

ABSTRACT

The Personal Laws are one of the unique components of the Indian Legal system. They are laws which govern matters of marriage, inheritance etc. of people belonging to a particular religion. India is a multicultural society and different groups in India have separate Personal Laws. Personal laws have always been regarded as an integral part since the ancient times. Even when the Mughals and the British ruled India they maintained a clear policy of no-interference with regard to personal laws of the native Indian. At the time of Constitution making process the members of the Constituent Assembly were in a dilemma on matters dealing with the personal law. The members were in a fix whether to leave the personal matters of each religious group outside the purview of law making. Several members of the Constituent Assembly were of the view that there ought to be a Uniform Civil Code without which they opined, there could be no comprehensive unity and integrity of the Nation. Most were of the view that it would be best for the Legislature to be given the task of reforming the Personal Laws and achieving the goal of a common civil code. In the aftermath of partition of India in 1947 the Constituent Assembly members were of the opinion that it will not be prudent to interfere with the existing system of Personal Laws apprehending that such interference may again agitate the sentiment of the members of the religious communities. However, even after extensive debates and discourse, separate Personal Laws were reserved for various communities.

Furthermore the Constituent Assembly members at that point of time were mainly concerned to protect the fundamental rights enshrined under Part III of the Constitution. The existence of different religious communities and personal laws in India is viewed as a major hurdle for achieving the constitutional goals of gender equality. Under the personal laws both men and women have differing rights in matters concerning marriage, inheritance, divorce etc. Nonetheless, much of the controversy is because of the reason that 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.

Therefore, unless and until the position of the personal laws within the framework of Indian legal system is made clear as to whether it is ‘law’ or ‘law in force’ or a custom having the ‘force of law’, the personal laws will continue to remain a controversial issue. Since the personal law is excluded from the definition of ‘law’ under Article 13 thus, it was placed beyond the Constitutional scrutiny. The implication of this is that the constitutional principles

cannot be invoked to scrutinise the personal laws irrespective of their discriminatory content. However, there are instances where the statutes relating to personal laws had to pass constitutional scrutiny and tested on the anvil of Article 13.

In the absence of lack of clarity regarding the status of Personal Laws whether it is a ‘Law’ or ‘Law in force’ or a Custom having ‘force of Law’ the position of personal laws within the framework of Indian legal system needs to be made certain. Also whenever the issue on reforms of Personal Laws is brought up before the policy makers or before the Courts the subject continues to remain untouched upon or remains vague. The other question that rises is if personal law is not within the ambit of Law under Article 13 then whether Judicial Review under Article 32 and Article 226 can be made applicable to it.

Even assuming that Article 13 is not included within its ambit Personal Laws, it must be kept in mind that Article 13 is not the only source of Judicial Review. In *A.K. Gopalan v. State of Madras* it was held that Article 13 was there by way of ‘abundant caution’ and even in the absence of Article 13, Judicial Review would have been possible due to the very nature of the Constitution. Judicial Review is thus an inherent concept and can also be read into Article 245 with respect to post-constitutional laws and Article 372 for pre-constitutional laws. However as discussed above the Judiciary has been ambivalent on the issue of “Law” with regard to the Personal Laws.

Time and again whenever controversy surrounding Personal Laws came up to the fore front there has been a huge demand for the implementation of a secular Uniform Civil Code. The question also remains whether adopting a Uniform Civil Code will be an answer to the controversy surrounding Personal Laws and will it be treated as ‘Law’ in the secular domain of India, satisfying the underlying principle of “equality before law and equal protection of law”. Despite these, complex political considerations keep personal law systems in place, and thwart efforts to reform them. In this backdrop the thesis examines the concept of personal laws in India in the historical context. The purpose is to study the stand adopted by the judiciary in India while dealing with personal law matters. The thesis also examines that whether adoption of a uniform civil code can be an answer to address major issues raised by personal law system. This researcher suggests a way out of the stalemate that has dogged efforts to reform the personal law system in India and an alternative to deal with the contentious issue.