Chapter V

PERSONAL LAWS AND JUDICIAL REVIEW- THE CONFLICTING JUDGEMENTS OF THE COURTS AND THEIR IMPACT UPON THE PERSONAL LAWS

The status of personal laws under the Constitution of India is ambiguous and requires clarity. Unless and until the position of personal laws under the Constitution becomes clear, the controversy surrounding the personal laws will continue to exist. Time and again the Parliament of India has put in efforts towards bringing changes and reforming the personal laws. However, the steps taken so far have proved to be inadequate. Right to equality and prohibition on the discrimination of sex, religion etc. is the two important Fundamental Rights besides other rights guaranteed by Part III of the Constitution of India.[229]On the other hand differing rights is provided to people under their separate personal laws. There is no uniformity in terms of enjoyment of these rights under different personal laws recognised by the state and being followed by different communities in India. Under the personal laws both men and women have different rights in matters concerning marriage, inheritance, divorce etc. The women have fewer rights compared to their male counter parts. The men folk enjoy more rights compared to the womenfolk. There exists inequality between the sexes under separate personal laws irrespective of the fact that the Constitution clearly guarantees 'equality to all' without any discrimination. Also the controversy with regard to personal laws has arisen because of the reason that its status under the Constitution is not clear. Except under Entry 5 of Schedule VII,[230] personal laws have not been mentioned anywhere under the Constitution.

Therefore, until and unless the position of the personal laws within the framework of Indian legal system is made certain as to whether it is a 'Law' or 'Law in force' or a 'Custom' having the 'Force of law', the personal laws will continue to remain a controversial issue. Amid such a situation where the status of personal laws is not clear under the Constitution of India and the lackadaisical attitude of the Parliamentarians on issues of personal laws, the judicial approach towards the said issue become significant to discuss. The Judiciary have

[229]Articles 14 & 15, Constitution of India.

[230]The IIIrd List entitled as the concurrent list and enumerates the subjects on which the Union and the State can simultaneously legislate. Entry 5 read as: marriage and divorce, infants and minors, adoption, will, intestacy and read to indirectly imply the existence of various religious personal laws. *See,* Ajai Kumar, *Uniform Civil Code-Challenges and Constraints* 22 (Satyam Law International, 2012).

been proactive and in many cases Judicial Activism has addressed matters of personal laws. However, they have been conflicting judgements of the courts on the status of personal law i.e. 'whether or not Part III of the Constitution governs personal laws'. Thus, it would be pertinent to discuss some of the important cases and the conflicting judgements rendered by the judiciary on the matters concerning the status of personal laws under the Constitution of India. In the below mentioned cases the High Courts as well as the Apex Court have examined, whether or not the personal laws are immune from the subject of fundamental rights i.e. whether Part III of the Constitution is applicable to personal laws or not.

5.1. '***Personal laws not laws'*** [***State of Bombay*** **v.** ***Narasu Appa Mali,*** **AIR 1952 Bom 84**]

The first judgement on the personal laws issue came from the High Court of Bombay in the case of *State of Bombay* v. *Narasu Appa Mali.*[231] In Narasu Appa Mali's case the Bombay Prevention of Hindu Bigamous Marriages Act 1946, rendered all bigamous marriages among the Hindus as void and also punishable as criminal offence. The question with regard to the validity of the Bombay Act was raised on various grounds in some proceedings before the High Court arising out of criminal prosecutions under the Act and one of the grounds, which are relevant for the present study, was developed in the following manner. It was urged that the provisions of Hindu Law and Mahomedan Law, which allowed polygamy for the males but provided strict monogamy for the females, were violative of the provisions of equality and non-discrimination on the ground of sex as contained in Article 14 and Article 15 of the Constitution and therefore the relevant provisions of the personal laws of both the Hindus and the Mahomedans became void and inoperative from the commencement of the Constitution. As a result both the Hindus and the Mahomedans became equally liable and punishable under Section 494, Indian Penal Code for contracting bigamous marriage. But the Bombay Act singled out the Hindus only and made the offence of bigamy under the Act graver and more serious than under Section 494, Indian Penal Code, by making it cognizable, non-compoundable and also by defining the expression 'abettor' more widely under the Bombay Act. In this case the question that arose before the learned High Court for consideration was "*whether the personal laws of the Hindus and* Mahomedans*, fell within the definition of 'law' as laid down under Article 13(1" and the other question was "whether Article 372(1) and Article 13(1) should be subjected to meet the requirements of Part III, particularly Articles*

[231] AIR 1952 Bom 84.

14 and 15?". To these questions the Learned Chief Justice Chagla and Justice Gajendragadkar had held that the personal laws do not fall within the scope of Article 13(1) and Article 372(1) of the Constitution. It is important to discuss and analyse the various grounds that were relied upon by the learned judges that led them to arrive at such a conclusion.

Ground No. 1: Both the Learned judges Chief Justice Chagla and Justice Gajendragadkar observed that the power of the President under Article 372(2)[232] to make "adaptations and modifications" of the laws that were in force prior to the adoption of the Constitution was not intended to apply to the personal laws and according to Justice Gajendragadkar, was clearly intended to apply to the statutory law". It is one thing to say as to how and in what manner or to what extent the framers of the Constitution might have intended any particular power to be exercised and an entirely different thing to say as to what is the ambit and the extent of that power. If the personal laws could be amended and in fact were amended on so many occasions before the commencement of the Constitution, it is difficult to understand as to why it could not be adapted by way of amendment under Article 372(2) by Adaptation Orders, personal laws not having been beyond the amendatory power of the state. It has been pointed out by the Supreme Court *in M.P.V. Sundaramaier v. State of Andhra Pradesh*[233] that provided that the law as adapted is within the legislative competence of the state and its enactment is in process of bringing the state law into compliance with the Constitution, it is within the scope of the power conferred by Article 372(2). Before the commencement of the Constitution, Hindu Law has been amended by the amendatory process of legislation on so many occasions from 1829 to 1949, by enactments expressly professing to amend the same, one such enactment being expressly entitled as Amendment Act also vide, the Hindu Law of Inheritance (Amendment) Act 1929. Also the Muslim Personal Law was amended before the commencement of the Constitution as early as in 1850 by the Caste Disabilities Removal Act, 1850 and again as late as in 1939 by the Dissolution of Muslim Marriage Act, 1939.[234]

Even if the power under Article 372(2) to adapt and modify "laws in force" was not proposed to be applicable to the personal laws but at any rate, it is difficult to understand that even if

[232]Article 372(2): "For the purpose of bringing the provisions of any laws in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order have effect subject to the adaptation and modification shall not be questioned in any court of law.
[233] AI 1958 SC 468 (482).
[234]A.M.Bhattacharjee, *Hindu Law and the Constitution* 57-58 (Eastern Law House, Calcutta, 2nd edn., 1994).

the intention of the framers of the Constitution was not to use the power of adaptation under Article 372(2) in respect of the personal laws or any type of law in force, why the same must be projected to limit operation of the provisions of Article 372(1). It cannot be disputed that all the British-Indian Legislations, securing the application of Hindu Law to the Hindus and the Muslim Law to the Muslims and also amending those laws stood adapted and modified by the Adaptation of Laws orders passed under Article 372(2) and it is therefore, difficult to understand that if those legislations were and could be subject to adaptations and modifications under Article 372(2), then why the personal laws themselves which these legislations sought to apply or to amend and modify were to be beyond the scope of Article 372(2).

It is now settled beyond doubt by a long catena of decisions[235] of the Supreme Court that the expression "laws in force" in Article 372(1) has been used in a very comprehensive sense and includes everything that is law in a sense acceptable to modern jurisprudence, whether statutory or non-statutory, written or unwritten, customary or common, state-made or judge made. In *Sant Ram v. Labh Singh*[236], a decision of a five-judge Bench of the Supreme Court, presided over by Justice Gajendragadkar, then the Chief Justice of India, it has been held that the customary law of pre-emption was 'law in force' within and void under Article 13(1), and in *Builders Supply Corporation* v. *Union of India*[237], it has been held by another five-Judge Bench, speaking through Chief Justice Gajendragadkar, that "the rules of Common Law relating to substantive rights which had been adopted by the country and enforced by judicial decisions, amount to 'law in force' in the territory of India at the relevant time within the meaning of Article 372(1). And these observations really make it difficult to understand as to what that eminent judge really meant when he observed in this Bombay decision in Narasu Appa Mali case that the expression "laws in force" in Article 13(1) as well as Article 372(1) would mean statutory laws and that "it was difficult to accept the argument that custom or usage having the force of law should be considered to be incorporated in the term "laws in force". Though the actual decision of a five-Judge Bench of the Supreme Court in *Director of Rationing* v. *Corporation of Calcutta*[238], to the effect "that the rule of interpretation of statutes that the state is not bound by a Statute, unless it is so provided in express terms or by

[235]*Director of Rationing v. Corporation of Calcutta* AIR 1960 SC 1355; *Sant Ram v. Labh Singh* AIR 1965 SC214; *Builders Supply Corporation v. Union of India* AIR 1965 SC 1061; *State of Madhya Pradesh v. Lal Bhargavendra Singh* AIR 1966 SC 704; *Superintendent and Remembrancer of Legal Affairs v. Corporation of Calcutta* AIR 1967 SC 997.
[236] AIR 1965 SC 314.
[237]AIR 1965 SC.1061.
[238]AIR 1960 SC 1355.

necessary implication, is still good law" has been overruled by the majority of the nine-Judge Bench in Superintendent and *Remembrancer of Legal Affairs v. Corporation of Calcutta*[239], yet the latter has approved and confirmed the observations in the former that the expressions "laws in force" includes not only laws made by the Parliament but also the laws that were was being administered by the courts". In *State of Madhya Pradesh v. Lal Bhargavendra Singh*[240], it has been held that Article 372 is based on legal ideas and notions founded on modern jurisprudence and it would therefore, be legitimative to hold that the word 'law' was used in them in a sense acceptable to modern jurisprudence. Thus it cannot be contended that the non-statutory personal laws of the Hindus or the Muslims were or are not such laws acceptable to modern jurisprudence.

Ground No.2:Article 44 as held by both the learned Judges in Narasu Appa Mali case may be construed to have recognised by implication the existence of the different codes applicable to different communities or classes of citizens. However, whether from the provisions of this Article 44 alone, it can be concluded, as done in the High Court decision on Narasu Appa Mali that this article has also 'permitted' and provided for the continuance of those different codes. When the Constitution in a special and specific article, being Article 372 has expressly provided for and 'permitted' the continuance of all the earlier "laws in force", it is difficult to understand why we would be required to refer to some other article, ex-facie meant for some other purpose and an entirely different subject-matter, and to glean there from, by implication, such provision or 'permission' for the continuance of the personal laws. The Entry No. 5 of the Concurrent List of the Constitution,[241] as subjects of legislation by appropriate Legislatures under the Constitution, cannot, by itself, justify any inference that the earlier personal laws were also thereby continued as they stood before.

It must now be taken to be well settled by the decisions of the Privy Council[242] as well as of the Supreme Court[243] that even on a change of sovereignty over an inhabited territory or country, the earlier laws of the country continue until the new sovereign alters them and until so altered, the laws remain unchanged. It is said that in India, there was no change of the

[239] AIR 1967 SC 997.
[240] AIR 1967 SC 997.
[241] Entry 5 of the Concurrent List provides that, "all the matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law".
[242] *Mayor of Lyons* v. *East India Company* 1 MIA 175 (270-271); *Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* 9MIA 387 (426).
[243] *Rao Shiva Bahadur Singh v. State of Vindhya Pradesh* AIR 1953 S. 394 (410); *Promode Chandra Dev* v. *State of Orissa* AIR 1962 SC 1288(1300).

political sovereignty by and under the Constitution of India, though there was a change of the legal sovereignty as the Constitution became the legal sovereign. In any view of the matter, it may be argued that if there was a change of sovereignty, or even if there was no change, the laws that were in force prior to the adoption of the Constitution would have continued even without the aid of any provisions like Article 372 and even in spite of the repeal of the Government of India Act, 1935 and the Indian Independence Act, 1947. But at any rate, when the new legal sovereign or the new national charter chose to declare what earlier laws shall continue and declared expressly and in absolute and unqualified terms that "all laws in force" would continue, it is difficult to cut down and circumscribe that expression. It should be noted that if that expression "law in force" is circumscribed and is construed to include only certain types of laws and thus to exclude certain other laws, then the laws so excluded would run the risk of not being included at all. The Constitution in Article 372 expressly provides for continuation of all the "laws in force", but that expression is construed to exclude personal laws, and then the personal laws themselves would stand excluded from being continued. If only "laws in force" have been mentioned for the purpose of continuance during the post- Constitutional era and that expression does not include the personal laws, then the personal laws, thus not having been mentioned for such continuance, must have ceased to continue after the commencement of the Constitution.

Ground No. 3: Both the learned Judges have observed that if the expression "laws in force" in Article 13(1) included "personal laws" then Article 13(1) read with Article 15 etc., would have rendered void all the provisions of the personal laws of the Hindus which discriminated between persons on the ground of religion, race, caste or sex and in that case there could have been no necessity for again providing expressly and separately, in Article 17 for the abolition of untouchability or providing in Article 25(2) (b) for throwing open Hindu Public Religious Institutions to all cases and sections of the Hindus. In the words of Justice Bhattacharjee, 'With great respect I would venture to think that this process of reasoning may not be quite sound. The framers of the Constitution intended to provide for the fundamental rights hitherto not guaranteed to us by any written instrument, in as much details as possible and as is natural in all legal instruments going into minute details, there has been some amount of repetitiveness.' Chief Justice Sikri no doubt, observed in Kesavananda Bharati[244]that:

[244] AIR 1973 SC 1461 (1500).

"Our Constitution was drafted very carefully and I must presume that every word was chosen carefully and should have its proper meaning" and for this his Lordship relied on the observation of the American Supreme Court to the effect that "in expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used, or needlessly added....".

One may doubt as to whether the observation of the United States Supreme Court in respect of the Constitution of United States, short, precise and running into few pages only, should at all be applied to our Constitution running into number of pages numberless and thus acquiring the distinction of being the lengthiest Constitution in the world". We should not forget as Justice P.B. Mukherji pointed out in *Mahadev Jiew v. B.B. Sen*[245], that "we are to interpret and expound our own Constitution and that the craze for American precedents can soon become a snare". His Lordships observed further that "a blind and uncritical adherence to American precedents must be avoided or else there will soon be a perverted American Constitution operating in this land under the delusive garb of the Indian Constitution". But this difficulty has now been removed to a great extent by the observations of Chief Justice Chandrachud in the Special Courts Bill case[246], to the effect that "some amount of repetitiveness or overlapping is inevitable in a Constitution like ours which, unlike the American Constitution, is drawn elaborately and runs into minute details". Even Article 13 itself, with its very grave and sombre declaration invalidating all pre-Constitution as well as post-Constitutional laws to the extent they are inconsistent with the provisions of Part III or take away or abridge any of the rights conferred by that Part, has been held to be unnecessary by Chief Justice Kania in A.K.Gopalan's case[247], and it was observed that the same result would have been achieved even without the aid of that article and the laws transgressing any of the other Articles of that Part could and were to be declared void even in the absence of Article 13.

Article 13 also appears unnecessary for yet another reason. The earlier laws in force, while continued by and under Article 372(1), have been expressly made "subject to the other provisions of the Constitution", including obviously all the articles relating to Fundamental Rights being Articles 14 to 35, and the earlier laws could not obviously continue subject to

[245] AIR 1951 Cal 563 at 569.
[246] AIR 1979 SC.478 (500).
[247]AIR 1950 SC 27 (34).

these articles relating to Fundamental Rights and at the same time infringe or transgress those provisions, but were to fail to the extent of any infringement or transgression, even without Article 13(1). Again Article 245(1), which has empowered Parliament and State Legislatures to make laws, has expressly made such law-making "subject to the provisions of this Constitution" including obviously all the provisions relating to Fundamental Rights in Part III, and, therefore, all the post- Constitutional laws also would have failed to the extent they are inconsistent with those provisions, even without Article 13(2).

Therefore, the fact that some matter has been specifically dealt with by one or more articles in Part III, would not, by itself, warrant the conclusion that the same has not been or cannot be also covered by or included in any other article or articles in Part III.[248]

Ground No. 4: Entry No. 5 of the Concurrent List, no doubt, specifically provides that matters covered by personal laws as subjects on which Parliament and the State Legislatures can make laws. But from that alone it is difficult to conclude that the framers, having recognised matters covered by personal laws as a distinct and separate subject or jurisprudential concept, would have specifically included 'personal laws' in the definition of "law" in Article 13(3)(a), if they intended to cover the same by the expression "laws in force". Firstly, the Constitution has also in the very same Concurrent List specified 'Criminal Law' (Entry No. 1), 'Criminal Procedure' (Entry No. 2), 'Transfer of Property' (Entry No. 6), 'Contracts'(Entry No. 7), 'Evidence' (Entry No. 12), 'Civil Procedure, Limitation, Arbitration' (Entry No. 13), etc., as different subjects of legislation and from that it surely cannot be concluded that these different law, not having been particularly specified in the definition of 'law' in Article 13(3)(a), are not included within the expression "laws in force" in Article 13(1). Secondly, even statutory enactments are not specifically included in the definition of "law" in Article 13(3)(a) and surely it could never be contended that statutory enactments, therefore, were not intended to be included within the expression "laws in force" in Article 13(1).

Ground No. 5: Since the expression "law" has been defined in Article 13(3)(a) as to include "custom or usage" also, the personal law of the Hindus in its entirety is to be deemed to be

[248]H.M. Seervai while commenting on this ground has observed that "it is not uncommon in a Constitution to make express provision for matters to which its makers attach great importance, instead of leaving them to dilatory and hazardous process of litigation". *See*, H.M. Seervai, *Constitutional Law of India* 288 (Universal Law Publishing, 2nd edn., 2015).

included within that expression as being "custom or usage". However, observation of the learned judge Justice Gajendragadkar that, Hindu and Mahomedan law was neither custom nor usage having the force of law is surprising.[249]

In respect of Hindu Law, Justice A.M. Bhattacharjee[250] have pointed out that in 1950 when the Constitution commenced to operate or in the 1952, when this Narasu Appa Mali case was decided almost the entire field of Hindu Law was covered by case laws and legislative laws and cases involving Hindu Law ceased by and large, to turn on the interpretations of the scriptual texts. But even assuming that in 1950 or 1952, save and except the cases where customs were permitted to operate, Hindu Law was covered by and contained in the Scriptures, these Scriptures using the expression to include the Smritis as well as the Nibandhas, were records and congeries of customs which already acquired the force of law as *jus receptum* or thereafter acquired such force as *jus receptum*. They were customs mainly, traditional customs as were prevailing and recorded in these Scriptures as well as new customs recognised from time to time with both overt and covert attempt to mould such customs.

Justice Bhattacharjee further had said that:

"It is not my purpose to suggest that Hindu Law as prevailing prior to the British period was nothing but customs and usages having the force of law and, therefore, should be regarded to have been included in the expressions "law" and "law in force" in Article 372(1) and Article 13(1) as such customs and usages. I have only tried to point out that Hindu law during the age of Commentaries and the Digests and even during the age of the Smritis also was based on and was congeries of customs, the old customs often very often yielding places to or being modified by the new, such replacement and modification sometimes taking place as a result of the latter customs gaining force as jus *receptum* and sometimes added strength by being approved and recorded by and in the Smritis. It is, in my view, difficult to agree with the sweeping generalisation of Justice Gajendragadkar that, the personal laws of Hindu and the Mahomedan are neither custom nor usage having the force of law.

[249]Justice Gajendragadkar observed that "it is impossible to hold that either the Hindu or the Mahomedan Law is based on custom or usage having the force of law" and that "on proof of a valid custom" only a departure from the Hindu Law is permitted". "His Lordship observed further that "save and except for the departures from the general rules of Hindu Law which are permitted on the ground of customs, the remaining field of Hindu Law is covered by scriptural texts themselves".

[250] *Supra* note 2.

In respect of Muslim law, the earlier Muslim jurists professed to treat the Koran as the starting point of Islamic law and avoided all reference to pre-Islamic customs, the later jurists have no hesitation in acknowledging the role of those customs in the formation of the basic structure of the Islamic law. As pointed out by a modern jurist,[251]the laws in Koran were evidently piecemeal, superseding some, but certainly nothing near a majority, of the pre-Islamic customary laws of Arabian communities. The learned jurist has observed that even the expression Sunna literally means the 'trodden path' and it was used to express the customary law prevalent in Arabia before the advent of Islam and after the revelation, the 'trodden path' continued to be the accepted law for the Muslim though not so far as it had not been abrogated by Mohamed.[252] According to Abdur Rahim[253], "those customs and usages of the people of Arabia which were not expressly repealed during the life-time of the Prophet are held to have been sanctioned by the law-giver by his silence. Customs (urf,ta-amal, adat) generally as a source of law are spoken of as having the force of Ijma, and their validity is based on the same text as the validity of the latter. It is laid down in Hedaya that customs hold the same rank as Ijma in the absence of an express text, and in another place in the same book, custom is spoken as being the arbiter of analogy". The learned jurist observed further that "even a custom which has sprung up within living memory will be enforced if it be found to be generally prevalent among the Mahomedans of the country in which the question of its validity has arisen". Abdur Rahim referred to various such customs adopted by the Islamic law with or without modifications. Fyzee[254] has also referred to this view of Abdur Rahim with approval. Markby in his work on Jurisprudence[255] also observed that certain amount of the old Arabian customs was, no doubt, assumed by Mahommed and "has always remained in force, though not expressly recognised". It is therefore, difficult to agree with Justice Gajendragadkar when the learned judge observed that, the personal laws of Hindu and the Mahomedan are neither custom nor usage having the force of law. .[256]

Justice A.M. Bhattacharjee further has pointed out that even under the series of enactments[257]directing application of Muslim Law to the Muslims, customs prevalent among them could be pleaded, proved and applied to the Muslims as forming part of their personal

[251]David Pearl, *A Text Book on Muslim Law* 2-4 (Croom Helm, 1979).
[252]Ibid.
[253] Muhammadan Jurisprudece, *Tagore Law Lectures* 136-137 (1911).
[254]Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* 6-7 (Oxford University Press, 4th edn., 1974).
[255]Sir William Markby, *Elements of Law* 52 (Oxford, 5th edn., 1896).
[256]S.A. Kader (ed.), *Muslim Law and the Constitution* 77-78 (Eastern Law House, Calcutta, 3rd edn., 2016).
[257] For example, Punjab Laws Act 1872 (s. 5), Madras Civil Courts Act 1873 (s. 16) Central Provinces Laws Act 1875 (s. 5), Oudh Laws Act 1876 (s. 3), Ajmere-Merwara Laws Regulation 1877 (s. 5).

law on the high authority of the Privy Council in Muhammad Ismail,[258]Adbul Hussein[259] and Roshan Ali[260]cases and it was so applied in Muhammad Ismail case even though the relevant provisions of the enactment[261] in terms directed application of "Mahomedan law" simpliciter without any reference whatsoever to customs or usages. As pointed out by the Supreme Court in *Mohammad Yunus* v. *Syed Unnissa,*[262] that position still continues in all matters not covered by Section 2 of the Shariat Act, 1937. The Shariat Act was avowedly and professedly enacted in 1937 to abrogate all these customs and usages which were being administered to the Muslims as part of their personal law and which, as already noted have continued to be applied in all matters covered by Muslim Law but not covered by the Act. It is therefore difficult to understand as to how Justice Gajendragadkar could make such sweeping observations to the effect that Mahomedan Law was not based on custom. Some of the provisions of earlier enactments[263]like Section 5(b) of the Punjab Laws Act, Section 3(2)(b) of the Oudh Laws Act have clearly directed application of Hindu Law and Muslim Law as such law has been modified by customs. If personal laws of the Hindus and the Muslims have stood modified by customs, then the personal laws are based on customs only. It appears that the Indian Parliament rightly realised that customs and usages were not mere departures or deviations from personal law, as observed both by Chief Justice Chagla and Justice Gajendragadkar but that they form parts of the personal laws themselves. The present Hindu Law Acts of 1955-1956,[264]while providing that on and from the commencement of those Acts all the texts, rules or interpretation of the Hindu Law as well as all customs and usages shall cease to have effect with respect to any matter for which provision has been made in those Acts. The preamble to the Hindu Widows' Remarriage Act 1856, equated Hindu Law with Hindu customs as if the two expressions were equivalent and synonymous and the preamble declared that though the pre-Act incapacity of the Hindu widows to contract re-marriage was "in accordance with established custom", yet the Act was enacted to ensure that "the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom".

[258] 17 Cal WN 97.
[259] AIR 1917 PC 181.
[260] AIR 1930 PC 45.
[261] Section 37, Bengal, Agra and Assam Civil Courts Act 1887.
[262] AIR 1961 SC 808 (811).
[263]For example, Punjab Laws Act 1872(s. 5), Madras Civil Courts Act 1873 (s. 16) Central Provinces Laws Act 1875 (s. 5), Oudh Laws Act 1876 (s. 3), Ajmere-Merwara Laws Regulation 1877 (s. 5).
[264] Section 4 of the Hindu Marriage Act, 1955, of the Hindu Succession Ac, 1956, of the Hindu Adoption and Maintenance Act 1956 and Section 5 of the Hindu Minority and Guardianship Act, 1956.

In the words of Justice Bhattacharjee, "I do not suggest that since the expression "law" has been defined in Article 13(3)(a) as to include "custom or usage" also, the non-statutory personal laws of the Muslims or the Hindus are to be deemed to be covered by that expression as being "custom or usage". But customs and usages formed part of the personal laws and to that extent the personal laws were obviously amenable to the Constitution. It is beyond doubt that "custom or usages formed part of the personal laws and to that extent the personal laws were obviously amenable to the Constitution. It is definite that "custom or usage having the force of law" that were in effect before the adoption of the Constitution was undoubtedly within the phrase "laws in force", in view of its specific inclusion in the definition of "law" in Article 13(3)(a) and it has also been so held by the Supreme Court in *Sant Ram v. Labh Singh*[265]. Any standard treatise on Muslim Law would also demonstrate that almost all the important points of Muslim Law are covered by case laws and as pointed out by a Full Bench of the Gujarat High Court in *Anand Municipality v. Union of India*[266], and also by Justice Mudholkar in the Supreme Court decision in *State of Gujarat v. Vora Fiddali,*[267] case laws are also laws in force. The binding decision of the existing High Courts rendered before the commencement of the Constitution have also continued as "laws in force" under Article 372(1) for the respective territories over which the High Court's continue to exercise jurisdiction. Under Article 225 of the Constitution also "the law administered in any existing High Court" is continued as before the commencement of the Constitution and there can be no doubt that such law would include the laws declared by the Privy Council, the Federal Court and the concerned High Court as the laws so declared were obviously being administered in the said High Court. Thus, if the statute, the custom and the case laws were attracted by the phrase 'laws in force' as provided under Articles 372(1) and 13(1), in that case it is doubtful as to whether anything appreciable could remain as residue and could be so unique as not to be classed as laws or laws in force and so to defy the operation of these articles.[268] In the present case, the High Court of Bombay not only

[265] AIR 1965 SC 314.
[266]AIR 1960 Guj 40 (43).
[267] AIR 1964 SC 1043(1094).
[268]Seervai has accordingly observed that personal laws would be 'law in force' and that it would be difficult to ascertain the residue of personal law outside them" and that "it was, therefore, essential to treat the entire personal law as 'existing law' or law in force under Article 372 and to continue it subject to the provisions of the Constitution", including obviously its Part III, *See,* Seervai, *Supra* note 6 at 401.

established the legality of the impugned law, but also elucidated the significance of having a uniform civil code.[269]

After the decision of the Bombay High Court in Narasu Appa Mali similar question arose before the Madras High Court in *Srinivasa Aiyar v. Saraswathi Ammal*[270]. However, 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 was challenged as violating Articles 14, 15 &25 of the Constitution. It was contended that by prohibiting, penalising and invalidating polygamy among the Hindus only, while leaving the rights of the Mohamedans to practise such polygamy wholly unaffected, the impugned Act denied equality before and equal protection of 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 held that though subjecting the Hindus and the Mahomedans to different sets of laws 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 rights to freedom of religion, it was held that the freedom to practise religion was not an absolute right, but as Article 25 itself states, it was subjected to public order, morality and health and also subject to legislations providing for social welfare and reform and that religious practices could be controlled by legislation if the state considered that it is necessary to do for the purpose of public welfare and bringing reform in the society.

But about the question as to "whether the expression 'all laws in force' in Art 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 Madras High Court decision does not help us in considering the question as to whether personal laws are immune from being subjected to Part III of the Constitution. A decision in *Abdulla Khan v. Chandni Bai*,[271]may also be referred here. In this case, a Hindu wife can ask for separate residence and maintenance from her husband in case

[269]The learned court acknowledged the importance of the Uniform Civil Code and opined that the institution of polygamy was not based on need. If there were no son born in the first marriage, then, instead of resorting to a second marriage, the way forward was the adoption of a child. Regarding the challenge of discrimination between Hindus and Muslims, the court made it very clear that the classification was reasonable and did not violate Article 14 of the Constitution.
[270] AIR 1952 Mad 193.
[271] AIR 1956 Bhopal 71 (72).

of husband's remarriage.[272]However in case of Muslim woman she has no choice but to accept her husband's polygamy. Irrespective of such contradictory provisions under the personal laws of the Hindus' and the Muslims' it was not considered as violating the equality provision guaranteed under Article 14. The reason is based 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 thereof for their post-constitutional survival and that is why a curial certification as to their being grounded on reasonable classification was awarded by the Bhopal Court.

In *Sudha v. Sankappa,*[273] the Learned Judge while repelling the contention that Sn. 10 of the Madras Aliyasanthana Act 1949, was violative of Art. 14 for having provided for an easy unilateral judicial divorce not available to the Hindu, [274]continued to examine further that the conflicting 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 Learned Judge had acknowledged that the personal laws can be subjected to the provisions of Part III of the Constitution and the relevant provisions was held to be within the permissible limits of reasonable classification under Art. 14. It is true that the provisions which were considered in the Mysore decision were statutory; but personal laws do not cease to be so in spite of their being enacted or codified and, as pointed out by the Supreme Court in *Bajya v. Gopikaba,*[275] all our Hindu Law enactments, including the major four acts of 1955-1956, are personal laws. In fact, 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 and Haryana High Court also incidentally touched a cognate question in *Gurdial Kaur v. Mangal Singh,*[276] 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

[272] The Hindu wife can make such claims under the Hindu Married Women's Rights to Separate Residence and Maintenance Act 1946.
[273] AIR 1963 Mys 245 (247).
[274] Since a Hindu is governed by Hindu Marriage Act, 1955.
[275] AIR 1978 SC 793 (797).
[276]AIR 1968 Punj 396 (398).

to the other Hindus and was therefore, void under Art.15 of the Constitution. However, this claim was rejected.[277]

In this case the Learned Judge did not consider that personal laws were laws within the meaning of Art. 13(1) for in that case it would not have been necessary to hold that the law in question was violative of Art. 15.

5.2. ***"Part III of the Constitution does not touch upon the personal laws"*** [***Krishna Singh* v. *Mathura Ahir*, AIR 1980 SC 707 (712)]**

In *Krishna Singh v. Mathura Ahir*[278], the Supreme Court has held that personal laws are not subject to Part III of the Constitution of India. It would be necessary to refer to the facts of the case to understand the reasons that led the Supreme Court to arrive at such a conclusion. The plaintiff-respondent Mathura Ahir was initiated in the holy order of the religious sect known as "Sant Mat" by the then Mohunt of that sect, Swami Atma vivekananda and on the death of the latter was installed as the Mohunt. He as the Mohunt filed a suit for ejectment against respondents No. 2 to 5 on the allegation that respondent no 2[279] took the suit premises on rent from the late Mohunt Atma vivekananda and had lawfully sub-let the same to the respondents No. 3 to No. 5. These respondents alleged that the house in suit was the personal property of the Mohunt Atma vivekananda and on his demise the property devolved on his natural son, the appellant Krishna Singh. The ejectment suit had, therefore, to be converted into a suit for possession based on title after impleading the appellant Krishna Singh, the son of the Mohunt Atma vivekananda. On being thus impleaded, Krishna Singh not only asserted, in tune with the other respondents, that the house in suit was the personal property of his father and was in any case, not a Math property, but also pleaded that Mathura Ahir, being a Sudra, was legally incompetent to become a Sannyasi and therefore, could not legally become the Mohunt. The suit was decreed by the trail court and the decree was maintained in the first appeal. The appellant Krishna Singh appealed to the High Court of Allahabad and the appeal was dismissed.

[277] It was observed that, if the argument of discrimination based on caste or race could be valid, it would not be possible to have diverse personal laws in this country and the court will have to go through length of holding that only one uniform code of laws on all issues covering all castes, creed and communities can be constitutional, and that to suggest such an argument is to reject it.
[278] AIR 1980 SC 707 (712).
[279] Respondents No. 2 was Avadesh Narain, who had taken the house on rent from Swami Atma vivekanand, the late Mahant.

On the question as to whether or not the plaintiff-respondent Mathura Ahir, being a Sudra could be a Sannyasi and could become a Mohunt, the learned single judge of the Allahabad High Court observed as hereunder:

"The disqualification if any, of a Sudra to enter into an order of Sannyasam or ascetism did not survive with the passage of time".

"To my mind, the changed and changing society accepted that even Sudra could be a Sannyasi and by virtue of his spiritual or religious attainment held in universal esteem by Hindus. By way of example, I may mention that Swami Vivekananda (Narendra Nath Dutta) who, being a Kayastha according to the decision of the Calcutta High Court....., was a Sudra, was initiated into the order of Sannyasam by no less a person than Paramhans Ram Krishna and nominated as his chief disciple. It would be preposterous to say, in my opinion, that Swami Vivekananda having been born as Sudra, was inherently disqualified from entering the order of Sannyasam."

The learned court further observed:

"To sum up my opinion is that even though as a result of custom, usage or practice or of sacramental precept, Sudras might have been considered to be incapable of entering into the order of Sannyasam at one time, such disqualification ceased to exist long ago and can no longer be held to exist now. The submission of the appellant, therefore, that the plaintiff being a Sudra was legally incompetent to enter the order of Sannyasam or to become Mahant cannot be accepted."

These observations of the High Court were endorsed by the Supreme Court in the following words:[280]

"On the main, in agreement with the High Court we are inclined to take the view that though according to the orthodox Smriti writers a Sudra cannot legitimately enter into a religious order and although the strict view does not sanction or tolerate ascetic life of the Sudras, it cannot be denied that the existing practise all over India is quite contrary to such orthodox view. In cases therefore, where the usage is established, according to which a Sudra can enter into a religious order in the same way as in the case of twice born classes, such usages should be given effect to."

[280] Paragraph 18 of the order.

But the High Court nevertheless thought it necessary to raise and decide the further question that if the Shastric Hindu law really imposed ban against the Sudras entering the holy order, whether such discriminatory provisions could survive the equality clauses in Part III of the Constitution and observed that "*the discriminatory ban on or bar against Sudras, even if enjoined by Hindu law, stands abrogated by virtue of Constitutional mandates embodied in Part III of our Constitution*." This view has earned an outright rejection by the Supreme Court, and as already noted, the learned judges ruled that the personal laws are not subjected to the requirements of Part III of the Constitution.

In *Krishna Singh v. Mathura Ahir,* while the decision of the Supreme Court relates to Hindu law, the declaration as noted above refers to personal laws in general and is, therefore, a binding decision as to the inapplicability of Part III of the Constitution in respect of the personal laws. The learned judge, who has delivered the judgement in *Krishna Singh v. Mathura Ahir,* has pointed out in *Dalbir Singh v. State of Punjab,*[281] that according to the well settled theory of precedents, statement of law applicable to the legal problem disclosed by the facts is the *ratio decidendi*. In this case both in the High Court and the Supreme Court the legal problem disclosed by the facts was whether a Sudra could become a Sannyasi and Mohunt of a Math and while the High Court held that he could become so both under the prevalent custom and also under the personal laws of the Hindus as modified and altered by the equality clause in Part III of the Constitution, the Supreme Court has accepted the view of the High Court as to the operation of custom , but has rejected its view as to the effect of Part III on the personal laws and has ruled personal laws are not subjected to the requirements of *Part III of the Constitution.* The dictum, therefore, is patently a statement of law applicable to the legal problem disclosed by the facts of the case and would not be possible to treat it as general observations without application of mind, which, according to the well-established principles of interpretation of judgements, as pointed out by the Supreme Court among others in *Raval & C. V. K.G. Ramachandran,*[282] would not have amounted to declaration of law as precedent.

The Supreme Court in declaring the personal laws to be untouched by the provisions of Part III of the Constitution has not spelt out any reason for the view; by reasons, is nonetheless binding. Such declaration is binding, not only because of Article 141,[283] but even without it

[281]AIR 1979 SC 1384 (1390, 1391).
[282]AIR 1974 SC 818 (821).
[283]*Fuzlunbi v. Khader* AIR 1980 SC 1730 (1730, 1733).

for the reason that of the 'theory of precedents' borrowed from the Britishers and being followed with devotional rigidity and as witnessed that if the endeavours made by a judge of the High Court to distinguish a Supreme Court decision do not earn the approval of the Supreme Court, he might be branded as having acted "lawlessly" and not as a "disciplined judge"[284]. It would be right to say that the absence of reasons in support of a declaration of law by the Supreme Court does not, as it obviously cannot, make the declaration any the less binding. '*Rajnadrstvaadrstvava nasty tasyapunarbhava*'; once the supreme authority decides a matter, the decision, howsoever arrived at, is beyond challenge.

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, the adoption of the Constitution did not qualify to fall within the definition of 'law' as laid down under Article 13 and 372 of the Constitution. For if they were then it would be difficult to understand how they could acquire any immunity from the operation of 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.

5.3. '***Personal laws are not excluded from the ambit of Article 13'*** **[*Re, Smt. Amina* v. *Unknown*, AIR 1992 Bom 214]**

In *Re, Smt. Amina v. Unknown*[285], Justice Dhanuka observed that in his order of reference he has however, categorically observed that the decision in the Narasu Appa Mali's[286] case that personal laws are not subject to Part III of the Constitution is not proper and the decision of the Supreme Court in Krishna Singh's case does not constitute a declared law "under Article 141 of the Constitution of India".

The learned Single Judge had held that, custom or usage having the 'force of law' must give way to fundamental rights and be in accordance with the provision of Article 13 of the Constitution. Whether the customary law operates in accordance with Article 13 of the Constitution but not the personal laws of which one of the main sources is custom?

[284]Ibid.
[285]AIR 1992 Bom 214.
[286] AIR 1952 Bom 84.

The court found that the answer to the question is evident and the drafters of the Constitution did not aim to leave out the personal laws from the ambit of Article 13 of the Constitution.

Let's examine this decision and refer to the facts of the case and understand in what context the Honourable High Court of Bombay had arrived at such a decision whereby the court had held that '*personal laws are not excluded from the ambit of Article 13*'. This decision of the Bombay High Court is contrary to the earlier decided cases where in Narasu Appa Mali[287], the learned judges had held that "the personal laws of Hindu and Mahomedans do not fall within the definition of 'law' as laid down in Article 372(1) and Article 13(1) and in *Krishna Singh v. Mathura Ahir*[288] , the Honourable Supreme Court had held that "personal laws are not subjected to Part III".

The petitioner Smt. Aminabai, the widow of Lt. Ismail Shaikh, went to court for being appointed guardian of her two minor children under the Guardians and Wards Act of 1890. The petitioner presented the petition with a prayer, to instruct the State Bank of India, Jacob Circle's Branch, to deposit the amounts of the term deposit receipts as well as the receipts from the monthly interest deposit plan and interest, etc. at the office of the Account officer at the High Court of Bombay. Through this petition, the petitioner requested a new order from the Court so that the amounts receivable by the Account officer, could be reinvested in one of the nationalized banks on behalf of her two minor children until they reach the age majority or they got married, which happened before, in the proportion of 2: 1 of all the property of the deceased husband, "the son receives double the share compared to the daughter, as established under the Muslim personal law". As part of this petition, the petitioner has asked for information so that the interest generated on the amounts invested can be delivered to the petitioner in order to spend it on the education, maintenance and upkeep of the two minor children.

The learned single judge, Justice Dhanuka was of the view that the provision relied upon by the petitioner whereby as per the Sunni Muslim personal law, the son gets double the share compared to the daughter on inheritance was against the equality provision guaranteed by Article 14 of the Constitution. The court had observed that although there have been many cases already decided on the matter that the personal laws do not fall within the ambit of Part III of the Constitution and thus they cannot be challenged on the ground of violating the

[287] AIR 1952 Bom 84.
[288] AIR 1980 SC 707.

equality principles. However, court observed that the founding fathers of our Constitution did not intend that any law, not even the custom or usage should be exempted from conforming to the requirement as laid down under Part III of the Constitution.

On the question as to whether the personal laws are excluded from meeting the requirements laid down under Article 13 of the Constitution and should not be subjected to Part III of the Constitution dealing with fundamental rights. The learned single judge of the Bombay High Court had held that every provisions stipulated in the Constitution has to be complied with.[289]The learned single judge further observed that in his opinion the learned men who were engaged in constitution making process did not intent to exempt the personal laws from the purview of Article 13 and Part III dealing with fundamental rights.[290]

Justice Dhanuka had referred to earlier decided cases that is Narasu Appa Mali and Krishna Singh's case where in the former case the honourable court had held that the personal laws of the Hindus and the Muslims does not fall within the definition of 'law' as laid down in Article 372(1) and Article 13(1) of the Constitution. In the latter case, a two judge bench of the Supreme Court has ruled that personal laws are not subject to Part III of the Constitution. The learned judge had relied upon the scholarly work of eminent jurist Mr. H.M.Seervai where Seervai had concluded that personal laws is very much covered within the scope of Article 13.[291]

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[289]The learned judge made the following observations: "It is well-settled that every action of the State-legislative, executive or judicial must necessarily conform to the Constitution of India including Chapter on fundamental rights enshrined in Part III of the Constitution of India. Article 12 of the Constitution defines "State" in widest sense so as to ensure supremacy of the Constitutional law in every walk of life. Pre-constitutional laws are void to the extent of their inconsistency with the provisions of Part III."Article 13(1) of the Constitution takes within its sweep "all laws in force". In my judgment, pre-Constitutional laws as well as post-Constitutional laws must conform to fundamental rights, to whichever category of 'Law' it may belong to." (para 4 of the judgement).

[290]The learned judge had observed: "According to my study of the subject, 'personal laws' are 'law' and 'laws in force' under Article 13 of the Constitution of India and are enforceable in Courts subject to provisions of the Constitution and not otherwise. Even customs and usages having the force of law are void if found inconsistent with any of the fundamental rights guaranteed by the Constitution. It could not be the intention of the founding fathers of our Constitution to create any immunity in favour of personal laws."

[291]The learned Bombay High Court judge had observed hereunder: "Mr. Seervai has rightly referred to entry 5 of list III appended to Schedule 7 of the Constitution support of his submission contained in his scholarly work that personal law was 'law' within the meaning of Article 13 of the Constitution and was subject to fundamental rights." Justice Dhanuka then continued: The learned author has rightly observed in paragraph 9.146 of the said book as under:-"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." See, Seervai, *supra* note 3, at 401, Referred in para 7 of the judgement.

The court observed that some of the provisions under the personal laws were discriminatory and unjust. Reference was made to the personal laws of the Hindus and the Muslims where differential treatment is given to the males and the females heirs. Thus, Justice Dhanuka had observed that the question is whether the personal laws are excluded from the purview of fundamental rights even though customs and enacted laws are subject to fundamental rights. In response to the said question the learned justice by making reference to the judgement of the Division Bench of High Court, Bombay in Narasu Appa Mali's case had said that the decision of the learned two judges in the said matter no longer holds the field.[Para 11 of the order]

The court had further relied upon the judgement delivered by S.K.Das, J., *in Dasaratha Rama Rao v. State of Andhra Pradesh*[292], where the learned judge had held that it is necessary for every laws to meet the requirements as laid down under Article 13 of the Constitution.[293]

Justice Dhanuka had relied upon the observation of Hon'ble Mr. Justice Hidayatullah in Sant Ram v. Labh Singh,[294] held that the personal laws just like the customs and usages having force of law should be subject to fundamental rights.[295]

In *Sant Ram v. Labh Singh's* case the Hon'ble Apex Court had held that custom and usage having the force of law falls within "all laws in force" as specifed under Article 13(3)(a). However, contradictory ruling was laid down in Narasu Appa Mali's case. In this case the customs and usage having the force of law was not regarded as 'law in force'. Thus, personal laws were not subject to fundamental rights. Justice Dhanuka did not agree with the observations laid down by the Hon'ble judges in Narasu Appa Mali's case.[296]

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[292] AIR 1961 SC 67.

[293]Justice S.K.Das had observed that, "Article 13 of the Constitution lays down inter alia that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with fundamental rights, shall, to the extent of the inconsistency, be void. In that Article 'law' includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditory village office, that custom must yield to a fundamental right." Ibid.

[294]Justice Hidayatullah had observed that:"Custom and usage having in the territory of India the force of law must be held to be contemplated by the expression 'all laws in force'."

[295] Paragraph 12 of the said order.

[296] The learned judge expressed his views on the said matter as follows: "To my mind, the interpretation of the expressions "law" and "laws in force" used in the said Article by the Hon'ble Supreme Court in Sant Ram v. Labh Singh is directly contrary to the Bombay High Court's view in Narasu Appa Mali's case. On this aspect, the Bombay Court's view does not hold the field. The question still remains as to whether the ultimate view of Division Bench in Narasu Appa Mali's case to the effect that "personal laws are not subject to fundamental rights" represents the correct law or deserves to be overruled by a larger Bench.

The learned High Court judge opined that the issue is a matter of public interest and should be reconsidered by a larger bench. He relied on the decision of the seven judges in the case *A.R. Antulay v. R.S. Nayak.*[297] The court while referring to the decision of the Apex court in Krishna Singh v. Mathura Ahir had held that the personal laws cannot be subject to Part III of the Constitution. But Justice Dhanuka opined that the Apex court had made such an observation just in the passing as the question with regard to personal laws being subject to Part III was never raised in Krishna Singh's case. [298]

Justice Dhanuka had expressed that he cannot pass a remark against the observation made by the learned judges in Krishna Singh's case.[299] He had referred to the case of *Raipur Ruda Meha v. State of Gujarat*, AIR 1980 SC l707: (1980 Cri LJ 1246)[300], by referring to this case the learned judge was of the view that in Krishna Singh's case the court had arrived at a decision that the personal laws are not subject to Part III of the Constitution even without being raised in Krishna Singh's case.

Also *Dalbir Singh* v. *State of Punjab* case, AIR 1979 SC 1384: (1979 Cri LJ 1058), was referred by Justice Dhanuka where A. P. Sen, J., had observed that everything said by a judge at the time of delivering judgement is not precedent.[301]

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[297] In this case "It was held by the majority that the Court could not pass an order or issue a direction which would be violative of fundamental rights of the citizens. It appears to be the modern trend of juristic thought that the expression "State" as defined in Article 12 of the Constitution includes judiciary also. Personal laws are not made by the legislature but are enforced by Courts. The question to be asked is as to whether the Court can be asked to enforce a provision of personal law which appears to be repugnant to the fundamental rights. In my view, personal laws shall have to yield to fundamental rights and all laws, whether made by the legislature or otherwise, must necessarily conform to fundamental rights."

[298] The Hon'ble Supreme Court had observed in the passing in paragraph 17 of its judgement that: 'In our opinion, the learned judge (meaning the judges of the High Court of Allahabad who decided the case) failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties."

[299]The learned judge held that, "It is not permissible to me, sitting as a single judge of the High Court, to comment on the above quoted view expressed by the Supreme Court. The Apex Court itself has observed in a catena of cases decided by it that the observations made by the Court is not necessary for disposal of the matter before it will not constitute 'law declared' under Article 161 of the Constitution and will not bind as precedent." Para 12 of the order.

[300]Hon'ble Mr. Justice Fazal Ali observed as under:"Neither in the application for adducing additional grounds or in the order of the Court directing the matter to be placed before the Constitution Bench, there was any reference to the validity of S. 384 of the Cr. P. C. Neither was it pleaded during the arguments that S. 384 of the Cr. P. C. is ultra vires of the Constitution. As the question of validity of S. 384 of the Cr. P. C. was neither raised nor argued, a discussion by the Court after 'pondering over the issue in depth would not be a precedent binding on the Courts. The decision is an authority for the proposition that R. 15(1)(c) of O.XXI of the Supreme Court Rules should be read down as indicated in the decision."

[301]Justice A.P.Sen had said that, "It is not everything said by a Judge when giving judgment that constitute a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi."

Thus, the High Court, Bombay by placing reliance on the above mentioned decided cases and after thorough reading of the judgement rendered by the Division Bench in *Krishna Singh* v. *Mathura Ahir* was of the view that the decision of the Supreme court in the said case "*was not decided on the basis that personal laws were not subject to fundamental rights, but was decided on the basis that the traditional law could not operate in view of established customs and usage to the contrary.*[302]

The Hon'ble judge had agreed with the argument placed by the Advocate General that "*custom is an important source of personal law*". The learned Advocate General had relied upon the scholarly works of Mayne's Hindu Law and Usage and Mulla's Principles of Hindu Law where the learned author has observed, '*custom as an important source of law'*. With regard to the Muslims also, custom is accepted as source of their personal law.[303]

The learned judge was of the view that the personal laws were subject to fundamental rights and the two judge's decision in Narasu Appa Mali's case requires reconsideration. He had expressed that a larger Bench comprising of at least three judges should decide upon the questions referred to in paragraph 1 of this order which according to him was necessary in public interest.

5.4. Cases where the personal laws have been tested as per the requirements laid down under Article 13

On the other hand, there are instances where the statutes relating to personal laws had to pass Constitutional scrutiny and tested on the anvil of Article 13. For example in *Harvinder Kaur v. Harmander Singh*[304], Section 9 of the Hindu Marriage Act was challenged on the ground of violating Article 14 and Article 21. In the previous decision, the Andhra Pradesh High Court in *T. Sareetha v. T.Venkata Subbaiah*[305], had declared Section 9 of the Hindu Marriage Act to

[302] Paragraph 19 of the order.
[303]The High Court of Bombay in paragraph 23 made the following observations:"It is well settled that custom or usage having force of law must yield to fundamental rights and operate subject to the overriding provision of Article 13 of the Constitution. The question to be asked is: Did the Constitution framers intend that customary law should operate subject to Article 13of the Constitution but not the personal laws of which one of the major source is custom? To my mind, with respect, the answer to the question is too obvious and the Constitution-framers did not intend to exclude personal laws from ambit of Article 13 of the Constitution. It is not necessary to emphasise that the Court must avoid an interpretation which would create anomaly as far as possible."Para 23 of the judgement.
[304] AIR 1984 Del 66.
[305] AIR 1983 AP 356.

be unconstitutional as if offends Articles 14 [Right to equality] and Article 21[Right to liberty which includes right to privacy].

In that case the petition for restitution of conjugal rights was filed by the husband and the petition was opposed by his wife who was a famous cinema star. On behalf of the wife it was argued that the right to privacy confers on a woman "a right of free choice as to whether, where and how her body is to be used for the procreation of children and also the choice of when and by whom the various parts of her body are to be sensed". This freedom of choice is part of her right to privacy". This is guaranteed by Article 21 as part of her "liberty". By recognising under Section 9 of the Hindu Marriage Act the remedy of restitution of conjugal rights the state is violating this fundamental liberty guaranteed by Article 21. Further, the remedy violates Article 14 by making this remedy available to both married men and married women, thereby treating as equals those who are inherently unequal and this is forbidden by Article 14. Thus, Article 9 was struck down holding that it violates the wife's right to privacy by compelling her to have sexual intercourse against her will. The husband's petition for restitution of conjugal rights was accordingly dismissed.

The decision of the Andhra Pradesh High Court (Sareetha's case) was cited in support of the arguments that Section 9 is invalid. In this case the Delhi High Court did not agree with the opinion of the High Court of Andhra Pradesh. The learned court opined that the view of the Andhra Pradesh High Court was wrong. Section 9 does not override "liberty" given under Article 21 of the Constitution. The object of Section 9 of the Hindu Marriage Act is to promote harmony and amicableness between the wife and husband, which is the primary purpose of marriage. In the marriage life, the questions of 'liberty' and 'one is high and another is lower' would not arise. The Delhi High Court upheld Section 9 and opined that it does not override Articles 14 or 21 of the Constitution.

The learned judge has found it necessary to make the following observation:

"Introduction of Constitutional Law in the home is most inappropriate, it is like introducing a bull in the China shop", "it will prove to be a ruthless destroyer of the marriage institution and all that it stands for". The learned judge has proceeded on further to observe that "Articles 21 and 14 cannot be applicable to matrimonial homes" and that "in a sensitive sphere which is at once most intimate and delicate, the introduction of the old principles of Constitutional Law will have the effect of weakening the marriage bond".

It is impossible to understand that if family and marriage relations are regulated by laws, how those laws can be beyond the reach of Article 14 and Article 21 or any other provisions of the Constitution, unless such family and marriage laws are, by the Constitution itself, excluded from its purview. It may however be noted that the Supreme Court in *Saroj Rani v. Sudarshan Kumar*[306], approved the decision of the Delhi High Court in *Harvinder Kaur* v. *Harmander Singh,* 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 Articles 14 or 21. In other words far from holding, as held in Krishna Singh v. Mathura Ahir[307], that personal laws cannot be subjected to Part III of the Constitution, the Supreme Court in Saroj Rani v. Sudarshan Kumar's case have tested the personal laws on the touch stone of Part III itself.[308]

In *Danial Latifi v. Union of India*[309]**,** the inapplicability of Section 125 of Criminal Procedure Code to divorced Muslim women was challenged.[310] The petitioners primarily submitted that:

(i) Section 125, Cr.P.C was enacted as a matter of public policy, in order to provide a quick summary remedy to persons unable to maintain themselves; that the provision reflected the moral stance of the law and ought not to have been entangled with religion and religion based personal laws;

(ii) Section 125, Cr.P.C also furthers the concept of social justice embodied in Article 21 of the Constitution of India; hence excluding divorced Muslim women from its protection is a discrimination against them;

(iii) The inevitable effect of the Act is to nullify the law declared by the Supreme Court in Shah Bano's[311] case which is most improper;

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[306] AIR 1984 SC 1562.
[307] AIR 1980 SC 707.
[308]Bhattacharjee, *supra* note 3, at 97.
[309] (2001) 7SCC 740.
[310] As per the Muslim Women (Protection of Rights on Divorce) Act, 1986, Sec 125 of Cr.PC is not applicable to Muslim women.
[311]Note: In *Shah Bano Begum* v. *Mohammad Ahmed Khan*, AIR 1985 SC 945, the five judges bench of the Supreme Court held that a Muslim husband having sufficient means must provide maintenance to his divorced wife who is unable to maintain herself. The Supreme Court rejected the contention of the husband that Section 125 of Criminal Procedure Code providing for the maintenance of divorced woman who is unable to maintain herself is inapplicable to Muslims. It was said that the religion professed by the spouse or the spouses has no place in the scheme of Section 125 Cr.P.C., which is a measure of social justice founded on an individual's obligation to the society to prevent vagrancy and destitution. Whether the spouses are Hindus, Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant to the application of Section 125 Cr.P.C. It was held that the Muslim divorced women who cannot maintain herself is entitled to maintenance from her former husband till the time she gets remarried. They rejected the plea that maintenance is payable only till the period prescribed under Muslim Personal Law. The learned judges held that the ability of the husband to maintain his

(iv) The Act is un-Islamic and also has the potential to suffocate Muslim women and to undermine the basic secular character of the Constitution;

(v) The Act is violative of Articles 14 and 21.

On behalf of the Union of India, it was submitted that the need for giving effect to a community's personal law was a legitimate basis for discrimination. If the legislature can apply a particular provision as a matter of policy, it can also withdraw such application and substitute another in its place. The policy of Section 125, Cr.P.C is not to create a right of maintenance beyond personal law. The Act has been enacted to overcome the ratio of the Shah Bano decision. The All India Muslim Personal Law Board had said that the purpose of the legislation was to invalidate Shah Bano's case, in that case the Supreme Court had attempted the hazardous task of interpreting an unfamiliar language connected to religious tenets, which was not a safe course to pursue; that the term 'mata' had been wrongly interpreted in Shah Bano's case. The purpose of the Act was to avoid vagrancy, but at the same time it aimed to prevent the husband from being penalised, that the terms "maintenance" and "provision" as used in Section 3(1)(a) had the same meaning; that provisions of Section 4 of the Act were adequate for taking care of any possibility of vagrancy; that according to the Muslim social ethos a divorced Muslim woman was not at all dependent on her former husband because society provided a wider safer net. The Supreme Court decided to consider only the question of the constitutional validity of the Act and upholding the same held that, in interpreting the provisions where matrimonial relationship is involved, the social conditions prevalent in society have to be considered. In Indian society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Indian society is male dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up all her other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life-a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up there can be no answer to the question as to how a woman can be compensated so far as

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divorced wife till the expiration of Iddat period extends only in case the wife is able to maintain herself. This decision led to some controversy among the Muslim community, the Parliament, therefore, decided to pass Muslim Women (Protection of Rights on Divorce) Act, 1986.

emotional fracture or loss of investment is concerned. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim Law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to be a kind of distortion of social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints.

It has been further observed that the purpose of the 1986 Act[312], appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of Iddat. However, a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and therefore, the word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, clothes and other articles.

While upholding the validity of the Act, the Supreme Court sum up the conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1) (a) of the Act.
(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

[312] Muslim Women (Protection of Rights on Divorce) Act, 1986.

(3) A divorced Muslim woman who has not remarried and who is not in a position to able to sustain herself subsequent to the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the state Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

Further, in the case of *Saumya Ann Thomas vs. Union of India & Ors.*[313]**,** the Division Bench held "that the period of 'two years' in Section 10A(1) is against the requirement of Articles 14 and 21 and that the period of 'two years' has to be read as 'one year'. In this case the court had said that: "All laws whether pre constitutional or post constitutional will have to pass the test of constitutionality and we find no reason, in a secular republic, to cull out "personal law" alone and exempt the same from the sweep of Art.13 and Part III of the Constitution."

The judgement of this case was endorsed by the Hon'ble Apex Court in Shiv Kumar's case and the court had made the following observations:

"The Kerala High Court's pronouncement on the constitutionality of a provision of a Central Act would be applicable throughout India. This is made clear by Hon'ble Supreme Court in Kusum Ingots and Alloys Ltd.[314], wherein it has been stated that an order passed on a Writ Petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution, would have effect throughout the territory of India subject of course to the applicability of the Act." [315]

Coming to the recent judgment of the Supreme Court in the case of *Shayara Bano v. Union of India.*[316], the Hon'ble Apex Court had declared the practice of talaq-e-biddat (Triple Talaq) as 'unconstitutional'. The judgement is made up of three separate opinions: one by Chief

[313]2010 (1) KLT 869.
[314]AIR 2004 SC 2321.
[315] Paragraph 3 of the order.
[316]*Shayara Bano* v. *Union of India*, (2017) 9 SCC 1.

Justice J.S. Kehar and Justice S. Abdul Nazeer; one by Justice Kurian Thomas and one by Justice Rohinton F. Nariman and Justice Uday U. Lalit. The three judgements concur on some issues and differ on others. This makes the task of figuring out the judgement's exact holding a difficult and confusing exercise. What is more, even with a five-judge bench decision, the constitutional status of personal law remains as uncertain as before, which makes the prospects of any future attempt to change discriminatory personal law provisions by challenging their constitutional validity, difficult. In this case the Constitutional bench headed by Chief Justice J.S.Kehar had clubbed seven petitions including five separate writ petitions filed by Muslim women, challenging the practice of talaq-e-biddat prevalent in the community and terming it unconstitutional. It is pertinent to go through the facts of the case and understand the observations of the learned Apex Court on the issue of triple talaq.

The petitioner-Shayara Bano had been unilaterally divorced through Triple Talaq by her husband. The petitioner had approached the Hon'ble Supreme Court seeking a declaration that the practice of Triple Talaq, polygamy and halala in Muslim personal law were illegal, unconstitutional and in violation of Article 14 (equality before law), Article 15 (non-discrimination), Article 21 (right to life with dignity) and Article 25 (freedom of conscience and religion) of the Indian Constitution. The court however chose to examine the issue of talaq-e-biddat (Triple Talaq) alone. The Union of India supported the petition. Among the others who intervened in this case, the All India Muslim Personal Law Board and the Jamiat Ulema-e-Hind argued that the court had no authority to decide on the validity of Muslim personal law and that the matter was in the domain of the legislature. The Bebaak Collective and the Centre for Study of Society and Secularism-two working organisations working with Muslim women supported the petition and urged the Court to declare that the personal law was subject to fundamental rights. Bharatiya Muslim Mahila Andolan and Majlis also women's rights organisations argued that in view of previous decisions of the Court, the bench need not consider the question about the Constitutional validity of talaq-e-biddat but should rather emphasise on the existing legal remedies.

The petitioner had argued that talaq-e-biddat abruptly terminates the marriage and the same cannot be revoked[317]and for this reason it should be declared as unconstitutional. Talaq-e-biddat (Triple Talaq) is against the spirit of Articles 14, 15 and 21 of the Constitution. Hence, the practice of 'talaq-e-biddat' will not fall within religious denominations under Articles

[317] Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937.

25(1), 26(b) and 29 of the Constitution. 'Talaq-e-biddat' is condemned globally, and many Muslim theocratic countries, have banned the practice of 'talaq-e-biddat'.

Talaq-e-biddat or Triple Talaq has always been a controversial topic. Time and again whenever the issue concerning the same has come up in the forefront, it has resulted into a heated debate without reaching to an amicable end. The learned Courts in India have also rendered many judgements on the validity of "Triple Talaq"**,** however it had not been declared as unconstitutional. Since the 1980s, several High Courts have ruled that for talaq to be valid, it must be pronounced for a logical cause and must proceed by effort towards reconciliation with the assistance of mediators representing both parties. The question of Constitutional validity of Triple Talaq had again come up for consideration before the Hon'ble Apex Court of the country. The Hon'ble Court before rendering the judgement had heard the arguments of learned counsels where the arguments with regard to 'talaq-e-biddat' being unconstitutional were made from different perspectives. Out of the many arguments that were placed before the Apex Court, the researcher would like to place reliance upon only that argument/s which is relevant to the purpose of the researcher's study. One of the important questions that were raised in this matter was *'whether the personal laws will fall within the meaning of 'laws in force' as provided under Article 13 of the Constitution.'*

The learned Senior Advocate, Ms. Indira Jaising, who was representing respondent no. 7-Centre for Study of Society and Secularism, had contended that personal laws have not been defined in the Constitution. A mention of Article 372 of the Constitution was made which provides that all the pre-constitutional laws shall continue to be valid and effective until and unless it is repealed or amended by competent legislature or authority. An argument was made further that the Muslims are administered by the Shariat law and the Muslim Personal Law (Shariat) Application Act, 1937 was in force even before the Constitution was adopted. Thus, it was contented that Muslim personal law should be considered as falling within the definition of 'laws in force' as provided under Article 13(3)(b).[318]

[318]"The term 'personal laws' had not been defined in the Constitution, although there was reference to the same in entry 5 of the Concurrent List of the Seventh Schedule. Reference was made to Article 372 of the Constitution which mandates, that all laws in force, in the territory of India immediately before the commencement of the Constitution "shall" continue in force until altered or repealed by a competent legislature (or other competent authority). It was submitted that on personal issues, Muslims were governed by the Muslim 'personal law'-Shariat. It was contended, that even before the commencement of the Constitution, the Muslim Personal Law (Shariat) Application Act, 1937 enforced Muslim 'personal law', and as such, the Muslim

The learned Counsel further said that Entry 5 of List III mentions about personal laws. Therefore, the personal law can be classified as family law, that is, disputes related to family matters. These family law disputes have generally been settled by family courts, established under the Family Courts Act of 1984. "On the basis of the above context, it was argued that it was safe to accept that the 'personal law' referred to family law and inheritance law, such as marriage, divorce and child custody, etc. The question involved in the case was whether 'rule of decision' [an expression mentioned in Section 2 of the Shariat Act], can be challenged on the ground of infringing the fundamental rights guaranteed under Part III. To this question, the Senior Advocate answered in the negative and argued that it has to be inconsonance with Part of the Constitution. It has been recognized that the "personal laws", which deals with conflicts between family and private individual (where the State does not have a role to play), cannot be questioned on the ground that it violates fundamental rights. With regard to the Muslim personal law, it was argued that it could no longer be treated as a 'personal law' because it had been declared by law as a "rule of decision" under Section 2 of the Shariat Law. Therefore, it was stated that all issues related to Muslims personal law, that had been characterized as a "rule of decision", could no longer be treated as private matters between the parties, nor can be treated as matters of mere 'personal law'.

The senior counsel maintained similar stand using different reasoning. The question involved was whether the court should admit the "rule of decision" in Article 2 of the Shariat Act as "laws in force" within the meaning of Article 13 of the Constitution and, therefore, test its validity as per the requirements of Part III of the Constitution. Responding to this question the learned counsel argued that 'rule of decision' does fall within the "laws in force". Thus, it has to meet the requirements as enumerated under Article 13 and must be inconsonance with fundamental rights.

The Learned counsels representing the Muslim Women Personal Law Board, argued that it has been acknowledged by all, as well as by the All India Muslim Personal Law Board (AIMPLB), that triple talaq is violating the basis right of the women conferred by Article 14 of the Constitution. Just by judicial intervention the situation cannot be remedied. Thus, Article 13 was referred to in this regard which clearly mentions about the validity of pre and post constitutional laws. As per Article 13 all laws must be in consonance with Part III of the

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'personal law' should be considered as a "law in force", within the meaning of Article 13(3)(b)." [Paragraph 44 of the order].

Constitution and if the laws violated the fundamental rights such law can be declared as void. This however, had to be declared expressly by way of laws enacted by the Parliament. And if Parliament was hesitant to introduce such legislation, the Court had a mandatory duty to declare such laws as unconstitutional.

The learned Attorney General had also stated that 'personal law' was included within the meaning of 'law' as provided under Article 13 of the Constitution. Therefore, any such law i.e. the personal law if incompatible with the fundamental rights should be treated as not valid. Further it was stated that the ruling of the Bombay High Court in the Narasu Appa Mali's case, requires re-examination.

First, it was argued that a plain reading of Article 13 makes it clear that the 'personal law as well as customs and usages', falls within the meaning of "law". The argument that was made was that the term 'law' as provided under clauses 2 and 3 of Article 13 was not comprehensive, thus, 'personal law' should also fall within the meaning of law as laid down in the said article. Further as per Article 246(2), the Parliament and the legislature have the authority to make laws with regard to topics mentioned in entry 5 of the Concurrent List in the Seventh Schedule.[319] As entry 5 is dealing with personal laws hence, 'personal law' should be incorporated within the definition of 'law' as expressed under Article 13. Thus, the ruling in the Narasu's case is contradictory to the language of Article 13.

Second argument, that the term 'law' under Article 13 (3) (a), also had been defined to include "any custom or usage having force of law in the territory of India" leave no scope for any doubt. And that the remarks in the Narasu's case were *obiter,* and cannot be treated to be the ratio of the judgment. Further, the decision was pronounced by the High Court and it does not have binding effect upon the Apex court. The learned Attorney General argued that the practice in question was included in the Muslim 'personal law' by the Shariat Act. And that the said Act was undoubtedly a "law in force", under Article 13(3)(b). Thus, Section 2 of the Shariat Act was challenged in this case as its sanction the practice of triple talaq or talaq-e-biddat. Even assuming that these practices can be treated as customs, the same were nonetheless clearly covered by Article 13. The ruling of the Bombay High Court in Narasu's case was established by the Apex court on number of cases.[320]

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[319]Entry 5 of the Concurrent List in the Seventh Schedule provides that : "Marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

[320]This ruling that was later followed in *Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689 and *Maharshi Avdhesh v. Union of India*, (1994) Supp (1) SCC 713, the Supreme Court has actively tested personal laws on the touchstone of fundamental rights in cases such as *Daniel Latifi v. Union of India*, (2001) 7 SCC 740 (5-

Reference was made to the Masilamani Mudaliar case[321], in which this Court took a contrary stand as compared to Narasu and held that the personal laws should be consistent with the equality principle enshrined in the Constitution. It has also been asserted that personal laws are derived from the religious scripture and not from the Constitution. Thus, the personal laws must meet the requirements as provided under Article 13.[322]

Therefore, it has been argued that the reasoning provided in Narasu Appa Mali, that the personal laws was not 'law' under Article 13, was incorrect and not binding on this court

Despite the aforementioned judgement of the single judge of the Bombay High Court, the fact is that Narasu's case requires reconsideration. However, the view expressed by the learned judges in Narasu has been reiterated in several cases such as, in *Ahmedabad Women Action Group* v. *Union of India*[323], a public interest litigation was initiated to pronounce that the Muslim Personal Law which authorises polygamy is void as its violates Articles 14 and 15. The Supreme Court declined to take cognizance of the matter. The court noted that the issues raised involved questions of state policy with which the court in general is not concerned with. The remedy lies elsewhere (meaning the legislature) rather than the courts.[324]

It has been asserted that the term 'custom and usage' mentioned in Article 13 of the Constitution, does not include faith of religious denominations, rooted in their 'personal law'. With regard to this question, mention was also made of Section 112 of the Government of India Act of 1915, which established an obvious distinction between "personal law" and " customs having the force of law ". It was asserted out that in the wording of Article 13 the selection of the terms "custom and usage" and the exclusion of the term "personal law" should be taken into consideration. It was submitted that the Constituent Assembly was conscious of the use of the terms "personal law" (which it had consciously used in entry 5 of the concurrent list of the Seventh Schedule) and the terms "customs and usages", which was used by the Constituent Assembly while framing Article 13 of the Constitution.

JudgeBench), *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 (5- Judge Bench), *John Vallamatom* v. *Union of India*, (2003) 6 SCC 611 (3- Judge Bench) etc.

[321] AIR 1996 1697.

[322] It was held that "the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the constitutional goals". It was also affirmed, that this Court had further held, "personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights."

[323] AIR 1997 SC 3614: (1997) 3 SCC 573.

[324]M.P.Jain, *Indian Constitutional Law* 846 (Wadhwa & Company, 5th edn., 2016).

It was illustrated that the above-mentioned stand was intentionally put forward by the High Court of Andhra Pradesh in the case of the Youth Welfare Federation. It has been argued that if the term "personal law" is excluded from the definition of "law in force" used in Article 13, then issues of faith directly related to a religious denomination do not necessarily have to guarantee the rights set forth in Articles 14, 15 and 21 of the Constitution. It was argued that the opposition made on behalf of the petitioners on the basis of the provisions of Part III i.e; Fundamental Rights should be summarily dismissed.

On the petitioner's submission, that the practice of "talaq-e-biddat" has been abolished all over the world, in Islamic and non-Islamic states.

In this regard, it has been argued that the constitutional validity of the personal laws in India cannot be established on the basis of laws enacted in other countries. The Learned Advocate argued that the validity of the personal laws cannot be absolutely proven by referring to the fundamental rights conferred on citizens by Part III of the Constitution, since the personal laws cannot be regarded as a "law" within the meaning of Article 13 of the Constitution. The Respondent argued in this regard that the 1937, Muslim Personal Law (Shariat) could not be considered to have conferred a legal status on the Muslim "personal law" - "Shariat", and as such could not be treated as law, thus, cannot be tested in accordance with the requirements of Article 13 (1) of the Constitution.

The Constitution bench headed by Chief Justice J.S.Kehar arrived at differing opinion on the question of Constitutionality of talaq-e-biddat. The two-judge, Chief Justice Kehar and Justice Nazeer have a diametrically opposite approach with regard to the question on Constitutionality of Triple Talaq. The two judges are of the view that those parts of Muslim personal law on which the state has enacted a legislation such as: the Dissolution of Muslim Marriage Act, 1939 or the Muslim Women's (Protection of Rights on Divorce) Act, 1986 can be tested for compliance with the fundamental rights but those parts that were un codified cannot be. This is based on the view that the Muslim Personal Law (Shariat) Application Act, 1937, which provided that Shariat was the only law applicable to the Muslims and not customary law, had a limited purpose. That limited purpose according to Justice Kehar, was to only state that customary law was not applicable to the Muslims in matters of marriage, divorce, inheritance, and so on. The 1937 Act did not automatically bring the un codified part of Muslim law within the state's jurisdiction and as a result it did not come within the phrase "laws in force" in Article 13 of the Constitution. Thus, Chief Justice Kehar affirms the Narasu Appa Mali judgement. Although the Union of India had urged that the judgement

should be reconsidered, Justice Kehar refrains from doing so, stating that the bench cannot do this as it had been upheld earlier by the Supreme Court benches of the same strength.
Further, Justice Kehar immunises Muslim personal law from Constitutional challenge by holding that it is protected as a matter of religious freedom under Article 25. Especially on triple talaq the judge holds that it had been practiced by the Sunni community for centuries which made it part of their religious faith and was protected from interference by the Court. Curiously in framing the issue thus, he gives up his distinction between codified and un codified laws and goes on to hold the entire category of personal law to be immune from constitutional challenge. He concludes that only the state can bring changes in the domain of personal laws through legislation within permissible limits of Article 25 in the interest of religious freedom. Justice Kehar and Justice Nazeer therefore direct the state to legislate on the issue within six months.[325]

Justice R.F.Nariman did not agree with the opinion of Chief Justice Kehar. Justice Nariman's opinion with which Justice U.U. Lalit concurs goes in the opposite direction. Nariman takes the view that the function performed by the 1937 Act, was not only to abrogate the application of customary law to Muslims. It also performed a positive function, in that it also provided what was the applicable law. The Muslim personal law was brought into existence by the state in exercise of its civil authority, which brought it squarely within the phrase "laws in force" in Article 13.[326]
Thus, according to Justice Nariman, even uncodified Muslim personal law can be tested for compliance with the fundamental rights. The judge contradicts the rationale on which Narasu's case was based. Further he sets aside an earlier two-judge bench decision of the Supreme Court that had relied on Narasu's case. But curiously having rejected Narasu both in substance and application, he notes that the question as to whether Narasu is still a valid law should be examined in a "suitable case".[327]

[325]Justice Kehar had said, "We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'. We hope and expect that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States."[Paragraph 199 of the judgement].
[326]Justice R.F. Nariman had argued that: "As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13(3)(b) and wouldbe hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency." [Paragraph 19 of the judgement].
[327]Justice R.F.Nariman had said:**"**In this view of the matter, it is unnecessary for us to decide whether the judgment in Narasu Appa is good law. However, in a suitable case, it may be necessary to have a re-look at this judgment in that the definition of "law" and "laws in force" are both inclusive definitions, and that at least one part of the judgment of P.B. Gajendragadkar, J., (para 26), in which the learned Judge opines that the expression

The centrepiece of Justice R.F. Nariman's opinion that what is "manifestly arbitrary" is also unreasonable and can be struck down under Article 14 which is concerned with equality before law and equal protection of laws. Justice Nariman points that Triple talaq is an "irregular or heretical form of talaq" since though lawful; it is considered to be incurring the wrath of God. For him the arbitrariness of Triple Talaq, when seen through the lens of Constitutional reasoning, its arbitrariness is thrown into sharper focus.[328]

Justice Nariman and Justice U.U. Lalit therefore struck down the 1937 Act, to the extent that it recognised Triple Talaq. Justice Kurian Joseph does not fully join either of the above positions but follows a different path. On the question of the nature of the 1937 Act, he agrees with Justice Kehar and disagrees with Justice R.F.Nariman. Thus, though he agrees with Justice Nariman's view of arbitrariness as an appropriate test for Article 14, he holds that the 1937 Act cannot be subjected to it. But he disagrees with Justice Kehar too. Justice Kehar held against determining the validity of Triple Talaq by referring to the Hadiths, as he felt that it was beyond the judicial role and expertise. Justice Joseph on the other hand is of the opinion that the 1937 Act, having declared Shariat to be the law applicable to Muslims, had essentially left it to the judges to find out what the Shariat said on the issue.[329]

Justice Joseph after going through the relevant verses of Quran concludes that, in exceptional situation, talaq is allowed. However, efforts should be made to settle the differences between the parties and in case the parties reconcile, talaq can be revoked before the final pronouncement.

These views have been adopted by a number of High Courts since the 1980s and have been endorsed by the Supreme Court in Shamim Ara's case in 2002. Further, between 2002 and 2017 a number of High Court benches had relied on Shamim Ara's case and invalidated triple talaq. Thus, Justice Joseph disagrees with Justice Kehar on two more points-one that Shamim Ara dealt with the valid procedure for talaq in general but did not contain a rule on triple talaq

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"law" cannot be read into the expression "laws in force" in Article 13(3) is itself no longer good law – See *Sant Ram &Ors.* v. *Labh Singh* (1964) 7 SCR 756."

[328]The learned judge concludes:"...It is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognise and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq."

[329]Therefore, leaving the question of constitutionality aside, the learned Justice pursues in his opinion is: "...whether what is Quranically wrong can be legally right... the simple question that needs to be answered in this case. Therefore, the simple question that needs to be answered in this case is whether triple talaq has any legal sanctity. That is nor more *res integra.* This court in *Shamim Ara* v. *State of UP and Another*, (2002) 7 SCC 518, has held, though not in so many words, that triple talaq lacks legal sanctity. Therefore, in terms of Article 141 Shamim Ara is the law that is applicable in India." Paragraph 1 of the judgement.

and two, that triple talaq was integral to the religious faith of the Muslims. On the first issue, he notes that Shamim Ara had effectively invalidated triple talaq though it did not say it in so many words. On the second issue, he notes that since the purpose of the 1937 Act was to abolish custom that were contrary to the Shariat and triple talaq was contrary to the Quranic tenets. Hence it could not be said to be an integral part of the Muslim faith and could not be immunised by resorting to Article 25. Here he again disagrees with Justice Nariman who held that the 1937 Act authorise Triple Talaq. Justice Kurian Joseph reiterates that the Shamim Ara judgement be upheld and finds triple talaq to be lacking legal validity.[330]

Having laid out the differences in the three opinions above, we find very few points on which a clear majority position emerges. Even when the judges agree on the outcome, they do so for different reasons. Justice Nariman and Justice U.U. Lalit find triple talaq to be un-Islamic and unconstitutional. Justice Joseph does not go into the question of constitutionality but finds triple talaq to be un-Islamic and hence, invalid. Thus, by no means can it be concluded that in Shayara Bano's case the court has declared triple talaq to be unconstitutional. On the issue of the Constitutional status of personal law, we find an utterly confusing judgement. Two judges hold at one point that uncodified personal law is beyond the scope of the fundamental rights, but following rather dubious logic, hold at a later point that the entire domain of personal law is protected as a matter of religious freedom, and they affirm Narasu's case. Two other judges hold personal law to be subject to the fundamental rights but they do not explicitly set aside Narasu. One judge rejects the proposition that uncodified Muslim personal law can be tested against fundamental rights, rejects that it is protected by religious freedom, acknowledges the ghost of Narasu, but avoids the issue altogether. Arguably, Justice Joseph's approach to the problem shows that it could have been tackled even without a constitutional challenge. But since the petitioners had raised the issue of constitutionality, the judges could have addressed the issue more thoughtfully. The judgement in Shayara Bano's case does not change the legal position of talaq-e-biddat that exised before, but creates confusion on the constitutional status of personal law and misses a great opportunity to elaborate on the constitutional vision of justice for women.

[330]Justice Kurian Joseph held that, **"...**What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well."

Sum Up

After going through the cases mentioned above the ambiguity in matters of constitutional status of personal laws continues to remain. The first case with regard to the status of personal laws under the Constitution of India was Narasu Appa Mali, where the Division Bench judges had discussed the said matter in length and had arrived at a conclusion that, personal laws does not fall within the definition of laws in force as laid down under Article 13(1) and Article 372(1) of the Constitution. Thereafter the Supreme Court had ruled in *Krishna Singh* v. *Mathura Ahir* that "Personal laws are not subject to Part III of the Constitution. Time and again whenever question in regard to the status of the personal laws arises these two cases is being referred by the learned judge/s and the counsels for placing their arguments and for arriving at a conclusion. As already discussed after the judgements of this two cases there have been many cases where the learned court had tested personal laws as per the requirements laid under Article 13 of the Constitution. Irrespective of the fact that the judgements rendered in these two cases have been criticised by many eminent jurists and learned judges, however the judgement still continues to remain in force as the same has not been overruled. For example, in Re Aminabai's case, the learned single judge was of the opinion that the Mathura Ahir's case decision requires reconsideration by a larger bench. If we go by the rule laid down in Narasu and Mathura Ahir's case it provides that personal laws were not "laws in force" and they cannot be touched by Part III of the Constitution. Thus the personal laws are immune from meeting the requirement as laid down under Article 13 of the Constitution. And they cannot be challenged on the grounds of violating any provisions of Part III of the Constitution.

On the other hand, there have been many cases, for example: *Harvinder Kaur* v. *Harmander Singh,* Daniel Latifi's case, Shiv Kumar's case etc., where the learned court has tested the personal laws on the touchstone of Part III of the Constitution. The recent case in this regard has been that of Shayara Bano's case where the Hon'ble Supreme court had decided upon the constitutionality of talaq-e-biddat/triple talaq and had declared it to be unconstitutional. However, we find an utterly confusing judgement on the issue of the Constitutional status of personal law. In this recent judgement also the five judges had made reference to Narasu Appa Mali's case and had given their own separate opinions. The Hon'ble judges did not set aside Narasu, thus the ambiguity surrounding the status of personal laws continues to remain.