"* within the ambit of Fundamental Rights was not accepted by the Constituent Assembly.

4.2. Personal Laws in the Constitutional Framework

In the Constituent Assembly when the matter concerning Article 8[Article 13 of the present Constitution] was being debated before the Constituent Assembly, Dr. B.R. Ambedkar had proposed an amendment to original draft Article 8 and had made recommendations to incorporate sub-clause 3 to Article 8.[154] Dr. Ambedkar's argument on the point was:[155]

"The reason for bringing in this amendment is this: It will be noticed that in Article 8 there are two expressions which occur. In sub-clause (1) of Article 8, there occurs the phrase "laws in force", while in sub-clause (2) the words "any law" occur. In the original draft as submitted to this House, all that was done was to give the definition of the term "law" in sub-clause (3). The term "laws in force" was not defined. This amendment seeks to make good that lacuna. What we have done is to split sub-clause (3) into two parts (a) and (b), (a) contains the definition of the term "law" as embodied in the original sub-clause (3), and (b) gives the definition of the expression "laws in force" which occurs in sub-clause (1) of Article 8. I do not think that any more explanation is necessary."

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[153]Dr. Ambedkar's further point of observation was, "I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the state. Having said that I would also like to point out that, all that the state is claiming in this matter is a power to legislate. There is no obligation upon the state to do away with personal laws. It is only giving a power. Therefore, no one need to be apprehensive of the fact that if the state has the power, the state will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India."Ibid.

[154] Incorporation of Clause 3 to Draft Article 8:-

(3) In this article—

(a) the expression 'law' includes any ordinance, order, bye-law. rule, regulation, notification, custom, or usage having the force of law in the territory of India or any part thereof;

(b) the expression 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

[155]Constituent Assembly Debates, Vol. VII, 26th November 1948, p. 640.

When the proposed amendment was placed before the Constituent Assembly for deliberation it was submitted by Mr. Naziruddin Ahmad that the words[156] which has been mentioned in the proposed amendment to original Article 8 by Dr. Ambedkar be deleted. Dr. Ambedkar expressed his observations as follows to the views expressed by Mr. Naziruddin Ahmad:[157]

"The amendment of Mr. Naziruddin Ahmad, I think, creates some difficulty which it is necessary to clear up. His amendment was intended to remove what he called an absurdity of the position which is created by the draft as it stands. His argument, if I have understood it correctly, means this, that in the definition of law we have included custom, and having included custom, we also speak of the state not having the power to make any law. According to him, it means that the state would have the power to make custom, because according to our definition, law includes custom. I should have thought that construction was not possible, for the simple reason, that sub-clause (3) of Article 8 applies to the whole of the Article 8, and does not merely apply to sub-clause (2) of Article 8. That being so, the only proper construction that one can put or it is possible to put would be to read the word 'Law' distributively, so that so far as Article 8, sub-clause (1) was concerned, 'Law' would include custom, while so-far as sub-clause (2) was concerned, 'Law' would not include custom. That would be, in my judgment, the proper reading, and if it was read that way, the absurdity to which my friend referred would not arise."

Keeping into consideration the views expressed by Mr. Naziruddin, Dr. B.R. Ambedkar suggested the incorporation of more words to the proposed amendment sub-clause 3 of Article 8.[158] Dr. Ambedkar's further observation on this matter was:

"So, if the context in Article 8 (1) requires the term 'law' to be used so as to include custom, that construction would be possible. If in sub-clause (2) of Article 8, it is not necessary in the context to read the word 'law' to include custom, it would not be possible to read the word

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[156] Custom or usage having the force of law in the territory of India or any part thereof.

[157] *Id.* at 641.

[158] Note: Dr.Ambedkar had suggested addition of the following words after the words "In this article" and after the addition sub-clause 3 is to be read as:

"Unless the context otherwise requires"

so that the article would read this way—

'In this article, unless the context otherwise requires—

(a) The expression 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom, or usage having the force of law in the territory of India or any part thereof;

(b) the expression ……..' "

'law' to include custom. I think that would remove the difficulty which my friend has pointed out in his amendment."

Accordingly, the amendment proposed by Dr. B.R. Ambedkar to original draft Article 8[Article 13 of the present Constitution] was adopted by the Constituent Assembly.

As discussed above the Constituent Assembly members remained divided on the issue with regard to the personal laws. Ambedkar initially aspired for 'essential uniformity in fundamental laws-civil and criminal'.[159] There were heated discussions among eminent public men and political leaders towards the issue of personal laws. However the controversy was set at rest in the Assembly when the learned chairman of the drafting committee, Dr. Ambedkar explained the distinction between the state's theoretical "power to legislate" and an "obligation" to do that in practise.[160] However when the Constitution was promulgated in 1950, a number of principles and provisions relating to personal laws-or affecting the personal laws in some way, found a place in the Constitution in its four various parts, viz:

(i). Part III: Fundamental Rights;

(ii). Part IV: Directive Principles of State Policy;

(iii). Part XI: Relations between Centre and States, and

(iv). Part XXI: Temporary Transitional and Special Provisions

Under the framework provided by these Constitutional principles and provisions, over the past six decades and more a lot has been said and done in respect of the Constitutional status of personal laws. The legislature, the executive and the judiciary, both at the centre and in the state have exhibited their innovativeness in the matter, and all sections of the people such as the bench and the bar, academicians, politicians, writers and the journalists, the media, theologians and clergymen, reformers, social workers and the masses have been quite vocal and active in this process. No other aspect of the Constitution has perhaps attracted such a nation-wide interest, rather anxiety regarding principles and provisions concerning personal laws.

Therefore, from the very outset of the debate in the Constituent Assembly it was not clear whether personal law as "law in force" as defined in 8(1) [Article 13(1) of the present Constitution] or custom having the force of law in 8(2) [Article 13(3)] and it was left for

[159]Constituent Assembly Debates, Vol VII 552 (1949).
[160]Ibid.

contextual interpretation. Such decision of contextual interpretation/reading was destined to give rise to further complication.

4.3. Article 13- An Overview and Some Observations

Under the Constitution of India, there are twelve articles[161] which have an impact upon personal laws and a deeper analysis of these articles can be condensed into the following three basic postulates:

I. That each of the personal laws in force till the adoption of the Constitution shall continue to apply unless the state considers it advisable [as a part of its function to set up a social order based on social justice or to provide for social welfare and reform, or otherwise] to repeal, modify or replace it.

II. After the adoption of the Constitution all laws enacted in the area of personal laws must conform to the provisions of Part III of the Constitution dealing with fundamental rights.

III. That the state shall gradually lead the nation towards progressive uniformity in the area of civil laws.

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[161] A Checklist of Constitutional Provisions with Regard to Article 13:The below mentioned is the twelve points in Constitutional framework which impact upon the personal laws.

1. Article 13 (1): saying that all "laws in force" since the pre-Constitution days as are inconsistent with the Fundamental Rights shall be void to the extent of such inconsistency;
2. Article 13 (2): provides that the state shall not make laws in future not to make any laws that takes away or abridges a fundamental right and declaring that any such law made in contravention of this prohibition shall be void to the extent of such contravention;
3. Article 14: containing the broad equality rights;
4. Article 15: directing the state not to discriminate against any citizen on the ground only of religion, race, caste, sex or place of birth or any of them; without prejudice to its power of making special provisions for women and children and for socially and educationally backward classes (including scheduled castes and tribes);
5. Article 25(1): guaranteeing the right freely to profess, practise and propagate religion;
6. Article 25(2): explaining that the right to freedom of religion shall not affect the state's power to regulate or restrict "secular activity associated with religious practice" and to provide for social welfare and reform;
7. Article 26(b): guaranteeing every "religious denomination" the right to manage its own affairs in matters of religion;
8. Article 29(1): guaranteeing to all sections of citizens the right to conserve their distinct culture, if any;
9. Article 38: directing the state "to strive to promote people's welfare" by securing and effectively protecting a social order under which, inter alia, justice shall inform all institutions of national life;
10. Article 44: directing the state "to endeavour to secure for the citizens a uniform civil code throughout the territory of India;
11. Article 246 [read with List III, Entry 5, in the Seventh Schedule]: empowering Parliament and state legislatures to make laws in the areas which since the pre-Constitution days fall in the domain of personal laws; and
12. Article 372: declaring that, subject to other provisions of the Constitution, all the laws in force in the pre-Constitution period shall remain in force unless lawfully altered, repealed, amended [or adapted] by a competent authority.

a. Laws inconsistent with the Constitution to be declared void

Article 13(1) declares that all pre-Constitution laws shall be void to the extent of their inconsistency with the Fundamental Rights. Article 13(1) deal with the pre-Constitution laws; if any such law is inconsistent with a fundamental right, it became void from 26.01.1950, the date on which the Constitution of India came into force. There were certain acts, orders, rules, bye-laws that were enacted by the British rulers prior to India's independence. The framers of the Constitution clarified that those Acts, rules, orders etc. passed in pre-independence shall be continued.[162]However, they should not violate the Fundamental Rights conferred in Part III. In applying the rule embodied in clause (1) the following principle of interpretation should be noted:

b. No retrospective effect

The provisions of the Constitution relating to the fundamental rights have no retrospective effect. All inconsistent existing laws, therefore, become void only from the beginning of the Constitution. Acts done before the beginning of the Constitution in pursuance or in contravention of the provisions of any law, which after the commencement of the Constitution become void because of inconsistency with the fundamental rights, are not affected. The inconsistent law is not wiped out so far as the past acts are concerned. In *Keshava Menon v. State of Bombay* proceedings had been started against the appellant for an offence punishable under Section 18 of the Press (Emergency Powers) Act, 1931, in respect of a pamphlet published in 1949. It was contended on behalf of the appellant that the Act was inconsistent with the Fundamental Rights conferred by the Constitution, and therefore, it had become void under Article 13(1) after January 26, 1950, and the proceedings could not be continued. The Supreme Court rejected this contention and held that Article 13(1) had no retrospective effect. The article did not have the effect of rendering the laws, which existed on the date of the commencement of the Constitution, void ab initio for all purposes if they were inconsistent with the fundamental rights. Das, J., said: "Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them (Fundamental Rights) retrospective effect which, we have said, they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution."

[162]Article 372 provides that all laws in force in India before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent legislature or other competent authority.

However, some of the provisions of personal laws such as Section 10[163], 12[164] and 13[165] of the Hindu Marriage Act, 1955 have skilfully adapted retrospective effect without substantial

[163]Section 10: Judicial Separation. - (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds might have been presented.
(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statement made in such petition, rescind the decree if it considers it just and reasonable to do so.

[164]Section 12: Voidable Marriages. -(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-
(a) that the marriage has not been consummated owing to the impotency of the respondent; or
(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or
(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or
(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.
2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-
(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-
(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or
(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;
(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and
(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

[165]Section 13: Divorce- (1) Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or
(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (ii) has ceased to be a Hindu by conversion to another religion ; or
(iii) has been incurably of unsound mind, or has suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
Explanation- In this clause-
(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;
(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other
party and whether or not it requires or is susceptible to medical treatment; or (iv) has been suffering from a virulent and incurable form of leprosy; or (v) has been suffering from veneral disease in a communicable form; or (vi) has renounced the world by entering any religious order; or
(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;
Explanation.- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.

and material compromise. Section 12 of the Hindu Marriage Act, 1955 has been made applicable and it says that the marriage solemnised either before or after the adoption of the Constitution, [166] thus, the provisions apply retrospectively but are in conformity with fundamental rights and do not alter the status of a person either substantially or materially.

Further Article 13 Clause (3) defines the terms 'law' and 'laws in force'. The definition is enumerative rather than substantive, i.e., it mentions some of the normal forms in which the law finds its expression. So understood, the definition mentions the following as included in the expression 'law':

c. **Statutory law**

This may be made either directly by the legislature or by the other subordinate authorities under the delegated law making powers. Delegated legislation appears under various names-rules, orders, regulations, notifications and bye-laws-mentioned in clause (3). The list is not exhaustive because delegated legislation may appear under other names also. Sub-delegated legislation is also included within the purview of the definition. The Constitution is itself not a statute within this provision. Delegated or subordinate legislation will stand nullified when the Act under which it is made is held unconstitutional under clause (1) or clause (2) of Article 13 or when the rule or order itself, but not the enabling Act, vitiates a prohibition enacted in Part III of the Constitution.

(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-
(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.
(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-
(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before the commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:
Provided that in either case the other wife is alive at the time of the presentation of the petition;
(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or
(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (Act 2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or
(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.
Explanation.- This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Law (Amendment) Act, 1976.

[166] Section 12: "Any marriage solemnised whether before or after the commencement of this Act.....

Likewise, ordinances issued by the President or the Governor under the authority conferred by the Constitution or the rule-making by other authorities or bodies set up directly by the Constitution will, no doubt, be laws in force within the meaning of clause (3) of Article 13 and must conform to the provisions of Part III. Administrative orders of the executive, if they are made in pursuance of statutory authority and affect the legal rights of the citizen, would fall within the definition of law. But administrative directions or instructions issued by the government for the guidance of its officers and not meant to be enforceable legal obligations would not be laws under clause (3).

d. **Customs**

In the early society's custom was the main vehicle of legal development. Though the Vedas and the Smritis are said to contain Divine Revelation, in reality they incorporated mostly the customs of their times. After the law was reduced into writing by the Smritikars, the process of legal development was carried out by the Digests and Commentaries. The Digest writers and the Commentators in their turn further incorporated the existing custom. But it would be a misnomer to say that the smritis, the Digests and the Commentaries, incorporated the entire custom or that they have just given it a formal shape. Authors of the Dharmashastras, though it is truer of Sutrakaras, pretend to expound the meaning of the Vedas, and the Digest writers and commentators also professed to comment and expound the meaning contained in the Smritis. In this process, some of the customs of the times were incorporated in the rules. But this incorporation was not always a faithful translation of customary rules into the principles of law. The customary rules were modified to suit the needs of the time and also to suit the philosophy of the times. Yet neither the Smritikaras nor the Digest writers and the commentators ever claimed to incorporate custom. They specifically left an area open to custom by saying that the king should decide a dispute in accordance with custom. They said that four legs of law were Dharma, Vyavahara, Charitra (custom) and Rajya-Shasana (royal ordinance or the king made law was supreme over the first three and the custom was supreme over the first two. Whether a custom which was palpably contrary to the fundamental principles of the Shastra could be given effect, may be debatable. At the lower rung of judicial administration, disputes were mostly decided on the basis of custom. But at the lower rung, the fundamental tenets of the Shastras seldom came into conflict with custom.[167]

[167]Paras Diwan, *Modern Hindu Law* 46 (Allahabad Law Agency 2009).

e. Requirements of a valid custom

(1) *Custom should be ancient*—It is necessary that custom should be ancient. The word "ancient" means that it belongs to antiquity. According to Section 3(a) of the Hindu Marriage Act, 1955, it should be observed for a 'long time'. In point of time what can be said to be the observance for a long time, is difficult to say. In India custom need not be immemorial in the English law sense. The courts have time and again expressed an opinion that if a custom is established to be 100 years or more, it is of sufficient antiquity to be called ancient. Derrett thinks that if it is more than 40 years old it is enough. The Privy Council observed that it is not the essence of this rule that its antiquity in every case be carried back to a period beyond the memory of man still less that it is ancient in the English technical sense, it will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent been accepted as the governing rule. A custom cannot come into existence by agreement. Similarly, no new custom can be recognised. In two cases, before the Madras High Court the question was: whether a group or organisation was free to lay down new ceremonies of marriages? In these cases, "the self-respecters cult" in Tamil Nadu state organised a movement under which traditional ceremonies were substituted by simple ceremonies. The basic idea was to abandon the Brahmanical or Shastric ceremonies of marriage. The first such marriage took place in 1925. In the first case which came in 1954 the main question before the court was: Could this ceremony be considered as established by custom? The court said that 25 years is not a sufficiently long period to elevate a practice to the rank of custom. In the second case which came in 1966, the court said that it was a different matter as to how much time should pass to enable a practise to gain judicial recognition as custom, but no useful purpose could be served by performers by merely presiding over such marriage and conducting the ceremony according to their own ideas unmindful whether such things are valid in law. The court was of the view that in modern times, no one is free to create a law or custom; that is the function of the legislature.[168]

(2) *Custom should be continuous*—Continuity of a custom is as essential as its antiquity. Suppose it is established that a custom has an antiquity of 400 years, but if it has not been followed since then, it may be sufficient indication of its abandonment. The Privy Council

[168] Ibid.

observed: "Their Lordships cannot find any principle, or authority, for holding that a point of law, a manner of descent of an ordinary estate, depending solely on family usage may not be discontinued, so as to let in the ordinary law of succession. It is of the essence of family usages that they should be certain, invariable and continuous and well established. Discontinuance must be held to destroy them. Such discontinuance may be intentional or accidental. Mayne says that in the case of widely spread local custom, want of continuity would be evidence that it had never had a legal existence, but it is difficult to imagine that such a custom once thoroughly established, would come to a sudden end. Suppose it is established that one hundred years back a custom existed. But there is not a single instance or other evidence available that after that time it has never been followed. The inevitable inference is that people had abandoned them or had become obsolete. An obsolete law can be repealed but there is no method of repealing custom except by abandonment. Abandonment, conscious or unconscious, is the mode by which a custom stands repealed.[169]

(3) *It should be certain*—It is necessary to prove that custom is certain. Mere vague allegations as to existence of custom will not suffice. One who alleges a custom must show what exactly the custom is and how far it is applicable to the matter at issue. For instance, a vague assertion that divorce by mutual consent is allowed, or that the daughter inherits along with the son, or that the rule of primogeniture operates, is not sufficient to establish a custom. It is necessary to prove with reasonable amount of certainty that the custom as alleged exists, and further that it is applicable to the parties on the matter at issue.[170]

(4) *It should not be unreasonable*— An unreasonable custom is void, although it cannot be said that custom is always founded on reason. No amount of reason can make a custom. What is reasonable or unreasonable is a matter of social values. It may differ from time to time from place to place. Therefore, whether a custom is reasonable or not is determined by the contemporary values of every society, though there are certain rules or practices which are considered unreasonable in all times and in all societies.[171]

(5) *It should not be immoral*—Like the standard of reasonability, the standard of morality may vary from time to time and from society to society. Custom which is immoral is void. Thus, it has been held that an alleged custom permitting a woman to leave her husband and to remarry without his consent, or a custom permitting a husband to pronounce divorce on

[169]Ibid.
[170]Ibid.
[171]Ibid.

payment of a sum of money to the wife without her consent, or custom under which adoptive parents pay a sum of money to the natural parents at the time of adoption, or a custom under which the trustees of a religious institution are allowed to sell their trust is void being against morality. But a custom permitting divorce by mutual consent and remarriage on repayment by one party to the other of the actual expenses of original marriage, or a custom which dissolves a marriage and permits the wife to remarry on her abandonment and desertion by the husband has been held to be valid and not against morality.[172]

(6) *Custom must not be opposed to public policy*—A custom which is opposed to public policy is void. Thus, a custom among dancing girls permitting them to adopt one or more daughters has been held to be void being opposed to morality and public policy. Similarly, a custom permitting the trustee of a religious endowment to sell the trust has been held to be contrary to public policy.[173]

(7) *It must not be opposed to law*—Here by being opposed to law we mean opposed to statutory law. A custom opposed to sacred law prevails, but no custom opposed to statutory law can be given effect. The codified Hindu Law has abrogated custom except in a few matters where it has been expressly saved.[174]

f. Proof of Custom

The burden of proving a custom is on the party who alleges it. There are certain customs of which the court will take judicial notice: when a custom is repeatedly brought to the notice of the court, the court may hold the custom proved without any necessity of fresh proof, otherwise all the customs are to be proved like any other fact, usually custom is proved by instances. Custom cannot be extended by analogy. No hard and fast rule can be laid down as to how many instances need be proved. A custom can be proved otherwise also. For instance, proof of conduct of members of the caste or locality which could be explained only on the basis of custom will be sufficient. Record of custom, such as riwaj-i-am, can be used for proving a custom. The riwaj-i-am, is a public record prepared by a public officer in the discharge of his public duties under government rules. The statement contained in the riwaj-i-am may be accepted, even if unsupported by manuals and books can also be used as record of custom. For instance, in Punjab, Rattigan's Digest on customary law of Punjab throws a good

[172] Ibid.
[173] Ibid.
[174] Ibid.

deal of light on Punjab customs and may be used for the purpose of proving custom. But such manuals and digests have to be used with caution. The burden of proof is on the person, who asserts the custom, and if he fails to prove it he will be governed by Hindu Law.[175]

g. Smritis & Nibandhas: Evidence of Customs

Desai in his introduction to Mulla's Principles of Hindu Law has observed that the law promulgated in the Smritis was essentially traditional and the injunction was that time honoured institutions and immemorial customs should be preserved intact and that the traditional law was itself grounded in immemorial customs. He has pointed out further that Medhatithi and Vijnaneswara as also the Mahabharata and the Aarthashastra of Kautilya maintain the view that law as enjoined in the Vedas and the Smritis was of popular origin. It was law by acceptance; Jus receptum and constituted in part of conventional and customary law. Commenting on the Dharmasutras, the learned Chief Justice has observed that these Sutrakars, who were the acclaimed propounders of the early Smriti law, primarily sought to express the communis sentential of the Indo-Aryans and were unanimous in their appeal to customary law and that this adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices, and family usages prevailed and were preserved is one of the outstanding features of Hindu Jurisprudence. Derrett has also regarded the ancient Hindu Law and the Dharmasastras, as "a rationalized and systematized body of customary law and observances, a collection of (for the most part) carefully justified 'oughts' and 'should nots' and while discussing about the Smritis the learned author has pointed out that "its raw material was custom".[176]

The Commentaries and the Digests were also the records of the traditional customs recorded in the Smritis as well as the new customs claiming for and found worthy of recognition. It is now agreed on all hands that the Commentators, though professing and purporting to rest on the Smritis, explained, modified and enlarged the traditions recorded therein to bring them into harmony and accord with prevalent practices of the day to suit the felt necessities of the time. But records of the traditions of an early age, the Smritis were very soon found to be insufficient and incomplete Codes for the later ages as the new and the prevailing practices of the later ages could not be found there. Thus, arose the necessity of moulding and modifying the texts of the Smritis to suit and fit in with the prevalent customs and usages of the different

[175] *Id.* at 47.
[176] Ibid.

parts of the country. Leading persons of eminence commanding great respect and influence from those among whom they lived because of their learning and integrity of character and other great qualities, took upon themselves the task of reconciling the texts of the Smritis with the new customs and usages of the day by addition and alteration in the garb of interpretation and thus ushered in the most significant era of Hindu law, namely, the era of the Commentaries and the Digests, which in effect became larger records of the customs, both past and present. About the well-known of these Commentaries, the Mitakshara, the Privy Council pointed out in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* that "the Digest subordinates in more than one place the language of the texts to customs and approved usage." Again while discussing about the nature and character of these Commentaries the Privy Council observed in *Balwant Rao* v. *Baji Rao*, that "they do not enact; they explain and are evidence of the congeries of customs which from the law". In *Atmaram* v. *Bajirao*, the Privy Council again pointed out that "the Commentators, while professing to interpret the law as laid down in the Smritis introduced changes in order to bring it into harmony with the usage followed by the people governed by the law and that it is the opinion of the Commentators which prevails in the provinces where their authority is recognised" and that "in the event of conflict between the ancient text writers and the Commentators, the opinion of the latter must be accepted". Leaving aside for a moment the debate as to whether the Smritis were the result of divine inspiration or were the records of traditions, this much is therefore, clear that those were virtually replaced by the Commentaries and Digests and that it was not open to us, at least from the time, when the Privy Council decided the Ramnad case in 1868. As pointed out there in further, some of these Commentaries "having been received in one and rejected in another, schools with conflicting doctrines arose". And if these Commentaries were as pointed out in *Balwant Rao* v. *Baji Rao*, "evidence of the congeries of customs which form the law" and as explained in the leading decision of the Calcutta High Court in *Jagadamba Koer* v. *Secretary of State* their "doctrines have themselves been moulded according to prevailing usage of which they are only the recorded expression", then there can be no escape from the conclusion that the Hindu law was all along Nibandhas, common customs of the realm. And therefore, the texts of the Smritis and the Nibandhas were not the legal sources of the law but were only evidence of customs recognised as sets of binding rules. The role played by the courts in England leading to the development of the common customs of the realm to the Common laws of the realm was really performed by these Smritis and more particularly by the Nibandhas. As observed by Justice Hedge in the Supreme Court decision in *V.D. Dhanwatey* v. *Commissioner of Income Tax* "our great

commentators in the past bridged the gulf between law as enunciated in Hindu law texts and the advancing society by wisely interpreting the original texts in such a way as to bring them in harmony with the prevailing conditions". In the words of Gajendragadkar "in due course of time, when the distance between the letter of the Smritis and the prevailing customs threatened to get wider, commentators appeared on the scene and by adopting ingenious interpretations of the same texts, they achieved the laudable object of bringing the provisions of the law into line with the popular usages and customs". It is no doubt true that under the British Jurisprudence a custom acquires the force of law after it is recognised by the courts. But even after recognition, the custom, so recognised, is to be regarded to be source of law and not its recognition by the courts, and therefore, the Smritis and the Nibandhas were not the sources, but were merely the records, of law. As Derrett has observed, "the Sastra incorporated numerous customs systematized, compared and summarily set down".[177]

4.4. Personal Laws and the Fundamental Rights

Although in theory, the state's legislative power to make laws on personal laws is not subject to any constitutional restriction. However, the successive governments at the center have adopted a strategy of exempting the personal laws from any direct reform. Of course, all these laws have been subjected to the few legislative measures [for example, the law on child marriage and the dowry] that have been adopted for all Indian citizens. In addition to these laws, Parliament enacted new personal laws for the majority community and the Sikh, Jain and Buddhist minorities-all of which are included within the expression 'Hindu' [not used in its religious sense]. The recognized laws of each and every one these communities not falling under these new laws remain in force in this country; for example-[178]

a. The pre-1950 laws of Muslim, Christians, Parsis and Jews [some of them partly codified];

b. The post-1950 codified laws of Hindus, Buddhists, Sikhs and Jains;

c. Some traditional laws of these four communities, not yet repealed; and

d. Laws commonly applicable, or available to all Indians.

[177] Ibid.
[178]Tahir Mahmood, *Personal Law in Crisis* 3 (Metropolitan Book Company, New Delhi, 1986).

As regards the requirement of conformity of all these laws to Part III of the Constitution, two different issues are to be closely examined:

(a). Is the system of community-wise personal laws in itself conducive to Article 14 of the Constitution, or will statutory reform of some of these laws will be repugnant on to the extent of their contravention of Article 14?

(b). Are the diversities found within a particular personal law, codified and uncodified, hit by Articles 14-15 of the Constitution and be subject to reasonable classification?

These questions are important because a personal law of each community is distinct and the content of each of them are to a large extent discriminatory in various ways.

In case the un-codified personal laws are discriminatory whether or not they can be declared unconstitutional in the light of Articles 14 and 15 of the Constitution. Under the personal laws especially that of the Hindu and Muslim personal laws, differing rights is provided to men and women, thus it violates Articles 14 and 15 of the Constitution. Time and again the discriminatory provisions under the personal laws have been challenged before the courts; however, the courts in majority of the cases have been reluctant to decide on the said matter. With such an approach the courts have in general left these laws intact.[179]

4.5. Personal Laws and Rights to Freedom of Religion

Article 25 of the Constitution [guaranteeing right to freedom of religion] is often relied upon by those supporters of the personal-law system who would want to retain the "unadulterated" form of each of the personal laws. They are not disillusioned by the juristic rebuff that the provision of Article 25 is not only subject to "the other provisions of Part III", but it also expressly authorises the state to "regulate" inter alia, "secular activity associated with religion". The relationship between and the parameters of interaction of the various provisions within Article 25 cannot, in fact, be easily determined. The expression "other provisions" of Part III is vague and wide and hence interpreted variously specially to support the conclusion that the personal-law system is not covered by the right to freedom of religion. It is not clear as to which is the Constitutional authority to decide whether a particular personal-law matter-e.g., getting married, or adopting a child, or naming a guardian for the

[179] Ibid.

child, or writing a will-is "practice" of religion [which Article 25(1) guarantees] or is in fact "a secular activity associated with religion" [which under Article 25(2) the state can nevertheless regulate] The term "secular" as used in this context needs to be defined. For example, whether the christening, circumcision and mundane (or aqiqah) of a child and burial or cremation of the corpses also be regarded as "secular activity associated with religion".

Delineation of these boundaries is not available. Due to such ambiguity supporters of personal law system take shelter behind right to religion. Hence clear delineation of boundaries of right to religion is the clarion call of the hour.[180]

4.6. Personal Laws and Right to Preserve Culture

Article 26 ensures to every religious denomination, the right to administer their own affairs in subject-matter of religion. However, the expression "their own affairs" is vague. If the "affairs" are secular in nature or activities associated with religion, then the provision is not applicable to personal laws.

Article 29 of the Constitution guarantees 'right to preserve culture'. Personal law may not be linked with religion, but it may be a component of culture of a community. However, nowhere under Article 29 there is a mention of the authority of the state to manage the secular activity linked with culture. As a result, it is difficult, if not impossible, to decide upon the claim made by a segment of citizens, that their distinctive culture is found in their personal laws. In addition, where personal law is accepted as part of the culture, a possibility of conflict arises between Article 29 and / or Article 25, Articles 14 and 15. Such a complex jural relationship gives rise to the dichotomy of 'law' and 'personal law'.

The fact is that most of the statutory laws enacted in the area of personal law are replete with provisions discriminating between person and person on the basis of religion, sex, domicile or place of birth. Underlying some apparently discriminating provisions of the classical [uncodified] personal laws was the wisdom of our ancient law-givers-which may not in our wisdom question, believing that Article 13 does not apply to such laws. But how about the wisdom of our modern Parliament and State Legislatures which have both retained in the old personal law statutes and also straight away introduced into the newly enacted personal laws discriminatory provisions much more pronounced than those under the conventional personal laws? Whether or not there is the Constitutional sanction for such legislative provisions.

[180] Ibid.

4.7. Personal Laws under Article 13

If personal law is law as understood in modern jurisprudence and if the same was in force in the territory of India, then a plain reading of the provisions of Article 372(1)[181] and Article 13(1)[182] of the Constitution should leave no doubt that the personal law have continued to be in force, since the adoption of the Constitution i.e., 26th January, 1950.

When the Constitution was adopted, it recognised the continuation of various personal laws in India and accordingly Article 44 was included in the Constitution. The framers of the Constitution were optimistic that a day will come when the people themselves will adopt a uniform civil code for themselves. Such recognition is also apparent from Entry No. 5 of List III of the Seventh Schedule of the Constitution[183] Therefore, even a cursory perusal of all these provisions would give rise to this impression that personal laws operating in India immediately before adopion of the Constitution have been continued by Article 372(1) subject to the provisions of the Constitution by Article 13(1), to the provisions in Part III, in particular.

Justice Vivian Bose while speaking for a three judge bench of the Supreme Court, observed[184] that the more learned a person is in law, the more puzzled he would be, "for it is not till one is learned in law that subtleties of though and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not versed in law, would have no difficulty in understanding." But whether or not, as observed by the eminent judge, learning in laws brings in some sort of amblyopia, it is startling to find that there are very high authorities, both judicial and juristic, for the view that personal laws of the Muslims and the Hindus, even though actually in force as laws, are not laws in force within the meaning of the provisions of Article 372(1) and Article 13(1) and were therefore, immune from the provisions of the Constitution including the provisions in Part III thereof relating to fundamental rights. Thus, the question arises as to whether personal laws as in force

[181]Article 372: Continuance in force of existing laws and their adaptation—
(1). Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395, but subject to other provisions of the Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.
[182] Article 13: Laws inconsistent with or in derogation of the fundamental rights—
(1). All laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
[183]Entry No. 5 of List III of the Seventh Schedule of the Constitution read with Article 246(2) empowers Parliament and the State legislatures to legislate on "all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."
[184] *Seksaria Cotton Mills* AIR 1953 SC 278 (181, 282).

immediately before the commencement of the Constitution, were or were not laws in the jurisprudential sense of the expression and if they were so, whether they could still then enjoy any immunity from the restrictions and limitations imposed by the Constitution.

If the personal laws were law in the accepted sense of the term, then the fact that it was also in force and operation immediately before the commencement of the Constitution cannot but be beyond all doubt and dispute. For example; as discussed in Chapter II, Regulations[185] from the time of Warren Hastings and then a series of enactments,[186] generally referred to as the Civil Courts Acts, and thereafter the central enactment being the Shariat Act of 1937 have all along continued to mandate the courts to apply and administer Muslim law to the Muslims on a number of matters specified therein. And as noted at the outset, the Constitution itself has recognised the personal laws as laws having provided in Entry No.5 of the Concurrent List read with Article 246(2). All these should leave no doubt that the Muslim law was very much a law in effective force and operation immediately before the commencement of the Constitution, though it may be noted that the expression laws in force in Article 372 as well as in Article 13 has been defined to include even laws which though, existing, were not in actual operation. It may also be noted that the Shariat Act of 1937, enjoining application of Muslim law to the Muslims had been amended in Madras in 1949 by the Madras Act 18 of 1949 and the law so amended has been applied by the Supreme court in *Mohammad Yunus v. Syed Unnissa,*[187] and the amendment of the Muslim Personal Law (Shariat Application) Act in 1949 should be an irrefutable proof, if such proof is at all necessary, of the existence of the Muslim Personal Law as a law in force in 1949, i.e., having existed prior to the adoption of the Constitution. And if Muslim Personal Law was a law in force immediately before the commencement of the Constitution, then one may not find any reason whatsoever as to why it would not, under Article 372(1), be subjected to all the provisions of the Constitution and would not under Article 13(1), be void to the extent of its inconsistency with the fundamental right. But as pointed the authorities in many of their decisions have laid down contrary views in regard of personal laws being subjected to the requirement/s laid down under Article 13 of the Constitution.

[185]For example, Regulations II of 1772, Regulation IV of 1793.
[186]For example; Punjab Laws Act, 1872 (Section 5), Madras Civil Courts Act, 1873 (Section 16), Central Provinces Laws Act, 1875 (Section 5), Oudh Laws Act, 1876 (Section 3), Ajmere-Merwara Laws Regulation, 1877 (Section 5), Bengal, Agra and Assam Civil Courts Act, 1877 (Section 37).
[187] AIR 1961 SC 808.

In *Krishna Singh v. Mathura Ahir*,[188] the Apex court had held that the personal laws cannot be challenged on the ground of violating Part III of the Constitution. Though, the honourable court did not give any explanation for such an observation. But if personal laws are not touched by Part III of the Constitution, then one would have to conclude that the personal laws of the Muslims or the Hindus, even though applying to and governing the millions of Indians before, and also immediately before, the commencement of the Constitution, did not fall within the scope of 'law' as provided under Articles 13(1) and 372(1) of the Constitution. For, if they were, then it would be difficult to understand how they could acquire any immunity from the operation of the paramount law, which, while having continued in operation all the earlier laws in force, has subjected all of them to the provisions of the Constitution and of its Part III, in particular. Mathura Ahir's case does not help us to understand the problem.

The only decision where the question 'whether Part III of the Constitution is applicable to the personal laws or not" have been considered in appreciable depth is the two judge's judgment of the Bombay High Court in State of Bombay v. Narasu Appa Mali[189]. In this case the two distinguished judges, Chief Justice Chagla and Justice Gajendragadkar in their separate but concurring judgments, held that personal laws of the Hindus and the Muslims were not laws as laid down under Article 372(1) and Article 13(1) of the Constitution.

In *Srinivasa Aiyar v Saraswathi Ammal,*[190] similar question that were raised in Narasu's case was also raised in this case. But the Division Bench did not think it necessary to decide that question. In that case, the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, penalising and also invalidating bigamy among the Hindus, was challenged as violative of the right to equality under Article 14 and Article 15 and the right to freedom of religion under Article 25 of the Constitution. It was contended that by prohibiting, penalising and invalidating polygamy among the Hindus only, while leaving the rights of the Muslims to practise such polygamy wholly unaffected, the impugned Act denied equality before and equal protection of the laws to the Hindus, discriminated against them on the ground of religion and violated their right to freely profess, practise and propagate religion. It was, however, held that though subjecting the Hindus and the Muslims to different sets of laws

[188] AIR 1980 SC 707 (712).
[189] AIR 1952 Bom 84.
[190] AIR 1952 Mad 193.

would amount to classification, the essence of that classification was "not based solely on the ground of religion but based on considerations peculiar to each of the communities." As to the contention that the impugned Act violated the right to freedom of religion, it was held that the freedom to practise religion was not an absolute right, but, as Article 25 itself shows, it was subjected to public order, morality and health and also subject to legislations providing for social welfare and reform it was necessary to do so. But about the question as to 'whether the expression 'all laws in force' in Article 13(1) of the Constitution includes personal laws or not", it was observed that it was "not necessary to go into the more difficult question", for even assuming it does, the Act does not offend, in our opinion, Article 15." This ruling of the court does not provide answer to the pertinent question, 'whether or not personal laws are subject to Part III dealing with fundamental rights.'

A decision in *Abdulla Khan v. Chandni Bi*,[191] may also be referred here. In that case it was held that a Hindu wife can ask for a separate residence and maintenance from her husband if the latter married again,[192] but a Muslim wife had to submit to her husband's polygamy without any demur, yet these different provisions were not violative of the Equality Clause in Article 14 being grounded on reasonable classification of the Hindus and the Muslims into two separate classes "based upon the outlook of persons belonging to the two communities". This decision clearly accepted the amenability of the Personal Laws of the Hindus and the Muslims to the provisions of the Constitution and their obligation to satisfy the requirements of Part III for their post Constitutional survival.

In Mysore decision in *Sudha v. Sankappa*,[193] Justice Hedge while repelling the contention that Section 10 of the Madras Aliyasanthana Act, 1949 was violative of Article 14 for having provided an easy unilateral judicial divorce not available to the Hindus governed by the Hindu Marriage Act, proceeded to examine further that the differing provisions relating to marriage and divorce among the Hindus, the Muslims, the Christians and the other communities "are the result of past history, difference in culture etc." The obligation of the Personal Laws to satisfy the criterion of Part III of the Constitution was also accepted by Justice Hedge in this Mysore decision and the relevant provisions were held to be within the permissible limits of reasonable classification under Article 14. It is true that the provisions which were being considered in this Mysore decision were statutory; but personal laws do not

[191] AIR 1956 Bhopal 71 (72).
[192]This right can be claimed under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.
[193] AIR 1963 Mysore 245 (247).

cease to be so in spite of their being enacted or codified and as pointed out by the Supreme Court in *Bajya v. Gopikabai*,[194]all our Hindu Law enactments, including the major four Acts of 1955-56, are personal laws. Infact in the Miscellaneous Personal Laws (Extention) Act, 1959, all the statutory enactments noted therein and relating to the personal laws of the Hindus and the Muslims have been referred to as personal laws.

A Division Bench of the Punjab & Haryana High Court also incidentally touched a cognate question in *Gurdial Kaur v. Mangal Singh*,[195] where it was contended that the custom prevailing among the Jats of Punjab, under which a mother was disinherited on her remarriage, discriminated against the Jats merely on the ground of caste or race as compared to the other Hindus and was therefore, void under Article 15 of the Constitution. This contention was repelled.[196] It would therefore, seem that the Division Bench did not consider that personal laws were laws as defined under Article 13(1), for in that case it would have not been necessary for the Division Bench to hold, as it did, that the law in question was not violative of Article 15. The trend of the judgement appears to be that personal laws were laws in force within the meaning of Article 13(1), and were, therefore, subject to the provisions of Articles 14, 15 and the other relevant Articles of Part III; but that the continuation of diverse category of personal laws were not violative of the equality clauses contained in Part III.

If the personal law was in fact in force and operation immediately before the commencement of the Constitution of India, then one may find it difficult to understand as to why it would not come within the expression all the laws in force in Article 372(1) or Article 13(1), unless one finds that because of any special, peculiar or particular definition or explanation or limitation governing the Articles or because of something in the relevant context, the expression all the laws in force has and must have a narrow meaning excluding from the ambit thereof the personal laws of the Muslims or the Hindus.

But for some insignificant verbal variations, the expression laws in force has been defined in similar terms in Explanation I to Article 372 and clause 3(b) of Article 13. Both the definitions, as well as the definition of law in Article 13(3) (a), are ex facie inclusive and obviously not exhaustive. For otherwise, even a statutory enactment, not having been

[194] AIR 1978 SC 793 (797).
[195] AIR 1968 Punjab 396 (398).
[196]The court while rejecting the contention had observed that "if the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds and communities can be constitutional" and that "to suggest such an argument is to reject it".

expressly included in the definition of law in Article 13(3) (a), would not have been law and the mandate in Article 13(2) would have been entirely useless as the state then would have been free to take away or abridge all the fundamental rights by and through ordinary legislations. It is now settled by a series of decisions[197] of the Supreme Court that the 'laws in force' used in Article 372(1) comprise not only laws made by the Parliament, but also the laws administered by the courts and non-statutory laws and customs and usages having the force of law, though the definition and the Explanation, as quoted above, expressly refer only to statutory laws. Therefore, the mere fact that any class of laws has not been specifically mentioned in the inclusive and non-exhaustive definition and explanation of the expression 'Law' in Article 13, by itself, would not, as if obviously cannot, mean that such law is excluded from the operation of Article 372 or Article 13 because of their not having been expressly specified in the relevant inclusive and obviously non-exhaustive definition and explanation.

Thus, not anything can be found in Article 372 or in Article 13 or anywhere else in the Constitution to indicate that the Constitution intended and/or purported to exclude the personal laws from the operation of these Articles. If the personal laws of the Muslims or the Hindus were laws in force within the meaning of Article 372(1), they could have and must have continued, as expressly provided in that clause, only "subject to the other provisions of Part III and in particular, if they were laws in force within the meaning of Article 13(1), they were obviously subject to all provisions of Part III.

Some observations of the Delhi High Court in *Harvinder Kaur v. Harmander Singh*[198] are to be noted. In that case the learned single judge was required to decide as to whether the provisions of Section 9 of the Hindu Marriage Act, 1955 providing for restitution of conjugal rights is violative of the right to equality under Article 14 and the right to personal liberty under Article 21 of the Constitution. The learned judge has upheld the validity of the Section and very strongly dissented from a single judge decision of the Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah*,[199] where this Section of the Hindu Marriage Act, 1955 was declared to be *ultra vires* Article 14 and Article 21 by a learned single judge. But even after holding that the Section does not violate Article 14 and Article 21, the learned judge had

[197] *Director of Rationing v. Corporation of Calcutta* AIR 1960 SC 1355 (1360); *Sant Ram v. Labh Singh* AIR 1965 SC 314; *Builders Supply Corporation v. Union of India* AIR 1965 SC 1061 (1068); *State of Madhya Pradesh v. Lal Bhargavendra Singh* AIR 1966 SC 704 (706); *Superintendent & Remembrancer of Legal Affairs v. Corporation of Calcutta* AIR 1967 SC 997 (1007).
[198] AIR 1984 Delhi 66 (75).
[199] AIR 1983 Andhra Pradesh 356.

observed that "the introduction of Constitutional Law in the home is most inappropriate", "it is like introducing a bull in a China Shop", "it will prove to be a ruthless destroyer of the marriage institution and all that it stands for".[200] The learned judge has proceeded on further and observed that it is impossible to understand that if family and marriage relations are regulated by laws, how those other provision of the Constitution, unless such family and marriage laws are, by the Constitution itself, excluded from its purview.

It may be noted that the Supreme Court in *Saroj Rani v. Sudarshan Kumar*[201] has approved the decision in Harvinder Kaur's case, but it has done so on the ground that on a proper appreciation of Section 9 of the Hindu Marriage Act and of the remedy of restitution of conjugal rights provided therein, the provisions do not appear to transgress the provisions of Article 21 or Article 14.

In *Mohd. Ahmed Khan v. Shah Bano Begum*[202]the Supreme Court had held that a Muslim wife, like any other Indian wife, was entitled to invoke the general law provisions relating to maintenance under Chapter IX of the Code of Criminal Procedure. Further in *Jordan Diengdeh v. S.S. Chopra,*[203]Justice O. Chinnappa Reddy had observed that the law on judicial separation, divorce and the nullity of marriage is far from uniform and to reform the same is the need of the hour.[204]

In the decision of the Supreme Court in *Sarla Mudgal v. Union of India,*[205] the two judge Bench had issued a direction, though couched in the frame of request, to the state to take steps to secure a Uniform Civil Code relating to our matrimonial or family laws. *Lily Thomas* v. *Union of India,*[206]was another case of bigamous marriage where the husband of the petitioner had converted to Islam religion with an intention to marry another woman. In

[200]The learned judge had observed that "in the privacy of the home and the married life, neither Article 21 not Article 14 will have any place" and that "in a sensitive sphere which is at once most intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond".
[201] AIR 1984 SC 1562.
[202] AIR 1985 SC 945.
[203] 1985 AIR 935: 1985 SCR Supl. (1) 704.
[204]Justice O. Chinnappa Reddy had observed,"It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, from uniform, surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration- a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and provide by law for a way out of the unhappy situations in which couples like the present have found themselves." *Id.* at 940-941.
[205] (1995) 3 SCC 635:JT 1995 (4) SC 331.
[206] AIR 2000 SC 1650.

Danial Latifi v. Union of India,[207] inapplicability of Section 125 of the Criminal Procedure Code to divorced Muslim women was challenged.[208] The Apex court had upheld the validity of 1986 Act.

In *Saumya Ann Thomas vs. Union of India*,[209]the Constitutional validity of Section 10-A of Indian Divorce Act was challenged on the ground of infringing Articles 14 and 21 of the Constitution. In this case the court had said that: "*All laws whether pre constitutional or post constitutional will have to pass the test of constitutionality"*. In the recent judgment of the Supreme Court in the case of *Shayara Bano v. Union of India*,[210] the Hon'ble Apex Court had declared the practice of talaq-e-biddat(Triple Talaq) as 'unconstitutional'. Looking into the judicial trend on matters concerning personal laws, there seems to be ambiguity with regard to the status of personal laws under the Constitution. In some cases as mentioned above the learned court has categorically held that the personal laws are outside the purview of Part III. However, they have also been cases where personal laws have been challenged on the ground of violating the fundamental rights and the learned court has tested the personal laws on the touchstone of Part III.

From the discussion above the approach of the courts towards personal laws matter have been conflicting. In some cases the courts have tested the personal law as per the requirement laid down under Part III of the Constitution and in some cases the courts have in order to avoid controversy kept the personal laws outside the ambit of Part III of the Constitution. As a result, the uncertainty surrounding personal laws continues to remain.

4.8. Personal Law a 'Law': The Debate

Derrett, a well-known authority on Hindu Law, has observed that Hindu Law as operating immediately before the commencement of the Constitution, "are retained intact by the provisions of the Constitutions", even if it discriminated between castes or between the sexes. The learned jurist has not spelt out his reasons for the view and has only referred to Narasu Appa Mali's case.[211] Anderson, a well-known authority on Islamic Law, has also observed that the equality clause in our Constitution was not to affect the prevailing personal laws as the injunction in Article 14 nor to deny to any person equality before law and that the

[207] (2001) 7 SCC 740.
[208] As per the Muslim Women (Protection of Rights on Divorce) Act, 1986; Section 125 of Cr.Pc was not applicable to Muslim women.
[209] 2010 (1) KLT 869.
[210]*Shayara Bano* v. *Union of India*, (2017) 9 SCC 1.
[211]*Narasu Appa Mali* v. *State of Bombay* AIR 1952 Bom 85.

prohibition mentioned under Article 15[212] "are addressed to state action, not to the existing personal laws". The foreign jurists had branded the personal laws of the Hindu and the Muslim as non-state action, however it is difficult to understand how Deshpande, a well-known Indian jurist-judge, could also observe that "there was no state action by which the Hindus were governed by the Hindu Personal Law and the Muslim by the Muslim Personal Law" and "therefore the personal laws continue to be valid inspite of Article 15(1), because the difference between them was not due to state action". The learned jurist has reiterated that "so far as the uncodified Muslim Personal Law is concerned, it was not the result of the state action".

Many great luminaries like former Chief Justice late M.C.Chagla and Justice P.B. Gajengragadkar had remained all their lives, great protagonists of secularization and unification of the personal laws prevailing in this country. But when, as judges, they had to explain the Constitutional position, they did not oblige either those who believed that the very system of community-wise personal laws was unconstitutional or those who objected to the exclusive reform of a particular law. The need and receptivity of a particular community in respect of personal-law reform would, in their opinion be a valid criterion for singling it out. In the celebrated Narasu Appa Mali's case these best of law brains in the country found enough indications and evidence in the Constitution, both recognising the system of separate personal laws and enabling the state to pick and choose between them for purpose of reform. In Narasu Appa Mali's case the learned judges have held that the personal laws do not fall within the coverage of Article 13 and thus, these laws cannot be challenged under the fundamental rights. Justice Gajendragadkar had observed that, although the framers of the constitution intended to do away with the personal laws and they wanted to adopt a common civil code. However the framers did not intend that the personal laws should be subject to Part III of the constitution i.e. personal laws cannot be challenged on the grounds of violating the fundamental rights guaranteed under Part III. Thus, personal laws were not included within the definition of the expression 'laws in force' (Article 13).[213]

[212] Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

[213]Justice Gajendragadkar had observed that: ".... the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution (viz., fundamental rights). They must have been aware that these personal laws need to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that that the provisions of the personal laws should be challenged by reasons of Fundamental Rights... and so they did not intend to include these personal laws within the definition of the expression "laws in force".

In the view of Justice A.M.Bhattacharjee, the mere fact that any class of laws has not been specifically mentioned in the inclusive and non-exclusive definitions of the expression "laws in force" in Article 372 and Article 13 and also of the expression "law" in Article 13, by itself, would not, as it obviously cannot, mean that such law is excluded from the operation of Articles 372 or 13. Therefore, it cannot be regarded to indicate that the "personal laws" were or are excluded from the operation of Article 372 or Article 13 because of their not having been expressly specified in the relevant inclusive and non-exhaustive definitions. Justice Bhattacharjee further observed that "I have not been able to find anything in Article 372 or in Article 13 or anywhere else in the Constitution to indicate that the Constitution intended and/or purported to exclude the personal laws from the operation of these Articles. And if the personal laws fell within the description of law as provided under Article 372(1), they could have and must have continued, as provided in that clause, only "subject to the other provisions of the Constitution" including Part III and in particular, if they were "laws in force" within the meaning of Article 13(1), they were obviously subject to all the provisions of Part III."

H.M. Seervai had argued that the distinction between personal laws and "existing laws" of "laws in force", i.e. those laws required under Article 13 of the Indian Constitution not to transgress the fundamental rights is difficult to uphold in any principled way.[214] The inclusion of the personal laws as "existing law" and "law in force" did not mean that Seervai thought that all personal law should be immediately brought into conformity with the Fundamental Rights. On the contrary, Seervai believed "that in introducing social reform, the state is entitled to proceed by stages and to consider whether any particular community governed by personal law is ripe enough for the reform proposed".

M.P.Jain is of the view that personal laws are by and large non-statutory, traditional system of law having some affinity with the concerned religion. Being ancient systems of law, there are several aspects of these systems of laws which are out of time with the modern thinking and may even be incompatible with some fundamental rights. M.P.Jain says that by not

[214] H.M. Seervai had observed that:"We have seen that there is no difference between the expression "existing law" and "law in force" and consequently personal law would be existing law and law in force. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them it was, therefore, necessary to treat the whole of personal law as existing law or law in force under Article 372 and to continue it subject to the provisions of the Constitution and subject to the legislative power of the appropriate legislature. He further stated that, Entry 5, List III, Sch. 7 clearly recognizes personal law, as law which Parliament and State legislatures can enact, alter or repeal. Therefore, he submitted that, the personal law of a community is "law", and is "law in force" or "existing law", within the meaning of the Constitution."

interfering in personal laws, "the courts have adopted a policy approach rather than a legalistic approach." All this, according to him, is "because of the sensitivities of the people and the delicate nature of the issue involved, the courts have thought it prudent not to interfere with these laws on the touchstone of fundamental rights and leave it to the legislature to reform these laws so as to bring them in conformity with the fundamental rights."

Sum Up

Before 26 January, 1950 separate personal laws were applicable under the provisions of the local civil court laws and under some special enactments.[215] After 1950, the various Hindu-law enactments apply to the Hindus, Buddhists, Sikhs and Jains by virtue of their own opening sections. Had the various personal laws been applicable only on the authority of these old and new statutes, the validity of the system could have been open to meet the requirement as laid down under Article 13 of the Constitution, which requires that all existing and future laws must conform to the provisions of Part III. However as pointed out by many courts, it is the Constitutions itself which recognises the existence and sanctions the continued application [with or without reform] of separate personal laws. And obviously, no provision of the Constitution can be regarded as invalid on the ground that it conflicts with another provision of the Constitution itself. So, the system of community-wise personal laws cannot automatically collapse under the shackles of Article 13.

Article 13 contains two separate clauses- one for the laws in force since the pre-Constitution days[216] and the other for the laws to be made in the post-Constitution era.[217] Conformity to the provisions of Part III is insisted upon in respect of the laws of both the categories. A third provision of Article 13 defines the term "law" and "laws in force" as used in its first two clauses.[218] In the definition clause of Article 13 the conspicuous absence of reference to "personal laws" coupled with the meaningful use of the term "competent authority" in respect of the pre-Constitution laws, lead to an irresistible conclusion that uncodified personal laws are outside the purview of Article 13(1). These clear points with regard to the inapplicability of Article 13(1) to non-statutory personal laws were forcefully registered by Late M.C.Chagla

[215]E.g:,the Muslim Personal Law (Shariat) Application Act, 1937.
[216]Article 13(1), Constitution of India.
[217] Article 13(2), Constitution of India.
[218] Article 13(3)---clauses (a) & (b), Constitution of India.

in Narasu Appa Mali's case.[219] In the same case P.B.Gajendragadkar has asserted that Article 13(1) applied only to "what may compendiously be described as statutory laws".[220] The distinguished scholars like D.D.Basu[221] , Seervai[222]and Mohammad Ghause[223], do not agree with the views of the two great judges of the time. These eminent scholars are of the view that the personal laws fall within the scope of Article 13(1). This judgement that was pronounced by Justice Chagla and Justice Gajendragadkar in the year 1952 has since then been followed, though often silently by all the higher courts in the country. Also the Apex Court in Mathura Ahir's case,[224] has firmly held that, personal laws are outside the purview of Part III of the Constitution.[225]

However, they have been many cases where the personal laws had to pass Constitutional scrutiny and were tested on the anvil of Article 13. For example in *Harvinder Kaur* v. *Harmander Singh*[226], *Saroj Rani* v. *Sudarshan Kumar*[227], *Saumya Ann Thomas* vs. *Union of India & Ors.*[228], etc., where personal laws have been tested on the touch stone of Part III of the Constitution. Mention has to be made of the recent judgment of the Supreme Court in the case of *Shayara Bano* v. *Union of India.,* where the Hon'ble Apex Court had declared the practice of talaq-e-biddat(Triple Talaq) as 'unconstitutional'. As discussed above the courts have in some cases ruled that personal laws are not immune from the obligations laid down under Part III of the Constitution. And in some cases the court have held that personal laws cannot be challenged on the grounds of violating any of the fundamental rights as guaranteed under Part III. As a result, the uncertainty surrounding personal laws continues to remain.

[219] *State of Bombay* v. *Narasu Appa Mali*, AIR 1952 Bom. 85.
[220] *Id.*
[221] D.D.Basu, *Commentary on the Constitution of India* 155 (1965).
[222] H.M.Seervai, Constitution Law of India, 254-55 (1968).
[223] Tahir Mahmood, Personal *Laws and the Constitution of India* 57-58 (Islamic Law in Modern India, 1972).
[224] *Krishna Singh v. Mathura Ahir,* AIR 1980 SC 707.
[225] *Id*. at 712.
[226] AIR 1984 Del 66.
[227] AIR 1984 SC 1562.
[228] 2010 (1) KLT 869.