

**A STUDY OF THE STATUS OF PERSONAL LAWS IN INDIA WITH
REFERENCE TO ARTICLE 13 AND JUDICIAL REVIEW UNDER
CONSTITUTION OF INDIA**

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DECLARATION

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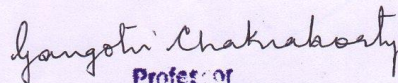
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ABSTRACT

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 non-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.

PREFACE

The issue of the personal laws vis-a-vis uniform civil code is entangled within the polemics of identity politics, minority rights, women's rights, national integration and uniform citizenry. Champions of each category view it through their own prisms, making the debate extremely complex, more so in a plural and noisy democracy like India. 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. 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. 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; are the two important fundamental rights besides other rights guaranteed by Part III of the Constitution of India. 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 differing rights in matters concerning marriage, inheritance, divorce etc. The women have fewer rights compared to their male counterparts. There exists inequality between the sexes under the 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.

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.

Time and again whenever controversy surrounding personal laws came to the forefront there has been a huge demand for the implementation of a secular uniform civil code. 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 the issue of personal laws, the judicial approach towards the said issue become pertinent to discuss. The judiciary have 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'.

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ABBREVIATION

A.L.R	:	Aligarh Law Journal
A.J.A.L	:	Australian Journal of Asian Law
A.I.R.	:	All India Reporter
A.P.	:	Andhra Pradesh (A.I.R.)
All.	:	Allahabad
B.L.R	:	Buffalo Law Review
B.C.	:	Before Christ
Bom.	:	Bombay
Bom.	:	Bombay (A.I.R.)
Cal.	:	Calcutta
Cr.P.C.	:	Criminal Procedure Code
D.B.	:	Division Bench
ed.	:	Edition
F.B.	:	Full Bench
Guj.	:	Gujarat
H.C.	:	High Court
i.e.	:	That is
I.J.S	:	Indian Journal of Secularism
I.L.R.	:	Israel Law Review
Ibid.	:	Ibidem
Id.	:	Idem
J.	:	Journal
J.B.S	:	Journal of Bhutan Studies
J.I.L.I.	:	Journal of Indian Law Institute
J.I.R	:	Journal of Indian Research
Kant.	:	Karnataka
Ker.	:	Kerala
Ltd.	:	Limited
M.P.	:	Madhya Pradesh

Mad.	:	Madras
Mat. L.R.	:	Matrimonial Law Reports
Nag.	:	Nagpur
N.J.R.S	:	Nordic Journal of Religion and Society
Ori.	:	Orissa
P.& H.	:	Punjab Law Reports
P.C.	:	Privy Council
p.	:	Page
Pat.	:	Patna
Punj.	:	Punjab
Pvt.	:	Private
Raj.	:	Rajasthan
S.C.	:	Supreme Court Cases
Sec.	:	Section
S.R.R.N	:	Social Science Research Network
U.P.	:	Uttar Pradesh
Viz.	:	Videlicet
Vol.	:	Volume
v.	:	Versus
Y.L.S	:	Yale Law School
Yaj.	:	Yajnavalkya
W.U.G.S.L.R:		Washington University Global Studies Law Review

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CHAPTER I

Introduction

Evolution of the Problem

The Personal Laws¹ 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.² The Personal Laws tell stories about the culture, behaviour, beliefs and values that are social constructs that shape the views of the people about their antecedents and roots. In India such social constructs have received legal recognition. India is a multicultural society and different groups in India have separate Personal Laws. Over centuries through invasions and migrations various religious groups like Islam, Parsi, Christians have made Indian their home.

Development of Personal Laws in India

In the Hindu Era(500 B.C-800 A.D): From the early ages, from the advent of Aryan civilization the pantheon people were termed Hindus by the British as they lived on the banks of the river Sindhu. However, recorded history is available from 500 B.C.

During this period, the general public enjoyed full liberty in matters concerning personal laws. The society during this period was administered by the sages. The laws made by religious leaders not only referred to religious ceremonies and rites, but acted as ethical and moral code.³

There were common laws established by the religious leaders of the society. There was no distinction between the civil laws, religious and social rules. Thus Hindus regarded the laws as a vital part of their religion.⁴The period between 800 A.D. to 1000 A.D. is an era of invasion and the beginning of the invasions into the territory of India.

¹ The expression 'Personal Law' means the law which governs a person's family matters. The framers of Constitution of India meant by the word 'personal law' as "marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition". See Entry 5 Schedule VII, Constitution of India.

²*Saldhana v. Saldhana*, AIR 1930 Bom. 105.

³ The various sources of law relied upon at this time were *shrutis*, *smritis*, *puranas*, *dharmasutras*, *dharmashastras*, etc. The *Arthashastra* and *Manusmriti* were influential treatises in India, texts that were considered authoritative legal guidance.

⁴ U.C Sarkar, "Hindu Law: Its character and Evolution" 6 *JILI* 214 (1964).

In the Muslim Era(1000 A.D-1700 A.D):After the Muslim conquered India, Islamic law became the law of the land.⁵Hindu law was not accepted by the Muslim rulers, however, they did not totally abolish the Hindu law system. In matters dealing with marriage, inheritance, worship, etc, Hindu law was applicable to the Hindus. Though the personal laws of non-Muslims were applicable in civil matters, the criminal law was of an Islamic nature. During this period there were two separate systems of personal laws that continued in parallel lines.

In the British Era(1700 A.D-1947 A.D):When the British established their hegemony over India they did not want to interfere in the religious matter of the Indians. The British adopted a clear policy and granted autonomy to the ‘natives’ in respect of Personal Laws. They considered that religion was a sensitive issue and that interference in the religious matters would in turn threaten the existence of the British. However there are instances of interference by the British as it is made out in the case of *Dada Bhikaji v. Rukmabai*⁶.

As discussed above in India before the colonization Hindus and Muslims with very few exceptions were governed by their own respective laws in both religious and secular matters.

The British continued with the same policy with regard to the personal matters of Hindus and Muslims.

However despite the colonial authorities distancing from the religious usages and Personal Laws of the ‘natives’, history is witness to the fact there were interventions with the same by both Judicial⁷ and Legislative⁸ means, that generated a huge amount of legal literature.

In the Post-Independence Period: In the late 1940s when the Constituent Assembly while engaged in drafting of the Indian Constitution they faced the dilemma of the issue of Personal Laws, 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

⁵*Quran* is the first and the most important source of Islamic law. It is believed to be the direct words of God.

⁶ (1885) ILR 9 Bom. 529.

⁷ With regard to dispute concerning personal matters the onus to prove the custom was upon the party alone. Due to the existing diversity of customary practices there was no coherent scheme of identifying religious practices that could be the basis for effective dispute-resolution. The judges trained in the English Common law tradition began to apply principles that they themselves were familiar with. The implication of this was that in the event of uncertainty in choosing between scriptural interpretations and actual customs, Courts were more likely to invoke the doctrine of ‘justice, equity and good conscience’ to decide cases.

⁸ The colonial period also witnessed several legislative interventions which sought to curtail practices that had a religious basis. These Legislations prohibited infanticide, abolished the upper-caste practice of sati sought to remove caste disabilities for ownership of property, provided for widow remarriage and raised the age of consent for marriage. The attribution of these interventions as ‘social reform’ measures met with some resistance on the ground that they violated the guarantee of religious autonomy.

to be a Uniform Civil Code⁹ 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.¹⁰

It is a matter of common knowledge that partition of India occurred on the basis of religion and the consequence had been extremely violent. 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.¹¹

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.¹² These rights restrains the governmental actions¹³ that is likely to violate the fundamental rights which find a pristine place in our Constitution. Amongst the many rights, freedom of religion and right to freely profess, practise and propagate religion¹⁴ is guaranteed under Part III of the Constitution.

The Constitutional scheme uses Article 13¹⁵ to define law and provide safeguard against any violation of fundamental rights. Hence it makes the fundamental rights justiciable. It arms the

⁹Uniform Civil Code was not defined by the framers of the Constitution and it was placed under Article 44, Part IV of the Constitution. However a Civil law would relate to various aspects of personal relations, such as, contract, property, marriage, succession etc.

¹⁰ The framers of the Indian constitution, including Jawaharlal Nehru, were convinced that a certain amount of modernisation is required before a uniform civil code is imposed on citizens belonging to different religions. It was also feared that any attempt to ignore personal laws of various religions might lead to civil war, wide-scale rioting and social unrest.

¹¹ At the time of drafting of the Indian Constitution there was a huge debate in the Constituent Assembly with regard to implementation of UCC and the same was opposed by the members representing Muslim community. The community opposing UCC took the plea that Article 25 guarantees the fundamental right to freedom of religion and unifying their Personal Laws would violate their fundamental rights. The main emphasis of the debate was that all laws in India have been codified except the Personal Law and that the Personal Law should be codified at the earliest.

¹² The Constitution of India, arts 12-35.

¹³ The governmental action implies that the State as broadly defined under Article 12 cannot take any action that threatens the exercise of fundamental rights. The word 'State' 'includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

¹⁴ The Constitution of India, art. 25.

¹⁵ Article 13: Laws inconsistent with or in derogation of the fundamental rights.—

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

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

Judiciary with the power of Judicial Review¹⁶ and makes it the guardian, protector and the interpreter of the fundamental rights.

The Framers of the Constitution of India took great care and caution in weaving the delicate fabric of Article 13. The Article in detail lays down the scope of ‘law’ and while doing so makes it clear that under what circumstances the pre-constitutional as well as post constitutional laws shall be valid or void.

The legality of pre-and post-Constitution laws shall be subject to compliance with the criteria as laid down in Article 13. As a necessary corollary it would mean that any Personal Laws if challenged and is found discriminatory should have been struck down. Since the Personal Laws did not exist as ‘Law’¹⁷ as is understood as being formally legislated law, personal laws were placed beyond the ambit of constitutional scrutiny. In other words the Personal Laws were not brought within the definition of ‘Law’ as provided under Article 13.¹⁸ They were not even considered as Custom¹⁹.

Thus the main problem concerning Personal Laws is that if it is excluded from the definition of ‘Law’ under Article 13 then the ‘status’²⁰ of Personal Laws remains ambiguous. The implication of this ambiguity is that the Constitutional principles cannot be invoked to scrutinise the Personal Laws irrespective of their discriminatory content.

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.

(a) “law” includes any ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law;

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

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

¹⁶This power is exercised by the Supreme Court under Article 32 and by the High Court’s under Article 226.

¹⁷The framers of the Indian Constitution did not anticipate that personal laws could be assailed as being violative of fundamental rights.

¹⁸ This has been the ruling by the Bombay High Court in *State of Bombay v. Narasu Appa Mali*, AIR Bom 1952 84, that even though customs and usage would fall within the scope of the definition of “laws in force”, there was a distinction between custom and personal laws, and that Article 13 would not cover personal laws. The subsequent decision of the Supreme Court in *Shri Krishna Singh v. Mathura Ahir*, AIR 1980 SC. 707, wherein they succinctly laid down that Part III does not touch upon personal laws so long as they are not “altered by any usage or custom or is modified or abrogated by statute”.

¹⁹ “Custom is *a*: a usage or practice common to many or to a particular place or class or habitual with an individual *b*: long-established practice considered as unwritten law *c*: repeated practice *d*: the whole body of usages, practices, or conventions that regulate social life” [Merriam- Webster Dictionary].

²⁰“status” is defined as social or professional position; standing” [Oxford Advanced Learner’s Dictionary].

Statement of the Problem

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 makers²¹ or before the Courts²² the subject continues to remain untouched upon or remains vague. The issue of reforms of Personal Laws has also been resisted in an aggressive manner by the religious denominations especially by the Muslims²³.

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,²⁴ 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*²⁵ 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 245²⁶ with respect to post-constitutional laws and Article 372²⁷ 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 Code²⁸.

²¹In *Dwarakabai v. Prof. Nainan*, AIR 1953 Mad. 792, the court observed that the time is not ripe for the legislature to reform the law.

²² In *Daniel Latifi v. Union of India*, AIR 2001 SC 3262, the Supreme Court with a view to unify the family matters held that Muslim divorced Women has a right to get maintenance even after Iddat period under the Act of Muslim Women (Protection of right on Divorce) Act, 1986. This ruling is in contrast to the rulings that were held in *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84 and *Shri Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707, where the Court held that Art 13 does not touch upon the Personal Laws.

²³ In *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945, the five judges bench of the apex court held that Muslim women may be given maintenance on the basis of some observation regarding personal laws. This resulted in a disaster and created a hue and cry amongst fundamentalists compelling the Parliament to pass a law modifying the said observation and given prevailing effect to the personal laws.

²⁴The constitution makers intended to confine the application of fundamental rights to what is stated in Article 13. Thus, for example, pre-constitutional laws shall be invalid only to the extent they fall within the category of "laws in force". As un codified personal laws do not fall within that category, it could be argued that they were not intended to become invalid on the ground of any inconsistency with the fundamental rights.

²⁵ AIR 1950 SC 27.

²⁶ Article 245 of the Constitution of India provides that the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

²⁷ Article 372 provides that subject to other parts of the Constitution, the pre-constitutional laws shall stay in force.

²⁸ In *Mohd. Ahmed Khan v. Shah Bano Begum*, 1985 2 SCC 556, the Supreme Court observed that the govt of India is duty bound of securing a Uniform Civil Code. In *Jorden Diengdeh v. S.S. Chopara*, AIR 1985 SC 935, the Supreme Court of India observed that the law relating to marriage, divorce and judicial separation is far from

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".

In a welfare State like India, the Judiciary has to take an activist stance in order to eradicate any type of discrimination²⁹ which it has been doing as Judicial Activism. In many cases Judicial Activism has addressed matters of personal laws. Only such an approach can curb the sprawling forms of discrimination in the Personal Laws and thereby ensure the accomplishment of the constitutional ideals of equality and fraternity.

Hypothesis

After 69 years of adoption of the Constitution the "status" of Personal Laws in India still remains ambiguous. It is not clear whether it is at par with the concept of 'Law' or 'Law in force' or Customs having the "force of Law" under Article 13 of the Constitution. Unless the status of Personal Laws is clarified and expressly made at par with the status of any other secular laws the ideology of securing equality of law and equal protection of law between men and women will continue to be an illusion leading to gross failure of social justice.

Moreover, even though the status of personal laws remains ambiguous, Judiciary has recognised as law and has reviewed it and tested it with the touch stone of constitutionality. However, an express clarification is needed to ensure progressive equality in the domain of personal laws.

Research Questions

1. Whether Personal Laws is 'Law' or 'Law in force' or Custom having the 'force of Law' under Article 13 of the Constitution?
2. Is Personal Laws a 'Law' within the definition under Article 13 of the Constitution and subject to Judicial Review?

uniform so the time has come to make a uniform law which would be applicable to all irrespective of religion and caste. In *Sarla Mudgal v. Union of India*, 1995 3 SCC 635, the Supreme Court directed the govt to take steps towards securing a Uniform Civil Code for Indian Citizen which is necessary for the national unity and integrity.

²⁹ The Personal Laws does not echo the spirit of equality as guaranteed under the Constitution. The Personal laws are discriminatory towards women's rights. For example; Muslim Law recognises unilateral divorce by the husband but not by the wife.

3. Whether a Uniform Civil Code if adopted, will it be treated as a 'Law' in the secular domain of India in personal matters?
4. What is the emerging Judicial trend on the issue?

Objective of the Study

Not considering Personal Laws 'Law' under Article 13 of the Constitution and keeping it outside the purview of Judicial Review gives rise to dangerous situation where women will be made victims of male dominance and abuse and social exploitation without any legal remedy. The object of the study is to see the status of the Personal Laws vis- a- vis the need of social justice and if a common civil code is adopted will it be treated as a 'Law' in the secular domain.

Significance of the Study

The laws governing the personal sphere of people whether Muslim, Hindu, Christian or Parsi has been influenced by religious faith and practises, culture and custom. These laws which have been in practise since many centuries are not in tune with the present time. Hence the Personal Laws are of special significance to ensure equal treatment of all for social integration. Ending discrimination on grounds of sex or religion is therefore a prerequisite for development and nurturing the inherent dynamism in a society.

In this backdrop the present study is significant because people in India are still being governed by their own Personal Laws. Despite the Constitution echoing the spirit of equality and non-discrimination, the existence of many Personal Laws in turn leads to an unequal society. Not treating Personal Law as 'Law' under Article 13 opens up avenues for patriarchy to meet out unequal treatment to women without any remedy against it.

The study proposes to clarify the 'status' of the Personal Law and if necessary propose an alternative possibility of secularization of religio-personal issues which will pave the way for achieving substantive equality.

Limitation of the Study

The research has been limited to evaluation of legal principles on the status of Personal Laws in India and how it has been developed and the legal reasoning and interpretation on the issue of Personal Laws. The study has not dealt with the content of the personal laws of any

community except where it has been contextually necessary. The study is confined on the broad concept of “personal law” vis-a-vis its status under the legal framework of India.

Methodology

The methodology adopted in this thesis is Doctrinal method. In this thesis, national and International instruments, Constitutional provisions and other relevant statutory materials besides relevant case laws and reports touching on the topic have been analyzed.

The primary data have been collected from the debates of Constitutional Assembly, the judgements of Supreme Courts and High Courts on the issue, and also various enacted laws have been relied upon.

The secondary data will consist of various interpretations made in commentaries on the Indian Constitution, the books, articles and research papers published in different journals.

The purpose of research is to critically evaluate the problem of implementation of various judgements and the role played by the Parliament in this area.

Chapterisation

The thesis is divided into eight chapters including introduction and conclusion along with suggestive recommendations. A brief summary of the chapters has been mentioned below.

Chapter I: Introduction, the introductory chapter provides a brief overview of the topic entitled “**A Study of the Status of Personal Laws in India with Reference to Article 13 and Judicial Review under Constitution of India**” along with detailed synopsis of the research.

Personal Law: Chapter II: A Conceptual Framework, deals with understanding the concept of personal laws. How the concept of personal law has evolved and what are the views of legal philosophers on personal laws is dealt with in this chapter. Also how personal laws are viewed in India has been discussed in this chapter.

Chapter III: Evolution and Growth of Personal Laws in India, traces the evolution of the personal laws in India since the ancient times, i.e. starting from the Hindu era and after the invasion by the Mughals and the British how the matters on personal laws were dealt, with the change in administration have been discussed in this chapter. After India achieved independence how the said issue was dealt at the time of framing of the Constitution. Insofar

as the Constituent Assembly debates are concerned the chapter elaborately analyses the discourse on personal law and uniform civil code, primarily in the context of constitution making.

Chapter IV: Part III of the Constitution in the Context of Personal Laws: An Analysis, discusses the personal laws in the context of Part III of the Constitution which deals with Fundamental Rights. It examines the position of personal laws within the constitutional framework and an academic discourse on the said matter.

Chapter V: Personal Laws and Judicial Review-The Conflicting Judgements of the Courts in India and their Impact upon the Personal Laws, discusses the judicial approach on matters concerning personal laws in India. The chapter examines that the judiciary have been proactive and in many cases Judicial Activism have addressed the issues on personal laws. However, they have been conflicting judgements of the courts on the status of personal laws thus; relevant cases have been discussed and examined in this chapter.

Chapter VI: ‘Locating Uniform Civil Code in the Personal Law Debate: As a Panacea for the Problem, discusses the Constituent Assemble Debate on Uniform Civil Code and the reasons that were given for its necessity have been discussed. Also the judicial approach towards Uniform Civil Code has been discussed. Further, whether adoption of Uniform Civil Code can be a solution and an answer to the controversy surrounding personal laws have been discussed. And the academic discourse on Uniform Civil Code has also been discussed in this chapter.

Chapter VII: Concept of Personal Laws in SAARC Countries, discusses the topic on personal laws and uniform civil code as it obtains in India and its South Asian neighbours, namely, Pakistan, Bangladesh, Nepal, Srilanka, the Maldives, Bhutan and Afghanistan. Since Pakistan and Bangladesh were part of India before 1947 and since both are predominantly Muslim countries, they provide interesting insights into how Muslims look at their own personal law and at that of others-reforms in Muslim personal law, yes; but, in respect of others, indifference. Nepal, Bhutan and the Maldives make interesting cases because they all have uniform legal codes or uniform justice systems. In respect of Srilanka, besides Buddhist, Hindu and Muslim personal laws, the Kandyan law and the customary inheritance law of the Jaffna Tamils known as the Thesavelamai law is discussed in this chapter.

Chapter VIII: Summation and Suggestions, is concluding chapter along with some suggestions given by the researchers.

Literature Review:

Simon Shetreet & Hiram E. Chodosh, *Uniform Civil Code for India* (Oxford University Press, 2015), the book lays down blueprint for alternative frameworks and courses of action, drawing lessons from the comparative context to develop a Uniform Civil Code for India. The author analyzes how to solve the challenge of introducing the civil code and at the same time maintain respect for community laws and social customs. It provides global and local perspectives on the promised Uniform Civil Code, envisioned by the Indian Constitution, but not yet implemented. It also lays down a new set of guidelines and processes that can help India find answers to the disconcerting and politically sensitive dilemma of implementing the Uniform Civil Code.

Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent* (All India Reporter, Nagpur, 2nd edn., 1983), this book begins with the survey of the legal documents which recognized Muslim Personal Law during the early days of British rule. It then proceeds to discuss the demands voiced by certain sections of Muslims in regard to their personal law during the independence movement and Constituent Assembly. The discussion is then conducted in terms of the place which Muslim law actually found in the Constitution enforced in 1950 and the way it has been treated in the Indian legislature since the advent of freedom. It is in the light of this survey and discussion that the right and wrong in the conflicting attitudes to a common civil code and the personal law reform, now prevailing in various sections of Indian Muslims, may be judged and illustrative and critical account of such attitudes being discussed in the book. The constitutional status of the Muslim Personal Law in other two parts of the subcontinent-Pakistan and Bangladesh-its reform in those countries and the reaction of the people to the same, have also been discussed by the author.

Partha S. Ghosh, *The Politics of Personal Law in South Asia; Identity, Nationalism and the Uniform Civil Code* (Routledge, 2007), the book deals with issues and concepts, posits the problematic in the context of the conceptual dichotomy between the centralized and the decentralized view of law together with the evolution of the concept of civil and common laws and then relates it to the overall South Asian scene from historical and sociological

perspectives. The author discusses the developments on the Indian political scene from the fifties through to the present. He discusses into the politics of the discourse on the uniform civil code as it unfolded during the period. He also explains the compulsions behind all the ruling coalitions going slow on the issue of introducing the uniform civil code, if not rejecting the idea outright. The author dwells into the subject as it obtains in India's South Asian neighbours, namely, Pakistan, Bangladesh, Nepal, Srilanka, the Maldives, Bhutan and Afghanistan. Since Pakistan and Bangladesh were part of India before 1947 and since both are predominantly Muslim countries, they provide interesting insights into how Muslims look at their own personal law and at that of others-reforms in Muslim personal law, yes; but, in respect of others, indifference. Nepal, Bhutan and the Maldives make interesting cases because they all have uniform legal codes or uniform justice systems. In respect of Srilanka, besides Buddhist, Hindu and Muslim personal laws, the Kandyan law and the customary inheritance law of the Jaffna Tamils known as the Thesavelamai law is discussed in the book.

Archana Parashar, *Women and Family Law Reform in India* (Sage Publication, 1992), in her book deals with the study of the legislative history of the Family Law of India. The laws relating to family in India are also called personal religious laws and the four major communities, namely Hindus, Muslims, Christians and Parsees have their own separate personal religious laws. Most of these laws give women fewer rights than men. The Constitution of India guarantees equality as a fundamental right, but despite this, the state has maintained and applied personal religious laws. The main argument of the book is that since the principle of legal equality is accepted in the Constitution, it must be translated into legal rights for women despite claims in the name of religions to the contrary. The substantive part of the book aims to analyze the legislative conduct of the state in order to understand how and why it justified the pursuit of legal inequality for women. However, in analysing the state's conduct, it is important to underline the importance of political factors, in addition to economic explanations.

Flavia Agnes, *Family Laws and Constitutional Claims* (Oxford University, 2011), in her book shed light on the laws relating to family in India, where different religious communities are guided by their own personal laws, each of which has evolved historically under various social, religious, political and legal influences. The author examines family law in the light of social realities, the discourse of contemporary rights and the idea of justice. Based largely on case laws, the book examines the evolution of the personal laws of Hindus, Muslims,

Christians, Parsis and Jews during colonial and post-colonial times how these laws apply in matters in regard to marriage, divorce, property rights and succession, and whether it is possible to ensure that the law is in accord with the modern changes, both in the formal and statutory law and the practices of the community. It also examines in depth the role of the judiciary, political and academic debates on the issue of the Uniform Civil Code and a comparison of the personal laws of the majority and the minority communities.

Ajai Kumar, *Uniform Civil Code-Challenges and Constraints* (Satyam Law International, 2012), discusses the debate on the Uniform Civil Code. The author examines the pertinent question 'whether the Uniform Civil Code should be applied with immediate effect or postponed for a period of time until the people themselves decides to adopt it. The author in this book has with his keen analytical dexterity has shown that the Indian method of operating a uniform law without having a uniform civil law has developed under our noses for several decades. But most Indians did not realize this and the nation had its own agenda not to tell people clearly what it was doing.

Jena, B.K.C, *Uniform Civil Code* (The Law, Neem Chauri Cuttack, 2007), has provided great service to the cause of personal laws by filling in the huge gap in the study of succession laws by paying due attention to Article 44 of the Indian Constitution. The author rightly argues that various provisions of the personal laws followed by the various communities deny the equal status to women. While the Hindu personal laws were to a large extent reformed, the personal laws of other communities were usually left intact. The author portrays the rights of Indian women under the various succession laws and suggests a uniform civil code to end prevalent inequalities. The author argues that the secular nature of the Indian state can only be fully achieved when a uniform civil code that serves the link between religion and civil rights is promulgated by Parliament.

E., Newbigin, *The Codification of Personal Law and Secular Citizenship* (Sage Publication, 2009), discusses the debates on personal law and a Uniform Civil Code in India. Hindu and Muslim leaders insist on the "religious" status of Muslim law in relation to a more secular or "civil" Hindu legal system. This article argues that these claims obscure very important similarities in the development and functioning of these legal systems. Drawing the origins of the debate on uniform civil code to the late nineteenth and early twentieth centuries of the, the author argues that the systems of personal law in force in India today are the result of the end of the colonial attempts by Hindu and Muslim male reformers to change their legal

systems as to serve their own interests. The ways in which the reformers managed to secure these ends was very different; The colonial constructions of the Hindu and Muslim religious practices, and later the partition, formed the context in which the male reformers tried to vindicate their demands, before the state and their own communities. Thus, far from making an inherent difference between Hindu and Muslim laws, claims concerning the "civil" or "religious" status of legal systems are used in both cases to support particular forms of patriarchal authority and gender inequality.

T. Brekke, "*The Concept of Religion and the debate on the Rights of Women in the Constitutional Debates of India*" *NJRS* (2009), the author emphasizes that in the Constituent Assembly Debates in the 1940s, religion was considered an obstacle to the improvement of women's rights in India. To understand the negative view of the role of religion in society, it is necessary to understand two very different concepts of religion currently in India. The author calls these notions the universalist and the particularist concepts of religion. These two concepts were associated with dichotomies such as universal religion and particular religious' traditions, positive and negative religion; inclusive and exclusive, progressive religion and conservative religion. For most members of the Constituent Assembly, religion was considered inseparable from the caste system, local customs, rituals, law, and the general worldview. The author argues that this particularist concept of religion has shaped the dominant views and attitudes about the public role of religion in the debates at the time of drafting of the Constitution. As a consequence, religion was perceived as a barrier to social reform in a number of different areas especially it is a major obstacle in the area of women's rights.

S. Jain, "Viewing the Constitutional framework of India from the mirror of Multiculturalism and Critical theories of Democracy with special focus on Personal Law" *SSRN* (2014), the author addresses fundamental questions about the nature of personal law in India. The author argues that the subordination of personal law to fundamental rights embodied in part III of the Indian Constitution is based on a priori theoretical approach derived from Western liberalism and Hindu Majoritarianism. Abolishing the personal law of minorities or aligning it with the reformed personal law of the majority is not a positive step towards the adoption of a Uniform Civil Code. Rather, it would strengthen the "majority construction" of the personal law of minorities and would be marked as a serious erosion of the idea of introducing in the public domain a debate on the discriminatory nature of the personal law of the majority. In the author's view, the promulgation of a Uniform Civil Code is not a

categorical constitutional obligation and, at the same time, Parliament and the courts must be cautious of the serious repercussions, while attaching undue importance to it. The author agrees with the approach adopted in South Africa, where the issue of customary law was politically addressed by ensuring the active participation of all communities during the process of law reform and the author sees no reason why we cannot adopt the same in India to participate in the reforms of the personal law of minorities.

The author also develops the argument that personal law as a socio-legal institution can coexist together with the written constitution and the legal norms. The doctrines and principles must be developed to deal with the cases where the laws contradict certain provisions of the Constitution.

M. Kasturi, “Judicial Activism under Article 21 and Personal Laws” JIR (2015), in her article elucidates, India is a nation with various communities that are governed by different personal laws according to their religion. These personal laws often come into conflict with the principles set forth in part III of the Constitution. In general, the courts have been reluctant to violate these laws because of a violation of fundamental rights. This is partly due to the fact that personal laws are generally not considered as "laws" under Articles 13 and 372 of the Constitution. However, some of the personal laws have been interpreted in a way that puts them in harmony with the fundamental rights. But the efforts of the judiciary are not enough, what is necessary is a proactive approach of the legislature. A Uniform Civil Code along with Judicial Activism has the potential to make significant positive changes in the field of personal laws.

CHAPTER- II

PERSONAL LAW: A CONCEPTUAL FRAMEWORK

Introduction

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

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

Savigny explained personal law in this way:

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

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

³⁰ Faustina Pereira, *The Fractured Scales The Search For a Uniform Personal Code* 4 (Mandira Sen for STREE, Calcutta, 2002).

³¹Ibid.

³²Friedrich Karl Von Savigny, *Private International Law: A Treatise on the Conflict of Laws* 58 (William Guthrie trans., T & T., Law Publishers 1869).

³³ Jeffrey A. Redding, "Slicing the American Pie: Federalism and Personal Law", 2 *YLS* (2007).

³⁴*Id.* at 58.

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

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

³⁵*Id.* at 59.

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

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

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

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

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

2.1. Personal Law in India

In Indian legal terminology, “Personal Law” is a very familiar expression, an expression not difficult to understand but not easy to define. Its denotation has been fairly established by the authorities, both judicial and textual, but a clear-cut and precise definition is not readily available. Mulla has described⁴⁰ Personal Law as “the laws and customs as to succession and family relations”. This has been generally accepted as a fairly workable definition or description, but it is obviously not adequate and comprehensive as the Muslim Law relating to Gifts, Wakfs or Pre-emption or the Hindu Law relating to Religious and Charitable Endowments or Damdupat, which have been treated as Personal Laws in Mulla’s celebrated treatises,⁴¹ are not laws relating to succession or family relations. Justice Bhagwati in the Supreme Court decision in *Pradeep Jain v. Union of India*⁴² has referred to Personal Law as the law dealing with matrimonial relation.⁴³ According to Cheshire,⁴⁴ Personal Law would mean the law relating to personal status and matters which are to a greater or lesser extent governed by the Personal Law are essential validity of marriage, mutual rights and obligations of husband and wife, parent and child, guardian and ward, the effect of marriage

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

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

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

⁴² AIR 1984 SC 1420.

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

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

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

2.2 Public Law and Private Law

In the Anglo Indian law-language both the Hindu law and the Mahomedan or the Muslim law have been described as the personal laws. In fact, since the British period the expressions ‘Hindu Personal Law’ and ‘Mahomedan (or Muslim) Personal Law’ have been used as synonymous and interchangeable. The appendage of the expression personal to the Muslim or Hindu Law was unnecessary and is also misleading to some extent.⁴⁵ The expression is likely to lead to the impression that the relevant law is confined to matters strictly personal in nature. The impression, even though correct to a very great extent would not be wholly correct, as public wakfs governed by Muslim law or public religious or charitable endowments governed by Hindu law are not matters of personal nature. Nor the Muslim law or the Hindu law covers all personal jural relations or legal matters of the Muslims or the Hindus as their personal obligations arising from private agreements or private transfers are not regulated by these laws.⁴⁶ The expression personal law was used in Section 112⁴⁷ of the Government of India Act, 1915 and has also been used in the Seventh Schedule of the Constitution of India. Sir William Jones while advocating enactments of legislations to

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

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

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

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

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

In the civil jurisdiction the expression ‘Public Law’ has come to mean those laws which deal with the constitution and functions of the state and also of its various departments, the relation between the state and its citizens, their mutual rights, liabilities and duties, laws relating to public order, public safety, public welfare and other matters concerning the public in general. In contradiction thereto, ‘Private Law’ would mean those laws relating to contract, transfer of property and the like which concern private individuals, as also laws relating to marriage, succession and other family relations. The division of law into public and private is one of the most well-known and widely recognised divisions, but as pointed out by Austin and many others the division is neither exhaustive nor accurate. In the Institutes of Justinian it is stated *jus privatum quod, ad singulorum utilitatem pertinent*, and this, in short, means that Public Law is mainly and mostly concerned with and directed to the State, while Private Law is mainly and mostly concerned with and directed to the individual. It is said as Markby observed⁵² ‘that public law comprises that body of law in which the people at large or sometimes put, the sovereign or the state as representing the people, is interested, while private law comprises that body of law in which individuals are interested’. But this division, as Markby pointed out, even though forcible and sometimes useful, is not accurate for though the interest of public or the state is conspicuous and predominant in public law, there is hardly any public law in which the interest of the private individuals is also not concerned. Both public and private element merge, mingle and co-exist in all laws, public and private. The supreme public law like the Constitution of India is the fountain head of individual legal

⁴⁸Lord Teignmouth’s *Life of Jones*, p. 106; also quoted in Sircar’s *Muhammadan Law* (Tagore Law Lectures, 1873. 72, 73; also in Tan Ma Shwe Tin AIR 1949 PC 228 (233).

⁴⁹ 12 MIA 81 (95-96).

⁵⁰ ILR 32 Cal 187.

⁵¹ AIR 1930 Bom 105.

⁵² William Markby, *Elements of Law* 152-153 (Oxford, Calendron Press, 5th edn., 1896).

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

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

As stated above in *Pradeep Jain v. Union of India*,⁵⁴ Justice Bhagwati has referred to personal law as the law dealing with matrimonial relations such as the important conditions of a marriage, divorce, adoption, succession etc. But even these descriptions are not sufficiently comprehensive for the Muslim or the Hindu personal laws apply not only to matters relating succession to movables but to succession to immovables as well. Be that as it may, the expression status comprehends natural, domestic as well as extra domestic status and if Muslim law or Hindu law, as administered since the British period, is to be regarded as personal law for being a law relating to personal status, then it relates to domestic status or family status and to the rights, duties and obligations arising out of family relations. Muslim law as applied since the British period is to a great extent the law of such status, though some portions thereof, like the law relating to public wakfs, or pre-emption do not relate to personal status. It should however be noted that unlike under the Private International law prevailing in the West⁵⁵ the applicability of personal law depends, not on nationality or domicile, but on religion or race. As observed by the Privy Council in *Fanny Barlow v. Sophia Orde*⁵⁶, the personal status of an individual in India “mainly depended on his religion”

⁵³*Supra*.

⁵⁴AIR 1984 SC 1420 (1426).

⁵⁵*Supra* note 1 at 179-181.

⁵⁶ (1870) 13 MIA 277 (307).

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

While commenting on Hindu law Mayne has observed⁵⁸ that ‘it is not merely a local law’, but it becomes the personal law and a part of the status of every family which is governed by it and these observations have been quoted with approval by the Privy Council in *Balwant Rao v. Baji Rao*.⁵⁹ In *Parbati Kumari v Jagadish Chunder*,⁶⁰ the Privy Council use the expression personal law ‘as distinguished from geographical or territorial law’.

Mulla has described⁶¹ personal law as ‘the laws and customs as to succession and family relations’. But while this may be accepted as a fairly workable definition or description, it is not, as already noted, adequate or comprehensive as the laws relating to Gifts, Wakfs and Pre-emption, which has been covered in Mulla’s celebrated treatise on Mahomedan law,⁶² are not laws relating to succession or family relations. Cheshire’s reference to personal law as “affecting family relations and the family property,⁶³ would not also be quite apposite in respect of the Muslim or the Hindu Personal Law as the Muslim Personal Law relating to pre-emption by vicinage of public wakf or the Hindu Personal law relating to public religious or charitable endowments has nothing to do with family relations or family property. In the context of various personal laws operating in India, a pragmatic definition of personal laws would be that body of laws which apply to a person on the ground of his descent from his parents and would continue to govern him until he can effectively dissociate from his parent community by change of religion or otherwise. But even that definition would not be fully comprehensive to cover the Hindu or the Muslim law relating to public wakfs or other public religious or charitable endowments as in those cases the law applies, not to any person, but to the institutions. Thus, personal law can be explained as, ‘the set of laws that are applicable to a person or thing because of their belonging to a particular religion.’

⁵⁷ILR 25 Cal 537 (546) PC.

⁵⁸Mayne, *Hindu Law and Usage* 90 (Higginbothams, 11th edn., 1953).

⁵⁹AIR 1921 PC 59 (60).

⁶⁰ILR 29 Cal 433 (452) PC.

⁶¹Mulla, *Principles of Hindu Law* 88 (N.M.Tripathi: Bombay, 15th edn., 1982).

⁶²Mulla, *Principles of Mahomedan Law* (Lexis Nexis, 20th edn., 2013).

⁶³*Supra* note 1.

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

2.3. Personal Law: Groups Rights or Individual Rights

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

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

⁶⁴AIR 1930 PC 251 (252).

⁶⁵*Supra* note 2.

⁶⁶Bhiku Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* 215-216 (Palgrave, London, 2002).

⁶⁷*Ibid.*

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

2.4. Personal Law-Definition

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

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

Sum Up

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

⁶⁸Ibid.

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

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

⁷¹ AIR 1930 PC 251 (252).

⁷²*Supra* note 3 at 4.

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

In Indian legal terminology, “Personal Law” is a very familiar expression, an expression not difficult to understand but not easy to define. Its denotation has been fairly established by the authorities, both judicial and textual, but a clear-cut and precise definition is not readily available. In the Anglo Indian law-language both the Hindu law and the Mahomedan or the Muslim law have been described as the personal laws. In fact, since the British period the expressions ‘Hindu Personal Law’ and ‘Mahomedan (or Muslim) Personal Law’ have been used as synonymous and interchangeable. Any one acquainted with the operation of the various Personal Laws in India would and can entertain no doubt that the applicability of these laws depends solely on religion.

CHAPTER III

EVOLUTION AND GROWTH OF PERSONAL LAWS IN INDIA

As discussed in the preceding chapter, personal law systems are legal systems where, in the same country, different bodies of law are applied to different persons according to their ethnic or religious identity.⁷³ The personal law is one of the unique components of the Indian legal system. India is a multicultural society and different groups in India have separate personal laws. Any one acquainted with the operation of the various personal laws in India would and can entertain no doubt that the applicability of these laws depends solely on religion.⁷⁴ The personal laws tell the stories about the culture, behaviour, beliefs and values that are social constructs that shape the views of the people about their antecedents and roots. In India such social constructs have received legal recognition. The colonial invasion has had an immense impact on the structure and substance of personal law systems in India.⁷⁵ Over centuries, through invasions and migrations various religious groups like Islam, Parsi, Christians have made India their home. The invasions and migration have led to the advent and development of various personal laws in India. The personal law system continued to be retained even after the adoption of the Constitution.

3.1. Personal Laws in the Hindu Era

Before the advent of Muslims in India, the term 'Hindu' had no creedal connotation. Then it had a territorial significance; probably it also denoted nationality.⁷⁶ It seems that the word 'Hindu' came into vogue with the advent of the Greeks who called the inhabitants of the Indus valley as *Indoi* and later on this designation was extended to include all persons who lived beyond the Indus valley. Today, the term 'Hindu' has no territorial significance, nor is it a designation of nationality.⁷⁷

⁷³Hadas Tagari, *Personal Family Law Systems- A Comparative and International Human Rights Analysis*, CIJL 231.

⁷⁴A.M. Bhattacharjee, *Matrimonial Laws and The Constitution 2* (Eastern Law House, 1996).

⁷⁵*Supra* note 4 at 231.

⁷⁶ See, Radhakrishnan: *Hindu View of Life*, quoted by Gajendragadkar, J. in *Shastri Yagnapurushadasji v. Muldas*, 1988 SC 1119.

⁷⁷The modern India is a country which abounds in personal laws: every community is governed by its own personal law as modified by custom and legislation.

In Hindu India⁷⁸ the general public enjoyed complete autonomy in the matters concerning their personal laws. There was no interference with regard to religion during this period. In the Hindu era the society was administered by sages and they relied upon the Vedas and other religious scriptures in matters concerning personal laws.⁷⁹ The society during this period was administered by the sages. The laws made by religious leaders not only referred to religious ceremonies and rites, but acted as ethical and moral code.⁸⁰ There were common laws established by the religious leaders of society. There was no distinction between civil laws, religious and social rules. During this period the society was based on 'Dharma'.⁸¹ There was no segregation between law and religion.⁸²

The king had very little authority to make laws and was required to govern according to Dharma. At the time of coronation, it was necessary for the king to take a vow that he would respect the laws and that he would not change them according to his desire.⁸³ Therefore, it is evident that Dharma was the rule in Hindu India. From this description it is seen that in Hindu India, the society had supremacy over the state and religion.⁸⁴ Thus the laws were regarded by the Hindus as an integral part of their religion.⁸⁵

⁷⁸ From the early ages, the advent of Aryan civilization the pantheon people were termed Hindus by the British as they lived on the banks of the river Sindhu. Hindu India is the period from the beginning of the Indian History (i.e. 1000 B.C.) to the establishment of an effective Muslim rule in the early 12th century. See, P.B. Gajendragadkar, "Secularism and the Constitution" 20 *AJCL* 25-26 (1972).

⁷⁹ The Vedas or revealed texts were believed to have been divinely inspired and were considered to be sacred. The various sources of law relied upon at this time were shrutis, smritis, puranas, dharmasutras, dharmashastras, etc. The Arthashastra and Manusmriti were influential treaties, texts that were considered authoritative legal guidance. Hindu law is a combination of shashtric injunctions and customary traditions. Since Hinduism is not based on one single scripture nor is there one single inspired text, to define Hindu law in precise terms is not simple. Hindu law essentially revolved around the concept of dharma.

⁸⁰ A.S. Altekar, *State and Government in Ancient India* 55 (Motilal Banarsidass, Delhi, 3rd edn., 1958).

⁸¹ The word Dharma is derived from the root 'dhru' means 'to hold'. *Dharma*, thus, was a principle of social cohesion, holding the society together in a harmonious relationship. See, M.S. Pandit, *Outlines of Ancient Hindu Jurisprudence* 3 (N.M. Tripathi, Bombay (1989).

⁸² Hari Singh Gour, *The Hindu Code* 5 (Allahabad Law Publishers 1973).

⁸³ The king had to follow *Rajdharma* that is to do his function of justice delivery according to the norms of *Dharmashastras* and the well established customs. He was the foundation of justice but not the source of law. The Vedas, the Smritis including commentaries and digests on them, and the Customs were the sources of law.

⁸⁴ Thus Shastra was the prevailing rule; the common law in ancient India and customs, 'being local variation (local custom, in India, may be divided into two classes – Geographical local customs and personal local customs. These customs are law only for a particular locality, community, sect, family, etc. Thus, these customs are personal law of such locality, communities, etc) of general law,⁸⁴ was without a doubt 'personal' for certain communities or groups who were governed by them. Thus, the clear continuation of personal law; the law which governs certain aspects of status or relationships of a person, as well as rights or privileges of certain matters such as succession, marriage, etc. by virtue of his belonging to a particular community or group; can be found in ancient India. However, the entire shastras and the customs are now known as the Hindu law.

⁸⁵ A. Chakerbarti, *Nehru, His Democracy and India* 61 (1961).

The conspicuous feature of the Hindu law was that it governed its entire Hindu community on a uniform conviction that law and religion have a common source of its growth.⁸⁶ The ancient Hindu sages not only enacted new laws but also made provisions to repeal certain existing laws in practice.⁸⁷ The speculation of Hindu laws by these sages was undoubtedly the result of their mature inspiration and supreme realisation.

Thus, the Hindu law in ancient India was almost identical to Hindu belief and there were no other religious communities. The homogeneity of the law of the small Hindu communities was a general rule and not an exception.⁸⁸

3.2. Personal Laws in the Muslim Era

The advent of the Muslims in India marked the foundation of a new era in the legal history of India. In the eighth century it was the Arab Muslims who first came and settled down in the Malabar Coast and in the Sind.⁸⁹ Towards the end of the eleventh and the beginning of the twelfth century began the downfall of the Hindu period.⁹⁰ The old Hindu kingdom began to disintegrate gradually. The political history of this period is full of constant struggles between a few powerful states for supremacy.⁹¹ An atmosphere of great mutual doubt was created amongst the contending states which prevented their political unity against the common enemy.⁹² It resulted in the frittering away of the economic and military resources of the country at a time when the country faced greater danger from foreign invaders. A proper leadership capable of controlling and guiding the political and military talents and uniting Indians against the common foreign enemy was also lacking. The enemy took full advantage of these weaknesses. Subsequently the Muslims invaded and acquired the territory of India.

After the Muslims invaded India it was practically not feasible for the Muslims to be administered by the Caliph⁹³ who was at a distant place. Thus, some people have had to take

⁸⁶U.C. Sarkar, "Hindu Law: Its Character and Evolution" 6 *JILI* 213 (1964).

⁸⁷*Id.* at 213.

⁸⁸ Kiran Deshta, *Uniform Civil Code In Retrospect and Prospect* (Deep & Deep Publications, New Delhi, 2002)

⁸⁹ A.B.M. Habibullah, *The Foundation of Muslim Rule in India* (1945), quoted in V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* 16 (Eastern Book Company, 1989).

⁹⁰ U.N. Ghoshal, *Studies in Indian History and Culture* 353-373 (1st edn., 1944).

⁹¹ V.A. Smith, *The Oxford History of India* 371 (Oxford University Press, 1923).

⁹² A.L. Srivastava, *The Sultanate of Delhi* (Shiv Lal Agarwal & Company, 1953).

⁹³ The Prophet, the religious leader of Muslims, was gradually elevated to the rank of the Head of the state. With the demise of Mohammad, the Muslims encountered the problem of lack of leadership. The main members of the Muslim community decided to have one leader and they chose Abu Bakr as the first Imam. All Muslims was required to owe adherence to single head called Imam or Caliph. The Caliph was to rule according to the principles of the Quran, which was supposed to have a divine origin. As a result, none could change the law or

charge of the political leadership. With the advent of Muslims, Islamic law⁹⁴ became enforceable in India.⁹⁵

Nonetheless, the Muslim rulers had to decide the law they were to apply to govern the large number of non-Muslims in India. The holy Koran did not afford much guidance in this regard. Since the leaders were aliens in this country, they retained the Hindu law instead of abolishing it. With regard to civil matters only the Hindus were allowed to be governed by their own norms and the Muslims rulers maintained the policy of non-interference in this regard.⁹⁶ The outcome was that the Hindus were permitted to adhere to their own norms and the same policy was followed by the Muslims. This rule was only in matters of civil laws.⁹⁷ But with regard to criminal law both the Hindus and Muslims were governed by the Islamic law.⁹⁸

Thus the Islamic law was applicable only to the Muslims and in matters of private law, all non-Muslims were free to follow their own religious laws and customs and there was no obligation imposed upon the non-Muslims. In matters falling in the domain of private law all non-Muslims were left free, to follow their own religious laws and customs and there was no

question the authority of Caliph. *See*, M. Rama Jois, *Legal and Constitutional History of India* (Universal Law, New Delhi, 1990).

⁹⁴ Muslim law is founded upon 'Al-Quran' which is believed by the muslimans to have existed from eternity, subsisting in the very essence of God. The Prophet Mohammad himself declared that it was revealed to him by the angel 'Gabriel' in various portions and at different times. Its texts are held by the Muslims to be decisive as being the words of God transmitted to man through the Prophet. Besides inculcating religion and theology, the Quran contains also passages which are applicable to jurisprudence, which form the principal basis of the 'Sharia'. *See*, Aqil Ahmad, *Mohammedan Law* 1-2 (Central Law Agency, 23rd edn., 2009).

⁹⁵ *Supra* note 5.

⁹⁶ *Supra* note 6 at 200.

⁹⁷ The Islamic civil code dealing with the laws of inheritance, marriage and other similar issues of the Muslims was not applicable to the Hindus. Hindus were permitted to be governed by their own laws in the civil matters. *Id.* at 209.

⁹⁸ Islamic law had a very clear segregation between public law and private law. Under this segregation criminal law and public administration were classified in the first category while marriage, family relations, successions, etc., were considered as private law. The extent of the application of Islamic and secular laws during the Muslim rule were as follows: (i). Civil law: a. The purely personal law of Islam relating to inheritance, succession, marital rights, guardianship, will, endow-ment, gift etc., was applied to Muslims only. b. The secular portion of the civil law relating to trade, barter, exchange, sale, contract, etc., was made applicable to muslims and non-muslims alike. (ii). The laws of the land: the system of taxation relating to land revenue, minerals, quarries, manufacture, agriculture, excise, merchandise, sea-borne trade, etc., were adopted from the people of this country by the muslim sovereigns of India with necessary modifications. These taxes and imports were levied on and realised from all races (including muslims) alike. (iii). the Religious and Personal laws of the non-muslims: suits involving points of personal law of the Hindus, were used to be decided with the aid of learned Hindu Pundits, in the case of other races, with the aid of their learned men. (iv). Criminal Law: The portion of the Islamic Canon law which deals with religious infringement, was applied to muslims only, such as drinking, marrying within prohibited degree, apostasy, etc. For such offences non-muslims were not liable to punishment under the laws of Shariat. (v). The Edicts and Ordinance: continued in the Farman's and Dastur-ul-amal for the guidance of the officers of the state. They were the common law of the people of the country as opposed to the Canon law. These Qanuns were binding upon the judicial and executive officers and in compliance therewith the courts of common law were established in India. *See*, Wahed Husain, "Administration of Justice During the Muslim Rule in India" 14-16 (Calcutta: University of Calcutta).

compulsion on non-Muslims. From the very beginning this norm was followed as a matter of state policy.⁹⁹

The whole of Shariat law was never indiscriminately and rigidly applied to the Hindus in India. In fact it has been said in the very Shariat itself that whole body of the Islamic law is not applicable to the non-Muslims. A systematic judicial procedure was followed by courts during the Muslim period.¹⁰⁰ It was mainly regulated by two Muslim codes, viz. Fiqh-e-Firoz Shahi and Fatwa-e-Alamgiri. According to Fatwa-e-Alamgiri also non-Muslims are not subject to the laws of the Islam; their affairs should be regulated according to the principles of their own religion.¹⁰¹ Islamic law has interfered with non-Muslims only where they were directly or indirectly involved with Muslims—a good example is criminal law where Islamic doctrines were applicable to both the Muslims and non-Muslims.

Dr. A.H. Gani opines that during the Mughal period, the Islamic law was also the law of the land. Not only the civil law, but also the criminal law then in force was Islamic; law and the judiciary enforced and administered these laws. However, the non-Muslims had the liberty to follow their own religion or customary law in matters of marriages, inheritance etc. Thus each community had its own personal laws in those days.¹⁰² The Muslim rulers of India were mostly Sunnis of the Hanafi school and therefore, generally the Hanafi law prevailed all over the country. Shyakh Burhanuddin's *Hidaya* was received in India in the foremost legal work throughout the Muslim period.¹⁰³

Thus during the Muslim era all non-Muslims with regard to their personal laws were governed by their own religious and traditional laws. Thus there were two separate personal law systems, which continued practically in parallel lines and which were later changed with the advent of the British.

⁹⁹ Thus, during this period, writes Grady, "the Hindus enjoyed a complete indulgence with regard to the rites and ceremonies of their religion, as well as with respect to various privileges and immunities. On matters of property and other temporal concerns; the Muslim law gave the rule of the decision in cases where both the parties were Hindu, and the case was referred to the judgement of Pundits (Hindu experts) or Hindu lawyers." See Grady, quoted in U.C. Sarkar, *Epochs in Hindu Legal History* 23 (Vishveshvaranand Vedic Research Institute, 1958).

¹⁰⁰ See, M.B. Ahmad, *The Administration of Justice in Medieval India* 201 (Aligarh, 1941).

¹⁰¹ Islamic law has interfered with non-Muslims only where they were directly or indirectly involved with Muslims—a good example is criminal law where Islamic doctrines were applicable to both the Muslims and non-Muslims. There were two exceptions, namely, oaths and ordeals. The Muslims had to swear in the name of God and Hindus had to swear by the cow. *Id.* at 201.

¹⁰² See, H.A. Gani, *Reforms of Muslim Personal Law* 17 (Deep & Deep Publications, New Delhi, 1977).

¹⁰³ See, Danial Latifi, 'Change and the Muslim Law,' in Tahir Mahmood, *Islamic Law in Modern India* 100 (N.M. Tripathi, New Delhi, 1972).

3.3. In the British Era

The Britishers initially came to India as trading merchants but with the passage of time the British managed to establish their hegemony over India. The British made efforts to establish systematic and modern legal framework in India. One after another various schemes for the administration of justice in different parts of the country were framed and enforced. The judicial system set up in the major part of India under the Mughals and in some places under local rulers, were gradually replaced with courts constituted by the British.¹⁰⁴ While assuming powers and functions of judicial administration, the British faced the question as to which law should in different kinds of cases be applicable by the hierarchy of their courts. The legal system adhered to and followed by the courts which had preceded them was based mainly on Hindu and Islamic religion. Civil, criminal, commercial and procedural laws were all religion based. The dominant element in that legal system was the traditional law of Islam. The courts in the regions ruled by the Mughals applied Islamic law relating to crimes, evidence and court procedure. Ancient Indian laws and custom¹⁰⁵ relating to the same were applied by the courts in those places where the local rulers were not Muslim. In civil matters religious and customary laws were invariably adhered to in almost all parts of the country.¹⁰⁶

Contractual transactions, commercial affairs, family relations and transfer of and succession to property were all regulated by religious laws and customs of the parties approaching the court. The law or custom of one or the other religion, thus, formed the rule of decision in every case. To the Britishers the system appeared complicated and anachronistic. This they set out to change. The religion based criminal laws of India were reformed piece meal, eventually culminating in the enactment of the Penal Code and the Criminal Procedure Code, both of a secular nature and divorced from religion. On the similar lines were enacted the

¹⁰⁴ The Charter of 1726 issued to East India Company by King George I on September 24, 1726, established for the first time Mayor's courts in the three Presidency towns of Calcutta, Madras and Bombay. These courts derived their authority from the king, and could therefore, be designated as Royal Courts. Thereafter, the Supreme Court of judicature was established at Calcutta, Madras and Bombay in 1774. Subsequently by way of Indian High Courts Act, 1862, High Courts were established in Calcutta, Madras and Bombay. These High Courts so established became successors of the Supreme Court.

¹⁰⁵ Note: In traditional Indian Jurisprudence, dharma, royal order and custom were the three sources of law. Custom was known to have formed a special law regulating various social groups, castes, corporations or guilds and families belonging to different regions of India. The customs could be contrary to the smriti (traditions or knowledge of the rules of dharma which are remembered and transmitted by the sages and which are the meaning of acquiring wisdom) or shastras (recorded literature or treatises inspired by the smriti) but the king would not intervene unless the usage was likely to create stress and discontent among the subjects by reason of its immorality or unjustness. Thus, customs of regions, castes, families and other group were to be maintained intact.

¹⁰⁶ Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent 2* (All India Reporter, Nagpur, 2nd edn., 1983).

Evidence Act and the Civil Procedure Code. All religious and customary laws in these areas were repealed and replaced with new codes. Likewise, the British could also have given to the country a civil code. They did not and their policies in regard to civil laws gave birth to the system of communal personal laws.¹⁰⁷ This system has survived in the entire subcontinent till the present day.¹⁰⁸

A civil code, in the modern sense of the term would include laws relating to contract, transfer of property, intestate and testamentary succession, marriage, divorce, adoption and all other family relations. Since in pre-British period all these matters were regulated by religious and customary laws, enforcement of secular and uniform laws in these areas would be viewed by the natives as displacement of religion.¹⁰⁹ The British enacted a Contract Act in 1872 and a Transfer of Property Act in 1882. In regard to other subjects which a civil code should ordinarily include they adopted a cautious approach. They decided to leave religious and customary laws intact in those areas at the same time they did not want to abjure them altogether. To begin with they just overlook those areas without making a commitment as to where they stood in their plans for legal reform and codification. They could not however maintain their silence for long. Cases involving civil matters were being frequently received in the civil courts which they had set up and they had to make known the laws which the courts would apply in such cases.

In the early days of British rule, religious laws were recognised to be the rules of decision in all civil cases. Later, it was realised that custom and usage at variance with written religious laws were also adhered to by millions of Indians. Moreover, since the British had no plan to totally leave out civil matters from the scope of their plans for law reform, it was considered necessary to clarify those religious laws or customary laws would form rules of decision, subject to the effect of any civil legislation that they might promulgate. Gradually, therefore, a trichotomous scheme of rules of decision was formally recognised and enforced in various parts of British India. It was meant for civil cases involving Hindus and Muslims but was, in practise applied to other religious communities as well. The courts were required to follow

¹⁰⁷The Britishers enacted common laws for the Indians but with regard to personal laws the British did not interfere. When the Mayor's courts were established in the three Presidency towns the question arose as to the courts competence to decide the religious matters of the natives. The Governor and council of the company expressed the opinion that the Mayor's court had no jurisdiction to determine causes of religious nature or disputes concerning castes among the natives, unless both parties submitted themselves to the jurisdiction of the court. *Supra* note 5.

¹⁰⁸*Id.* at 3.

¹⁰⁹The British were conscious of the possibility of such repercussions and therefore refrained from enacting a comprehensive civil code on the lines of the penal and procedural codes.¹⁰⁹ These codes too had replaced religion and custom, but only in areas which were not regarded by the natives as vital to religion as civil matters. In the latter areas the British came forward with piece meal legislation.

the custom and usages, personal laws of the communities and the rules imposed by the sovereign.¹¹⁰ Obviously there were possibilities of conflict between the three Rules of Decision to which the courts were directed to adhere.

The courts were not left without guidance in cases of conflict. The order of preference between the first two rules of decision, namely, custom and religious civil laws, were not kept uniform. It was changed off and on with reference to the various communities governed by the scheme. However, the laws made by the sovereign were always kept over and above both custom and religious civil laws. No difference between one community and another was ever made in regard to the supremacy of laws enforced by the rulers over the other two rules of decision. The policy seemed to be that the rulers would not ordinarily make laws in areas to which the trichotomous scheme applied, but in theory they would have power to do so, and if and when they enacted law in those areas, contrary rules of both customary laws and religious civil laws of all communities would cease to be applicable in the courts. This trichotomous scheme with its varying order of preference between custom and religious laws and with legislation by the rulers as the supreme rule of decision was gradually implemented in the civil courts located at various levels in different parts of the country.

Hindu law and Muslim personal law were officially acknowledged foremost in British Bengal (including the Mofussils of Bengal, Bihar and Orissa). That was the time immediately preceding formal introduction of the trichotomous scheme of rules of decision explained above. The recognition came under Warren Hastings Judicial Plan of 1772 which laid the foundation of Adalat system.¹¹¹ This was the foremost 'policy declaration' formulated by the British concerning the religious laws of Hindus and Muslims. Hastings' Judicial Plan did not make any reference to custom or to the government's power of modifying or abolishing any rule of the personal laws. The 1772 Judicial Plan regarding personal laws, remained in application in the Mofussils of Bengal, Bihar and Orissa till 1781. Later Lord Cornwallis implemented a new judicial scheme by way of Regulation VI of 1793. However, the 1793

¹¹⁰ Note: Custom and usage in this context would include any established practice having the force of law. Religious civil laws were what in the course of time came to be known as the personal laws. Laws enforced by the rulers would include regulations and enactments of the local governments in various parts of the colony as well as the laws which the British Parliament could enforce.

¹¹¹ As per Warren Hastings Plan of 1772, it was provided that all the civil matters, such as disputes relating to real and personal property, inheritance, marriage, caste, debt, disputed accounts, partnership and demands for rent were to be decided by Mofussil Diwani Adalat of each district headed by the collector of that district as judge. Provisions were also made that in all suits regarding inheritance, marriage, caste and other religious usages and institution, the laws of the Koran with respect to the Mohammedans and those of the shastras with regard to the Hindus will be invariably adhered to and on all such occasion, Maulvis or Brahmins shall respectively attend the courts to expound the law and they shall sign the report and assist in passing the decree.

Regulation also kept the personal laws of the Hindus and the Muslims intact. The judicial scheme of Bengal was extended to Benaras and Madras with regard to the application of Hindu and Muslim law. In the Mofussil of Bombay a new judicial plan was set up in 1827 as regards the law to be applied by the courts established under the new plan.¹¹²

In provinces like Punjab, Agra and Oudh, Assam, Central Provinces which became parts of British India in the 19th century, custom and religious laws prevailed in these provinces as well. The courts generally applied Hindu and Muslim laws only in the absence of an established custom.

The regulations above applied only to the lower courts in mofussil areas. As regards the application of Hindu and Muhammadan laws in the higher courts of the Presidency towns of Calcutta, Madras and Bombay, the Judicial Charter of 1753 had barred the jurisdiction of the Mayor's courts which were courts of English law to try cases between the Indians, unless asked to do so by the parties to a particular case. This amounted to an implied protection of religious laws and local usage. Later, in pursuance of the Regulating Act, 1773, a charter was issued for the establishment of Supreme Court at Calcutta. This court had limited jurisdiction to try cases between Indian natives and in such cases it applied religious laws.¹¹³ The defects in the working of the court and the havoc they created in British Bengal eventually attracted the attention of the British Parliament, which resulted in enactment of the Act of Settlement, 1781. This Act reconstituted the powers and jurisdiction of the Calcutta Supreme Court and marked the first statutory recognition by the British parliament to the principle that was introduced by Warren Hastings in 1772 where religious laws were to form the rules of decision in cases involving succession and personal status etc. Further the Act of Settlement also gave recognition to 'laws and usages' of Hindus and Muslims.¹¹⁴ Later the rule regarding

¹¹² The new judicial plan was introduced by Governor Elphinston in 1827. As per the new plan Regulation IV of 1827 contained the following directives: 'The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government, applicable to the case, in the absence of any such Acts and Regulations the usage of the country in which the suit arose, if none such appears, the law of the defendant and in the absence of specific law and usage, justice, equity and good conscience' (Sec 26).

This directive was to be followed by the courts in every case. However, no special provision was made for matters of personal status and succession. Since there were then no acts and regulations dealing with marriage, divorce and succession, etc, in practise the rule of decision applicable to such cases would be 'usage of the country' or 'falling that law of the defendant'. Hindu and Muhammadan laws could thus, be applied in Bombay (Mofussil) only as the 'law of the defendant' (in the absence of a local usage to the contrary) where the parties in the particular case were, or the defendant was Hindu or Muslim.

¹¹³ Note: Chief Justice Impey had assured to the native Indians' in 1774 that the court would apply their personal laws in such cases.

¹¹⁴ Sec 17 of Act of Settlement provided: 'All matters arising out of succession to lands, rents and goods and all matters of contract and dealings between party and party shall be determined in case of Muhammadans by the laws and usages of the Muhammadans and in the case of Gentoos (Hindu) by the laws and usages of Gentoos'. The Act of Settlement, 1781 did not specify as to what was meant by 'laws and usages' of Hindus and Muslims.

the application of laws and usages of Hindus and Muslims became applicable to the Supreme courts of Bombay and Madras.

The High Court's Act enacted by the British in 1861 replaced the Supreme Courts.¹¹⁵ The High Court's Act laid down that in exercise of its appellate jurisdiction, the court would apply Hindu and Mohammadan laws and usages as the lower courts ought to have applied in a particular case. Thus, it was clear that the British did not interfere in the religious matters and granted autonomy to the natives in respect of personal laws. Moreover, the British as discussed above by way of enacting various regulations secured the religious laws of the Indians.¹¹⁶

As a general rule, the various laws have been applied by the villages, districts and provincial courts. In such a scenario, the certainty and uniformity of the law have become essential.¹¹⁷ Also a strong demand for change from the Hindu reformist on the British legislator was another reason that gave impetus to enacting laws on certain aspects of the personal laws, especially of the Hindus.¹¹⁸ However the Muslims did not have the same approach as the Hindus.¹¹⁹

Besides Hindus and Muslims, laws were enacted for the Christians and the Parsis.¹²⁰ A number of other laws¹²¹ that affected both Hindus and Muslims were also approved and

¹¹⁵The Supreme Courts were effective in the three Presidency towns of Calcutta, Madras and Bombay.

¹¹⁶There were many reasons that forced the British legislators to re-examine their policy of non-interference in the personal laws of the natives. India's legal system at the beginning of the nineteenth century was one of confusion and chaos.

¹¹⁷ Lord Macaulay observed: 'we must know that respect must be paid to the feelings generally by differences of religion, of nation and caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But whether we assimilate those systems or not, let us ascertain them, let us digest them. We propose no rash innovation; we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this – uniformity where you can have it – diversity where you must have – but in all cases certainty.' See, D.K. Srivastava, "Personal Law and Religious Freedom" 18 *JILI* 551,553 (1976).

¹¹⁸ Sati Prevention Act, 1829, Hindu Widows' Remarriage Act, 1856, Guardians and Wards Act, 1890, The Anand Marriage Act, 1909, Hindu Disposition of Property Act, 1916, Hindu Inheritance (Removal of Disabilities) Act, 1928, Hindu Gains of Learning Act, 1930, Hindu Women's Right to Property Act, 1937, Aryan Marriage Validation Act, 1937, Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, etc. are the important enactments made in British India.

¹¹⁹The Muslim community in India was reluctant and did not support any alteration or reform in their personal laws. Thus, the British legislators did not interfere in the personal laws of Muslims. The enactments made for the Muslims were with the objective of restoring the orthodox doctrine of Muslim law and to undo the effect of liberalizing judicial decisions. Mussalman Wakf (Validating Act, 1913, Muslim Personal Law (Shariat) Application Act, 1937, Dissolution of Muslim Marriage Act, 1939, etc. were enacted during the British rule in India.

¹²⁰Indian Divorce Act, 1869, the Christian Marriage Act, 1872, was adopted for the Christians and Parsis Marriage and Divorce Act, 1936 was enacted for the Parsis.

¹²¹ Those statutes are – Caste Disabilities Removal Act, 1850, India Penal Code, 1860, Indian Evidence Act, 1872, Indian Contract Act, 1872, Transfer of Property Act, 1882, Child Marriage Restraint Act, 1929, which is subsequently repealed by re-enacting the Prohibition of Child Marriage Act, 2006, Indian Succession Act, 1865, which was subsequently amended in 1925, Special Marriage Act, 1872, which was subsequently re-enacted in 1954, etc.

applied to all peoples, regardless of their religious affiliation. The British could easily regulate the personal laws of different communities. A survey of the constitutional documents in existence before the Government of India Act, 1915, leads one to arrive at this conclusion. The British were hopeful that with the passage of time a common civil code can be adopted.¹²²

Although the early documents of a constitutional nature empowered the East India Company to make laws only for the inhabitants of the British settlement.¹²³ However, even when after the expansion of political power legislative authority in regard to the natives of India was conferred on the colonial government, no statutory directive was issued to it for leaving the personal laws wholly untouched. Obviously, if there were any such directive, the provisions in the various laws relating to civil courts, to the effect that personal laws would be applied subject to contrary legislation, would have ultra vires the charter of government's powers.¹²⁴ Although the British made an effort towards codification of Hindu and Muslim personal laws however the British could not achieve success.

3.4. In the Post-Independence Period

As soon as India gained independence the matter dealing with the personal laws got entangled into national politics.¹²⁵ In the changed political context of independence and the advent of representative democracy, the Indian government could have approached its legal system and its policy on the personal laws in several ways. It could conceivably have abandoned the British colonial legal system, including the personal laws, altogether. Alternately, government leaders could have retained some portions of the legal system and

¹²²The First Law Commission set up under the Charter Act 1833 had expressed a hope that in the near future codes of Hindu and Muslim law would be prepared. In 1861 another Law Commission was appointed for the preparation of draft code regarding civil law in India. On February 11, 1879, the fourth Law Commission was appointed with a goal of codifying all the substantial law prevailing in British India. By the efforts of various Law Commissions criminal laws were codified and the Indian Penal Code, 1861 and Criminal Procedure Code, 1898, came into force and is applicable to all India irrespective of their religious belief. But there was no Common Civil Code. *See*, B.P. Ojha, Common Civil Code and its Probable Effect on Society 35.

¹²² Tahir Mahmood, *Personal Law in Crisis* 3 (Metropolitan Book Company, New Delhi, 1986).

¹²³ *See*, for instance Charters of 1726 and 1753.

¹²⁴The Government of India Act, 1915, which consolidated all prior laws relating to the government of India, lay down that the legislature would have power to make laws. Sec 69 of the Government of India Act, 1915 provided that : (i) for all persons, for all courts, and for all place and things within British India, (ii) for all native Indian subjects, and (iii) for repealing or altering any laws which for the time being are in force in any part of British India or apply to persons for whom the Indian legislature has power to make laws. Obviously the personal law of any community was not placed out of the scope of this wide legislative power. None of the constitutional documents enforced after the Government of India Act, 1915, effected any change in the situation. Neither the Minto-Morley nor the Montague- Chelmsfort reforms in the system of government had any bearing on the issue of personal laws vis-a-vis powers of the state to make laws.

¹²⁵*Supra* note 7 at 3.

altered others, such as the personal laws, altogether. Yet India retained the British colonial legal and judicial structure virtually intact.

In the late 1940s when the Constituent Assembly¹²⁶ while engaged in drafting of the Indian Constitution they faced the dilemma of the issue of personal laws, 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.¹²⁷ 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 uniform civil code. However, on the floor of the Constituent Assembly, the issue suffered a setback due to dissenting voices and the fear echoed by the members representing the minorities.¹²⁸

In 1947, when the Constituent Assembly debated on the adoption of Uniform Civil Code, the sub-committee on fundamental rights incorporated the uniform civil code under the Directive Principles of the State policy.¹²⁹ Sub-Committee on Fundamental Rights, while discussing the draft of Article 35 proposed the application of Clause 39 should be made on an entirely voluntary basis for all citizens. This did not satisfy all and some members felt strongly in favour of an affirmative position. Considering the importance of uniform civil code is very vital to social progress, some members of the sub-committee pleaded to transfer the provision from the Directive Principles to Fundamental Rights.¹³⁰

¹²⁶ The Constituent Assembly of India which held its sessions from 9 December 1946 to 24 January 1950, considered whether it was possible to introduce a family code uniformly applicable across the communities. One of the greatest champions for the cause was B.R.Ambedkar, the chairman of the Drafting Committee. There was some debate in the Constituent Assembly about how much constitutional protection should be given to the personal laws and about the establishment of a Uniform Civil Code for all the Indians regardless of religion. It provided neither any timetable for establishing uniform code, nor any guidelines as to how such code could be established, nor what the content of the laws might be. Instead it merely laid out a desired goal of state policy.

¹²⁷ The then Prime Minister Jawaharlal Nehru, felt it was important to include the principle of a uniform code in the Constitution for the sake of national unity.

¹²⁸ Prior to the partition of India, it was the constant propaganda of the Muslim League that Muslim personal law would not be respected in 'Hindu India' after independence. The Jamaat-e-Ulema-e-Hind (the organisation of Muslim theologians) and the Deobandis in general, which were opposed to Muslim League and subscribed to the Congress theory that India was one nation, took up as a challenge and tried to convince the Muslims of India that just as the British did not touch the essentials of Muslim personal law the Indian government would also not tamper with them. Indeed the Deobandis were conservative on social questions pertaining to Muslims but their commitment to a unified India was beyond doubt. ,Yoginder Sikand, *The Glories of India: Indian Patriotism in Islamic Discourse*, 8(4) *IJS* 25-31.

¹²⁹ The clause 39 of the Draft of Article 35 read: 'The state shall endeavour to secure for the citizens a uniform civil code. See, Shiva Rao, *Framing of India's Constitution: Select Documents* 176 (N.M.Tripathi Bombay, 1968).

¹³⁰ The three members namely: M.R.Masani, Rajkumari Amrit Kaur and Hansa Mehta recorded their minutes of dissent in clear and ringing words. They said: 'We are not satisfied with the acceptance of a uniform civil code as an ultimate social objective set out in Clause 39 (Article 35 in the Draft Constitution and Article 44 in the adopted Constitution) as determined by the majority of the Sub-Committee. One of the factors that has kept

Although the provisions were a directive to the state, an objection was raised to this Article by several Muslim members of the Constituent Assembly. One Muslim member argued that draft Article 35 (now Article 44) did not empower the state to legislate on personal laws and that the words ‘Civil Code’ occurring in draft 35 does not cover strictly personal law of a citizen.¹³¹ The Muslim members asserted that the secular state of India should not be endowed with the legislative power to encroach upon the beliefs and practices of any religious communities. They further opposed the enactment of draft Article 35 on the ground of expediency and practicability.¹³² Finally the Muslim members demanded an amendment to draft Article 35.¹³³

Muslim politicians in the Constituent Assembly opposed the inclusion of the article in the Constitution.¹³⁴ They argued that their personal laws were intimately connected to religion.

India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into water tight compartments in many aspects of life. We are of the view that a uniform civil code should be guaranteed to the Indian people within a period of five to ten years in the same manner as the right to free and compulsory primary education has been guaranteed by Clause 23 within ten years. *See, Vasudha Dhagamwar, Towards the Uniform Civil Code* (N.M.Tripathi Bombay, 1989).

¹³¹*See, Shri Mahboob Ali Baig Sahib Bahadur Constitution Assembly Debates, (1948), Vol. VII, P.543.* available at: https://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-12-07 (last visited on July 19, 2018).

¹³² Mr. Hussian Imam remarked: ‘India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything’. *See Constitution Assembly Debates, (1948), Vol. VII, p. 546. Ibid.*

¹³³ Ismail Sahib demanded an inclusion of following proviso in draft Article 35: ‘Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law.’ Another Muslim member Shri Naziruddin Ahmed proposed the following amendment to the draft Article 35: ‘Provided that the personal law of any community which has been guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law.’ He argued that while the 175 year old British regime had enacted several laws that interfered with the civil laws of various communities, but on fundamental matters like marriage, inheritance etc., there was conscious effort on its part not to meddle with them. ‘I have no doubt that a stage would come when the civil law would be uniform. But then that time has not yet come. We believe that the power that has been given to the state to make the civil code uniform is in advance of the time. As it is any state would be justified under Article 35 to interfere with the settled laws of the different communities at once. *See Constituent Assembly Debates, Vol. VII, 4 November 1948-8 January 1949: 540-43*) available at: https://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-12-07 (last visited on July 19, 2018).

¹³⁴ India got independence on 15th August 1947 and it also witnessed partition of the country into India and Pakistan. It is a matter of common knowledge that the partition of India occurred on the basis of religion and the consequences had been extremely violent. As a result of the partition millions of Indians had migrated to India and Pakistan. Subsequently on 23rd November 1948 the debate on uniform civil code created a sense of predicament amongst the Muslim. The Muslims in India were worried about their future and as such were diffident in pushing their case aggressively. In the Constituent Assembly there were no female members from the Muslim Community. As a result, the Muslim women’s perspective on the subject of a uniform code was missing. The four members from the Muslim community who moved amendments to the draft Article 35 were Naziruddin Ahmad from West Bengal, Mahboob Ali Baig Sahib Bahadur, B.Pocker Sahib Bahadur and Mohammad Ismail Sahib were the three members from Madras. Besides these four members there was Hussain Imam from Bihar, who did not propose any amendment but strongly argued in favour of preserving Muslim personal law.

Opponents to uniform civil code held that the personal laws were ‘inseparably connected with religious beliefs and practices. As such they argued that inclusion of an article advocating a uniform civil code would violate the fundamental right to freely profess and propagate religion. They further contended that the minority community would be discontent thus opposing the view that having a uniform code will generate a sense of unity amongst the people. They argued that incorporating an article on uniform code will lead to discord and unrest particularly among the minority communities.¹³⁵ It was argued further that a uniform code was opposed not only on the ground that it would hurt the religious sentiments of the minority communities but they were many in the majority community i.e. the Hindus who seemed to be divided on the issue.¹³⁶ The issue of non-interference on matters of personal laws was also argued during the debate.¹³⁷

On the other hand the members advocating the adoption of uniform civil code did not accept the argument that a uniform code will violate freedom of religion. In fact they questioned the assumption that personal law is related to religion. One of the supporters strongly advocated the uniformity of civil law to serve as a vehicle of societal growth in which in the larger interest, some sacrifices were inevitable.¹³⁸ Dr. B.R. Ambedkar, chief architect of the Constitution did not accept the proposed amendments and took the opportunity to refer to several developments in respect of Muslim law during the 1930s.¹³⁹ In parts of Bombay, the

¹³⁵ The opponents to the adoption of uniform civil code asserted that: ‘people want a uniform civil code...to secure harmony through uniformity. But [such] regimentation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law there will be no discontent or dissatisfaction. Every section of the people, being free to follow its own personal law will not really come in conflict with others. *See*, Constituent Assembly Debates, Vo. VII, 4 November 1948-8 January 1949:540-41). *Ibid*.

¹³⁶ One member argued that: ‘there are ever so many sections of the Hindu community who are rebelling against this and who voice forth their feelings in much stronger language than I am using. If the framers of this article say that even the majority community is uniform in support of this, I would challenge them to say so. It is not so.’ *See*, B.Pocker Saheb Bahadur Constituent Assembly Debates (23 November 1948), 545. *Ibid*.

¹³⁷ One of the member in the Constituent Assembly who was opposing the adoption of a uniform code argued that: ‘one of the reasons why the Britisher has been able to carry on the administration of this country for the last 150 years and over was that he gave a guarantee of following their own personal laws to each of the various communities in the country. This is one of the secrets of success and the basis of the administration of justice on which even the foreign rule was based. *See*, B.Pocker Saheb Bahadur Constituent Assembly Debates (23 November 1948), 11. *Ibid*.

¹³⁸ K.M.Munshi argued that the Article was just an enabling clause and the whole idea was that ‘as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt will be made to unify the personal laws.’ Munshi further said that ‘this attitude of mind perpetuated under the British rule, that personal law is the part of religion, has been fostered by the British and by the British courts. We must therefore outgrow it. Munshi asserted that personal laws discriminated between persons and on the basis of sex which was not permitted by the Constitution. *See*, Constituent Assembly debates, Vol VII, 4 November 1948-8 January 1949:547-48) available at: <https://indconlawphil.wordpress.com/2018/06/27/how-to-read-the-constituent-assembly-debates-i/> (last visited on July 29, 2018).

¹³⁹ Dr. Ambedkar mentioned that up to 1935 the North-West Frontier Province (NWFP) was not subject to the Shariat Law. Many important aspects of civil law of the province were governed by Hindu law. So much so that

Central Provinces and the United Provinces the same situation prevailed till 1937 in respect of succession among Muslims. In order to make it uniform for all Muslims, an enactment was passed in 1937 applying the Shariat law to the rest of India. Ambedkar also referred to the contemporary practice of the matriarchal system of the Marumakkathayam law that was being applied to both Hindus and Muslims of North Malabar. However, Ambedkar tried to assuage Muslim sentiments by talking about his position on the optionality of the uniform civil code.¹⁴⁰

The amendment that was proposed by the Muslim members was not accepted and draft Article 35 (now Article 44) was added to the Constitution. On 1 and 2 December 1948, when the Constituent Assembly members had gathered to debate on draft Article 13 (now Article 19 of the Constitution), the issue on the uniform civil code once again was brought up. It was argued again that freedom of religion also included within its ambit to practise the personal law of their community. It was further argued that religion and personal laws were closely linked and one could not be divorced from the other.¹⁴¹ The result of long debate on Article 35 was that the proposed article was carried out without any amendment and was renumbered as Article 44 of the Constitution.

Sum up

The history of Hindu laws opens with an entirely personal concept of law. In the early Hindu history, religion came to be closely associated with the growth of law. The people were God fearing and they easily accepted to everything that was being pronounced by the religious leaders. Divine sanction rather than a king's diktat was more powerful in enforcing such laws. The laws, the people followed could be called laws of nature being based on custom,

in 1939 the central legislature had to revoke the application of Hindu law to the Muslims and Shariat law was applicable to them.

¹⁴⁰Ambedkar summed up his argument on this point by saying: I quite realise their feelings in the matter, but I think they have read rather too much into Article 35, which merely proposes that the state shall endeavour to secure a civil code for the citizens of the country. It (the Draft Article 35) does not say that after the code is framed the state shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North – West Frontier Province. The law said that here is a Shariat law which should be applied to Mussalmans provided a Mussalman who wants that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successor. It would be perfectly possible for the Parliament to introduce a provision of that sort, so that the fear which my friends have expressed here will be together nullified. I therefore, submit that there is no substance in these amendments and I oppose them. *See, Constituent Assembly Debates, Vol. VII, 4 November 1948-8 January 1949, 550-52. Ibid.*

¹⁴¹*See, Mohammed Ismail Sahib, Constituent Assembly Debates, Vol. VII, 4 November 1948 to 8 January 1949: 722-23.*

ascertained by experience as being the best for community in the long run. The study of Hindu period shows that laws in Hindu society were uniform as the entire Hindu society was an organisational unit and the leaders of the society were Hindu sages who expounded laws on the principles rooted deep in the Vedas and revealed Hindu scriptures. Though there was some difference of opinion on the interpretation of Hindu personal law yet we do not find much difference in this respect. It is evident from the foregoing study that the Dharmasutras representing earliest Smriti epoch support the argument that the treatment of civil laws and religious and social laws was not differentiated in any marked degree.

However, the culmination of the process of differentiation of personal laws took place in the Muslim period. It marked the beginning of a new era in the legal history of India. The end of the eleventh century and the beginning of the twelfth century brought the downfall of Hindu period. The defeat of local Hindu kings by the foreign invaders witnessed a sudden change in the legal history of India. It resulted in disorganisation of Hindu society and fairly paved a strong path to encourage personal laws on the line of religions brought in by the invaders from time to time. The invaders did not accept the Hindu law for themselves. However, Hindu law was permitted to be reserved for Hindus, and did little to intervene with the Hindu legal system. This resulted in emergence of two separate personal laws system that existed together till the advent of the British in India. The study of the British period displays that the British leaders have continued more or less with the Muslim model of judicial administration.

It is also evident from the above study that though the British did not interfere with the personal laws of Hindus and Muslims yet they endeavoured to enact common laws for all sections of the society irrespective of their religions. They rightly realised that the general legislations were essentials for the unity of India. The uncertain state of law in India made them to realise that there was a strong need for codification to achieve certainty and uniformity in the field of legislation to ensure the unity of nation to engulf the differences arising out of disbelief on orthodoxial lines. The British policy remained to assimilate the prevailing different systems of law without wounding the religious feelings of the people.

The appointment of different Law Commissions is also a testimony to the fact that the British endeavoured to achieve the object of uniform legislations applicable alike to all the people irrespective to their religious beliefs. The British made efforts to enact new laws with a view to introduce reforms in the old Hindu and Muslim personal laws to make them an engine of social progress and social control. Therefore, the legislations passed by the British touched all topics, viz., marriage, succession, transfer of property, inheritance, etc.

The idea of uniform civil code got further impetus at the hands of Constituent Assembly. Despite lot of opposition the majority in the Assembly favoured the idea of uniformity of laws and consequently the uniform civil code was incorporated as one of the Directive Principles of State Policy in the Constitution.

CHAPTER IV

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

The Constitution of India prescribes certain requirements which must be met by laws in order to be constitutionally valid.¹⁴² For laws that pre-date the constitution, such as personal laws the relevant constitutional provision is Article 13(1). Article 13 (1) provides that all pre-constitutional laws shall not violate any of the provisions of Part III of the Constitution.¹⁴³ Another provision under the same Article, i.e. Article 13(3)(a) elucidates what is meant by the term ‘law’.¹⁴⁴ These two provisions should be read in light of Article 372.¹⁴⁵

Reading the above provisions harmoniously, it becomes clear that any law to be constitutionally valid must not infringe upon the fundamental rights guaranteed by the Constitution of India. Irrespective of such provisions however, the courts have been very cautious while adjudicating the constitutionality of the personal laws. The courts so far have adopted a very contradictory approach starting from *Narasu Appa Mali*'s¹⁴⁶ case where the Hon'ble Bombay High Court had held that “the personal laws are not ‘laws’ under Article 13(3)(a) of the Indian Constitution”. Although, the *Narasu* judgment was delivered by one of the High Courts in the country prior to the enactment of post-independence Hindu personal law reforms, its reasoning had a huge impact on the personal law jurisprudence in the High Court's as well as the Supreme Court in the post-reform era.¹⁴⁷

¹⁴²The Constitution of India. art. 13.

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

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

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

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

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

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

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

4.1. Constituent Assembly Debate on Personal Law

At the time of drafting of the Constitution of India when the debate on fundamental rights came before the Constituent Assembly, the members remained divided on the issue of incorporation of personal laws within the ambit of Fundamental Rights. Some of the Constituent Assembly members had desired to include the '*right to follow personal laws*' within the ambit of Article 13[Article 19 of the present Constitution]. Some of the Muslims members had aspired for including '*right to practice personal laws*' within the scope of Fundamental Rights. Shri Mohammad Ismail Khan had expressed the addition of new sub-clause after sub-clause (1) of Article 13.¹⁴⁸ Shri Mohammad Ismail Khan had made his arguments on this point and said that by the incorporation of clause '*h*' after Article 13(1), the right of the people to follow their own personal laws will be established. He had further argued that this clause shall not intrude into the personal laws of any other communities. Shri Ismail Khan had further said that only in matters of succession, inheritance etc., by mode of wakf and will, the people will be governed by their personal law. In other areas such as transfer of property, contract, evidence etc., the citizens will be governed by a uniform civil code.¹⁴⁹

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

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

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

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

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

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

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

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

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

Shri M. Ananthasayanam Ayyangar further pointed out that:¹⁵¹

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

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

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

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

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

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

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

4.2. Personal Laws in the Constitutional Framework

In the Constituent Assembly when the matter concerning Article 8 [Article 13 of the present Constitution] was being debated before the Constituent Assembly, Dr. B.R. Ambedkar had proposed an amendment to original draft Article 8 and had made recommendations to incorporate sub-clause 3 to Article 8.¹⁵⁴ Dr. Ambedkar’s argument on the point was:¹⁵⁵

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

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

¹⁵⁴ Incorporation of Clause 3 to Draft Article 8:-

(3) In this article—

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

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

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

When the proposed amendment was placed before the Constituent Assembly for deliberation it was submitted by Mr. Naziruddin Ahmad that the words¹⁵⁶ which has been mentioned in the proposed amendment to original Article 8 by Dr. Ambedkar be deleted. Dr. Ambedkar expressed his observations as follows to the views expressed by Mr. Naziruddin Ahmad:¹⁵⁷

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

Keeping into consideration the views expressed by Mr. Naziruddin, Dr. B.R. Ambedkar suggested the incorporation of more words to the proposed amendment sub-clause 3 of Article 8.¹⁵⁸ Dr. Ambedkar’s further observation on this matter was:

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

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

¹⁵⁷*Id.* at 641.

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

“Unless the context otherwise requires”

so that the article would read this way—

‘In this article, unless the context otherwise requires—

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

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

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

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

- (i). Part III: Fundamental Rights;
- (ii). Part IV: Directive Principles of State Policy;
- (iii). Part XI: Relations between Centre and States, and
- (iv). Part XXI: Temporary Transitional and Special Provisions

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

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

¹⁵⁹Constituent Assembly Debates, Vol VII 552 (1949).

¹⁶⁰Ibid.

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

4.3. Article 13- An Overview and Some Observations

Under the Constitution of India, there are twelve articles¹⁶¹ which have an impact upon personal laws and a deeper analysis of these articles can be condensed into the following three basic postulates:

- I. That each of the personal laws in force till the adoption of the Constitution shall continue to apply unless the state considers it advisable [as a part of its function to set up a social order based on social justice or to provide for social welfare and reform, or otherwise] to repeal, modify or replace it.
- II. After the adoption of the Constitution all laws enacted in the area of personal laws must conform to the provisions of Part III of the Constitution dealing with fundamental rights.
- III. That the state shall gradually lead the nation towards progressive uniformity in the area of civil laws.

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

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

a. Laws inconsistent with the Constitution to be declared void

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

b. No retrospective effect

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

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

However, some of the provisions of personal laws such as Section 10¹⁶³, 12¹⁶⁴ and 13¹⁶⁵ of the Hindu Marriage Act, 1955 have skilfully adapted retrospective effect without substantial

¹⁶³Section 10: Judicial Separation. - (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statement made in such petition, rescind the decree if it considers it just and reasonable to do so.

¹⁶⁴Section 12: Voidable Marriages. -(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

- (a) that the marriage has not been consummated owing to the impotency of the respondent; or
- (b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or
- (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if-

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

¹⁶⁵Section 13: Divorce- (1) Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (ii) has ceased to be a Hindu by conversion to another religion ; or

(iii) has been incurably of unsound mind, or has suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation- In this clause-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and include schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other

party and whether or not it requires or is susceptible to medical treatment; or (iv) has been suffering from a virulent and incurable form of leprosy; or (v) has been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation.- In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.

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

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

c. Statutory law

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

(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upward after the passing of a decree of restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground-

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before the commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition;

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (Act 2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.- This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Law (Amendment) Act, 1976.

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

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

d. Customs

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

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

e. Requirements of a valid custom

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

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

¹⁶⁸ Ibid.

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

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

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

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

¹⁶⁹Ibid.

¹⁷⁰Ibid.

¹⁷¹Ibid.

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

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

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

f. Proof of Custom

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

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

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

g. Smritis & Nibandhas: Evidence of Customs

Desai in his introduction to Mulla's Principles of Hindu Law has observed that the law promulgated in the Smritis was essentially traditional and the injunction was that time honoured institutions and immemorial customs should be preserved intact and that the traditional law was itself grounded in immemorial customs. He has pointed out further that Medhatithi and Vijnaneswara as also the Mahabharata and the Aarthashastra of Kautilya maintain the view that law as enjoined in the Vedas and the Smritis was of popular origin. It was law by acceptance; Jus receptum and constituted in part of conventional and customary law. Commenting on the Dharmasutras, the learned Chief Justice has observed that these Sutrakars, who were the acclaimed propounders of the early Smriti law, primarily sought to express the communis sentential of the Indo-Aryans and were unanimous in their appeal to customary law and that this adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices, and family usages prevailed and were preserved is one of the outstanding features of Hindu Jurisprudence. Derrett has also regarded the ancient Hindu Law and the Dharmasastras, as "a rationalized and systematized body of customary law and observances, a collection of (for the most part) carefully justified 'oughts' and 'should not's' and while discussing about the Smritis the learned author has pointed out that "its raw material was custom".¹⁷⁶

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

¹⁷⁵*Id.* at 47.

¹⁷⁶*Ibid.*

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

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

4.4. Personal Laws and the Fundamental Rights

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

- a. The pre-1950 laws of Muslim, Christians, Parsis and Jews [some of them partly codified];
- b. The post-1950 codified laws of Hindus, Buddhists, Sikhs and Jains;
- c. Some traditional laws of these four communities, not yet repealed; and
- d. Laws commonly applicable, or available to all Indians.

¹⁷⁷ Ibid.

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

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

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

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

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

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

4.5. Personal Laws and Rights to Freedom of Religion

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

¹⁷⁹ Ibid.

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

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

4.6. Personal Laws and Right to Preserve Culture

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

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

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

¹⁸⁰ Ibid.

4.7. Personal Laws under Article 13

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

When the Constitution was adopted, it recognised the continuation of various personal laws in India and accordingly Article 44 was included in the Constitution. The framers of the Constitution were optimistic that a day will come when the people themselves will adopt a uniform civil code for themselves. Such recognition is also apparent from Entry No. 5 of List III of the Seventh Schedule of the Constitution¹⁸³ Therefore, even a cursory perusal of all these provisions would give rise to this impression that personal laws operating in India immediately before adoption of the Constitution have been continued by Article 372(1) subject to the provisions of the Constitution by Article 13(1), to the provisions in Part III, in particular.

Justice Vivian Bose while speaking for a three judge bench of the Supreme Court, observed¹⁸⁴ that the more learned a person is in law, the more puzzled he would be, “for it is not till one is learned in law that subtleties of thought and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not versed in law, would have no difficulty in understanding.” But whether or not, as observed by the eminent judge, learning in laws brings in some sort of amblyopia, it is startling to find that there are very high authorities, both judicial and juristic, for the view that personal laws of the Muslims and the Hindus, even though actually in force as laws, are not laws in force within the meaning of the provisions of Article 372(1) and Article 13(1) and were therefore, immune from the provisions of the Constitution including the provisions in Part III thereof relating to fundamental rights. Thus, the question arises as to whether personal laws as in force

¹⁸¹Article 372: Continuance in force of existing laws and their adaptation—

(1). Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395, but subject to other provisions of the Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.

¹⁸² Article 13: Laws inconsistent with or in derogation of the fundamental rights—

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

¹⁸³Entry No. 5 of List III of the Seventh Schedule of the Constitution read with Article 246(2) empowers Parliament and the State legislatures to legislate on “all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.”

¹⁸⁴ *Seksaria Cotton Mills* AIR 1953 SC 278 (181, 282).

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

If the personal laws were law in the accepted sense of the term, then the fact that it was also in force and operation immediately before the commencement of the Constitution cannot but be beyond all doubt and dispute. For example; as discussed in Chapter II, Regulations¹⁸⁵ from the time of Warren Hastings and then a series of enactments,¹⁸⁶ generally referred to as the Civil Courts Acts, and thereafter the central enactment being the Shariat Act of 1937 have all along continued to mandate the courts to apply and administer Muslim law to the Muslims on a number of matters specified therein. And as noted at the outset, the Constitution itself has recognised the personal laws as laws having provided in Entry No.5 of the Concurrent List read with Article 246(2). All these should leave no doubt that the Muslim law was very much a law in effective force and operation immediately before the commencement of the Constitution, though it may be noted that the expression laws in force in Article 372 as well as in Article 13 has been defined to include even laws which though, existing, were not in actual operation. It may also be noted that the Shariat Act of 1937, enjoining application of Muslim law to the Muslims had been amended in Madras in 1949 by the Madras Act 18 of 1949 and the law so amended has been applied by the Supreme court in *Mohammad Yunus v. Syed Unnissa*,¹⁸⁷ and the amendment of the Muslim Personal Law (Shariat Application) Act in 1949 should be an irrefutable proof, if such proof is at all necessary, of the existence of the Muslim Personal Law as a law in force in 1949, i.e., having existed prior to the adoption of the Constitution. And if Muslim Personal Law was a law in force immediately before the commencement of the Constitution, then one may not find any reason whatsoever as to why it would not, under Article 372(1), be subjected to all the provisions of the Constitution and would not under Article 13(1), be void to the extent of its inconsistency with the fundamental right. But as pointed the authorities in many of their decisions have laid down contrary views in regard of personal laws being subjected to the requirement/s laid down under Article 13 of the Constitution.

¹⁸⁵For example, Regulations II of 1772, Regulation IV of 1793.

¹⁸⁶For example; Punjab Laws Act, 1872 (Section 5), Madras Civil Courts Act, 1873 (Section 16), Central Provinces Laws Act, 1875 (Section 5), Oudh Laws Act, 1876 (Section 3), Ajmere-Merwara Laws Regulation, 1877 (Section 5), Bengal, Agra and Assam Civil Courts Act, 1877 (Section 37).

¹⁸⁷ AIR 1961 SC 808.

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

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

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

¹⁸⁸ AIR 1980 SC 707 (712).

¹⁸⁹ AIR 1952 Bom 84.

¹⁹⁰ AIR 1952 Mad 193.

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

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

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

¹⁹¹ AIR 1956 Bhopal 71 (72).

¹⁹²This right can be claimed under the Hindu Married Women’s Right to Separate Residence and Maintenance Act, 1946.

¹⁹³ AIR 1963 Mysore 245 (247).

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

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

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

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

¹⁹⁴ AIR 1978 SC 793 (797).

¹⁹⁵ AIR 1968 Punjab 396 (398).

¹⁹⁶The court while rejecting the contention had observed that “if the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds and communities can be constitutional” and that “to suggest such an argument is to reject it”.

expressly included in the definition of law in Article 13(3) (a), would not have been law and the mandate in Article 13(2) would have been entirely useless as the state then would have been free to take away or abridge all the fundamental rights by and through ordinary legislations. It is now settled by a series of decisions¹⁹⁷ of the Supreme Court that the ‘laws in force’ used in Article 372(1) comprise not only laws made by the Parliament, but also the laws administered by the courts and non-statutory laws and customs and usages having the force of law, though the definition and the Explanation, as quoted above, expressly refer only to statutory laws. Therefore, the mere fact that any class of laws has not been specifically mentioned in the inclusive and non-exhaustive definition and explanation of the expression ‘Law’ in Article 13, by itself, would not, as if obviously cannot, mean that such law is excluded from the operation of Article 372 or Article 13 because of their not having been expressly specified in the relevant inclusive and obviously non-exhaustive definition and explanation.

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

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

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

¹⁹⁸ AIR 1984 Delhi 66 (75).

¹⁹⁹ AIR 1983 Andhra Pradesh 356.

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

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

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

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

²⁰⁰The learned judge had observed that “in the privacy of the home and the married life, neither Article 21 not Article 14 will have any place” and that “in a sensitive sphere which is at once most intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond”.

²⁰¹ AIR 1984 SC 1562.

²⁰² AIR 1985 SC 945.

²⁰³ 1985 AIR 935: 1985 SCR Supl. (1) 704.

²⁰⁴Justice O. Chinnappa Reddy had observed, “It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, from uniform, surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration- a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and provide by law for a way out of the unhappy situations in which couples like the present have found themselves.” *Id.* at 940-941.

²⁰⁵ (1995) 3 SCC 635:JT 1995 (4) SC 331.

²⁰⁶ AIR 2000 SC 1650.

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

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

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

4.8. Personal Law a ‘Law’: The Debate

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

²⁰⁷ (2001) 7 SCC 740.

²⁰⁸ As per the Muslim Women (Protection of Rights on Divorce) Act, 1986; Section 125 of Cr.Pc was not applicable to Muslim women.

²⁰⁹ 2010 (1) KLT 869.

²¹⁰ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

²¹¹ *Narasu Appa Mali v. State of Bombay* AIR 1952 Bom 85.

prohibition mentioned under Article 15²¹² “are addressed to state action, not to the existing personal laws”. The foreign jurists had branded the personal laws of the Hindu and the Muslim as non-state action, however it is difficult to understand how Deshpande, a well-known Indian jurist-judge, could also observe that “there was no state action by which the Hindus were governed by the Hindu Personal Law and the Muslim by the Muslim Personal Law” and “therefore the personal laws continue to be valid inspite of Article 15(1), because the difference between them was not due to state action”. The learned jurist has reiterated that “so far as the uncodified Muslim Personal Law is concerned, it was not the result of the state action”.

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

²¹² Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

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

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

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

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

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

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

Sum Up

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

Article 13 contains two separate clauses- one for the laws in force since the pre-Constitution days²¹⁶ and the other for the laws to be made in the post-Constitution era.²¹⁷ Conformity to the provisions of Part III is insisted upon in respect of the laws of both the categories. A third provision of Article 13 defines the term “law” and “laws in force” as used in its first two clauses.²¹⁸ In the definition clause of Article 13 the conspicuous absence of reference to “personal laws” coupled with the meaningful use of the term “competent authority” in respect of the pre-Constitution laws, lead to an irresistible conclusion that uncodified personal laws are outside the purview of Article 13(1). These clear points with regard to the inapplicability of Article 13(1) to non-statutory personal laws were forcefully registered by Late M.C.Chagla

²¹⁵E.g., the Muslim Personal Law (Shariat) Application Act, 1937.

²¹⁶Article 13(1), Constitution of India.

²¹⁷ Article 13(2), Constitution of India.

²¹⁸ Article 13(3)---clauses (a) & (b), Constitution of India.

in Narasu Appa Mali's case.²¹⁹ In the same case P.B.Gajendragadkar has asserted that Article 13(1) applied only to "what may compendiously be described as statutory laws".²²⁰ The distinguished scholars like D.D.Basu²²¹, Seervai²²² and Mohammad Ghause²²³, do not agree with the views of the two great judges of the time. These eminent scholars are of the view that the personal laws fall within the scope of Article 13(1). This judgement that was pronounced by Justice Chagla and Justice Gajendragadkar in the year 1952 has since then been followed, though often silently by all the higher courts in the country. Also the Apex Court in Mathura Ahir's case,²²⁴ has firmly held that, personal laws are outside the purview of Part III of the Constitution.²²⁵

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

²¹⁹ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 85.

²²⁰ *Id.*

²²¹ D.D.Basu, *Commentary on the Constitution of India* 155 (1965).

²²² H.M.Seervai, *Constitution Law of India*, 254-55 (1968).

²²³ Tahir Mahmood, *Personal Laws and the Constitution of India* 57-58 (Islamic Law in Modern India, 1972).

²²⁴ *Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707.

²²⁵ *Id.* at 712.

²²⁶ AIR 1984 Del 66.

²²⁷ AIR 1984 SC 1562.

²²⁸ 2010 (1) KLT 869.

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

²²⁹Articles 14 & 15, Constitution of India.

²³⁰The 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

²³²Article 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).

²³⁴A.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 decisions²³⁵ 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 SC 214; *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 legitimate 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 Council²⁴² as well as of the Supreme Court²⁴³ 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. Rane* *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 case²⁴⁶, 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

²⁴⁸H.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. Bhattacharjee²⁵⁰ 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 scriptural 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.

²⁴⁹Justice 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 Rahim²⁵³, “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. Fyzee²⁵⁴ has also referred to this view of Abdur Rahim with approval. Markby in his work on Jurisprudence²⁵⁵ 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 enactments²⁵⁷ 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

²⁵¹David Pearl, *A Text Book on Muslim Law* 2-4 (Croom Helm, 1979).

²⁵²Ibid.

²⁵³Muhammadan Jurisprudence, *Tagore Law Lectures* 136-137 (1911).

²⁵⁴Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* 6-7 (Oxford University Press, 4th edn., 1974).

²⁵⁵Sir William Markby, *Elements of Law* 52 (Oxford, 5th edn., 1896).

²⁵⁶S.A. Kader (ed.), *Muslim Law and the Constitution* 77-78 (Eastern Law House, Calcutta, 3rd edn., 2016).

²⁵⁷For 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 Abdul Hussein²⁵⁹ and Roshan Ali²⁶⁰ cases and it was so applied in Muhammad Ismail case even though the relevant provisions of the enactment²⁶¹ 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 enactments²⁶³ 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 Act, 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

²⁶⁹The 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 2²⁷⁹ 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 trial 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.

²⁷⁸AIR 1980 SC 707 (712).

²⁷⁹Respondents 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

²⁸¹AIR 1979 SC 1384 (1390, 1391).

²⁸²AIR 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. ‘*Rajnadrstvadrstvava 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*’s²⁸⁶ 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?

²⁸⁴Ibid.

²⁸⁵AIR 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.²⁸⁹The learned single judge further observed that in his opinion the learned men who were engaged in constitution making process did not intend 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

²⁸⁹The 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).

²⁹⁰The 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."

²⁹¹The 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 specified 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

²⁹² AIR 1961 SC 67.

²⁹³Justice 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 hereditary village office, that custom must yield to a fundamental right." Ibid.

²⁹⁴Justice 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 1707: (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

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.

³⁰³The 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 13 of 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*'s³¹¹ case which is most improper;

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

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 Act³¹², 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 be 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

³¹³2010 (1) KLT 869.

³¹⁴AIR 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 revoked³¹⁷ 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 contended 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

'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

³¹⁹Entry 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.”

³²⁰This 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 case³²¹, 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 it 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 uncodified 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

³²⁵Justice 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].

³²⁶Justice 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 would be 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].

³²⁷Justice 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

"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."

³²⁸The 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."

³²⁹Therefore, 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 existed 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.

³³⁰Justice 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.

CHAPTER VI

LOCATING UNIFORM CIVIL CODE IN THE PERSONAL LAW

DEBATE: AS A PANACEA FOR THE PROBLEM

Many countries in the world have common laws that are in perfect harmony with freedom of religion and worship for people with different beliefs. A vast multi religious society like India needs a common civil code because the personal laws of different religions are always in conflict and it is good for the unity of the country and for the supremacy of the Constitution to replace the personal law. A civil code does not interfere with the traditions of any religion. In fact, the personal laws of few religions interfere with the country's civil laws.³³¹

The Uniform Civil Code³³² directive has provided an occasion for a contest between legal pluralism and legal universalism in modern India. Legal pluralism recognised and legitimized the personal law of India's religious communities. Legal pluralism emphasises the individual rights and liberties and refuses to recognise the group oriented identities based on religion or

³³¹ Dinanath Raina, *Uniform Civil Code and Gender Justice 1* (Reliance Publishing House, New Delhi 1996).

³³² The concept of Uniform Civil Code does not connote several meanings. Courts have understood it differently. Different benches of the same court have given it varying interpretations. Even among jurists there is no unanimity about its construction. According to some the uniform code directive is a misfit in the Constitution and according to some others it is only distant Constitutional dream. In fact, it carries no single meaning over historical time. Susanne Hoeber Rudolph and Lloyd I. Rudolph have identified five possible meanings for the uniform civil code:

1. The British implicitly moved toward a uniform civil code without calling it so. At the cultural level, making the law more uniform, standardizing it, was an expression of rationalisation and modernization. Legal uniformity was in keeping with the formal organisations of the raj's administrative state. It made the law more legible for bureaucrats who were strangers to India's diversity and villages. And it was believed to facilitate control. These rationales were equally congenial to those charged with ruling the post-colonial state.

1. For modernist, rationalist nationalists a uniform civil code seemed to promise national integration. It would do for twentieth century India what nineteenth century nationalism was thought to have done for European states, dissolve or erase differences. It would help bring into being a nation whose people shared an identity congruent with state boundaries.
2. For civil rights activists, those speaking for the marginalised and powerless, women, children, cultural and ethnic minorities and lower classes, a uniform civil code signified the expansion of rights to categories of persons oppressed by patriarchal, gerontocratic, collective and oligarchic forms of social domination and control.
3. For religious minorities, the uniform civil code signified an effort to erase the personal law of diverse communities. It posed a threat to their cultural identity, even to their cultural survival.
4. For Hindu nationalists, a uniform civil code promised a legal means to eliminate cultural differences and the "special privileges" accorded to "pampered minorities". It would also have rectified what they perceived as an injustice, the reform in the 1950s of Hindu personal law (the Hindu Code Bills) without reforming the Muslim personal law, making it possible in principle (but rarely in practice) for Muslim men to have four wives and to divorce at will. See, M.P.Raju, *Uniform Civil Code, A Mirage 12* (Media House Delhi, 2003).

culture. However, the uniform code debate has brought to the fore several core issues of Constitutional importance.³³³

The rationale of the Uniform Civil Code is to enact a uniform law concerning family with the intention of referring to different personal laws.³³⁴ A combination of perverse communalism and perverted secularism made it possible for the law of the land to be overtaken by the precepts and practices of a specific religion. Successive governments, instead of adopting the same rational principle of applying a common civil code to the whole of India, have contributed to dissociate the Indian mind on the lines of religion. Appeasement and adhocism became durable instruments of state policy and governments and politicians were in the vanguard of the movement to banish fear and respect for law from our polity.³³⁵

Surprisingly, most political parties, except for few, remain insensitive to the dangers posed by the deliberate subversion of civil laws on religious grounds. There is an urgent need to put an end to the tendencies that seek to institutionalize and legitimize practices allegedly sanctioned by religion, but which respond to individual whims that are contrary to law and justice.³³⁶

6.1. Uniform Civil Code: Article 44 of the Constitution of India

India is a land of diversity and people belonging to different faith and beliefs peacefully coexist amongst each other. Hindus, Muslims, Christians, Parsis etc., are governed by their own personal law which to a great extent is diverse from one another.³³⁷ Perhaps due to these personal laws, religion has become the most distinctive aspect of cultural diversity.³³⁸ This division according to religion is despite Article 44 of the Constitution. When in 1949 Article 44 was enacted, we already had uniform codes of laws covering almost every aspect of legal relationship excepting only those in which we were governed by the various personal laws. The laws of Contract, Transfer of Property, Sale of Goods, Partnership, Arbitration and Limitation, Crimes and Criminal Procedure, Evidence and Civil Procedure and a host of other

³³³ *Id.* at 13.

³³⁴ The debate in the Constituent Assembly under draft Article 35 (present Article 44) shows that the concept of "uniform civil code" was limited to a uniform family law for members of all communities living in the country. not for the sake of uniformity, but also to ensure social justice for the weaker strata of different communities in the areas of marriage, divorce, child custody, adoption and succession. *See, Neema Qamar, Need of Uniform Civil Code- A Critical Study* 3 (Laxmi Book Publication, 2015).

³³⁵ *Supra* at 2.

³³⁶ *Ibid.*

³³⁷ B.R.Sharma, "A Uniform Civil Code for India" 21 *CMLJ* 21 (1985).

³³⁸ Mary E. John, "Feminism in India and the West: Recasting a Relationship" 10 *Cultural Dynamics* 197, 201 (1998).

statutory laws were uniform civil codes applying to all throughout the country. As Ambedkar observed during the debates in the Constituent Assembly³³⁹ on the draft of Article 35(subsequently enacted as Article 44), the only province which was not covered by any uniform civil code was marriage and succession and it was declared intent of those who promulgated Article 44 within the framework of the Constitution to bring about that change and to do what has been neglected for so long.³⁴⁰

Though Ambedkar referred expressly only to marriage and succession as constituting the zone uncovered by any uniform civil code, it is obvious that he and the other honourable members who participated in the discussion meant not only marriage and succession but all those matters in respect of which we were and still are governed by our Personal Laws.³⁴¹

Article 44 has been placed in Part IV of the Constitution and is only a directive given to the state. However, this principle enshrined in the Constitution has two characteristics; in the first place they are not enforceable in any courts and therefore, if the state does not obey or implement it, its obedience or implementation cannot be guaranteed by judicial proceedings. Secondly, these principles have to be taken into consideration by the state at the time of enactment of legislations.³⁴²

Article 44 is the only provision of the Constitution on the basis of which we can talk about the unification of family laws; therefore, there has been much controversy about the real meaning, message and the scope of the Article. Article 44 of the Constitution does not direct any law making body to enact a uniform civil code straight away. It only provides that the state shall make an effort towards enacting a uniform civil code. The cautiously selected wording of the Article is important. Every word of it needs deepest attention. There has been some controversy as to the real scope of the article and the following questions have been raised in relation to Article 44:

- a. Is endeavouring to secure something the same as directly enacting a law?
- b. What is the meaning and scope of a civil code? What is conveyed by the expression uniform?
- c. Are 'uniform' and 'common' interchangeable word?

³³⁹ Constituent Assembly Debate, Vol. VII, 550-551.

³⁴⁰ A.M.Bhattacharjee, *Matrimonial Laws and the Constitution 1* (Eastern Law House, Calcutta, 1996).

³⁴¹ Ibid.

³⁴² M.P. Singh (ed.), V.N.Shukla, *Constitution of India*, 298 (9th edn., 1994)

- d. What is the meaning and scope of a civil code? What is conveyed by the expression uniform?
- e. Is the uniform civil code to be compulsorily applicable to all citizens of India?

The above are the important question which needs proper consideration while interpreting Article 44. There has been problem as to how to determine the meaning and scope of expression 'civil code' as used in Article 44 in the Constitution. The word 'code' is used in much different sense. It may be in single comprehensive statute e.g. Indian Penal Code. But it may also refer to a body of several statutes dealing with same subject. It is in this latter sense that we used the term Hindu Code by which we mean the four Hindu Law statutes enacted during 1955 and 56. Again it may be pointed that the term 'uniform' is not equal or similar to the term 'common'. Therefore, a question arises that what are infact requirements of uniform in respects of a 'civil code' does the Constitution talk of a strict and rigid uniformity of family law. All the questions are indeed important in the interest of a smooth implementation of Article 44 of the Constitution.³⁴³

The principle of Article 44 is basically related to the unification of civil laws. The state is expected to apply this principle while making laws relating to civil matters. Incase the state cannot apply this principle in unifying the laws the question remains whether the court can apply it. The Constitution of India, it appears have given utmost authority to the state as it is entirely up to the state's whims to adopt a uniform civil code as and when they think the time is appropriate.

It may be reiterated that the word 'State' in Part IV of the Constitution as per its definition contained in Article 12, includes government and legislature but does not include the judiciary. It may be pointed out that Article 44 cannot be read in its own context only, infact it may be interpreted in the light of the other provision of the Constitution. Therefore, the demands of Article 44 and modalities with implementation both are to be determined in the light of the provisions of Part III of the Constitution i.e., Fundamental Right. So for the relationship between the Directive Principle of the State Policy and the Fundamental Right is concerned there has been changing interpretations. In the beginning of the Constitution this

³⁴³Ibid.

problem came before the courts of India. The Apex Court took the view that Directive Principles cannot be given preference over the Fundamental Rights.³⁴⁴

But this interpretation was diluted subsequently and the Supreme Court saw harmony between the Fundamental Right and the Directive Principle.³⁴⁵ Later in *C.B. Boarding & Lodging v. State of Mysore*,³⁴⁶ the court held that it does not see any conflict on the whole between the provisions contained in Part III and Part IV and that ‘they are complementary and supplementary to each other’.³⁴⁷ Finally in *Minerva Mills Ltd. v. Union of India*,³⁴⁸ the court held that ‘harmony and balance between Fundamental Rights and Directive Principles is an essential feature or the basic structure of the Constitution’. In pursuance of this approach the court has been trying to draw a balance and harmony between the Fundamental Rights and the Directive Principles. In the light of the foregoing discussion it may be said that as part of the Directive Principles Article 44 cannot be given preference over Fundamental Rights. In this connection one of the most important question is that how to implement Article 44 without affecting the Fundamental Rights of the citizen. Article 44 desires that the government and the legislatures to make possible endeavours which may in the long run secure uniformity in the making and application of civil laws.³⁴⁹ The demand that Parliament should straight away enact uniform civil code goes against the letter and spirit of Article 44.³⁵⁰

The bare reading of Article 44 makes it crystal clear that it is an imperative duty of the state to make efforts in this regard. This provision after thorough discussion got placed in Part IV i.e. Directive Principles of State Policy thus, obligates the state to enact an appropriate legislation on the said matter. In this regard the words ‘endeavour’ and ‘secure’ are of utmost importance. These two words indicate that State can apply the liberal approach as well as can adopt intermediary arrangement for securing a uniform civil code for the citizens of India. The word ‘State’ used in Article 44 is of wide amplitude and has a close reference to Article

³⁴⁴In *State of Madras v. Champakam Dorairajan* AIR 1951, SC 226, the Learned Court held that the Directive Principles of the State Policy have to conform to and run as subsidiary to the chapter of Fundamental Rights because the latter is enforceable in the court while the former is not.

³⁴⁵ See, *Mohd. Hanif Qurasi v. State of Bihar* AIR 1958 SC 739, *Kerala Education Bill, Re* AIR 1958 SC 956.

³⁴⁶ AIR 1970 SC 2040.

³⁴⁷ Ibid.

³⁴⁸ AIR 1980 SC 1784 at 1806.

³⁴⁹ Note: Professor Tahir Mahmood is of the opinion that legislative enactment of an all India Uniform Civil Code straight way is not envisaged by the Constitution even at the Central or Union level. See, Tahir Mahmood, *UCC: Fictions & Facts* (1995).

³⁵⁰ Note: Professor Tahir Mahmood had suggested that the fact is that, as per extremely clear words of Article 44, uniformity in civil laws is not to be achieved by one stroke of parliamentary legislation-its gradual evolution is to be secured by the State through proper and prolonged endeavours. Mahmood, *Supra* at 133.

12 of the Constitution of India.³⁵¹ Thus, all the authorities functioning within the territory of India are under an obligation to make efforts towards one civil code.³⁵²

The Constitutional scheme regarding division of power between the Centre and the State further provides justification in this regard. Entry 5³⁵³ of the List III of the Schedule VIII of the Constitution authorises the Parliament and the State Legislature towards enacting a uniform civil code. Taking into consideration Article 12, Article 44 and List III, Entry 5 it becomes clear that each and every functionary must work towards securing a common code for the whole of the country.³⁵⁴

A common civil code will remove all the inequalities and discrimination and may help in maintaining a rule of law in the Indian society. Thus, we cannot read this provision in isolation with other provisions of the Constitution which provides for equality before law and equal protection of law. It gets added importance even from the Preamble of the Constitution which clearly provides for justice, political, economic and social. The idea of justice as envisaged in the Preamble i.e. social justice we can achieve only when we have a one law for all the citizens. For this purpose our government and authorities have to rise above their own consideration (political and temporary gains) to give practical shape to this Constitutional provision. Thus, the idea behind incorporating this provision in the Constitution is to convert heterogeneous society into homogenous one.

The truth that remains even today is that in the pre independence era India was divided on religion and caste lines. This type of division which we may call heterogeneous society remained prevalent till we attained independence for our motherland. But the wise founding father of our Constitution endeavoured in their true spirit to generate an environment of homogeneity by putting earnest efforts to incorporate Article 44 in our National Charter. Thus, when India became independent and the Constituent Assembly was elected and authorised to prepare a Constitution for a country, the Nationalist members of the Assembly despite strong opposition from some members adopted this provision. The reason which

³⁵¹Article 12 makes it clear that the State includes, 'Government and Parliament of India, Government and State Legislature of each states and all local or other authorities functioning within the territory of India or under the control of the government of India.

³⁵² Note: Part IV of the Constitution places positive duty on the State to make such laws and policies which may help towards achieving the objectives laid down in this part.

³⁵³ Entry 5: Marriage and divorce; infants and minors; adoption; wills; intestacy; and succession; joint family and partition; all matters in respect of which in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

³⁵⁴ Note: It is not the sole duty of the legislature to enact a uniform civil code but the imperative duty of each and every part of the governance to work towards achieving a civil code for every citizens of the country.

compelled the majority members to pass through this provision in the Assembly was to save this newly born democracy from disintegration.

Thus, the true spirit of this provision is to establish a homogenous society³⁵⁵ in consonance with other provision of the Constitution. The idea of homogenous society can be achieved only by enacting a uniform civil code. Such type of arrangement is beneficial not only to the unity of nation but also to each and every section and community residing within the territory of India. In this way this provision is binding on the whole country and there is no justification to adopt different attitude to achieve this noble goal as envisaged by the Constitutional makers.

6.2. Uniform Civil Code: Reasons given for its necessity

a. Constituent Assembly Debate & Uniform Civil Code

As stated in the previous chapter, in the Constituent Assembly when the matter concerning 'personal laws' came up for discussion the members of the House remained divided on the issue. The debate on personal laws in turn led to heated discussion on whether or not uniform civil code should be adopted. The idea of Uniform Civil Code was supported by the Hindu members while there was a strong opposition from the Muslim members. Uniform Civil Code was mooted in the Constituent Assembly under Article 35 (Article 44 of the present Constitution) of the original draft. Although uniform civil code was placed under the Directive Principles of State Policy, an objection was raised to this article by several Muslim members of the Constituent Assembly. Shri Mohamad Ismail Sahib had asserted that, it is the fundamental right of any group or community to follow their personal laws and this provision should be made justiciable.³⁵⁶

Shri Ismail Sahib had stated further that personal laws are part of religion and culture and there should be no obstruction in enjoyment of this right by the people.³⁵⁷ Further to support

³⁵⁵ Note: By homogenous society, it means a society which is not divided on religion and caste lines.

³⁵⁶ Shri Mohamad Ismail Sahib had asserted that, "The right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and this provision should really be made amongst the statutory and justiciable fundamental rights." See, Constituent Assembly Debate, Vol. VII, November 1948.

³⁵⁷ Shri Ismail Sahib had stated that, personal laws is part of religion and culture, thus, intrusion of those people who are following such laws and anything done to affect their personal law will be equivalent to interfering with the way of life of those people who have been practicing these laws since many generation. He expounded that India emerging as a secular state, thus it should not do anything that obstructs the religious and cultural ethos of the people. Ibid.

his arguments he had taken examples of few European countries, where they had granted rights to the minorities in their respective country.³⁵⁸

To enrich his arguments, he named similar protective clauses of other European Constitutions which dealt with the minorities. However, he pointed out that such clauses were narrow in scope as they dealt with any group, section or community of the people and not confined to minorities only. Shri Mohamad Ismail Sahib had proposed an amendment in order to secure the rights of the people in respect of their existing personal laws.³⁵⁹

By following their own personal laws, he said that the people of different caste and communities would not be in conflict with each other. He further submitted that for creating and augmenting the harmony in the land it is not necessary to compel people to give up their personal law. The argument of Mohammad Ismail Sahib was objected by Suresh Chandra Majumdar, another member of the Constituent Assembly, who contended that the proposed amendment was in direct negation of Article 35.

Another Muslim member Shri Naziruddin Ahmed had pointed out that, Uniform Civil Code would create inconvenience not only to Muslims but to all religious communities who had religion oriented laws. According to him Uniform Civil Code was against the freedom of religion and culture and that the state may infringe these freedoms by enacting a uniform law. He further asserted that, neither the Muslims nor the British did anything with regard to religion and personal laws during their tenure in India.³⁶⁰ Shri Naziruddin Ahmed had submitted that the situation is not ripe for introducing a uniform civil code at this point of time. Shri Mahboob Ali Baig Sahib Bahadur argued that the personal laws were deeply interwoven with religion and that the secular state in India should permit its citizens to practice their own religion, observe their own life and their personal laws.³⁶¹

³⁵⁸Shri Ismail Sahib in order to strengthen his argument, he cited the examples of European countries like Yugoslavia, the Kingdom of Serbs, Croats and Slovenes which were obliged under treaty obligations to guarantee the rights of the minorities. The clause regarding rights of Mussalmans reads as follows:

"The Serbs, Croats and Slovene States agree to grant to Mussalmans in the matter of family law and personal status, provisions suitable for regulating these matters in accordance with Mussalman usage." *See*, Mohd. Shabbir, "Muslim Personal Law, Uniform Civil Code, Judicial Activism: A Critique" 47 XII *ALJ* 47 (1997).

³⁵⁹ The amendment proposed by Shri Ismail Sahib read as: "Any group, section or community of the people shall not be obliged to give up its personal law incase it has such a law."

³⁶⁰Shri Naziruddin Ahmed had in the Constituent Assembly said that, "What the British in 175 years failed to do or were afraid to do. What the Muslims in the course of 500 years refrained from doing, we should not give power to the state to do at all once, I submit Sir, that we should proceed not in haste but with caution, with experience, with statesmanship and with sympathy."

³⁶¹C.A.D, *Id.* at 544.

Shri Hussain Imam remarked, "India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything."³⁶²

Taking into account the opinions expressed by the Muslim members on the subject of Uniform Civil Code the members of the House had differing views on the same. As stated above members like Naziruddin Ahmed and Hussain Imam were of the view that uniform civil code can be adopted in near future however, other members did not at all approve of adoption of uniform civil code. There were many other members of the Constituent Assembly who did not agree with the arguments given by the Muslim members. Shri K.M. Munshi expressed his views as follows; the argument that is put forward against uniform civil code is that in the first place it is against the rights conferred by way of Article 19 and the second argument is that it will be unfair towards the marginal population. In support of Article 35 Shri Munshi asserted that, it should be remembered that if this clause was not added, it did not mean that Parliament would no longer have the right to adopt a civil code. The matter is deferred till the time the Parliament thinks that the time has come to enact a uniform civil code.³⁶³

On the second argument that it is tyrannous to the minority, Shri K.M. Munshi expressed his views that not in any Muslim country a civil code has not been enacted for reasons that the personal laws of the minority has been acknowledged as sacred. He took the instances of countries like Turkey and Egypt to support his argument.³⁶⁴

Shri Alladi Krishnaswami Ayyar was convinced with the views expressed by K.M. Munshi on adoption of a Uniform Civil Code. Shri Ayyar expressed his views as follows:³⁶⁵

"A modern state cannot accept the proposition that religious freedom covered personal law. Our ancestors did not think of united nation to be welded together into a democratic whole;

³⁶²Shri Hussain Imam further argued and appealed that, "The apprehension felt by the members of minority community is very real. Secular state does not mean that it is anti-religious but non-religious and as such there is a word of difference between irreligious and non-religious. I, therefore, suggest that it would be a good policy for the member of the Drafting Committee to come forward to such safeguards in this proviso as will meet the apprehension genuinely felt and which people are feeling and I have every hope that ingenuity of Dr. Ambedkar will be able to find a solution to this." *Id.* at 546.

³⁶³Shri Munshi had asserted that "...it must be remembered that if this clause is not put in it does not mean that the Parliament in future would have no right to enact a civil code. The only restriction to such a right would be Article 19 and I have already pointed out that Article 19, accepted by the House unanimously permits legislation covering secular activities. The whole object of this article is that as and when the Parliament thinks proper or rather when the majority in the Parliament thinks proper an attempt may be made to unify the personal law of the country."

³⁶⁴Shri Munshi had said that, "A further argument has been advanced that the enactment of a civil code would be tyrannical to the minorities. Is it tyrannical? Nowhere in advanced Muslim countries has the personal law of each minority been recognised as so sacrosanct as to prevent the enactment of a Civil Code. Take for instance, Turkey or Egypt. No minority in these countries is permitted to have such right...."

³⁶⁵*Id.* at 549.

but we are departing from the past. We want the whole of the nation to be welded and unified together as a single nation. We must end a series of competing communities in the country and seek factors which will help the welding together of the country.”

Dr. B.R Ambedkar had expressed that he was surprised at the statement made by Mr. Hussain Imam, who had said that keeping into consideration the vast population of India, having a uniform civil code to govern all may not be possible. To this Ambedkar had said that, besides marriage and succession we have a uniform laws on all other spheres such as; crimes, transfer of property etc; that have been in force in the entire country. Thus, the primary goal of Article 35 is to achieve uniformity of laws covering every aspect of a human life.³⁶⁶

Ambedkar added that it was not true that the Muslim Law was permanent and uniform throughout India upto 1935. The North West Frontier Province was not administered by the Shariat Law. Up to 1937, the Muslims in this province in matters concerning succession were not administered by the Shariat rather they followed Hindu laws of succession. Northern Malabar, the Marumakkathayam, a matriarchal law were applicable to the Hindus and Muslims. Dr. Ambedkar summed up his argument as follows:

Muslim law was not a permanent law and it was not applicable to some parts and it has been made applicable since past decade. He further said that if necessary certain parts of the Hindu law that are considered appropriate can be incorporated into the new civil code proposed under Article 35. Thus, the Muslims cannot argue that their sentiments were not taken into consideration by the framers who advocated for a uniform civil code.³⁶⁷

Ambedkar wanted to give an assurance to the Muslims and had stated that, Article 35 do not say that the state will right away apply this code to every citizens. He said that as and when the Parliament in the near future thinks that the people and the situation are apt then

³⁶⁶Dr. Ambedkar had said, ‘we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there are the Negotiable Instruments Acts; and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have Article 35 as part of the Constitution to bring about that change...”*Id.* at 550.

³⁶⁷Dr. Ambedkar’s argument: “It is therefore no use making a categorical statement that the Muslim law has been an immutable law which they have been following from ancient times. That law as such was not applicable in certain parts and it has been made applicable ten years ago. Therefore if it was found necessary that for the purpose of evolving a single civil code applicable to all citizens irrespective of their religion, certain portions of the Hindu Law, not because they were contained in Hindu Law but because they were found to be the most suitable, were incorporated into the new civil code projected by Article 35, I am quite certain that it would not be open to any Muslim to say that the framers of the civil code had done great violence to the sentiments of the Muslim community.”

accordingly a uniform civil code can be adopted. Until then the code can be applied merely on a voluntary basis. This approach was also undertaken in case of application of the Shariat Act of 1937, to territories besides the Province of the Northwest Frontier. Parliament would be perfectly capable of introducing such a provision. The result of long debate on Article 35 was that the proposed article was carried out without any amendment and was renumbered as Article 44 of the Constitution.

6.3. Intent of Judiciary

The responses of the judiciary to the uniform civil code directive have not been uniform at all. The views expressed by the Supreme Court were inconsistent to the extent of being self-contradictory and conflicting. Apart from being unwarranted, some of the opinion stands poll apart. Let us first glance through those cases where some judges of the Supreme Court thought it fit to comment on the Uniform Code directive directly or indirectly especially in the context of codification or reform of personal laws.³⁶⁸

The history of judicial behaviour tells that in initial stage it adopted a literal interpretation with regard to constitutionality of personal laws as well as implementation of the Uniform Civil Code. One of the earlier case in which the question relating to personal laws was involved was the case of *State of Bombay v. Narasu Appa Mali*.³⁶⁹ The learned judge with regard to Uniform Civil Code had stated the significance of Article 44³⁷⁰ This provision recognizes the continuation of personal laws of different communities till the time the state does not enact a uniform civil code. The provisions of personal laws are mixed and based on religious and cultural considerations. Having said that, one can conclude that enactment of a uniform civil code still remains a distant dream. The reality is that there exist many personal laws which have been in practice since many centuries and to do away with it completely is practically not feasible. Keeping into consideration all these factors the Constitution makers deliberately did not interfere in the personal law matters.³⁷¹

³⁶⁸M.P. Raju, *Uniform Civil Code: A Mirage?* 73 (Media House Delhi, 2003).

³⁶⁹*State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84.

³⁷⁰*Id.* at 91-92.

³⁷¹The learned judge had stated:“Article 44 of the Constitution is in my opinion very important. This Article says that the state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. In other words, this article by necessary implication recognises the existence of different codes applicable to the Hindus and Mohammedans in matters of personal law and permits their continuance unless the state succeeds in its endeavour to secure for all the citizens a Uniform Civil Code. The personal laws prevailing in the country owe their origin to scriptural texts. In several aspects their provisions are mixed up with and based on considerations of religion and culture, so that the task of evolving a Uniform Civil Code applicable to different

As discussed in detail in the preceding chapter that the learned Court had declined to accept the argument that the impugned legislation was applicable to Hindus and not to all the communities. In this case the reasons were explained by Justice Chagla who had observed that, to bring in social reform there has to be an acceptance by every community. Willingness of one community will not suffice. Also Article 14 does not provide that any enactment in which the State may participate must necessarily be of a universal nature. The state can correctly decide to initiate social reform in stages and steps can be territorial or community based.³⁷² The other case in which the court declined to enforce the directive of Article 44 under the pretext of enforcing the Fundamental Right was *Gurdial Kaur v. Mangal Singh*³⁷³. In this case the court refused to read the personal laws with Article 15 of the Constitution.³⁷⁴ These are the cases in which the courts declined to strike down the various personal laws being violative to Fundamental Rights. But the Bombay High Court took a positive stand with regard to the spirit of the Uniform Civil Code in the sense that it upheld a progressive social legislation applicable to the Hindus. Now a contrast colour may form in which the courts have contributed in a different approach. In these cases the courts have upheld the applicability of all those laws which are secular in nature. In *Shahulameedu v. Subaida Beevi*,³⁷⁵ while interpreting the provisions relating to maintenance contained in Section 488 of the Criminal Procedure Code the Kerala High Court extended its benefit to the wife of a bigamous Muslim staying away after the second marriage of her husband. In this case Justice Krishna Iyer provided the benefits of a secular law to Muslim women and said:³⁷⁶

“The Indian Constitution directs that the state should endeavour to have a Uniform Civil Code applicable to the entire Indian community, and indeed, when motivated by a high public policy, Section 488 of the Criminal Procedure Code has made such a law, it would be

communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a Directive Principle that the endeavour must hereafter be to secure a Uniform Civil Code throughout the territory of India.” *Id.* at 91-92.

³⁷²“One community might be prepared to accept social reform, another may not yet be prepared for it; and Article 14 does not lay down that any legislation that the state may embark upon must necessarily be of an all-embracing character. The state may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise.” *Id.* at 87.

³⁷³ AIR 1968 P.&H 396.

³⁷⁴The Court explained: “If the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the courts will have to go to the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds or communities can be constitutional. To suggest such an argument is to reject it.” *See, Ibid* at 398.

³⁷⁵ 1970 KLT 4.

³⁷⁶*Id.* at 9.

improper for an Indian court to exclude any section of the community born and bred up on Indian earth from the benefits of that law.”

a. Shah Bano’s Case

After the incorporation of the uniform civil code directive in the Constitution as Article 44, there have been a number of instances where the Supreme Court has dealt with this provision directly or indirectly. However, it was in the famous Shah Bano’s case³⁷⁷ that the Supreme Court has responded to this Constitutional provision in a major way for the first time. Shah Bano’s decision had even created history to the effect that the Parliament had to intervene and legislate a law allegedly to negate the impact of the verdict.

A Constitution Bench of five judges through Chief Justice Y.V. Chandrachud, had declared in the first sentence of the judgement, “This appeal does not involve any question of constitutional importance but that is not to say that it does not involve any question of importance.” However, ultimately the court touched upon the constitutional issue of uniform civil code under Article 44 of the Constitution. At the end of the verdict, the Supreme Court made some observations on the Uniform Civil Code and to reform the Muslim Personal Law, and said that it a matter of regret that Article 44 has not seen the light of the day and the government has also not made any sincere efforts towards implementation of the same. The court had passed the issue in to the tables of the legislature for the implementation of the uniform civil code. The court also had remarked that there has to be willingness towards enacting a civil code. The court had remarked that the Muslim community can show the way by bringing in reforms in their personal laws. Else the constitution will have no meaning.³⁷⁸

³⁷⁷ *Mohd. Ahmed Khan v. Shah Bano Begum & Ors.* 1985 AIR 945.

³⁷⁸ The learned judge had held that, “It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India’. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue it is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of reformer has to be assumed by the courts because; it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between the personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.”

The Shah Bano judgement received maximum criticism. On the one hand the judgement was lauded by the progressive and secular sections of the population and on the other hand the fundamentalist section of the Muslim community openly opposed the judgement. The judgement was interpreted as putting Islam in danger. It was seen as an interference with the Shariat law. It was alleged that the judgement would help to impose a uniform civil code over the Muslim community. The critics of the judgement argued that maintenance after divorce was forbidden by Quran. The Muslim law was immutable and though marriage under it was a contract it was a 'sacred contract' and therefore, unchangeable. The whole concept of uniform civil code was once again challenged and a legislation to undo the effects of the judgement was demanded.³⁷⁹

The post Shah Bano developments show that initially the government was in the favour of the judgement but in view of the strong protests followed by mammoth processions and rallies of the Muslims, it changed its stand. In order to appease the Muslim community who were unhappy with the ruling, the then Prime Minister, Shri Rajiv Gandhi's government enacted the Muslim Women (Protection of Right on Divorce) Act, 1986.

b. Shah Bano's Case- Aftermath

All that the Supreme Court has decided in Shah Bano Begum,³⁸⁰ is that its earlier decisions in Bai Tahira³⁸¹ and Fazlunbi³⁸², holding that notwithstanding any divorce obtained by or against her, a Muslim wife, like any other Indian wife, was entitled to invoke the general law provisions relating to maintenance under Chapter IX of the Code of Criminal Procedure, were correctly decided and that payment of dower of Mahr payable to a Muslim wife, not being an amount payable "on divorce" within the meaning of Section 127(3) of the Code, shall not affect any order for maintenance under Section 125. But the expression of regret by the Supreme Court at the absence "of any official activity" towards framing a uniform civil code as directed by Article 44 during all these years, could not generate some militant official activity, though on the reverse gear, so much so that Muslim divorced women have virtually been excluded from the operation of the uniform general law as contained in Chapter IX of the Code of Criminal Procedure by the Muslim Women (Protection of Rights on Divorce) Act of 1986, unless in a given case, both the woman and her former husband agree in writing

³⁷⁹Vasudha Dhagamwar, *Towards the Uniform Civil Code* 48 (N.M.Tripathi, Bombay, 1989).

³⁸⁰ AIR 1985 SC 945.

³⁸¹ AIR 1979 SC 362.

³⁸² AIR 1980 SC 1730.

before the Magistrate to be governed by the relevant provisions of the Code. The Act, far from taking any step towards the “immediate and compulsive need for a uniform civil code”, has really jettisoned the little amount of uniformity in law that we had under Chapter IX of the Code and the gloss put thereon by the Supreme Court in Shah Bano’s case.

c. Jordan Diengdeh Case

Immediately after the Shah Bano’s decision the Supreme Court referred again to Article 44 directive in a matter related to Christian personal law on marriage and divorce in the case of *Jordan Diengdeh v. S.S. Chopra*³⁸³. The facts of this case exposed totally unsatisfactory state of affairs which arose due to lack of a uniform civil code.

The petitioner filed a petition for declaration of nullity of marriage or judicial separation in the year 1980 under the Indian Divorce Act, 1869.³⁸⁴ The request for declaring the marriage as null and void was rejected by the High Court, but a decree for judicial separation was granted, on the ground of cruelty. Against the judgement of the High Court the wife filed a special leave petition to declare the marriage as null and void on the ground of impotency of the husband.

The Supreme Court found that the marriage had broken down irretrievably, but, the couple had no way out as the grounds for divorce by mutual consent and irretrievable break down of marriage were not grounds for divorce under the Indian Divorce Act, 1869. It may be noted that the Act, 1896 applies only to cases where the parties profess the Christian religion. In this case Supreme Court analysed the provision of the said Act and compared it with other enactment and laws which provide for decree of nullity of marriages, divorce, judicial separation. The judgement was delivered by Justice O. Chinnappa Reddy on 10th May, 1985. The necessity of having a Uniform Civil Code was mentioned in this case.³⁸⁵

³⁸³ 1985 AIR 935: 1985 SCR Supl. (1) 704.

³⁸⁴ The petitioner-wife was a Khasi tribe of Meghalaya, born and raised as a Christian. The husband was a Sikh. They got married in 1975 under the Indian Christian Marriage Act, 1872. Ibid.

³⁸⁵It was held, “It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, from uniform, surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration- a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and provide by law for a way out of the unhappy situations in which couples like the present have found themselves. Ibid.

Justice O. Chinnappa Reddy for himself and Justice Mishra, R.B. reiterated the importance of legislating a uniform civil code.

“It was just the other day that the Constitution Bench of this court had to emphasise the urgency of infusing life into Article 44 of the Constitution. The present case is yet another which focuses attention on the immediate and compulsive need for a uniform civil code. The totally satisfactory state of affairs consequent on the lack of a uniform civil code is exposed by the facts of the present case. Before mentioning the facts of the case, we must as well refer to the observations of Chandrachud, C.J in the recent case decided by the Constitution Bench (*Mohd. Ahmed Khan v. Shah Bano Begum and Ors.*). Then it quotes the observations made in Shah Bano case as quoted above.

In this case the Apex Court had passed on the matter into the tables of the law makers and had in its order directed that the order be send to them for necessary action

d. Sarla Mudgal Case

In the decision of the Supreme Court in *Sarla Mudgal v. Union of India*,³⁸⁶ a two-judge Bench has issued a direction, though couched in the frame of request, to the state to take steps to secure a Uniform Civil Code relating to our matrimonial or family laws, and the decision has been hailed as a landmark in our legal and constitutional history and is expected to provide for a turning point in our religion-oriented Personal Laws.³⁸⁷

The facts of the case were as follows. The petitioner is the president of a social organisation registered under the Societies Registration Act. She filed the writ petition praying the Supreme Court to order the Central Government to bring a uniform civil code under Article 44 of the Constitution. Along with it, there were three other petitions filed by three Hindu wives. The three petitions filed by the Hindu wives were similar in nature. The husband had left them to their mercy and converted themselves into Islam and married Muslim women. The questions for consideration before the Supreme Court were:

- (i). Whether a Hindu husband, married according to Hindu law, who embraces Islam, can solemnise a second marriage?
- (ii). Whether such a marriage without the first marriage being dissolved, would it be valid

³⁸⁶ (1995) 3 SCC 635: JT 1995 (4) SC 331.

³⁸⁷*Supra* note 2 at 6.

marriage if the first wife continues to be a Hindu?

(iii). Whether the apostate husband would be guilty of the offence under Section 494 of Indian Penal Code?

The judgement was delivered by a Division Bench comprising Justice Kuldip Singh and Justice R.M. Sahai. Both the judges delivered separate but concurring opinions. Answering the questions, the court held that a marriage celebrated under a particular personal law cannot be terminated if one of the parties embraces another religion. The court held that where a Hindu husband converts his religion into Islam and marries another woman belonging to Islam, his first marriage could not be dissolved by mere conversion. Such Hindu husband is liable to be punished under Section 494 of Indian Penal Code. Also such Hindu husband is liable to maintain his Hindu wife and children under Section 125 Criminal Procedure Code even though he becomes Muslim. The second marriage, i.e. marriage between a Hindu husband and a Muslim girl, is a void marriage. In the light of the facts of this case the Supreme Court once again quoted with approval the Shah Bano³⁸⁸ and Diengdeh³⁸⁹ judgements and emphasised the need to have a Uniform Civil Code. In the end the Supreme Court stressed the government of India through Prime Minister to have fresh look at Article 44 in matters of marriage, inheritance, succession, etc.

In concurring judgement, Justice Sahai made few valuable suggestions for achieving the Uniform Civil Code in India. He also criticised the misuse of polygamy by Muslims as well as non-Muslim. In this connection he suggested the government may also consider feasibility of appointing a committee to enact a Conversion of Religion Act, with immediate effect, to check the abuse of religion by any person. The law may provide that every citizen who changes his religion cannot marry another wife unless he divorces his first wife. The provision should be made applicable to every person whether he is a Hindu or a Muslim or a Christian or a Sikh or a Jain or a Buddhist and provision may also be made for maintenance and succession etc. to avoid clash of interest after death. This would go a long way to solve the problem and pave the way for uniform civil code.

On the point of uniform civil code, Justice Kuldip Singh had referred two earlier above-mentioned decisions of this court in cases- *Mohd. Ahmed Khan v. Shah Bano Begum*³⁹⁰ and

³⁸⁸ AIR 1985 SC 945.

³⁸⁹ AIR 1985 SC 935.

³⁹⁰ AIR 1985 SC 945.

Jorden Diengdeh v. S.S. Chopra³⁹¹ and after tracing political history of India concluded that the government till date had been wholly remiss in its duty of implementing the constitutional mandate under Article 44 of the Constitution of India. He requested the government of India through the Prime Minister of the country to have a fresh look at Article 44 and endeavour to secure uniform civil code. He further issued the direction to the government of India through Secretary, Ministry of Law and Justice to file an affidavit in this court in August, 1996 to furnish details on the steps the government have taken so far for making Article 44 a reality. Justice R.M. Sahai while delivering concurring judgement agreed in principle with Justice Kuldeep Singh on point of desirability of a uniform civil code. He pointed out the desirability of a uniform civil code. He pointed out that pattern of debate even today is the same as was voiced forcefully by the member of minority community in the Constituent Assembly. The argument of one party in the case was that non-implementation of the provisions contained in Article 44 amounts to grave failure of Indian democracy, whereas other side claimed that the code may cause dissatisfaction and disintegration. He emphasised that government may consider feasibility of appointing a committee to enact Conversion of Religion Act immediately to check the abuse of religion by any person. The Act should provide that every citizen who changes his religion cannot marry another wife unless he divorces his first wife.

The observations and the direction of the Mudgal case have been criticised on following counts throughout the country:

1. It has been said that the direction of the court was made without the jurisdiction and that the question of implementation of the uniform civil code was not before the court.
2. The question what law should be made or not is a business of the legislature and the judiciary should not have any say over such matter. In other words, the Parliament is not accountable to the Supreme Court if it does not undertake any legislation to implement Article 44.
3. The Court's observation regarding the uniform civil code constitutes an obiter because the question of implementation of uniform civil code was not a legal issue. Therefore, an obiter of the court has no binding effect.

It is submitted that criticism of the outcome of Mudgal case are not fair. In the judgement the court did not wish to direct the government to implement Article 44. Infact the court only wanted to draw the attention of the government towards their duty to implement Article 44. It

³⁹¹ AIR 1985 SC 935.

is true that the observation of the Court was obiter but it is not fair to say that the Court had no locus to express its opinion on an issue closely related to the real legal question. As pointed out earlier the judiciary in a broader sense is state and therefore, it is duty of the judiciary to make effort to achieve uniform civil code in India. It is also true that under Article 44 the State has been asked only to endeavour to secure a uniform civil code but the critics of the Court missed the spirit of the direction of the Court. In this connection supporting the Courts view point, Prof. D.D. Basu has rightly stated:³⁹²

“It is true that the function of legislation is that of the legislature and not of the Courts. But legislation is sponsored by the executive in a Parliamentary form of government, as India has. Hence, once it is conceded that the Directive Principles in Part IV are binding on all the organs of the State (Art. 37), it was nothing improper for the judges to point out to the executive and the Legislature that they had failed in their duty to have due regard to the provision in Article 44. In the Mudgal judgement, the judges did not direct the Legislature to make a law or how to legislate, or the executive to initiate it. What they have done is to point out; (a). that ‘there is no justification in delaying indefinitely the introduction of a uniform personal law’. (b). that successive governments till date have been wholly remiss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.

e. Ahmedabad Women Action Group Case

The correctness of the doctrine laid down in Sarla Mudgal case was scrutinized by the Supreme Court in *Ahmedabad Women Action Group v. Union of India*³⁹³ and further explained in *Lily Thomas v. Union of India*³⁹⁴. In Ahmedabad Women Action Group case, three writs filed as Public Interest Litigation were not directly dealing with the uniform civil code but indirectly called for bringing uniformity in the personal laws. The Supreme Court held that these petitions involved matters of state policies and the appropriate remedy lies somewhere else and not with the court.³⁹⁵

³⁹²D.D. Basu, *Uniform Civil Code for India* 25-26 (2nd edn., 1997).

³⁹³ AIR 1997 SC 3614.

³⁹⁴ AIR 2000 SC 1650.

³⁹⁵In this case, first writ petition, the prayers were made by the petitioner to declare law of polygamy amongst the Muslim which emphasised the power of Muslim husband to pronounce unilateral talaq, Muslim Women (Protection of Rights on Divorce) Act, 1986 and inheritance law of Shia and Sunni as void. Second writ petition contained the prayer to declare Sections 2(2), 5(ii) and (iii), 6 and Explanation of Section 30 of the Hindu Succession Act, 1956, Section 2 of the Hindu Marriage Act, 1955, Section 3(2), 6 & 9 of the Hindu Minority and Guardianship Act, 1956 and power of the Hindu Male for testamentary disposition as void offending Article

f. Lily Thomas Case

Lily Thomas v. Union of India,³⁹⁶ was another case of bigamous marriage where in Smt. Sushmita Ghosh wife of Shri G.C. Ghosh, who had filed the writ petition stated that she was married to Shri G.C. Ghosh in accordance with Hindu rites on May 10, 1984 and was living happily at Delhi. Later on her husband converted himself into Islam religion with the objective to re-marry another woman. The petitioner had prayed before the Court with the following relief:

- a. The honourable Court by an appropriate writ, order or by direction, declare the polygamous marriage between a Hindu and a non-Hindu after conversion to Islam religion as illegal and void.
- b. The Court issue appropriate directions to Respondent No. 1 and Respondent No. 2 to carry out suitable amendments in Hindu Marriage Act, 1955 so as to curtail and forbid the practice of polygamy.
- c. The Court issue appropriate direction to declare that where a non-Muslim male embraces the 'Muslim' faith merely with intent to avoid a previous marriage or to enter into second marriage, any of such marriage entered into by him after conversion would be void.
- d. The Court also issue appropriate direction to Respondent No. 3 restraining him to enter into any marriage with Ms. Vanita Gupta or any other woman during the subsistence of his marriage with the petitioner.

The Learned judges³⁹⁷ on a point of uniform civil code came on a conclusion that this Court cannot direct the state to secure a uniform civil code as provided under Article 44. Hon'ble Justice Sethi had also made a remark that no direction appeared to have been issued by this Court for the purpose of having uniform civil code within the meaning of Article 44. Justice Kuldip Singh in his judgement (*Sarla Mudgal Case*³⁹⁸) only requested the government to have a fresh look at Article 44 in the light of words used in that Article. Whereas Justice Sahai in

14 and 15 of the Constitution. In third writ petition, the petitioner prayed to declare Sections 10 and 34 of the Indian Divorce Act, 1869 (old provision) and sections 43 to 46 of the Indian Succession Act, 1925 as void. Ibid.

³⁹⁶ AIR 2000 SC 1650.

³⁹⁷The judgement was delivered by Division Bench comprising of Justice Shagir Ahmed and Justice R.P. Sethi.

³⁹⁸ AIR 1995 SC 1531.

his concurring but separate judgement only suggested the ways and means, if deemed proper, for implementation of the aforesaid directives.³⁹⁹

In fact Sarla Mudgal's case was considered by this Court in Ahmedabad Women Action Group case⁴⁰⁰ and was held that the question regarding desirability of enacting a uniform civil code did not directly arise in Sarla Mudgal Case. Before Ahmedabad Women Action Group Case, in the year 1996 another important pronouncement of the Supreme Court appeared in *Pannala Bansilal Patel v. State of A.P.*⁴⁰¹ The fact of the case was not relating to marriage and divorce law. The legality of some provisions of Andhra Pradesh Charitable Hindu Religious and Endowment Act, 1987 were in dispute in this case. The case did not directly involve the question of uniform civil code and the relief was also not prayed by the petitioner in this connection but the observation of Justice K. Ramaswami is relevant:

“In a pluralist society like India in which people have faith in their respective religion, beliefs or tenants propounded by different religions of their offshoot, the founding fathers, while making the Constitutions were confronted with problems to unify and integrate people of India professing different religious faith, born in different castes, sects or sub-sects in the society speaking different language and dialects in different regions and provided a secular Constitution to integrate all sections of the society as a united Bharat. The Directive Principle of the Constitution themselves visualize diversity and attempted to foster uniformity among people of different faiths. Although uniformity of law is warranted however, enacting a uniform civil code right away whether it will be a success is questionable. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Law making is a tedious process in India, thus one can ponder as to whether the ultimate solution to do away with the inequalities that exist in the society can be achieved by a mere application of a uniform civil code right away.

³⁹⁹Justice Saghir Ahmed observed; “I agree with Justice Sethi that any direction for the enforcement of Article 44 of the Constitution could not have been issued by only the judge in the Sarla Mudgal case.” Ibid.

⁴⁰⁰ AIR 1997 SC 3614.

⁴⁰¹ AIR 1996 SCW 507.

g. John Vallamattom Case

Lastly and finally, the verdict of the Supreme Court in the year 2003 on the issue of uniform civil code and its desirability was raised once again in *John Vallamattom v. Union of India*.⁴⁰² The first petitioner was a Christian priest belonging to religious denomination of Roman Catholics. The second petitioner was also a member of the Christian community. Both petitioners were aggrieved by the discriminatory treatment meted out to the members of the Christian community under the Indian Succession Act, 1925 by which they were practically prevented from bequeathing property for religious and charitable purposes. This has led them to file this writ petition by which the constitutional validity of Section 118 of the India Succession Act, 1925 was being challenged. The section lays down special procedure for bequeathing any property to religious and charitable uses by a Christian having any near relative. The will is required to be bequeathed by testator not less than twelve month before his death and deposited within six months from its execution in safe custody as provided by the law. The petitioner argued that the section is violative of Article 14 and 15 of the Constitution because:⁴⁰³

- (i). It discriminates against a Christian vis-a-vis non-Christian.
- (ii). It discriminates against religious and charitable use of property vis-a-vis other use.
- (iii). It discriminates against a Christian having a nephew, niece or nearest relative vis-a-vis a Christian having no such relative.
- (iv). It discriminates against a Christian who dies within twelve months of execution of the will of which he has no control.

This analysis makes it clear that the petitioners never prayed for direction to legislature for enacting uniform civil code. Chief Justice V.N. Khare was the only judge out of three judges who pointed out the importance of having a common civil code. In the wording of Chief Justice Khare, he said that Article 25 provides religious freedom and Article 44 dissociates religion from social relations and personal law. Justice Khare also emphasised that unless and

⁴⁰² AIR 2003 SC 2902.

⁴⁰³ *Id.* at 2908.

until Article 44 is adopted the goals of achieving national integration and removing inconsistencies based on ideologies will remain a distant dream.⁴⁰⁴

This discussion indicates that the issue of uniform civil code has been agitated and re-agitated in the Supreme Court of India several times. But at the same time when it is raised by the petitioner, the Supreme Court either ignored it or side traced it as secondary issue. Actually, it has become a political issue with which judiciary is very often confronted and has always found herself helpless to enter in this field. This issue is essentially in the legislative domain and requires a public debate to form any acceptable public opinion.

6.4. Academic Discourse on the Uniform Civil Code in India

The scholarly writing on the issue of securing a uniform civil code for India is very wide. Numerous books and articles have been published on this controversial subject.⁴⁰⁵ Controversial debates on the uniform civil code began prior to India's independence in August 1947. The major concern of India's population regarding implementation of a uniform civil code was that it was seen as analogous to westernization of India's personal laws or the imposition of the majority law on all the minorities. Dr. Ambedkar, the law minister at the time, refuted such claims and instead, insisted that the implementation of a uniform civil code will not westernize India's laws, rather it will provide 'modernisation, secularization and national unity'.⁴⁰⁶ This debate that started in the early 1930s was at the forefront of discussion in the Constituent Assembly. In the debate it was emphasised that the Constituent Assembly had already 'accepted the principle that the freedom to practise and propagate religion did not bar the making of any law regulating or restricting any secular activity'.⁴⁰⁷ Personal laws hindered women from several opportunities of social life and welfare. The man was seen as the head of the household and treated as such. Women were secondary. This secondary status was evident in the discrimination and unequal

⁴⁰⁴“The aforesaid two provisions viz., Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Article 25 and 26 of the Constitution. Any legislation which brings succession and like matters of secular character within ambit of Articles 25 and 26 is a suspect legislation. It is a matter of regret that Article 44 of the Constitution has not been given effect to, Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.”*Id.* at 1913.

⁴⁰⁵Simon Shetreet & Hiram E. Chodosh, *Uniform Civil Code for India* 135 (Oxford University Press, 2015).

⁴⁰⁶Nandini Chavan & Qutub Jehan Kidwai, *Personal Law Reforms and Gender Empowerment* (Hope India Publications).

⁴⁰⁷ *Id.* at 267.

treatment of women in matters of marriage, divorce, maintenance, guardianship of children, adoption, succession and inheritance.⁴⁰⁸

Prof Upendra Baxi in his article “Muslim Law Reform, Uniform Civil Code and the Crisis of Commonsense”⁴⁰⁹ has said that the main theme in the controversy has been the present state of Muslim family law in India which among other things, exposes Muslim women in India to grave injustices, if not to a persistently inferior social status. Prof Baxi argues that the obligation to ameliorate the situation through law reform is inherent in the directive to secure a uniform civil code, since such a code must fulfil the equalitarian secular ideology of the Constitution.⁴¹⁰

Dr Tahir Mahmood⁴¹¹ appeal’s to secure uniform civil code for all the citizens throughout the country. He says in a secular state, continuation of personal laws based on religion is against the principles of secularism. Dr. Mahmood wants the lead to come from the majority community but even with lead or no lead, the state must act.⁴¹²

Dr. Tahir Mahmood in his article, “Uniform v/s Common Civil Code in India”,⁴¹³ had expressed that, ‘It is an unfortunate fact that the Constitutional directive of Article 44 is currently being grossly misunderstood and gravely exploited by elements obstinately intolerant to the religious minorities.’ He has pointed that, ‘It is indeed a mystery why and how the lofty ideals of secularism and national integration have come to be read in between the lines of the simple and clear provision of Article 44 which merely speaks of territorial uniformity in the application of the civil laws. The interpretation that this provision basically requires a dramatic abolition of the personal laws of all the religious minorities in the country and the enactment in their place of an entirely novel code is based on faulty foundations. The directive speaks of a civil code to be uniformly applicable all over the country and, as such, it casts no aspersion on any personal law. Nor does it indicate any preference whatsoever for any of the personal law now in force.

⁴⁰⁸ *Id.* at 268.

⁴⁰⁹Tahir Mahmood (ed.), *Family Law and Social Change* 24 (N.M. Tripathi, Bombay 1975).

⁴¹⁰*Ibid.*

⁴¹¹Tahir Mahmood, *Muslim Personal Law* 200-202 (1977).

⁴¹²It would be useful to quote the appeal made by the author to the Muslim Community: ‘Instead of wasting their energies in exerting theological and political pressure in order to secure an immunity for their traditional personal law from the state legislative jurisdiction, the Muslim will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India.’ *Ibid.*

⁴¹³ *Journal of Dharma: Dharmaram Journal of Religions and Philosophies*, Vol. 11, Issue 3, July-September 1986, pp. 227-235.

Tahir Mahmood further states that, over a period of three and a half decades of the post constitution era irresponsible, irrational, illogical response on the uniform civil code, by persons concerned, unconcerned and ill-concerned, has drowned the provision of Article 44 into the mud of such awful and frightful complexities from which it is indeed difficult for it to emerge. The meaning now being given to it has the dangerous potential of causing rapid national disintegration. A fresh thinking in the matter therefore is inevitable. And by no standards will a fresh thinking on this extremely sensitive issue be a sacrilege to the Constitution or blasphemy to nationalism. He further states that in a constitution which has been, within thirty five years of its life, subjected to not less than fifty amendments—most of them in its mandatory provisions — a mere Directive Principle need not be so rigidly, literally or otherwise universally construed as to ignore both its past history and present communal overtones.⁴¹⁴

He concludes by expressing that if national integration is in fact the only or even the major goal behind the directive principle of Article 44, who will have the audacity to deny that the end is much more sacred than the means? As experience has shown that interpreting or translating that noble directive principle of state policy into hasty action in a particular way has the potential of putting the pace of national integration into the reverse gear, we must think of other possible dimensions and parameters of its interpretation and implementation. What is most important is the unity of the nation and not how we achieve it. And nothing can be more prejudicial to the unity of nation than disgruntled minorities.⁴¹⁵

The debate on the implementation of a uniform civil code reignited during the 1980s amidst conflicts among religious communities and castes. ‘The crisis of identities refers to the escalation of communal conflicts, the resurgence of majority and minority fundamentalisms, caste wars, and regional separatist movement in this period, and political mobilization seems also to have increasingly relied on particularistic identities and loyalties’.⁴¹⁶ The issues of implementing a uniform civil code were again brought to the forefront because of the clashes between the majority Hindu population and the minority populations. The minority populations acquired the mindset that the majority would impose the majority culture resulting in interference with their religious freedom and homogenization of culture would occur. However, the enactment of a uniform set of laws was not intended to do so. Instead,

⁴¹⁴Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ *Supra note 7* at 270.

the vision of the Constituent Assembly was that it was best to implement a set of civil laws that would enable and empower women and other disenfranchised groups to successfully coexist in a male dominant society. In 1985, the Shah Bano case brought these gender issues to the forefront of the public agenda. The Supreme Court ruled that Section 125 of the Criminal Procedure Code dealing with maintenance applied to Muslim women as well in order to prevent destitution of a divorced wife.⁴¹⁷ The court declared that the ‘state should enact a Uniform Civil Code to promote national integration’.⁴¹⁸ Therefore, the implementation of a Uniform Civil Code was not seen as a step towards exclusion or homogenisation but rather towards inclusion, integration and social justice.

In the aftermath of the Shah Bano case, Parliament reversed the Supreme Court decision and enacted an Act in 1986.⁴¹⁹ Several years after the Shah Bano case, the controversy over the uniform civil code significantly intensified. However, in the 1990s three new major problematic groups emerged.⁴²⁰ The most prominent of these was the Bharatiya Janata Party (BJP) and as a result their interests were proliferated.

Justice Ratnaparkhi makes a very detailed and well-reasoned argument for the early adoption of a uniform civil code. He advances the thesis that what is best in all existing personal laws, be it Hindu, Muslim, Christian, Parsi or any other, will be formulated and offered as basic principles of a civil code to serve a developing and modern thinking, emphasizing the argument that ‘the uniform civil code is not feasible, but is also immediately necessary’.⁴²¹ He is of the opinion that though Article 44 is a directive, that is declaratory and is not included in the binding parts of the Constitution, it imposes a Constitutional mandate on the state.

Justice Reddy former judge of the Supreme Court of India explained very clearly the reasons why the Indian leadership did not enact a uniform civil code in the 1950s after the independence of India. In his preface to the book by Justice Ratnaparkhi on the Uniform Civil Code, he suggests that in the early 1950s ‘it would not have been very difficult for Parliament to enact a Uniform Civil Code’.⁴²² They did not do so because; they had no desire to rush things in the direction of a uniform civil code’. Among the factors that Justice Reddy mentioned were that ‘they wanted a smooth transition and they had many pressing priorities.

⁴¹⁷*Id.* at 271.

⁴¹⁸*Ibid.*

⁴¹⁹ The Act enacted was ‘The Muslim Women (Protection of Rights on Divorce) Act, 1986’.

⁴²⁰*Id.* at 272.

⁴²¹ M.S. Ratnaparkhi, *Unifrom Civil Code: An Ignored Constitutional Imperative* (Atlantic Publishers and Distributors, 1997).

⁴²²*Ibid.*

There were social and economic reforms of a large magnitude to be carved out.’ These included the nationalisation of key industries, the abolition of sati, land reforms, economic issues, reorganisation of states, the relations with neighbouring countries, and non-alignment strategy.

There have been numerous objections to a uniform civil code on part of the Muslim community as well as from other communities, but the Muslim community has been viewed as the main community which opposes the implementation of a uniform civil code. In support of the uniform civil code, it was argued that there cannot be different laws for different communities in one country such as on bigamy, polygamy, and favouring Muslims who can marry four wives. Further it was said that it is under the Constitutional mandate by virtue of Article 44 and hence must be implemented. It is over sixty years since the Constitution was framed, but a uniform civil code has not been introduced. In support of a uniform civil code, its advocates argue that it is needed in order to ensure gender justice. Muslim personal law in particular violates gender justice because it permits polygamy and unilateral divorce. Adopting a uniform civil code will ensure gender justice. Likewise Hindu Law has certain aspects that are adverse to the equality of women and the uniform civil code is required to achieve the empowerment of Hindu women as well. In addition, it is argued that the Hindus have introduced changes in their personal laws and other communities, including the Muslim communities, cannot resist modernisation and change. Finally, and very importantly, the advocates of a uniform civil code emphasize that it will strengthen the unity and integration of the country.

Article 44 is included in the advisory part of the Constitution. The provisions are directives. In the course of the debate during the drafting of the Constitution, a committee report included a minority view which recommended that Article 44 should be moved to Part I and changed to become binding in ten years (like Article 45 on education which had to be implemented in ten years). This proposal was not approved.⁴²³ Proposals and arguments against Article 44 relied on a number of grounds and lines of reasoning. It was argued that the Constitution guarantees the right to an individual’s personal law and uniform civil code would be seen as a violation of this right. The concept of secularism will be damaged by perceived interference in individual lifestyles. It was also argued that, ‘the concept of the Uniform Civil Code does not include personal laws. The traditional laws were never

⁴²³*Id* at 6-7.

disturbed by India's colonial rulers in its long history. Finally it was supposed that India is so large and heterogeneous a country that a uniform code would be impossible to implement.⁴²⁴

It should be noted that before the 1937 Shariat Act there were a number of Muslim community members who followed Hindu Law in personal law matters, so a uniform code should be objectionable when or if it is introduced.⁴²⁵ In the debate in the Constituent Assembly, the majority rejected the proposals to limit the scope of Article 44 or to water it down. These amendments aimed at restricting the power of the state to implement a uniform civil code. The restrictive approach was dismissed by the majority. Nevertheless, our approach is not only based on the language, or on the Constitutional and legislative history. The proposal is to follow consensual approach and not a majoritarian approach.

Justice Ratnaparkhi refers to the fact that members of the Muslim minority tend to be in the lower socio-economic strata, and they tend to have the least interest in societal changes and are largely influenced by their religious leaders.⁴²⁶ He suggests that a uniform civil code will help bring unity to the fragmented Indian society. Without a uniform civil code, other religious minorities will demand their own distinct personal laws further fragmenting Indian society on religious lines.⁴²⁷ He notes the significance of the change of the attitude of the Muslim community.⁴²⁸ There are signals coming from the constituencies of the minority communities in favour of a change in the personal law of these communities. He mentions the reformist Maulana Wahiuddin and Dr. Tahir Mahmood who expressed support for change, so there are voices for internal change. However, in order to succeed Justice Ratnaparkhi proposes to take proper measures to educate the public on the necessity of a uniform civil code.⁴²⁹

Justice Ratnaparkhi suggests that Muslims should not carry on with the notion that by adoption of a uniform civil code imply imposition of laws of the majority community on them. The Hindu law itself was changed when the Hindu Code Bill was drafted. In this context he mentions that the option of puberty was borrowed from Islamic law; it was decided that marriage was a contract and not sacrament as in the old Hindu law. Having noted these changes in the Hindu law, Ratnaparkhi asks, 'here is a community which has

⁴²⁴*Id.* at 7-8.

⁴²⁵*Ibid.*

⁴²⁶*Id.* at 99.

⁴²⁷*Id.* at 98.

⁴²⁸*Id.* at 100.

⁴²⁹*Ibid.*

borrowed some concepts from other personal laws including the Muslim law and grafted them into its own system. How can it be imagined that this community would thrust its personal law on other communities?’⁴³⁰

Justice Ratnaparkhi advances the proposition that:

The real intention is that the Uniform Civil Code is not merely a feasibility, but necessity too. It will take hardly any time to prepare the draft and put it before the people for their approval. What has been said so far, is more than sufficient to convince the people, including the minority communities, that the Uniform Civil Code is not only feasible, but is also imminently necessary.⁴³¹

Justice Ratnaparkhi adds that:

The nation has sufficiently waited with all eagerness for half a century for the fulfilment of the positive mandate given by the Constitution. But our State during the last five decades has made no endeavour in that direction. On the other hand, promises which are not in consonance with the Constitutional mandate have been given to different communities from time to time. This is in flagrant violation of the Constitutional provisions, which no sensible Indian would appreciate if the impending cleavage between different communities has not only to be aborted but also obliterated in totality.⁴³²

Gender justice requires civil law to be applied because traditional law discriminates against women. Quranic law was based on a concept of gender justice, but later developments in Muslim law were not favourable to gender justice. Patriarchy prevailed and did away with the Quranic gender-just approach. Dr. Engineer calls for a return to the Quranic gender-just approach. The British rulers did not touch the personal law of the communities except for the Christian Divorce Act.⁴³³

The reasons for the British policy in India mentioned by Dr. Engineer were varied. He refers to the Revolt of 1857, the enactment of a criminal procedure code that was accepted by all communities, and the fact that women in nineteenth century were far from liberated and

⁴³⁰Ibid.

⁴³¹*Id.* at 106.

⁴³²Ibid.

⁴³³*Supra* at 7.

mostly illiterate and thus not aware of their rights. The 1937 Sharia Act benefited women as it provided better protection than the traditional law accorded them.⁴³⁴

As Dr. Engineer has suggested, it is more difficult to effect change today in a democratic society than in the colonial era. The reason being that, 'the politicians are afraid of facing the wrath of their voters, the vast number of women continue to be illiterate and unaware of their rights as equal citizens and hence it is men who decide what is good or bad for them.'⁴³⁵

The Jamait-Ulama-i-Hind (the Muslim Council of India) supported independence and objected to the uniform civil code since they had been promised that Sharia law would apply to their communities in the post independence period. The Indian political leadership could not breach this promise, and this produced severe ramifications for the newly established independent state of India.⁴³⁶ Other difficulties which prevented a uniform civil code can be mentioned. No community was ready to accept gender justice. Even in the majority community, the Hindu community there was a heated debate on the Hindu Bill introduced by Dr. Ambedkar. The Bill was not adopted. Instead a series of watered down texts were passed on several matters including marriage, divorce, etc.⁴³⁷

A significant factor was the minority fear psychology, which played an important role in the political scenario. The fear psychology was further reinforced by the immigration of the elite Muslim population to Pakistan, while the remaining population were more committed to traditions. It was less educated and viewed the Sharia as divine law ignoring the realities of what the Sharia law was, that is predominantly in fact a post Quranic set of norms with custom and practise taken from the Arab world.⁴³⁸ The result was that 'minority status, poverty, illiteracy and sense of insecurity due to repeated communal riots all combined together to make any changes in Sharia laws impossible.'⁴³⁹

As to the Hindu side in the Indian society, the situation was not conducive to change, neither was it inclined to support the implementation of a uniform civil code. Hindu society itself is diverse internally. There is a large proportion of the population that is illiterate and many perceive their traditions as sacred and not subject to change by secular authority. For instance, child marriage takes place in the open in spite of the fact that it was made lawful in

⁴³⁴*Id.* at 6.

⁴³⁵*Ibid.*

⁴³⁶*Id.* at 7.

⁴³⁷*Ibid.*

⁴³⁸*Id.* at 8.

⁴³⁹*Ibid.*

1930s. Likewise, the Sati and Dowry Acts are violated quite openly.⁴⁴⁰ Dr. Engineer has observed that the issue was politicised and a uniform civil code was never implemented.

Shri M.P.Jain has asserted that not much progress has so far been made towards achieving the ideal of a uniform civil code which still remains a distant dream. The only tangible step taken in this direction has been the codification and secularisation of Hindu Law. The codification of Muslim Law still remains a sensitive matter though enlightened Muslim opinion appears to favour such a step. Jain emphasises that law be divorced from religion. With the enactment of a uniform code, secularism will be strengthened; much of the present day separation and divisiveness between the various religious groups in the country will disappear, and India will emerge as a much more cohesive and integrated nation.⁴⁴¹

6.5. Uniform Civil Code: Whether a solution

Framers of the Indian Constitution were men dedicated and committed to pull up the nation from its dark past and place it as an equal in body and mind with the other free and decent members of the world community. Their aspirational goals were therefore enumerated as: Democracy, Justice, Liberty, Equality, and Fraternity.⁴⁴² Laudable, worthy and universally accepted objectives of state policy as they happen to be the task of achieving these in India was and continues to be immense and complex. But aspirational force of the Constitution-framers was impatiently assertive. The Constitution both in spirit and form is itself a proof of concerted efforts geared towards the fulfilment of these goals. However aware of the social, economic, political and historical perspective of the country and of the ensuing hurdles in the way of immediate or exact implementation of certain goals, they had to defer the same for a while. These goals were therefore, enumerated as the Directive Principles of State Policy to be pursued by the state in the governance of the country and formulation of laws;⁴⁴³ they were not guaranteed as justiciable constitutional rights of the people. They constituted a promise to be fulfilled when time and resources permitted—a compromise between idealism and pragmatism. One of these policy prescriptions was to enact a uniform civil code for the citizens of the entire country.⁴⁴⁴

⁴⁴⁰Ibid.

⁴⁴¹ M.P. Jain, *Indian Constitutional Law* 1386 (Wadhwa & Company, 5th edn., 2006).

⁴⁴² Constitution of India, Preamble.

⁴⁴³ Articles 36-51, Constitution of India.

⁴⁴⁴ Article 44, Constitution of India.

As mentioned above in the Constituent Assembly it was decided that when the time and situation is apt the Parliament will work towards realising the objective of Article 44.⁴⁴⁵ Keynote of the theme of the arguments obviously was secularism and national unity. As norms each is undisputedly commendable due to its intrinsic potential as well as for being remarkably useful in a developing country having multi-religious population. But the choice of the proposed compulsory uniform code of family law as a tool for translating these norms into a tangible reality can be questioned. Actually need and efficacy of such code has been under serious doubt since the very beginning. Some representatives of the major minority community (the Muslims) had taken in the Constituent Assembly strong exception to it upon more than one ground.⁴⁴⁶

Enactment of a uniform civil code described by its advocates as “the corner-stone of modern secular society in the country and thus essential in the process of evolution of such new secular social order” was initially (regretfully) deferred because its immediate implementation was considered unwise even by Nehru.⁴⁴⁷ Those in authority have been preoccupied with other matters and for political reasons too; they probably thought it prudent to let the matter of uniform civil code lie dormant. It may also not be presumptuous to suppose that the belief of the decision makers in the proposal of the code was itself shaky. On people’s side the code was never their direct or indirect demand. Nevertheless, it was enshrined in the Constitution. For long years this particular directive of the Constitution remained wholly neglected and ignored. Time and again whenever personal laws have been challenged the apex court has directed the government for implementation of a secular uniform civil code.⁴⁴⁸ Adoption of a uniform civil code has been viewed as the solution in order to eradicate the discriminations existing in various personal laws and to achieve a gender-just society.

⁴⁴⁵ Constituent Assembly debates, Vol. VII, 23rd November 1948, views expressed by K.N.Munshi.

⁴⁴⁶Views expressed by Mohammad Ismail, Naziruddin Ahmad, Mahboob Ali Beg, Pocker Saheb and Hussain Imam. Ibid.

⁴⁴⁷ For Nehru-More repartee in Parliament clarifying former’s hesitancy in the matter, See, P.B. Gajendragadkar, *Secularism and the Constitution of India* 124-125 (1971).

⁴⁴⁸In *Mohd. Ahmed Khan v. Shah Bano Begum*, 1985 2 SCC, the Supreme Court held that the government of India is duty bound of securing a uniform civil code. In *Jorden Diengdeh v. S.S. Chopra*, AIR 1885 SC 935, the Supreme Court observed that the law relating to marriage, divorce and judicial separation is far from uniform so the time has come to make a uniform law which would be applicable to all irrespective of religion and caste. In *Sarla Mudgal v. Union of India*, 1995 3 S.C.C. 635, the Supreme Court directed the government to take steps towards securing a UCC for Indian citizens which is necessary for the national unity and integrity.

6.6. Role of the Government towards Uniform Civil Code

Article 44 is very often opposed by one section of the community or the other. Hence, the government has consistently maintained the initiative for formulating a uniform civil code must come from within the communities themselves and that it will not move in the matter until they are ready to accept a uniform civil code. The state instead of making some serious attempt in this direction tends to adopt an indifferent attitude ostensibly as a matter of political expediency. As Professor Tahir Mahmood rightly pointed out, Directive Principles which direct the state towards a particular goal, put a heavier burden on the executive organ of the state than on the legislature.⁴⁴⁹ The government has not done anything to discharge burden. No steps have been taken to explain the contents and significance of Article 44. No measures have been adopted to fight the obscurantists who opposed the uniform civil code. The vehement opposition of uniform civil code and of the family law reform by Muslim masses and by others is the result of the government's failure to make them understand these issues in their true perspective. Undue weightage is being given in this respect to the views held by conservative sections of the citizens and this can obviously have only political motivations.

In 1963 the government had expressed its intention of appointing a committee to study how the problem of family law reforms was tackled in the contemporary Muslim Countries.⁴⁵⁰ But the government did not translate its intention into action because of the resentment expressed against this move by vested interests. The leaders of the ruling party time and again have declared in and out of Parliament that the government will not touch the Muslim Personal Law unless a substantial number of Muslims themselves demand reform. Even after the Bombay Convention for the protection of Muslim personal law, the then Congress President Shankar Dayal Sharma reiterated this policy of his party's government.⁴⁵¹ The reassurances are generally given on the eve of elections and are seen to be well in keeping with secularism, Indian style, viz., equal status to all religions.

The opposition party also cannot be praised for their role. No party has been above political alliances with communal parties or giving membership and prominence to openly communal

⁴⁴⁹See, Tahir Mahmood, "Progress in Implementing Social Directives of the Constitution- A Critical Appraisal" in Alice Jacob (ed.), *Constitutional developments since Independence* 659 (1975), Tahir Mahmood, *An Indian Civil Code and Islamic Law* 16 (1976), also see Vasudha Dhagamwar, *supra* at 45, *Towards the Uniform Civil Code* 48 (N.M.Tripathi, Bombay).

⁴⁵⁰See, A.G. Noorani, "Reform of Muslim Personal Law" *Indian Express*, May 21, 1972, also see Paras Diwan, *Muslim Law in India* 41 (1991).

⁴⁵¹See, *The Hindustan Times*, October 20, 1973, also see Vasudha Dhagambar, *supra* at 48.

persons living up to the adage that politics makes strange bed-fellows.⁴⁵² No other party except Communist Party of India and Communist Party of India (Marxist) took a principled, unequivocal stand against the Muslim Women's Bill.⁴⁵³

It is a matter of great pity that the country's governance rests on legal illiteracy and that veto powers on social progress are being cheerfully handed out to this vested interest to scuttle the introduction of an optional uniform civil code of which Dr. Ambedkar spoke and which Article 44 of the Constitution enjoins. Moreover, an optional uniform civil code would merely give a choice to every individual to arrange his or her marital relations under a dispensation other than that of his or her personal law. It is a choice available as much to Muslims as to persons of any other religious community. Having regard to the diversity of our country and heterogeneous population enactment of uniform civil code has not been undertaken by the state. However, the state should make an effort towards creating such a situation where the people themselves willing will accept a uniform civil code. For this purpose sensitization and awareness on the subject to the masses can play a key role in marching towards implementation of Article 44.⁴⁵⁴

On September 26, 1986 the then Prime Minister, Mr. Rajiv Gandhi directed the Law Ministry to speed up work on drafting a uniform civil code and bring the Bill before the Parliament at the earliest. He specifically told the law ministry that before drafting the uniform civil code Bill, there must be wide ranging debate at all levels involving scholars, political parties, academicians and the press.⁴⁵⁵ From statements of the government spokesmen, it appears that the government does not have a firm or clear stand. Theoretically, a good many of government spokesmen seem in favour of reforming Muslim Personal Law, but in practice, seem reluctant to reform it because of political considerations.

However, in the recent years the issue has shown signs of life. When the Bharatiya Janata Party (BJP) came to power in 2014 the issue with regard to the uniform civil code was once again brought to the forefront. The Narendra Modi-government had requested the Law Commission to study the implementation of a uniform civil code in the country. Uniform civil code has always been one of the agenda in the election manifesto of the BJP. After it came into power it has initiated steps towards securing the same. Ever since triple talaq

⁴⁵²See, Vasudha Dhagamwar, *Ibid.*

⁴⁵³*Ibid.*

⁴⁵⁴See, H.A. Gani, *Reforms of Muslim Personal Law 45* (Deep & Deep Publications, New Delhi 1988).

⁴⁵⁵See, *Indian Express*, September 27, 1986.

became a debatable issue, the demand for enacting a Uniform Civil Code was once again reiterated.⁴⁵⁶ Thus, in the year June 2016, Law Commission of India was given the task to examine as to whether it is feasible to introduce uniform civil code in India. And the Law Commission invited feedback and had solicited the views from the people. Anybody interested was required to submit their suggestions along with the questionnaire dated 7 October, 2016, that was prepared by the Law Commission.⁴⁵⁷ The Law Commission Chairman, Justice Balbir Singh Chauhan was of the view that the Uniform Civil Code cannot be implemented and the Commission has recommended to reform the personal laws by the community themselves. Since freedom of religion is guaranteed by the Constitution thus, to do away with personal laws completely and be administered by a common civil code is not possible.⁴⁵⁸ The demand for Uniform Civil Code garnered attention after the decision of Triple Talaq by the Apex court. The Law Commission of India had asked the stakeholders for their suggestions on uniform civil code and all such suggestions and proposals were to reach and were to be submitted by April 6 2018.⁴⁵⁹

6.7. Uniform Civil Code: An answer to oppression of women?

The adoption of a uniform civil code is considered important in order to guarantee the equality to all citizens and to promote national integration. Uniform civil code is viewed as a solution to eradicate discrimination that women under various personal laws are being subjected to. Unless and until the discriminations is completely eradicated and women enjoy equal status at par with their male counter parts under their respective personal laws the true spirit of Articles 14 and 15 cannot be attained.

Uniform civil code is considered as a solution to guarantee to women, rights and to bring the much needed reforms in different religion and culture that are oppressive towards women. But the pertinent issue amid the whole debate on uniform civil code is whether the voices of the different categories of women is been taken into consideration. As discussed above in the Constituent Assembly at the time of drafting of the Constitution the representation of women

⁴⁵⁶ <http://www.dnaindia.com/india/report-uniform-civil-code-not-possible-personal-laws-can-never-be-done-away-with-law-commission-chairman-2565313> (May 29, 2018, 3.00 P.M) (Visited on 3 June, 2018).

⁴⁵⁷ //economictimes.indiatimes.com/articleshow/63376499.cms?utm_source=contentofinterest&utm_medium=te xt&utm_campaign=cppst (last visited on June 3 , 2018)

⁴⁵⁸ <http://www.india.com/news/india/uniform-civil-code-difficult-to-implement-personal-laws-can-not-be-scrapped-law-commission-chairman-justice-balbir-singh-chauhan-2716754/> December 5, 2017. (last visited on June 14, 2018).

⁴⁵⁹ Economic Times dated March 20, 2018.

members was very few. Moreover, whenever matter concerning women was debated in the Constituent Assembly, whether it was a debate on the enactment of uniform civil code or codification of Personal Laws of the Hindu which involved issues impacting the lives of women the views of the women members were never taken into consideration. Thus, the debate on uniform civil code will become a futile exercise unless and until the women's voices and the fundamental issues concerning women is taken into consideration.⁴⁶⁰

The whole discussion on uniform civil code is centred around two statements, firstly, it is considered the best answer in order to achieve gender justice and national integrity and secondly the concept of uniform civil code is viewed as a threat to the minority section of the population. Also uniformity of laws is considered necessary to secure the rights of women. The apprehension of the minorities has been given much attention and the government in order to pacify the minorities have deferred the adoption of uniform civil code on this ground. However, the government has ignored the matter with regard to securing the rights of the women. The government has not taken any concrete step in this regard.⁴⁶¹

6.8. Fear of the minorities

The members belonging to the Muslim community had raised their opposition to Article 35 (subsequent Article 44) in the floor of Constituent Assembly. The members were concerned about preservation of their culture and the members representing Muslim community were apprehensive that their identity will be crushed by the majority community. It has been argued that a secular state does not necessarily mean a uniformly regulated state rather than it is a state in which all its subjects can appreciate the continuation of their distinct beliefs. Secular State, if it is understood from the viewpoint of a layman it means a state that has no official religion. Secularism was a gift from the Western nations "Civilised" where the state was free from any religious influence, and due to our irresponsible prejudice to the "civilization" of the West, their secularity is considered an ideal to be attained.

Secularism of the west has in fact led to the suppression of many systems of faith, beliefs and created the hegemony of a series of principles that are considered better, more gradual than the other systems of faith whose principles are considered oppressive and archaic. The members of the Constituent Assembly who rose against the common civil code had their well-founded fear of the majoritarian notions of progressive laws, social reform swallowing

⁴⁶⁰Shambavi, "Uniform Civil Code: The Necessity and the Absurdity" 21 *ILI* 2017.

⁴⁶¹ Ibid.

the various other minor views on progress and modernity. Mehmood Ali Baig Sahib Bahadur laid down the different understanding of secularism. He stated that secularism does not mean that every citizen is to be governed by one common law. But he said that this is not the case. Secularism means that people belonging to any faith will be respected and their personal laws will be continued.⁴⁶²

Different communities feared that by making a uniform law, a way of life would be taken as the standard on modernity and progressiveness. The Muslim members of Constituent assembly emphasized the excessive western colonial influence on the understanding upliftment and modernity.⁴⁶³

Uniformity in personal laws is not a harbinger of communal harmony. In fact in the year 1948, at the time of drafting of the Constitution the Constituent Assembly members and the then leaders had aspired for a secular nation. The British policy of non-interference in the personal laws of various communities was a calculated approach towards keeping the communities divided thus; the British could easily administer the country. The policy of divide and rule was a weapon used by the British to keep the communities divided till the time of withdrawal of British from India. Further, it ultimately led to the partition of the country in the 1947. The nationalist leaders such as Jawaharlal Nehru had this communal clash at the back of their minds when they aimed to construct a secular state with no religious affiliations.

A non-religious state is absolute anti-thesis of an anti-religion state however similar they might appear from outside. A non-religious secular state does not give precedence to one religion over the others and all communities have the liberty to practice and follow their religious beliefs and laws. The role of the state is minimalistic in nature and its only function is to prevent any conflicts between separate systems and protect the private spheres of the communities. An anti-religion state also is a state which does not have inclination towards any one religion. However, an anti-religious state would be one where religion and its distinct

⁴⁶²“People seem to have very strange ideas about secular State. People seem to think that under a secular State, there must be a common law observed by its citizens in all matters, including matters of their daily life, their language, their culture, their personal laws. That is not the correct way to look at this secular State. In a secular State, citizens belonging to different communities must have the freedom to practice their own religion, observe their own life and their personal laws should be applied to them. Therefore, I hope the framers of this article have not in their minds the personal law of the people to cover the words "Civil code". CAD, *Supra*.

⁴⁶³B. Pocker Sahib very aptly stated: “It is very easy to copy sections of other constitutions of countries where the circumstances are totally different. There are still many multitudes of communities that follow different customs for centuries, even thousands of years. With a single stroke of a pencil, you want to cancel all that and standardize them. What is the purpose served? What is the purpose of this uniformity, apart from killing the conscience of people and making them feel trampled by their rights and religious practices? Such a oppressive measure should not find its place in our Constitution. Ibid.

provisions would be completely discarded from the legal and political system of the state. The role of the state then becomes overbearing, since the laws and the political setup will have to be created and regulated by those principles which the State deems to be appropriate. The State will have the power to be intrusive and authoritarian to govern the people along the secular line which it considers to be progressive and modern.

The accidental concepts of modernity cannot be considered to be the uniform standards of a progressive society. Universalisation of laws, especially personal laws would necessarily have to dodge this question, *i.e.*, modern according to whom; oppressive and backward according to whom.

6.9. Uniformity and Rights of Women: A myth demystified

The Uniform Civil Code is viewed as an ultimate solution to do away with inequalities existing in the society between the sexes. Even in the debates of the Constituent Assembly, discrimination against women and social reforms were considered necessary to improve their status in the society have been the main argument in favour of Article 35 (present Article 44). At the time of the debate on uniform civil code the arguments of the members who opposed the enactment of the code only centred on cultural disparities and majoritarian domination. Time and again uniform civil code is considered as an answer to eradicate the inequalities but the pertinent question as to how the code is going to be helpful to the women has not been addressed. Also as discussed above when the matter on Article 35 was debated in the Constituent Assembly there was no representation of the women. K.M. Munshi had appealed to the Assembly that the absence of a uniform personal law would be tantamount to considering all discriminatory practices within the scope of freedom of religion and thus making it impossible to reform laws.

Unless and until the views of the women on the issues concerning them are taken into consideration, every exercise will become futile which is done with an objective to bring social reform. A comparison is always drawn between Muslim women with Hindu women, a Muslim woman is considered oppressed and subjugated whereas a Hindu woman is considered more empowered as she has the protection of codified uniform Hindu law. Codification of Hindu law is being viewed as guaranteeing rights to the Hindu women and improving their status in comparison to Muslim women who are still being deprived of rights under their un codified personal laws. In spite of the codification of Hindu personal law and

universal application of the codified law, it has not been able to address the question of social reform properly. The voice of the Hindu women, which speaks about the partial failure of uniform law, was lost in the din of secularism, unnecessary glorification of uniform civil law and obsession with the protection of diversity and minorities.

Madhu Kishwar, a renowned legal scholar states, “In their stated determination to put an end to the growth of custom, the reformers were in fact-putting an end to the essence of Hindu law, yet they persisted in calling their codification 'Hindu'.”⁴⁶⁴ It would be wrong to declare that the codification of Hindu personal law did not bring any change or reform. By way of codification discrimination that the women were being subjected to was acknowledged. However, no further measures were taken in this regard. Nonetheless, the codification of Hindu law was lauded as a path breaking in the field of social reform and was the subject of continuous reference in discussions on a uniform civil code.

The Indian legislators merely assumed the roles of their western colonizers and drafted the codified Hindu law, unifying various categories within the definition of Hindu and sort through the different diverse religious practices and principles to cull out only those principles which were appealing to their western British homogenous minds. In fact, many provisions have been borrowed from other religions of the world, such as divorce, but because of the different personal laws that functioned separately in a close knit society, such references and examples could be considered as societal reforms.

Hence, before celebrating aspects of universality, it is necessary to see the darker side of the codification of Hindu law. Even after codification of the personal law, the Hindu woman still suffers from inferiority complex. The western ideals of monogamy, divorce and maintenance certainly cured some of the afflicting diseases in Hindu law, but for those Hindu communities who were much ahead of the western ideals were brought back into a much more regressive personal law regime. For instance, Kerala’s, *marumakattayam* system, which was applicable to the Kerala Muslims prior to the adoption of the Shariat Act, 1937, had a well-developed and progressive system of divorce and maintenance systems. The matrilineal-based system also had well developed inheritance laws for women.

Giving these forms of divorce the right to co-exist with the contrary requirements of the Hindu Marriage and Divorce Act, amounts to declaring that the new law has no teeth at all. It is not surprising, therefore, that barring a small section of the urban educated elite in India, very few people go to court to get their marriages dissolved. Often the women are abandoned

⁴⁶⁴ Madhu Kishwar, “Codification of Hindu Law: Myth and Reality” Economic and Political Weekly, Aug. 13, 1994, available at <http://www.economicandpoliticalweeklt.org/> (last visited on June 20, 2018).

by their husbands and thus divorced de facto without any formal procedures, or the matter is settled through the mediation of biradari elders. In fact, if any example has to be carved out of the present codified Hindu law then it should be that how without recognizing the difference in stature and socialization of women, social reforms can in fact become regressive. First and foremost, there must be wide spread awareness about the women's rights amongst the general public then only the reforms can be proclaimed. A good example is monogamy which became a norm to be followed by the Hindu men after the codification of Hindu law. The discontent of the Hindu community towards monogamy and the exclusion of others were evident even before the Supreme Court.

The introduction of rule of monogamy and the prohibition of polygamy without stirring social consciousness have led to the continued practice of polygamy of Hindu men, except that now they were safer to escape the claws of the law because of the definition of valid marriage as enumerated under the Hindu Marriage Act, 1955. Saptapadi, lajja home etc. were made requisites of a valid Hindu marriage. Other forms of marriage that could have been accepted in other Hindu communities have not been respected. Hindu man could now easily escape the clutches of law by taking this defence that his second marriage was not a valid one as per the requirement laid down under the Hindu Marriage Act, 1955.⁴⁶⁵ This leads to weakening the position of the second wife. The second wife had no safeguard provided to her under her own uniform codified law.⁴⁶⁶

Moreover, the achievement of the goal of equality for women cannot be achieved purely by law. Whatever the laws, including the Dowry Prohibition Act, 1961, Section 498-A and the Indian Penal Code 1860, the Protection of Women from Domestic Violence, 2005, the Hindu Succession Act, 1956, which was amended in 2005, was not able to provide much assistance. More concrete steps have to be undertaken in order to socially and economically empower women so that they are work needs to be done to increase the social and economic influence of women before they can take benefit of all the laws that guarantee equality to them.⁴⁶⁷

This sums up the lesser taken route of discussing the pitfalls of having a Uniform Civil Code and coaxes us to take the question of rights of women, women who do not belong to homogenous groups and come from different social and religious setups looking forward to

⁴⁶⁵ Flavia Agnes, "Hindu Men, Monogamy and Uniform Civil Code" *Economic and Political Weekly*, Dec.16, 1995, available at: <http://www.economicandpoliticalweekly.org/> (last visited on June 25, 2018).

⁴⁶⁶ Flavia Agnes, "Liberating Hindu Women" *Economic and Political Weekly*, March 7,2015. available at :<http://www.economicandpolitcal weekly.org/> (last visited on June 28, 2018).

⁴⁶⁷M.P.Singh, "On Uniform Civil Code, Legal Pluralism and Constitution of India" 5 *JILS* (2014).

specific reforms endemic to their specific existential realities and not a uniform social reform which might lose its progressiveness in the effort to unite. Hence uniformity cannot be expected to be a perfect solution to multitude and diverse gender inequalities.

First of all, one needs to understand as to what is the moving jurisprudence behind having a uniform civil code? Is it to integrate the nation or is it for the eradicating the various forms of discrimination that is prevalent in every personal law. These two objectives of uniform civil code are totally different from one another. It was said that the preliminary discourse around the uniform civil code was towards national integration, and gender equality was a fortuitous consequence. Today, however, the uniform civil code is being viewed as a solution to achieve gender equality. If this is the case, the dialogues on uniform civil law have sadly missed their mark. In fact, the uniform law which will be applicable to all uniformly is the desired aim and as Dr. Ambedkar had wanted that the society should move towards realising this objective.

Citing example of uniform criminal law as a bench mark to achieve uniformity of personal laws is not prudent. Personal laws govern family relations of a person. Therefore, the uniformity of personal laws must be treated much more subtly.

We have to deal with two issues that are completely ignored in the current context of uniform civil code. First of all, how the uniformity in personal laws can be achieved without disturbing the diverse essence of all aspects of society. How can one differentiate as to what practices of a community are backward what makes us think that the practices of a community are upside down and unfair?

The second question is whether uniformity can be an answer to the controversy surrounding personal laws. Whether gender inequalities that exist in every personal law can be completely rooted out from the society by enacting a uniform civil code. This question relates to the previous question. The definition of inequalities may differ from one community to the other community. Thus, first and foremost the types of injustices prevalent in different society and communities needs to be identified then accordingly addressed. The first step is to abolish the unjust traditions that are prevalent in that particular society. Unless and until the injustices and inequalities that exist amongst different personal laws and that is prevalent in different society, else no matter how good an initiative may be taken it won't result into a positive outcome. One of the positive effects with regard to discourse on uniform civil code is that it brings to the forefront anomalies that subsist in the personal laws and enlightens the community to bring necessary changes as per the changing times. However, all this is a time consuming exercise which may or may not result to the desired outcome.

Time and again the debate on uniform civil code reminds people of the ailments in their personal law and reminds the people to bring reforms keeping into consideration the present scenario. For this the people can take inspiration from such other community who have reformed themselves with the contemporary times. Lastly, one should remember that all this is a slow process, and unreasonable haste would only lead to failure and not to the desired result.

Sum Up

The spirit of Article 44 makes it crystal clear that the state is under the constitutional obligation to endeavour to make efforts towards one civil code in India. It is however, unfortunate to point out here that we have badly failed to carry out the constitutional obligations. The discussion on the academic response to uniform civil code undoubtedly proves beyond the shed of doubt that the idea of uniform civil code has been opposed on the ground that the personal law is a part of religion and culture. And the constitution guarantees to the citizens right to practice their religion and culture. The discussion on the role of the judiciary discloses that it has made earnest efforts towards securing a uniform civil code. The judiciary has reiterated the significance of having a uniform civil code for the entire citizen of the country. And the court has on number of cases directed the state to take necessary steps in this regard. Time and again the government have desired to implement a uniform civil code with no success. However, when the Bharatiya Janata Party (BJP) came to power in 2014 the issue with regard to the uniform civil code was once again brought to the forefront.

The Narendra Modi-government had requested the Law Commission to study the implementation of a uniform civil code in the country. Uniform civil code has always been one of the agenda in the election manifesto of the BJP. After it came into power it has initiated steps towards securing the same. Ever since triple talaq became a debatable issue, the demand for enacting a Uniform Civil Code was once again reiterated. Thus, in the year June 2016, Law Commission of India was given the task to examine as to whether it is feasible to introduce uniform civil code in India. And the Law Commission invited feedback and had solicited the views from the people. Anybody interested was required to submit their suggestions along with the questionnaire dated 7 October, 2016, that was prepared by the Law Commission. The Law Commission Chairman, Justice Balbir Singh Chauhan was of the view that the Uniform Civil Code cannot be implemented and the Commission has

recommended to reform the personal laws by the community themselves. Since freedom of religion is guaranteed by the Constitution thus, to do away with personal laws completely and be administered by a common civil code is not possible. The demand for Uniform Civil Code garnered attention after the decision of Triple Talaq by the Apex court. The Law Commission of India had asked the stakeholders for their suggestions on uniform civil code and all such suggestions and proposals were to reach and were to be submitted by April 6 2018.

CHAPTER VII

CONCEPT OF PERSONAL LAWS IN SAARC COUNTRIES

South Asia as a region connotes Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Srilanka. They all form the regional institutional grouping called SAARC (South Asian Association for Regional Cooperation). In South Asia, Muslim-majority Pakistan, Bangladesh, Afghanistan and the Maldives are Islamic states. Although Buddhist-majority Sri Lanka stops short of declaring Buddhism as the state religion, it does place it foremost. Bhutan, in its constitution, declared Buddhism as the spiritual heritage and, Hindu-majority Nepal's Constitution defines Nepal as a secular state.

7.1. Pakistan

a. 1956, Constitution of Pakistan

In August 1947, delivering the inaugural address in the Pakistan Constituent Assembly, Mohammad Ali Jinnah said:

“We are starting with this fundamental principle, that we are all citizens of one state. I think we should keep that in front of us as our idea and you will find that in the course of time Hindus will cease to be Hindus and Muslims will cease to be Muslims, not in the religious sense because that is the personal faith of each individual but in the political sense, as citizens of the state.”⁴⁶⁸

These words were indeed pregnant with significant implications. It may apparently look surprising to have heard such secular views from the founder of a state the very basis of which was communalism and religious separatism.⁴⁶⁹ The interim Constitution of Pakistan drawn from the Government of India Act, 1935, remained un-replaced till 1956. There was nothing in its provisions determining the position of Islamic law in the country. It only mentioned subjects like marriage, divorce, wills and succession, in the Concurrent List without restricting the powers of the legislatures in any way in regard to these subjects. The first step in the framing of a new Constitution was taken in March 1949, when the Constituent Assembly passed the “objectives resolution”. The resolution portrays Pakistan as a state in which the Muslims should be able to organize their lives in the individual and

⁴⁶⁸ Pakistan Constituent Assembly Debates, 19-20 (1948).

⁴⁶⁹ Tahir Mahmood, *Muslim Personal Law: Role of the State in the Indian Subcontinent* 156 (All India Reporter, 2nd edn., Nagpur, 1983).

collective spheres as per the teachings and requirements of Islam as laid down in the Holy Quran and the Sunna.”⁴⁷⁰

Over a period of five years that followed, the Constituent Assembly could not decide on the true import and implications of this clause in the objectives resolution. The ulema demanded a theocratic state; the elite refused to accept dominance of theocracy. The conflict was problematic and could not be easily resolved. The assembly, however, did complete a draft Constitution by September 1954. On 24 October 1954 the first Constituent Assembly was dissolved and after hectic political and judicial activity was replaced by a second Constituent Assembly in November 1955. As a result of the latter’s deliberations the first Constitution of Pakistan was adopted and enforced on 29 February 1956.⁴⁷¹ As per the Constitution, Pakistan has been defined as an "Islamic Republic" wherein "the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, should be fully observed."⁴⁷²

Besides the Preamble the identification with Islam in the 1956 constitution continues in several articles and the Directive Principles of State Policy (Part III) as follows: (i) steps shall be taken to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy Quran and Sunnah. (2) the state shall endeavour, as respects the Muslims of Pakistan, (a) to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah; (b) to make the teaching of the Holy Quran compulsory; (c) to promote unity and observance of Islamic moral standards; and (d) to secure the proper organization of Zakat, Wakfs and mosques. More important, however, is Article 98 which lays down that "no law shall be enacted which is contrary to the rules as laid down in the Holy Quran and Sunnah" and "existing law shall be brought into conformity with such injunction.”⁴⁷³ The question whether a law was repugnant to Islamic injunctions was to be decided by the national assembly not by the ulama⁴⁷⁴. A Commission was to be adopted to recommend measures for adapting the existing law to “Islamic injunctions”.⁴⁷⁵

⁴⁷⁰ G.W.Chowdhary, *Constitutional Development in Pakistan* 35 (1969).

⁴⁷¹ Ibid.

⁴⁷² Preamble to the Constitution of the Islamic Republic of Pakistan.

⁴⁷³ See, The Constitution of Pakistan.

⁴⁷⁴ Ulama (singular ‘Alim means a religious scholar and a follower of one of the various schools) believe that the laws in Islam are supreme and have long been finally settled by the great Imams - that is the founders of the various schools. They are most reluctant to give authority to any organ or body including themselves to depart from the opinions of the Imams. See, Abdul Ghafur, “Islamization of Laws in Pakistan: Problems and Prospects” *Muslim Islamic Studies* 266 (1987).

⁴⁷⁵ Note: The term ‘existing laws’ occurring in Article 198 included Muslim Personal Law was very clear from the explanation appended to the article that its provisions would not affect the personal laws of non-Muslims.

b. 1962 Constitution of Pakistan

The years that followed the promulgation of the first Constitution witnessed that President Iskander Mirza, who had little regard for religious ideology and preferred to keep religion out of state affairs, did nothing to enforce the above mentioned “Islamic provisions” of the 1956 Constitution. In any case, the 1956 Constitution proved to be a short lived measure as it was abrogated and replaced by martial law in October 1958. Under the martial law Pakistan had to be governed in accordance with the 1956 Constitution, including its “Islamic provisions”.

In February 1960 Ayub Khan set up a Constitution Commission in accordance with whose recommendations a new Constitution was drafted and promulgated in March 1962. As regards Article 198 of the late Constitution (of 1956), the Commission had recommended that since there was great diversity of juristic opinion within the fabric of Islamic injunctions a high power Commission should first evolve unanimity with regard to fundamentals, before the existing laws were brought into conformity with such injunctions.⁴⁷⁶ Nevertheless the 1962 Constitution made provisions for a council of Islamic ideology to advise the state on the question if a particular law enacted in future violated the Constitutional principles of law making.⁴⁷⁷ One of which was that no law should be repugnant to Islam.⁴⁷⁸ The advisory opinion of the council for Islamic ideology in this respect was not, however, to be binding on the legislature or executive.⁴⁷⁹ The first amendment to the 1962 Constitution made it clear that the mandate against repugnance to Islam meant repugnance to the “teachings and requirements of Islam as set out in the holy Quran and the Sunna.” It was also made clear that in the application of this principle to the personal law of any Muslim sect, the expression ‘Quran and Sunna’ would mean the “Quran and Sunna as interpreted by that sect.” The call for unanimity in law given by the Constitution Commission was, thus, overlooked by the framers of the new Constitution. In other words, the diversity of legal principles within the fabric of the Muslim Personal Law was perpetuated. Unlike the Constitution of 1956, the new 1962 Constitution originally did not include a mandate for the adaptation of the existing laws to Islamic injunctions. The first amendment, however, reintroduced that mandate.⁴⁸⁰

President Ayub who was the head of the state, was responsible for the implementation of the Constitutional directives regarding Islamic law, was not as orthodox in his outlook as the ulama of Pakistan wanted him to be. In pursuance of his democratic ways he had bowed

⁴⁷⁶ Constitution Commission Report, 69(1960).

⁴⁷⁷ Second Constitution of Pakistan, 1962, arts. 199-206.

⁴⁷⁸ Ibid, Part 11, “Principles of Law Making and Policy”.

⁴⁷⁹ *Supra* note 8.

⁴⁸⁰ Mahmood, *Supra* at 160.

to the wishes of the majority in agreeing to the amendments of the second Constitution in order to make its “Islamic provisions” as rigid as they were under the 1956 Constitution. He did not show much enthusiasm to carry out the mandate relating to Islamic injunctions as understood by the ulama. On the contrary even before the enforcement of the new Constitution, he promulgated the Muslim Family Laws Ordinance of 1961; and the ulama were sure about it. Leaders of the Jamaat-e-Islami (including Maulana Maududi and luminaries of Karachi’s Dar-ul-Uloom like Mufti Mohammad Shafi) along with large number of their followers and admirers opposed Ayub’s policies tooth and nail. They could never “pardon” Ayub for his failure to build up Pakistan as a “truly Islamic state” governed wholly by Islam. Their warth was one of the factors which led to Ayub’s downfall. On 25 March 1969 he abrogated the 1962 Constitution and transferred power to General Yahya Khan.⁴⁸¹

c. ‘New’ Pakistan’s Constitution, 1973

Within four years of Ayub’s downfall, misdeeds of the Yahya regime resulted in the dismemberment of Pakistan and liberation of Bangladesh. Under the civilian rule of Zulfikar Ali-Bhutto a third Constitution was adopted. The 1973 Pakistan Constitution can be characterized as “Islamic, federal and democratic.” It established a parliamentary government with a federal structure and an independent judiciary and expressly provided for many fundamental rights for its people, including the right to freedom of speech, expression, and press.⁴⁸² This included freedom to establish and practice any religion.⁴⁸³

The 1973 Constitution also contained many provisions that signalled the important role of Islam in the structure and governance of the state. Among the Islamic provisions contained in the Constitution were the following: First, Islam was established as the state religion. Second, no laws were to exist that were “repugnant” to Islam.⁴⁸⁴ Third, the President was charged with establishing a “Council of Islamic Ideology.” While these provisions

⁴⁸¹ Ibid.

⁴⁸² These guarantees can be found in article 19 of the Constitution of Pakistan, which reads:

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.

⁴⁸³ “Freedom of conscience and the right to profess, practice, and propagate any religion, subject to public order and morality, were guaranteed. Every religious association and every sect thereof was guaranteed the right to establish, manage, and maintain its religious institutions.”

⁴⁸⁴ Specifically, one provision mandated that “no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and the sunnah,” while another required that any existing laws also “be brought into conformity with injunctions of Islam as laid down in the Holy Quran and sunnah.”

demonstrated the important role of Islam in the governance of Pakistan, they fell short of establishing a nation governed expressly by Shari'a law, and were balanced by the distinctly democratic guarantees also found in the Constitution.⁴⁸⁵

d. The Zia ul-Haq Regime and the Islamization of Pakistani Law

In Zia-ul-Haq, the army Chief General, who ruled the country from 1977 to 1988, the Islamic ideology of Pakistan found its staunchest champion. Immediately after he captured power on 5 July 1977 through a military coup, he declared: 'Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam. That is why I consider the introduction of Islamic system as an essential prerequisite for the country.'⁴⁸⁶ Zia viewed his regime as the "guardian of the faith and made Islamization of the law a primary objective."⁴⁸⁷ General Zia-ul-Haq announced a program of legal Islamization for Pakistan in February of 1979. An initial step involved amending the Constitution by adding Article 203-D, which established a Federal Shariat Court.⁴⁸⁸ The most important aspect in Zia's Islamization program involved the enactment of Islamic criminal legislation.

Within a few days, martial law was declared and several Quranic punishments were introduced through the Hudood Ordinances (1979). In 1984 the Qanun-e-Shahadat (law of evidence) became the law, which replaced the Evidence Act of 1872 to bring it in 'conformity with Islam'. In addition, three amendments (popularly referred to as the "blasphemy laws") were added to the Pakistan Penal Code in 1980, 1982, and 1986, which criminalized "the defiling, by words or acts, of the Prophet Mohammed and his wives and

⁴⁸⁵ Matt Hoffman, "Modern Blasphemy Laws in Pakistan and the Rimsha Masih Case: What Effect—if Any—the Case Will Have on Their Future Reform" Vol. 13, Issue 2, *WUGSLR*.

⁴⁸⁶ This proclamation came among other remarks that included Zia accepting the challenge of leading Pakistan "as a true 'soldier of Islam'" and opining that "Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam." He also promised a commitment to democracy and holding elections moving forward, saying via radio and television broadcast shortly after taking power that "he had faith in democracy and that elections would be held in ninety days and power would be transferred to the elected representatives of the people." Ultimately, however, Zia made good only on his pledge to make Pakistan and its laws more overtly Islamic. *Id.* at 377.

⁴⁸⁷ In addition, Zia used his commitment to pursuing Islamization both to give himself political legitimacy and to justify "his retention of dictatorial powers and the suspension of constitutional rights." Zia's rise coincided with the increased prominence and authority of the Islamic fundamentalist groups whose activism had led to Bhutto's downfall, as he "relied upon the Islamic fundamentalist groups in the execution of his Islamization policy." For this reason, therefore, "the religious groups were given enormous opportunities to serve as judges, to control government television, to set requirements for university courses, and to attain government towned property to build mosques."

⁴⁸⁸ This constitutional amendment was the first step taken by Zia towards his programme of Islamization. The specific role of the Shariat Court was to determine 'whether or not any law or provision of a law [was] repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunna' and [to] rescind laws found to be in conflict with Islam."

relatives and the desecration of the Quran. The amendment of 1986 made such defiling of the Prophet a capital offence.”⁴⁸⁹

Whether Zia-ul-Haq’s Islamisation drive worked effectively or not, the Islamic tone set by him lingered on even after his death in 1988, largely because his Islamism had the full support of Jamaat-i-Islami and Tabligh-i-Jamaat, the influence of which went on increasing in Pakistani society because of international aid. The restoration of democracy and the electoral process that followed his death did not thus obliterate the Zia legacy. Even the regime of Benazir Bhutto (1988-90), which made women more visible on the media, lifted the ban on their participation in spectator’s sports and improved their job status, did precious little to do away with the laws of the Zia regime. So was the case with Muhammad Nawaz Sharif, who became the Prime Minister in October 1990 following the interim government of Ghulam Mustafa Jatoi (August- October 1990). Sharif went a step further by passing the Enforcement of Shari’ah Bill in the National Assembly in May 1991, which Zia had not been able to effectively do. Sharif actually had no choice. His Pakistan Muslim League had come to power with the support of Jamaat-i-Islami and other religious groups, and during the electoral campaign he had made such a commitment to the ulema that he would ensure the passing of the Bill. The Shariat Act was intended to ensure the continuing process of bringing civil law into conformity with Islamic injunctions. Although it did not happen in reality, it was, at least in theory, meant to undercut the authority of the civil courts.⁴⁹⁰ In 1999 Nawaz Sharif was deposed and Pakistan was once again brought under a military dictatorship led by General Pervez Musharraf, which virtually coincided with an extreme form of Islamic militancy in many parts of the world, an important theatre of which was Pakistan.

⁴⁸⁹Sections 295-A, 295-B, and 295-C of the Pakistan Penal Code, read as follows:

295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting Its religion or religious beliefs: Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

295-B. Defiling, etc., of Holy Qur'an: Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract there from or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine. Act XLV of 1860, PAK. PENAL CODE, *amended by Criminal Law (Amendment) Act, No. 3 of 1986, The Gazette of Pakistan Extraordinary, Oct. 12, 1986.*

⁴⁹⁰Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* 220-21 (Foundation Books, New Delhi, 1995).

It is apparent from the above discussion that the tenor of Pakistan politics has always been such that any modernist approach to politics which even remotely advocates separation of religion and state becomes an anathema for the political class. In its extreme form, this class considers only that person to be a true Pakistani who is a Sunni and also, preferably, a Punjabi, or atleast a Sunni Pathan. Ahmediyas have not been considered Muslims ever since 1974, and the Shias, who form a minority, are often on the receiving end of frequent anti-Shia violence. In this short of climate, the Pakistani state started countenancing a serious challenge from the so-called jihad industry. Although under strong U.S pressure in the aftermath of 9/11, Pervez Musharraf tried his best to cope with the problem. Musharraf banned several extremist's groups and he had tried to exhort his people about the true concept of jihad, originally conceived as a war against poverty and social evils, but it was probably too late for him to extricate Pakistan from the clutches of the Frankenstein of religious politics. There are between 40,000 to 50,000 madrassas in Pakistan, which according to Moinuddin Haider, the former interior minister of Pakistan, preach a brand of Islam which is not good for the country. In the garb of religious teaching they fan sectarian violence. His efforts to get them registered yielded little result. Only about 4,350 responded positively. As there is an intricate nexus between these madrassas, religious extremism and international Islamic funding, something like a 'Jihad International, Inc.' has emerged. One may trace the origin of International Islamic funding to the ideological conflict for the leadership of the Islamic world, between the Shite 'revolutionary' Iran and the Sunni Wahabi Saudi Arabia in the 1980s. Saudis succeeded because of their financial strength. They supported the madrassa education in many Muslim countries and also did not fail to project Iran's Shiaism as an anathema to Sunnism.⁴⁹¹ It must however be underlined that it is too simplistic to conclude that all madrassa breed fanaticism and militancy. Some of them are used by the military regime to counter the democratic forces.⁴⁹²

e. Legislation After 1947

(i). The New Shariat Act

After the creation of Pakistan as a Muslim majority state, the ulama, who dreamt of Pakistan as a state governed wholly, by Islamic socio-political norms, urged the government to amend the Muslim Personal Law (Shariat) Application Act of 1937 as applied in Pakistan so that the

⁴⁹¹ Graham E. Fuller, *The Future of Political Islam* 55(Foreign Affairs, Newyork, 2002).

⁴⁹²Yoginder Sikand, *The Indian Ulema and Freedom Struggle* 10-12 (Muslim India, New Delhi, 2004).

special provision about adoptions, wills and legacies,⁴⁹³ made in British India in 1937 could be repealed. The ulama wanted matters relating to testamentary succession and adoption, too, to be governed compulsorily by the law of Islam, in supersession of contrary usage.

The Punjab legislature was the first in the newly created state to accede to the demand of the ulama. In 1948 it enacted the Punjab Muslim Personal Law (Shariat) Application Act, 1948. The new law did away with the place given to custom and usage relating to legacies, wills and adoption in the Shariat Act of 1937 and made a few other provisions to ensure effective and compulsory application of Islamic law in all matters of personal status and succession.

The Lahore legislation had its echo in the capital of Pakistan and the government of Sind was urged to adopt it. The considerations which had prompted Muslim League leaders in undivided India to press for the protection of customs relating to testamentary succession had not vanished after the creation of Pakistan. Nevertheless, those who had created the new state in the name of Islam did not have the courage now to betray their ulama by opposing the latter's move to get un-Islamic usages superseded by religious laws. In 1950 the Muslim Personal Law (Shariat) Application (Sind Amendment) Act was promulgated on the lines of Lahore legislation of 1948. The princely states of Bahawalpur and Khairpur which in pre-partition days had no laws parallel to the British India Shariat Act of 1937 had become parts of Pakistan. Joining the process of Islamization, these states agreed to enforce laws on the pattern of the new Shariat Application Acts promulgated in Lahore and Karachi. Hence, the Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1951, and the Khairpur State Muslim Female Inheritance (Removal of Customs) Act, 1952, were put on the statute book. No steps were taken in the erstwhile East Pakistan for the amendment of the Shariat Act. The reason obviously was that the religious leaders of Karachi and Lahore were neither much active nor, indeed, interested in Dacca. The ulama of Bengal perhaps lacked in the religious zeal and fervour which in West Pakistan had resulted in the promulgation of the new Shariat Application laws.

When the whole of West Pakistan came under a unified legislature it was deemed expedient to enact a new consolidated law relating to the application and scope of the Muslim Personal Law, replacing all the provincial and regional legislation on the subject. The move had full support of the ulama and other religious minded leaders of Karachi, Lahore, Peshawar and Quetta. Accordingly, the West Pakistan Muslim Personal Law (Shariat) Application Act

⁴⁹³ In respect of these subjects the application of Islamic law, it will be remembered, was not made obligatory.

came into existence in 1962.⁴⁹⁴ In 1963, Ordinance no. 39 amended some provisions of the Act enforced earlier.⁴⁹⁵

It is notable that limited life-estate held by women as well as successive legacies were repugnant to the Islamic law of inheritance; the former because they did not give the women holder her full share under Islamic law and the latter since they violated the Islamic principle of “bequeathable third”. The termination of both under the Act of 1962 was meant to apply compulsorily the Islamic law of inheritance and wills. The Act was made applicable to the whole of the “Province of West Pakistan” which means (with the exception of tribal areas) the entire Pakistan. It expressly repealed the Shariat Act of 1937 in its application to West Pakistan and also abrogated all provincial laws relating to the scope of the Muslim personal law.

(ii). Family Laws Ordinance 1961

In pursuance of the goal of Islamization of laws, a Commission was set up by the government of Pakistan in August 1955 to survey the laws relating to marriage, divorce and succession with a view to suggesting means for their adaptation to true Islamic teachings. Popularly known as the marriage Commission, it was constituted by Khalifa Shujauddin and on his death was succeeded by former Chief Justice Main Abdur Rashid. In July 1956 the Commission submitted its report recommending certain significant reforms. The personnel of the Commission as well as its report attracted severe criticism from various sections of citizens. People were disappointed to find that except Maulana Thanvi no other member of

⁴⁹⁴ Act V of 1962.

⁴⁹⁵ Note: The salient features of the Act as amended by the Ordinance of 1963 were:

(i). The difference between agricultural and non-agricultural properties for the purpose of applying Muslim personal law as found in the pre-partition Shariat Act of 1937 was wholly abolished.

(ii). Testamentary succession was as much subjected to compulsory application of Muslim personal law as intestate succession had been ever since 1937. The choice between custom and Islamic law in this regard given to Muslims by the Shariat Act of 1937, was taken away.

(iii). It was provided that in regard to adoption too, Muslims would be governed by the Muslim personal law and would have no right to plead a contrary custom in that regard (which is possible under the Shariat Act of 1937).

(iv). Limited estates in respect of immovable property held by Muslim women under customary law were terminated; and it was provided that such estates would devolve upon the heirs (including the holders) of their last full owners in accordance with the Islamic law of inheritance.

(v) Further operation of legacies created in favour of several successive legatees was to cease upon the death of the legatee-in-enjoyment; and it was provided that such legacies would devolve on the testator's heirs in accordance with Muslim law of inheritance.

(vi). It was laid down that if any person entitled, as an heir, to a share in any limited estate or legacy terminated by the new legislation was not alive at the time, his entitlement would devolve upon his own heirs according to the Islamic law of inheritance.

the commission was a traditional *alim* and that all other were western educated modern men and women. Their expectation that the function of recommending means for the Islamization of the law would be entrusted exclusively to ulama was belied; and they were sore about it. Molvi Mohammad Taqi Amini of the Dar-ul-Uloom, Karachi wrote:

“It was necessary that this Commission should have been constituted by such ulama who have spent their lives in the study of the Quran and Sunna, on whose knowledge and religious insight people have full confidence. On the contrary, except Maulana Ehteshamul Haq, no other alim was taken in the Commission and it was dominated by those who never in their lives had a chance to study the Quran and the Sunna. The result is that these people have formulated certain recommendations which are wholly against the Quran and Sunna, and they had rejected the points made by Maulana Ehteshamul Haq.”⁴⁹⁶

It is notable that Maulana Ehteshamul Haq did not agree with the findings of the other six members of the Commission and submitted a long dissenting note. In the Gazette of Pakistan the Commission’s report was published, followed by a general demand that Maulana Ehteshamul Haq’s dissenting note should be published too. It then appeared in an extraordinary issue of the gazette brought out on 30 August 1956.

Maulana Abul Ala Maududi of the Jama’at-e-Islami, Pakistan was one of the ulama who had sent detailed answers to the questionnaire sent out by the Commission. Nearly all his arguments and suggestions were overlooked by the Commission. He and other leaders of the Jama’at-e-Islami were therefore bitterly critical of the Commission’s report and many religious and political parties and organisations joined them.⁴⁹⁷ There was, however, another section of people who hailed the recommendations of the Commission. Some members of the Anjuman-e-Tulu-e-Islam (a *ghayr muqallid* organisation whose members do not believe in blind adherence to traditions without ascertaining their veracity) expressed support for the Commission’s report. The opponents to the report were however in an overwhelming majority and the supporters could not have their voice heard. Naturally, therefore, the then government did not have the courage of taking action on the commission’s report.

The next few years witnessed many changes in the government in quick succession, after a spell of political instability the country came under the military rule. The new regime made a plan to implement the recommendations of the Commission by issuing an ordinance for that purpose. As the government’s intention became known, opposition was again voiced by the ulama in various parts of the country. Maulana Maududi of the Jama’at-Islami and

⁴⁹⁶Molvi Mohd. Taqi Usmani, *Hamarey Aili Masail*, 13 (1962).

⁴⁹⁷*See*, Khurshid Ahmed, *Marriage Commission Report X-rayed* 33-34 (1959).

Maulana Mohammad Shafi of the Dr-ul-Uloom, Karachi (a former member of Pakistan Law Commission), were in the forefront of opposition. In April 1960 a group of fourteen ulama of Punjab met in Lahore to protest against the move regarding the implementation of the recommendations. A similar meeting of ulama opposed the move in a grand session held at Peshawar at about the same time. Eighty-four ulama of erstwhile East Pakistan too sent a memorandum to Field Marshall Ayub expressing their strong opposition to the Commission's report. The theme of all these protests was indicated by what Maulana Mohammad Shafi wrote in a letter dated 1 April 1961 to Ayub:

“After coming to power you have announced your plans to undo many wrongs done or contemplated by the previous governments recommendations of the Family Law Commission are among the reminiscences of those unfortunate days. The previous governments did not implement them in view of their popular opposition. We wish, instead of adopting those recommendations you had appointed a new Commission to make fresh recommendations...most of the present recommendations conflict with Islamic laws in letter and spirit.⁴⁹⁸

For reasons quite unknown, however the Ayub Khan regime did not budge before the organised protests by the ulama. In March 1961, it promulgated the Muslim Family Laws Ordinance,⁴⁹⁹ based on the recommendations of the Commission. Some more provisions were introduced in it by two other successive Ordinances.⁵⁰⁰ The new measure from the very beginning became the target of severe criticism by majority of the ulama so much so that when martial law was lifted and a national assembly constituted, the ordinance was discussed in it and the assembly decided to refer it to Islamic consultative council for its opinion. The ordinance however, was never repealed or modified.

⁴⁹⁸ Text of the letter is found in Mufti M. Shafi, *Ali Qawanin par Mukhtasar Tabsera*, 13-19(1963).

⁴⁹⁹ Muslim Family Laws Ordinance was a brief document consisting of thirteen short sections. Its main features included:

(i). All Muslim marriages must be registered. A marriage that is not solemnised by the Nikah Registrar has to be reported to him by the person who has solemnised it.

(ii). Polygamy is discouraged. Only if found 'necessary and just' by an arbitration council headed by a civil official, and after the first wife's consent has been obtained can bigamy be allowed.

(iii). Divorce through 'triple talaq' is abolished and one would have to follow a certain process through the Arbitration Council before it is granted.

(iv). In respect of succession, an orphaned grandchild would receive the share equivalent to that which its father or mother would have received if alive. This provision was the most controversial one and the ulema strongly criticised it as it was in contravention of the Quran and the Sunnah. Ordinance No. 8 of 1961.

⁵⁰⁰ Ordinance No. 21 and 30 of 1961.

The provisions of the Pak-Bangla Ordinance were admired by Western critics who do not find them in any serious conflict with the traditional laws of Islam.⁵⁰¹ But the ulama not only in Pakistan and Bangladesh but also in India, regarded the Ordinance as a wholly “un-Islamic” measure.

(iii). Reaction to Reform

Reform of the traditional family law has been attempted in Pakistan under the garb of “adapting” the existing laws to “true Islamic principles”. The claim to such an adaptation may be correct only if the principles of Islamic law are seen in their true perspectives and interpreted in their true spirit. On the other hand, if retention of the traditional interpretation of the classical principles is insisted upon, one will find a conflict between the same and the reforms. It is regrettable that many ulama of Pakistan and their followers had rejected the reforms by shutting their eyes to the rationale behind the traditional Islamic principles. There were however, also people who were keen on setting aside the obsolete principle of *taqlid* and were willing to accept the new reforms as they find them in conformity to the “true Islamic ideals”. Society in Pakistan was thus marked by a conflict between conservative and orthodox elements.

Maulana Amin Ahsan Ishahi, a former member of the Pakistan Law Commission, was a staunch supporter of codification of Islamic personal law on the basis of a suitable selection of legal principles from all the schools of Islamic law. He advocated the idea that in the social conditions of Pakistan and exclusive adherence to any one school of law was not advisable. Maulana Islahi was one of the few ulama of Pakistan who accepted the equal validity and utility of all the schools of Islamic law and on the basis wanted the personal law to be codified. Among the supporters of revolutionary reform in the area of family law in Pakistan were also people belonging to the Aanjuman-e-Tulu-e-Islam- an organisation inspired by the reformist thoughts of Ghulam Hasan. They did not believe in blind *taqlid* and they were convinced that many of the so-called traditions are unreliable or fabricated.⁵⁰²

⁵⁰¹ See, for instance, N.J Coulson, “Reform of Family Law in Pakistan,” *Studia Islamica*, Fasc. VII, 133-55 (1956); “Islamic Family Law, Progress in Pakistan,” in J.N.D. Anderson (ed.), *Changing Law in Developing Countries* 240-257 (1963).

⁵⁰²For instance, they did not agree that an apostate is to be killed or that it is lawful to indulge in sex with female slaves. Similarly, scholars belonging to this school of thought fully support the view that in the estate of a grand parent issues of his predeceased children should get the same share as would have gone to the link parent if alive. Also an absolute freedom to contract a bigamous marriage and an arbitrary power to pronounce divorce, both are rejected by them.

Among the socially progressive people who found nothing wrong in the reforms were lawyers, social workers and political leaders. S.S.Mohammad,⁵⁰³ A.I.Kazi,⁵⁰⁴ and M.Noorani,⁵⁰⁵ were amongst those lawyer-writers who did not regard the reform of Muslim personal law carried out in Pakistan as an un-Islamic measure. Justice Hamoodur Rehman of the Supreme Court of Pakistan was another enthusiastic supporter of the reforms introduced in the country in the area of Family Law.⁵⁰⁶

Members of the Marriage Commission themselves (apart from late Maulana Ehteshamul Haq) were satisfied; it is notable that their recommendations did not violate any provisions of the Quran and the Sunna and they would rather facilitate a better implementation of Islamic social ideals. They, therefore, disavowed any intention to introduce foreign principles into the fabric of Islamic law. They asserted that these reforms meant restoration of the “true Islamic laws” themselves.

On the other hand, leaders of the Jamma’at-e-Islami, Pakistan were convinced that what is now known as Muslim personal law (unreformed) does not represent the true socio-legal ideals of Islam, do not want any interference in the matter by the state. In their opinion the prevailing practices and usages relating to polygamy and divorce are in themselves un-Islamic; but when the state takes steps to reform them, they criticised those steps. Obviously they did not want the traditional jurisdiction of ulama to be ousted and want that whatever reforms are necessary, the same should be effected by the ulama through *labligh*, and not by the state through legislation.⁵⁰⁷ Maulana Abul Ala Maududi, founder of the Jama’at-e-Islami rejected the report of the Marriage Commission.. Even though Maulana Maududi himself had written that unilateral divorce is against the teachings of Islam,⁵⁰⁸ but when the Muslim Family Laws Ordinance imposed restrictions on arbitrary divorce, he described it as a despotic measure opposed to Islam. It is quite apparent that he and his followers wanted the

⁵⁰³See his ‘A Commentary on Muslim Family Laws Ordinance’, (Lahore, 1961).

⁵⁰⁴See his, ‘Family Laws Ordinance’, Karachi Law Journal, 57-61 (1964).

⁵⁰⁵See his, ‘A Brief Commentary on the Muslim Family Laws Ordinance (Karachi, 1961).

⁵⁰⁶ Justice Hamoodur Rehman while speaking to the newsmen during his visit to New Delhi in December 1971, to participate in an international conference of chief justices had supported the modernisation measures been undertaken in Pakistan with great zeal . See his statement reported in all the leading dailies of New Delhi, issues of 27-28 December 1971.

⁵⁰⁷ Note: Maulana Abul Ala Maududi, founder of the Jama’at-e-Islami, was dissatisfied with some provisions of Muslim personal law. According to him, “The law in force here under the title of Muhammadan law is very much different in letter and spirit from the true Islamic Shariat; its application cannot be rightly equated with the enforcement of the Sharia of Islam.” He further said, “The law now regulating matrimonial matters among the Muslims though called Islamic law is greatly distorted. No other law has so badly affected the social life of Muslims as this so called ‘Muslim law’ has. It is difficult to find a single family in the sub-continent in which one or the other life has not been ruined because of this defective law.” See, A.A. Maududi, *Huquq al-Zaujain*, 8 (1968).

⁵⁰⁸Maududi, *Huquq al-Zaujain*, 8 (1968). *Id.* at 10.

state should keep away from matters of family law and the ulama should continue to have unfettered powers in these areas.

There was another group of ulama and their followers who refused to accept that there were any flaws in the traditional laws of Islam as applicable in Islam before 1961. Among them was the custodian of the Karachi's Dar-ul-Uloom. The former rector of the Dar-ul-Uloom, late Mufti Mohammad Shafi, was one of the most vocal opponents of reform introduced by the Muslim Family Laws Ordinance, 1961. A former luminary of Deoband, Mufti Saheb was a convinced muqallid. As Mufti-e-A'zam and Shaykh-ul-Islam of Pakistan, he had done his best to dissuade Ayub Khan from implementing the recommendations of the Family Law Commission. Thus, nearly the whole of the Muslim Family Laws Ordinance of 1961 was in the opinion of Mufti Mohammad Shafi, opposed to the teachings of Quran and the Sunna.

After the military coup of General Zia-ul- Haq in July 1977 when the introduction of the Islamic system became the essential prerequisite for the country, the supremacy of the Shari'ah was established in all branches of law.⁵⁰⁹ Through various Hudood Ordinances, the Quranic penal laws on theft, fornication, the false accusation of unchastity, the prohibition of alcohol, etc., were introduced. Jurisdictional conflicts between the Supreme court and the Federal Shari'ah courts, however, continued. The latter lacked jurisdiction over the Constitution, over Muslim personal law and the personal laws of other communities and over laws relating to court procedures and fiscal rules. The Hudood ordinances relating to criminal justice remained mostly on paper. No wonder that later, in 2003, when the Shari'ah laws were imposed in the Northwest Frontier Province, there was no discernible difference in the situation. Although this development was hyped up as the beginning of theocracy in Pakistan, a closer look at the laws showed that they were merely the literal translation into Urdu of the Enforcement of the Shari'ah Act adopted by the Federal Parliament and gazetted on 18 June 1991.⁵¹⁰

Zina Ordinance, 1979 contributed to the circumvention of the provisions of Muslim Family Laws Ordinance. Polygamy was prohibited, but there was little that the government could do to prevent it. Similarly, triple talaq or plain abandonment of the wife also continued because, in many cases, aggrieved wives accepted the situation under social pressure. Sometimes vindictive husbands and their relatives tried to use the Zina Ordinance to harass divorced

⁵⁰⁹Tahir Mahmood, *Common Civil Code, Personal Laws and Religious Minorities* 77 (N.M. Tripathi, Bombay 1995).

⁵¹⁰P. Nayak & S. Nayak, *Status of Muslim Personal Law in Pakistan* 43-75 (Kalinga, Delhi, 2001).

wives. In many cases, however, the Federal Shari'ah Court dismissed such petitions as malafied.⁵¹¹

There were thus, several means of circumventing the Muslim Family Laws Ordinance and in this the Zina Ordinance too came handy. For example, fathers who did not approve of their daughters' marriage choices filed cases of kidnapping against their husbands under the provisions of Zina Ordinance. The husband was made criminally liable for having a sexual relationship outside marriage, because their wives were forced to stand as witness against their husbands. Since the 1970s, access to the Special Marriage Act (SMA) has all but ceased because of the strict penal provisions concerning blasphemy that make it impossible for someone to renounce Islam. Since Ahmediyas/Qadiyanis were declared non-Muslims in Pakistan in 1974, it has not been clear if the Muslim Family Laws Ordinance applies to marriages involving Ahmediyas or if a Muslim woman's marriage to an Ahmediya man is valid. The courts have preferred to avoid dealing directly with this controversial issue and have instead ruled on the immediate issue at hand (the demand for maintenance and the validity of talaq). In the three known cases, it appeared that the husband was attempting to evade his legal responsibilities by claiming that the marriage was not valid and in all the cases the court ruled in the woman's favour without directly dealing with the issue of validity.⁵¹²

In Syed families, especially in Shia Syed families, women are not permitted to marry non-Syeds. If there is no suitable match for a daughter, some feudal Syed families of the Sind province will ask her to forgo her right to marriage. She then makes a formal enunciation on the Quran, or *haqbakhshwana* (literally foregoing the right). The woman is therefore condemned to a life without a husband or children and may live as a recluse. Families inflict such a fate on their daughters to avoid marrying persons of lower social status as well as to ensure that property remains within the family.⁵¹³ In June 2005, the Council of Islamic Ideology, and advisory body of the Islamisation of laws, drafted a bill to punish with

⁵¹¹Werner F. Menski, *Comparative Law in a Global Context* 322-23 (Platinum, London, 2000). In the case of *Allah Rakha v. Union of Pakistan* (2000) the supremacy of Shari'ah over the Muslim Family Laws Ordinance was reiterated. In this case the Federal Shari'ah Court ruled that while Shari'ah was a God-given law and Muslim Family Laws Ordinance was a man-given law the former would naturally receive precedence over the latter in case of a conflict between the two. The case proved that the 1961 reform was just a reformist fig-leaf meant for the educated and modernist middle class, while for an average Pakistani it meant little. See Werner F. Menski, "From Dharma to Law and Back? Post Modern Hindu Law in a Global Order" 10 Heidelberg Papers in South Asian and Comparative Politics (2004).

⁵¹²*Nasir Ahmed Shaikh v. Mrs Nahid Ahmed Shaikh* NLR 1986 Civil 659; LN 1986 Lahore 597; *Muhammad Rashid v. Mst. Nusrat Jahan Begum* 1986 MLD 1010 Lahore).

⁵¹³Women Living Under Muslim Law, *Knowing Our Rights: Women, Family Laws and Customs in the Muslim World* 75, 102, 106 (Zuban and Kali for Women, New Delhi).

imprisonment anyone who became a party to a woman's marriage to Quran. The draft bill proposed to amend Section 285-B⁵¹⁴ of the Pakistan Penal Code which prescribes life term for anyone who desecrates the Quran. The draft bill said that the marriage with the Quran had no legal standing and amounted to punishable offence under the Shari'ah Law.⁵¹⁵

It is evident from the above discussion that reform in Muslim Personal Law in Pakistan is most unlikely. Pakistan is not a theocratic state yet it does not have the political will to extricate itself from the forces of political Islam because of the complex set of vested interest. As a result, the evolution of law suffers considerably. Pakistanis satisfied themselves by merely making general programmatic statements such as the Objectives Resolution of 1949. As such their experiments with the legal modernisation of family law remained half hearted. Even the Islamisation process that started in the late 1970s could not assert itself as a coherent legal policy, resulting in some massive failures of justice. The result was that because of the partition socio-cultural and historical position of Pakistan, there could be only a combination of juristic reassessment of the Quran and some piecemeal efforts at lawmaking.

7.2. Bangladesh

Indian sub-continent got divided in 1947 on the basis of religion and a new country was born i.e. Pakistan. The two nation theory was put forward by Mohammad Ali Jinnah who was of the firm belief that Hindus and Muslims are the two separate nations and they cannot live together. But after the creation of Pakistan which was consisted of two wings West Pakistan and East Pakistan, got divided because of the hard and stubborn nature of Pakistani leadership and with the result Bangladesh came in to existence as a new state in South Asia in 1971. The birth of Bangladesh was an epoch-making event within the post-colonial order of South Asia. Led by the middle classes, a bitter and bloody war of Liberation from Pakistan was fought, based on Bangladeshi peoples' aspirations for democracy, identity and for a more progressive society. Soon after its emergence, Bangladesh adopted the four-pronged state ideology of nationalism, democracy, socialism and secularism. However, not long after the

⁵¹⁴Section 295-B: Defiling of and marriage with the Holy Quran: whosoever wilfully defiles, damages or desecrates a copy of the Holy Quran or an extract therefrom or directly or indirectly allows the Holy Quran to be used for purpose of its marriage with a female or fraudulently or dishonestly induces any person to swear on the Holy Quran never to marry anyone in her lifetime or knowingly uses it in any derogatory manner or for any unlawful purpose, shall be punishable with imprisonment for life.

⁵¹⁵ Human Rights Commission of Pakistan, *State of Human Rights in 2005* 20-21 (Human Rights Commission of Pakistan, Lahore, 2006).

emergence of the nation-state, religion re-emerged as an important factor in the country, both socially and politically. The assassination of Sheikh Mujibur Rehman and the overthrow of his government by a military coup d'état in August 1975 brought Islam-oriented state ideology into prominence by shunning secularism and socialism.

It is noteworthy that today most Bangladeshi people are not sure which comes first—their loyalty towards political Islam or towards secularism. After the fall of the —socialist-secular-Bengali nationalist Mujib government in 1975, his successors realized the importance of political Islam to legitimize their rule. The military ruled government in Bangladesh used religion and promoted it from 1975 onwards and denounced the secularist ideology. It was after 1975; Zia-ur-Rehman inserted religious principles in the constitution and removed secularism from the constitution. Thereafter a series of constitutional amendments and government proclamations between 1977 and 1988 lead the body politic towards a process of Islamisation. The erosion of the secular character of Bangladesh deepened when Gen Ershad declared Islam as the state religion in 1988. During both military and democratic regimes the controversy continues into deeper labyrinth which ultimately shaped the state politics and social life. The Bangladesh Nationalist Party (BNP) which was founded by Zia-ur-Rehman and Jamiat-e-Islami are the main promoters of religious ideology while as Awami League is the main force behind the promotion of secular ideology. In 1990 there was a democratic wave in Bangladesh but that too could not sideline the rift between secularism and religion in Bangladesh. After 1990 it was Bangladesh Nationalist Party which came to power and with it the religion got more importance both at governmental as well as at the social level. In 1996 it was secularism propagating party Awami League which formed the government but it could not change the constitution and restored the secular principle. Again it was BNP in 2002 which won the elections and formed the government at the centre and used the religion as a tool both at public forms as well as at the personal level in order to strengthen the base of its party. There were strong allegations of the rising of religious fundamentalism in Bangladesh during this period and Awami League the opposition party also accused it of using the religion for their own political benefits as there were blasts in the major towns in which a leader of the opposition was having narrow escape. In 2008 general elections Awami League had promised that it would restore the secular character of Bangladesh polity by reinstating the original 1972 constitution. After forming the government the Awami League passed the 15th amendment in the parliament in 2011 and restored the secular principle in the constitution but at the same time also accepted Islam as a state religion of Bangladesh. The

government possibly fears that any bold move for the restoration of original constitution could fuel the public unrest which is not desirable at this juncture.

The original 1972 Constitution of Bangladesh embodied the principle of secularism.⁵¹⁶ Sheikh Mujibur Rahman, widely known as the founding father of Bangladesh and Bangabandhu (Friend of Bengal), in 1972 said that secularism does not mean faithlessness, much less atheism. It simply allows the citizens of the country to practice their religion. He explained that the government does not and will never want to ban the practice of religion through the enactment of laws. He said the government would allow members of every religion—Islam, Hinduism, Buddhism, and Christianity—to practice their faith; nobody would prevent or stop them. What the government would not allow is the use of religion as a political weapon or as justification to commit grievous vices, like killings, persecutions, and rapes. He further said that religion is indeed a very sacred thing and that this sacredness of religion must not be used for political advantage. He also said secularism does not curtail people's rights but rather ensures the right of every citizen of the country to practice his religion in accordance with his free will.⁵¹⁷ However, the Fifth Amendment to the Constitution of Bangladesh abolished secularism in favor of Islam⁵¹⁸, and legalized religious political parties.⁵¹⁹ The amendment took place during the rule of Zia-ur-Rahman.⁵²⁰

A further amendment to the Constitution of Bangladesh (known as the Eighth Amendment) declared Islam as the state religion.⁵²¹ The amendment was passed in 1988 by President Hussain Muhammad Ershad.⁵²² During that time, the political parties in opposition were vocally opposed to his rule.⁵²³ Realizing that he would not be able to run the government in that critical situation, Ershad decided to incorporate a provision into the Constitution of Bangladesh that recognized Islam as the state religion.⁵²⁴ Ershad did this to satisfy the Middle

⁵¹⁶Casanova, states that secularism is a reference to more broadly to a whole range of modern secular worldviews and ideologies that may be consciously held and expressly elaborated into philosophies of history and normative-ideological state projects, as well as into projects of modernity and cultural programs. *The Secular and Secularisms*, *supra* note 21, at 1051.

⁵¹⁷Sheikh Mujibur Rahman, Prime Minister of Bangladesh, National Assembly Speech, (Oct. 12, 1972). He delivered his speech in Bangla. For an English translation, See, *Meghna Guhathakurta & Willem Van Schendel, The Bangladesh Reader: History, Culture, Politics* 334 (2013).

⁵¹⁸And incorporated *Bismillah-ar-Rahman-ar-Rahim* (meaning “In the name of Allah, the Beneficent, the Merciful”) into the preamble of the Constitution of Bangladesh.

⁵¹⁹Bangladesh Constitution amend. V, act 1 of 1979.

⁵²⁰ *Ibid.*

⁵²¹Constitution (Eighth Amendment) Act, 1988 (Act No. 30 of 1988) (Bangladesh).

⁵²² *Ibid.*

⁵²³Hussain Mutalib, Taj ul-Islam Hashmi, et.al. (eds.), *Islam in Bangladesh Politics, in Islam, Muslims and the Modern State* 100, 114 (1994).

⁵²⁴ *Ibid.*

Eastern countries and to get prompt support from pious Muslims.⁵²⁵ He asked the Prime Minister to bring the eighth amendment of the constitution to Parliament.⁵²⁶ The amendment was passed and allowed him to maintain power for another two years.⁵²⁷

At the time Islam was incorporated as the state religion in 1988, Sheikh Hasina and Begum Khaleda Zia lead the two major political parties in Bangladesh, the Bangladesh Awami League and the Bangladesh Nationalist Party (BNP), respectively.⁵²⁸ Both parties declared that they would annul the Eighth Amendment if they came in to power.⁵²⁹

Though both Begum Khaleda Zia and Sheikh Hasina became the prime minister of Bangladesh in 1991 and 1996 respectively, they did nothing to change the Eighth Amendment. In 2001, Begum Khaleda Zia again became Prime Minister with a two-thirds majority in the Parliament with the support of Jamaat-i-Islam and other Islamic political parties, so she felt like her hands were tied because she did not want to make the Islamic political parties upset. In 2009, Sheikh Hasina became Prime Minister again with more than a two thirds majority. She made a special amendment to the Constitution on June 30, 2011, Division of the Supreme Court of Bangladesh.⁵³⁰ The Appellate Division in 2010 had affirmed the judgment⁵³¹ of the High Court Division of the Supreme Court of Bangladesh, which held that secularism was one of the fundamental principles of state policy.⁵³² The original Constitution of Bangladesh, adopted in 1972, had four pillars: nationalism, socialism, democracy, and secularism.⁵³³ Secularism was removed from the Constitution of Bangladesh by President Zia-ur- Rahman, who was also Chief Martial Law Administrator, through the Proclamations (Amendment) Order, 1977 (Proclamation Order No. I of 1977) on April 23, 1977.⁵³⁴ The Parliament passed the Constitution (Fifth Amendment) Act, 1979 on April 6, 1979.⁵³⁵ The Fifth Amendment Act officially legalized, among others, the Proclamation Order No. I of 1977.

The Fifteenth Amendment of the Constitution of Bangladesh, however, re-instituted all four of the original pillars on June 30, 2011, recognizing that, although Islam is the majority

⁵²⁵*Id.* at 114–15.

⁵²⁶*Id.* at 116.

⁵²⁷*Id.* at 113-17.

⁵²⁸*Id.* at 115-16.

⁵²⁹*Id.*

⁵³⁰*Khondker Delwar Hossain and others v Bangl. Italian Marble Works Ltd. (Fifth Amendment Case)*, Civil Petition for Leave to Appeal Nos. 1044 & 1045 (2009).

⁵³¹*Bangl. Italian Marble Works Ltd. v Gov't of Bangl.*, Writ Petition No. 6016 (2000) (judgment delivered in 2005).

⁵³²*Ibid.*

⁵³³The Constitution of Bangladesh, 1972, Preamble.

⁵³⁴Proclamations (Amendment) Order, 1977 (Order No. 1 of 1977) (Bangl.).

⁵³⁵Bangladesh Constitution (Fifth Amendment) Act, 1979.

religion, other religions have equal rights.⁵³⁶ Nevertheless, the “secularism” and “Islam as state religion”⁵³⁷ provisions still exist. Werner Menski argues that according to the “plurality-sensitive perspective,” there is no contradiction in a Muslim-majority country like Bangladesh showing a commitment to Islam, provided that it both recognizes equal rights for religious minorities and provides “strong and effective mechanisms” to protect those rights.⁵³⁸ Minorities and progressives in Bangladesh are extremely unhappy with the Fifteenth Amendment of the Constitution.⁵³⁹ The present prime minister, Sheikh Hasina, is possibly too cautious about the common Islamic sentiment prevailing in the world and the State of Bangladesh’s relationship with Middle Eastern countries.⁵⁴⁰ In Bangladesh politics, Sheikh Hasina follows the footprints of her father, Sheikh Mujibur Rahman, while Begum Khaleda Zia emulates her husband, Zia-ur- Rahman.⁵⁴¹ Khaleda Zia and Sheikh Hasina did not say that they wanted to establish an Islamic state.⁵⁴² Though Sheikh Mujibur Rahman and Zia ur Rahman did not include state religion Islam provision in the Constitution, it was included by Ershad.⁵⁴³ But Sheikh Hasina did not abolish it from the Constitution.⁵⁴⁴

Bangladesh is a country that derives an important measure of its national identity from its religious character.⁵⁴⁵ Islam is the largest religion of Bangladesh; Muslims constitute 89.5 % of the population followed by Hindus who constitute 9.6 %. The remainder of Bangladesh is practices other religions such as Buddhism and Christianity.⁵⁴⁶ Personal laws govern important aspects of family life in Bangladesh. Matters such as divorce, marriage, maintenance, custody, adoption and so forth are determined by each religious community’s religious-personal law system. Therefore, people of different religions are not treated equally on the same kinds of issues. Many of the personal laws are not gender-sensitive, codified and do not accord to the demand of the time. Political use of religion, patriarchal interpretation of

⁵³⁶Constitution (Fifteenth Amendment) Act, 2011.

⁵³⁷Article 2A of the Constitution of Bangladesh provides that “The State religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Bhuddist, Christian and other religions.”.Constitution of Bangladesh.

⁵³⁸Werner Menski, *Bangladesh in 2015: Challenge of the iccherghuri for Learning to Live Together*, 1 U. ASIA PAC. J.L. & POL’Y 7, 23 (2015).

⁵³⁹ Haroon Habib, *A Return to Secularism, Almost*, HIMAL SOUTHASIAN (Nepal) (Aug. 2011), <http://old.himalmag.com/component/content/article/4588-a-return-to>

⁵⁴⁰ ShivamVij & Jyoti Rahman, *Islamic secularism’ in Bangladesh: Jyoti Rahman*, KAFILA <https://kafila.online/2011/01/11/islamic-secularism-in-bangladesh-jyoti-rahman/>.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Ibid

⁵⁴⁴ Ibid

Md. Jahid Hossain Bhuiyan, Law and Religion in Bangladesh, Brigham Young University Law Review.

⁵⁴⁵Asim Roy,*The Islamic Synergetic Tradition in Bengal* 15, 16(Princeton University Press, 1983).

⁵⁴⁶*See*, http://en.wikipedia.org/wiki/Religion_in_Bangladesh.

existing progressive laws and the persistent disparity and anomalies in the different personal laws leave the Bangladeshi women's lives in a subjugated state. In the case of Bangladesh where we have a system of pluralist society with diversity of ethnicity and religious origin, gender discrimination and anomalies are evident.

As regards marriage, polygamy/bigamy is allowed for Muslim and Hindu/Buddhist husbands. Under the Hindu law unlimited polygamy is permitted for males while polyandry for females is prohibited. In India however, by virtue of Hindu Marriage Act, 1955, monogamy has been established and bigamy is made punishable both for the male and female. Section 11 of the Act makes a bigamous marriage null and void and Section 17 makes it a penal offence. Other changes made to the laws on Hindu marriage in India include the legalization of inter-caste marriages which continues to be forbidden in Bangladesh. As far as capacity is concerned, only a person who has attained majority can enter into a marriage contract. Muslim law however recognizes the right of guardian to contract marriage on behalf of a minor. A woman is deemed to have reached majority upon the attainment of puberty and as a major, she alone has the right to consent to her marriage. In 1929, the effort was first made to enact a minimum age of marriage which would be uniform, and would apply to all communities of the then undivided India. Due to the fear of backlash from these communities, the Child Marriage Restraint Act, 1929 dealt with punitive measures and could not declare marriages, where the parties were below a certain age, void. In 1929 the minimum age was set at 14 for girls. In 1961 by virtue of the MFLO the age was raised from 14 to 16 and by the Child Marriage Restraint (Amendment) Ordinance to 18 in 1984.⁵⁴⁷ Hindu law permits child marriages and though the Child Marriage Restraint Act, 1929 limits the marriage of children by making it a punishable offence, it does not affect the validity of such marriage. Unlike the Muslim girl, a Hindu girl has no option on reaching puberty to repudiate the marriage. Child marriages and the marriage of minors with the consent of a parent or guardian are recognized under the Christian Marriage Act, 1872, as well as the Code of Canon Law. In case of providing consent to the marriage of a minor, there is noticeable discrimination in recognizing only the father as the primary legal guardian of the child. Thus Section 19 of the Christian Marriage Act, 1872 plainly excludes a mother's right to give or withhold consent in the marriage of her minor child in the presence of not only the father but also the legally

⁵⁴⁷Shahnaz Huda, "Untying the knot—Muslim Women's Right of Divorce and Other Incidental Rights in Bangladesh" 133-157 *DVS* (1994).

appointed guardian.⁵⁴⁸ As under age marriages are allowed under the religious laws and statutory laws did not declare such marriages as void, the practice of child marriage is rampantly continuing leaving the lives of the teenage girls at stake. As far as registration is concerned, although Bangladeshi law provides for registration of Muslim marriages⁵⁴⁹ through legal mechanisms, albeit faulty, there are no provisions at all for the registration of Hindu marriages.⁵⁵⁰ The lack of proof of marriage is causing considerable difficulty to Hindu women in Bangladesh who seek to validate their rights.

Muslim marriages may be dissolved by the death of the spouse, by the act of parties or by judicial process. Since Islam considers divorce to be distasteful but nevertheless a necessary evil, there exists the scope of reconciliation between the parties in most cases. The various forms of divorce are covered by Section 7 of the Muslim Family Laws Ordinance, 1961, Section 5(a) of the Family Courts Ordinance, 1985 and the Dissolution of Muslim Marriages Act, 1939. The primary and unfettered rights of dissolving the marriage lie with the husband who can according to religious law pronounce talaq. In the case of talaq the wife's consent is not required, and the declaration of talaq is extra-judicial, in no way subject to any external check.⁵⁵¹ The Dissolution of Muslim Marriages Act, 1939, provides a woman with a number of specific grounds for seeking a divorce.⁵⁵² She may obtain a decree for the dissolution of her marriage without necessarily losing her right to dower⁵⁵³ if she can invoke one or more of the grounds enshrined in the Act. The Muslim Family Laws Ordinance, 1961 has attempted to make the effects of the talaq-al-bida't a less precipitate.⁵⁵⁴ Section 7 enumerates various restrictions to unilateral, arbitrary and unencumbered divorce by husbands. By virtue of this enactment no divorce will become effective from the moment of pronouncement. Notice must be given to the Chairman of the Arbitration Council, who will call a meeting of both parties about reconciliation.⁵⁵⁵ A copy of the notice must be supplied to the wife.⁵⁵⁶ Divorce is legally effective even in the absence of proof of constitution of Arbitration Council.⁵⁵⁷ The divorce will be effective after 90 days even if no such committee was formed and no attempts made at reconciliation. The date of the receipt of notice by the Chairman is the date from

⁵⁴⁸ *Supra* note 3 at p.47.

⁵⁴⁹ The Muslim Marriages and Divorces Registration Act, 1974.

⁵⁵⁰ Shahnaz Huda, Registration of Marriage and Divorce in Bangladesh, A study on Law and Practice; (Bangladesh Legal Aid and Services Trust, Dhaka, 1999).

⁵⁵¹ Pearl, David (1987) A Text Book on Muslim personal Law, 2nd Edition; Croo, Helm, London at p.100

⁵⁵² Section 2 of the Dissolution of Muslim Marriages Act, 1939 (as amended up to 1986).

⁵⁵³ *Id.* Section 5.

⁵⁵⁴ *Abdul Kadir v. Salima* (1886) 8 ALL. 149.

⁵⁵⁵ Section 7(3) of the MFLO, 1961.

⁵⁵⁶ Section 7 (1) of the MFLO, 1961.

⁵⁵⁷ *Abdul Aziz v. Rezia Khatoon*, 21 DLR 733.

which the 90 days will run irrespective of the fact that the other party may have been notified later. This is a gross procedural defect because there may be cases where the party initiating the divorce deliberately delays the serving of notice to the other party so as to deprive him/her from accessing to the Arbitration Council. The wife is entitled to her dower and maintenance until the divorce becomes effective. She is required, however, to observe iddat. The MFLO, 1961 legally abolished the need for an intervening marriage; commonly known as –Hilla’ marriage with a third person required by the religious law for a woman before she can remarry a husband from whom she has been divorced.⁵⁵⁸ The rights of women in Islam regarding the right to divorce are not equal. The man still has unfettered right to divorce his wife whereas the woman has: in the case of talaq-e-tafweez, to depend on her husband’s delegation of the right; in the case of khul, where the husband does not consent, to convince the Court that the marriage has transgressed the bounds prescribed by Allah; and in the case of faskh or judicial rescission to involve oneself in costly and complicated legal procedures.⁵⁵⁹ Even in the case of judicial dissolution of marriage, a distinct disparity exists between Muslim men and women in relation to the right to divorce. A man can obtain a divorce under any circumstance by pronouncing talaq, giving notice to the Arbitration Council and waiting for 90 days to take it effect. A woman, on the other hand, who has not been delegated the right of divorce, must have recourse to a court of law and prove one or more of the grounds stipulated. This process is not only inconvenient but also time-consuming, expensive and in most cases socially humiliating for the woman and her family.⁵⁶⁰ The social stigma attached to divorce is so pernicious for women as opposed to men, that a woman in many cases is compelled to remain with her husband under torture and suppression leading a life of jeopardy.

The dismal condition of the legal status of a Hindu woman is more evident in the case of divorce as divorce for Hindus is not possible in Bangladesh. Under no circumstances a Hindu woman has the recourse to bring a suit for dissolution of marriage. In reality, this means that many Hindu women in Bangladesh lead lives of abject misery in cases of abandonment by the husband who can marry as many wives as he wishes. The deep embedded gender biasness in Hindu law on the question of dissolution of marriage relegates women to a role of service providers, without any statutory rights. The most she may get is limited relief under which

⁵⁵⁸Section 7 (6) of the MFLO, 1961.

⁵⁵⁹Vesey, Fitzgerald, Seymour, *Muhammadan Law: An Abridgement* 154 (Oxford University Press, London, 1931).

⁵⁶⁰*Supra* note 3 at p.25.

she is entitled to separate residence and maintenance from her husband on one or more of the grounds stipulated in the Act.⁵⁶¹ A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or she embraces other religion or is living apart without justifying causes. Many of the disabilities of Hindu women have been removed in India. By the enactment of Hindu Marriage Act, 1955 bigamy is made punishable offence. This Act provided for the registration of marriage and made scopes for bringing a suit for divorce on certain grounds. The existing Hindu law in Bangladesh is a violation of the Universal Declaration of Human Rights, 1948 which declares under Article 16(a) that the right to marry and divorce is a Human Right for all.

According to the Divorce Act 1869, adultery simpliciter by the husband would not entitle a wife to dissolution of marriage, though adultery by the wife is an important weapon in the hands of the husband to get the marriage dissolved. Moreover, under Section 34, for this Act, a husband may sue the co-respondent for damages; not by way of punishment but for compensation for the loss of his wife. A wife, however, has no such redress on the same ground. The Law Commission of Bangladesh, however, submitted a draft of proposed amendment to the Divorce Act, 1989 to the Ministry of Law on 19th February, 2006 with the view to bring substantial change, relief and speedy justice to Christian women who are currently going through a complicated, restricted and time consuming process of dissolution of marriage.⁵⁶²

A Muslim mother is never a legal guardian of her child; she can only claim custodianship in limited circumstances. In Hindu and Christian law also, the mother's right to guardianship is secondary to the father's right. Under Hindu law, only men have the right to adopt, that too only a male child who will maintain the family line of succession.

As far as Muslim women are concerned, except for a few exceptional cases, most women inherit half of their male counterparts e.g. the daughter inherits half of what the son inherits.⁵⁶³ A Bangladeshi Hindu woman's right to inheritance is non-existent. Under the Dayabagha law, the right to inherit arises on the heir's capacity to confer or offer spiritual benefit to the propositus. A widowed, sonless, or childless daughter cannot inherit, as she

⁵⁶¹Section 2 of Hindu Married Woman's Right to Separate Residence and Maintenance Act, 1946.

⁵⁶² See, the detail draft of the proposed Amendment to the Divorce Act, 1869 at <http://www.lawcommissionbangladesh.org/reports/72.pdf>.

⁵⁶³ For more See, Shahnaz Huda, Women's Property Rights in Bangladesh: Effect of Religion and Custom in Development Issues Across Regions: Women, Land and Forestry Wickramasinghe. Anoja (ed.), Corrensa, Peradiniya 294-308 (Sri Lanka, 1998).

cannot afford spiritual benefit through a son.⁵⁶⁴ A widow's life-estate generally means that she is not entitled to alienate the immovable property inherited by her but only that she has the power of disposal of the income of the property. She acquires merely a very limited estate, over which she has a restricted power of alienation, and on her death or surrender, it reverts to the line of the last male owner.⁵⁶⁵ In India, the Hindu Succession Act, 1956 brought revolutionary changes in the inheritance law of Hindus. In a land-hungry country like Bangladesh, inequalities arising from inheritance rights perpetuate women's disadvantaged position perhaps more crucially than any other areas of family law. Already a number of reforms have been undertaken, mainly through the MFLO, 1961, to ameliorate some areas of discrimination for Muslims. For instance, Section 4 of this Ordinance changed the rule where the grandchild could not inherit their deceased parents' property if the grandparents are alive. By incorporating the Doctrine of Representation, now the grandchildren can inherit the same share as their deceased parents would have inherited. Nevertheless, the position of women has not benefited in any significant way from such piecemeal reforms.⁵⁶⁶ The Hindus in Bangladesh belong to the Dayabagha School. Since the laws governing Hindus in Bangladesh date back to the pre1947 period, when it was part of the undivided subcontinent, Hindu women in Bangladesh continue to face disabilities due to application of ancient discriminatory laws. There are at least twenty-seven different documented tribes in Bangladesh and they belong to about six linguistic categories.⁵⁶⁷ In some sections of the tribal populations matriarchy is the norm, thus problems evolving in the personal sphere are somewhat different from those under scrutiny herein, requiring a different matrix of assessment. A large part of the ethnic community belongs to the Christian and Hindu faiths. The Buddhists in Bangladesh have no distinct personal or civil law of their own and that from time immemorial they have followed the Hindu religious law and customs in spite of the fact that they renounced the Hindu religion.⁵⁶⁸

⁵⁶⁴MridulKanti Rakshit, *The Principles of Hindu Law—Personal Law of Hindus in Bangladesh and Pakistan 391* (Chittagong, 1985).

⁵⁶⁵Op. cit. Pereira (2002) p.45.

⁵⁶⁶Op. cit. Pereira (2002) at p.38.

⁵⁶⁷See, R.W. Timm, *Ethnic and Religious Minorities in Bangladesh, in state of Human Rights: Bangladesh* (CCHRB. 1999).

⁵⁶⁸Tahmina Ahmad and Md. Maimul Ahsan Khan (eds.), *Custody and Guardianship of Minors in Bangladesh in Gender in Law*; Ahmad, 34 (ADTAM Publishers, Dhaka, 1998).

7.3. Nepal

Nepal has a uniform civil code operative since 1963, notwithstanding the fact that it is a multi-ethnic and multi-religious state. That this code is essentially a Hindu code is another matter, which will be discussed later further. No wonder therefore that the 1990 Constitution of Nepal (which stands abrogated) is silent on the issue of personal laws of different communities for the Constitutional Monarchical Kingdom of Nepal itself is ‘Hindu’ (Article 4). Indeed, the Constitution also provides that ‘every person shall have the freedom to profess and practise his own religion as handed down to him from ancient times having due regard to traditional practices’.⁵⁶⁹

It may be argued that the 1990 Constitution may not have mentioned personal laws because the matter had already been settled through the enactment of the 1963 national legal code. A comparison with the Indian situation should clarify the point. The Constitution of India too guarantees freedom of conscience to all communities, yet advises the state to try to achieve the objective of a uniform civil code as contained in its Directive Principles of State Policy. Unlike this, Part IV of the Nepalese Constitution, which is almost similarly titled ‘Directive Principles and Policies of the State’, does not mention anything in respect of civil laws, as if the matter is settled for good. For sure, apparently there is no controversy in Nepal over the personal laws.⁵⁷⁰

Before the unification of Nepal, the common characteristic among the principalities was the recognition of the law based on the Dharmashashtra viz; veda, smirities, purana, commentaries. King Prithivi Narayan Shah entrusted the responsibility of justice to Dharmadhikara. The King was the foundation of law and Justice. He established the trial and appellate courts in all provincial and district level courts. Pundits of Brahmin caste were appointed as representatives of Dharmadhikari, who were responsible for the application of law and religion in all cases. The doctrines of equality were ignored, the caste system was predominant, and the criminals were treated in accordance with their caste.⁵⁷¹

Jung Bahadur Rana, an ambitious and astute courtier, established the Rana regime in 1846, and made the position of Prime Minister hereditary to the Rana family and maintained the status quo in all areas. Jung Bahadur travelled to England and France in 1849 to observe its legal structure. The structure of the English and French courts, the Napoleon Code and the

⁵⁶⁹Partha S. Ghosh, *The Politics of Personal Law in South Asia; Identity, Nationalism and the Uniform Civil Code* 190 (Routledge, 2007).

⁵⁷⁰ *Id.* at 191.

⁵⁷¹ Kanak Bikram Thapa, “Religion and Law in Nepal” National Report: Nepal, available at: <https://www.iclrs.org/content/blurp/files/Nepal.pdf> (last visited on October 2, 2018).

Civil Code of France, influenced him. During his visit he was impressed by the governmental institution of their method of functioning. After his return from Europe, he began revising the laws of Nepal, and in 1851 he appointed the Law Council (Ain Kausal). Ain Kaushal worked diligently for almost three years, and finally on January 5, 1854, the country code (Muluki Ain) was promulgated. The code comprises of 163 chapters running into 1400 pages. The code deals with criminal and civil law, as well as provisions relating to administrative law, land law, regulation for the management of revenues administration, land survey, and so forth.⁵⁷²

The code (Muluki Ain, 1854) embodied the various customs, laws, uses, social norms and royal proclamations of Nepal, including the untouchability and punishment for breaking the hierarchy of castes, making legal the traditional rules of caste-based discrimination. The country code of 1854, the first code of modern Nepal, was therefore based on the Hindu jurisprudence and incorporated the different castes and ethnic groups of Nepal within the framework of the national hierarchy of castes.

The preamble of Muluki Ain of 1854 mentions that the code entered into force to introduce the uniformity of the legal administration in the country. The 1854 Code has been changed and recreated from time to time and has been subjected to up to thirteen minor and major changes. It continued as a main source of law in the country until 1963, for about 110 years, until it was replaced by the country code (Muluki Ain) of 1963.

The code of 1854 remained the backbone of the Nepal's legal system until 1951. The Code fell into a state of limbo, when the dynasty of Prime Ministerial, Rana Dynasty, fell out of power after a popular revolt. Thereafter, after the return of the monarchical authority in its panchayati incarnation in 1960, the King Mahendra in 1963, replaced the code of 1854.

The Country Code of 1963 codified all the laws of Nepal – civil, criminal, religious, and customary laws. The code abolished all forms of discrimination and untouchability. The Code also recognized customary rules and practices of certain indigenous communities. It prohibits converting another person from one religion to another. An attempt to convert another is punished with three years imprisonment, a successful conversion of another is punished with six years strict punishment. If the person is a foreign national, after serving six years he/she will be expelled from the country.⁵⁷³

⁵⁷² Ibid.

⁵⁷³ *Id.* at 519

The Country Code of 1963 codified all the Laws of Nepal – civil, criminal, religious and customary laws. The code abolishes all forms of discrimination and untouchability. The Code also recognizes the customary rules and practices of some aboriginal communities. It is forbidden to convert person from one religion to another. An attempt to convert another is punished with three years imprisonment, a successful conversion of another is punished with six years of stringent punishment. If the person is a foreigner, after serving six years, he will be expelled from the country.⁵⁷⁴

a. Religion in the Constitution of Nepal

The constitution is the supreme and fundamental law of the land. The constitution is legally binding on the state and all subjects within it. The first three constitutions of Nepal, namely The Government Act 1948, Interim Government of Nepal Act 1951, and The Constitution of Kingdom of Nepal 1959, guaranteed fundamental rights which were protected by the due process of law. They contained directive principles of state policy, and the rule of law was assured. They provided to the citizen of Nepal freedom of person, speech assembly, and worship, but they did not mention anything about the right to freedom of religion or anything regarding personal laws.

The Constitution is the supreme and fundamental law of the land and is binding on the state. The first three constitutions of Nepal, namely, the Government Act 1948, Interim Government of Nepal Act 1951, and the Constitution of Kingdom of Nepal 1959, guarantee the fundamental rights that are protected by the due process of the law. The Constitutions contained provisions on the Directive Principles of State Policy and ensured the rule of law. The citizen of Nepal was provided the freedom of the person and worship, but did not mention anything about the right to freedom of religion or anything related to personal laws. In 1962, the king rejected the parliamentary system and introduced the so-called partyless democracy known as the "Panchayat system." On December 16, 1962, a new constitution was promulgated which laid the foundations of Panchayat democracy in the country. It was said that it was a constitutional innovation and that the system was essentially Nepali in character and spirit. By introducing the system, King Mahendra stated that the Panchayat system has its roots in the soil of our country, and is able to grow and develop in the prevailing climate in

⁵⁷⁴ Ibid.

the country. Some have claimed that the constitution was nationalist in the background and democratic. Fundamental rights and due process of law, with the exception of the right to form a political organization, were granted to the people.⁵⁷⁵

Nepal's 1962 constitution declared for the first time that Nepal is an independent, indivisible, sovereign, and monarchical Hindu kingdom. Religious freedom has been granted, although the conversion of religion has been banned. The Constitution of Nepal 1962 had mentioned that the word "His Majesty " means His Majesty the reigning King now, descendant of the great king Prithivi Narayan Shah and believer of Aryan culture and Hindu religion. The Constitution also gave fundamental rights to religion, according to which each person should have the freedom to profess and practise his or her own religion as it is transmitted since antiquity, taking due account of the traditional practices but that no one should have the right to convert another person into a different religion.

The Nepal Constitution 1962 was replaced when the Constitution of the Kingdom of Nepal was introduced in the year 1990. The 1990 Constitution of the Kingdom of Nepal introduced the multiparty parliamentary system in the country, but the basis of the Hindu Kingdom and the prohibition of the conversion of a religion remained intact.

After the success of the People's movement of 2006, the 1990 Constitution of the Kingdom of Nepal was repealed in the year 2007 and interim Constitution was introduced. The interim Constitution of Nepal stated, in Article 3 to "have a common aspiration united by bonds of allegiance to national independence, integrity, national interest and prosperity of Nepal". All Nepalese collectively constitute the nation with multi-ethnic, multilingual, multi religious and multicultural characters. "

Article 4 of the Interim Constitution establishes that the state of Nepal is "an independent, indivisible, sovereign, secular, inclusive and fully democratic state". Article 23 stipulates that the right to religion as a fundamental right means that every person has the right to profess, practice and safeguard his or her own religion as has been transmitted to him since ancient times, taking due account of the prevailing social and cultural practices. Provided that no person is allowed to convert another person from one religion to another, and that no act or action is made in such a way as to threaten the religion of others. Every religious denomination shall have the right to preserve its existence and to function and protect their religious site and religious trust according to the law.⁵⁷⁶

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

The 2015 Constitution states that the country is a secular state and defines secularism as "the protection of age-old religion and culture and religious and cultural freedom." The Constitution provides that every individual has the right to profess, practice and protect his or her religion. While exercising this right, the Constitution prohibits individuals from engaging in acts "contrary to public health, decency and morality" or "disturbing the situation of law and public order ". It also prohibits people from converting other people from one religion to another or disturbing the religion of others, and violations are punishable by law.

b. Demand for Secularism

From the year 1950s, the grave and most common demands of secularism emerged only in 1990 after the fall of the partyless Panchayat regime. Launched by Theravada Buddhist monks and lay people who no longer wanted to be considered members of a Hindu sect, and strongly supported by Janajati (indigenous) activities this campaign aimed to achieve the same recognition, rights and space for all religions practised in the country.

The activists recognized that a century old process had integrated Hinduism into the Nepalese national identity, seeking to homogenize an extremely heterogeneous population and leading to the domination of the "high caste" Hindus all the spheres i.e; political, legal, economical and educational. Secularism was therefore, a request for recognition of the country's multi-ethnic and multi religious structure. It was not a movement to banish the religion of public life but rather a call for non-Hindus to be treated at par with the Hindus. The central elements of this petition were the de-hinduization of the state (for example: substitution of Hindu symbols and rituals for the state), the thrust for a multicultural Nepal and the recognition of the distinctive identity of the ethnic groups.⁵⁷⁷

The Constitution of 1990 retained Nepal's identity as a Hindu kingdom, but secularism won after seventeen years with the efforts of the Maoist party. The Maoists had called for secularism since the beginning of their ten-year insurgency. It was listed in the petition of 40 point demand that they submitted to the government before the launch of the "People's War " in 1996. Its pro-secular position was popular among the Janajatis, which formed a large part of its support. Opinion polls have always shown that most Janajatis, unlike other important groups in the country, favor a secular state – although there is still a significant minority of Janajatis who prefer the Hindu State. Secularism was supported by NC and UML parties in

⁵⁷⁷ Chiara Letizia, Secularism and statebuilding in Nepal, available at:<https://www.c-r.org/downloads/SecularismAndStatebuildingInNepal.pdf> (last visited on October 5, 2018).

2007 and 2008 since they saw it as a necessary step to dismantle the power of the monarchy, which existed in symbiotic relationship with Hinduism. Although many of their leaders had reservations, they still went along with the secular tide for fear of being considered monarchists.

Secularism has faced strong opposition specifically because it implies a new pluralistic notion of national identity in which different religions gather on the basis of equality. The anti-secular and Hindu nationalist associations and political parties focus on the sanatan Dharma (Hinduism as transcendental, the "eternal Religion") as a shared Nepalese (and South Asia) heritage. They argue that Hinduism is the most secular religion in the world, which includes many different sects and assures tolerance and harmony between the different religious communities of Nepal. Hindu Nationalists ignore the fact that the various ethnic and religious identities of Hinduism (especially Islam) have a long history in Nepal, and that seeing some people as more Hindu than others confers them special privileges.

Neglecting the vital role that the movements to assert of a non-Hindu identity have played in the recent history of Nepal, Hindu nationalists prefer to portray secularism as a foreign import. In doing so, they capitalize both the lack of an appropriate public debate on secularism before the declaration of a secular state, which astonished and stunned many and the widespread belief that foreign actors play an important role in politics of Nepal. Therefore, secularism is often seen by its opponents as the product of a Christian conspiracy to allow proselytizing. In this discourse, secularism is seen as conferring to religious minorities the right to convert and eat cows – while the protection of cows and the prohibition of conversion symbolize the purity and Hindu-ness of the past kingdom. Secularism, therefore, is perceived as a lack of respect, communal violence, and loss of unity and national identity. The idea that Nepal is the "last country of the Hindus ", or the only Hindu state in the world, retains its appeal to a younger generation seeking assertion of its Nepali identity.

c. What does secularism mean now and what has changed

The declaration of secularism did not bring about radical legal changes: "Anti-secular laws " like those of penalising cow slaughter and proselytizing were not abrogated. None of the gods left the political sphere. A large part of the symbolic and ritual apparatus of the monarchy was unaltered to the secular republic. The rituals that included the king's public

presence continue to be financed as state affairs, and the president of secular Nepal has appropriated the king's ritual role in important Hindu festivals.

Far from being a mere continuation of the status quo, however, this reconfiguration of the royal rituals in the rituals of the state is a means in which the young secular republic is legitimized, which is precisely why some seek to reverse this trend. While secularism has not undermined the dominance of the power of the traditional elite, the fact that Hinduism is no longer formally guaranteed a hegemonic place has opened the possibility that Nepali's of different religious backgrounds can represent the state in the future. Certainly, other challenges for Nepali secularism will emerge when minorities begin to represent themselves more in the courts, the legal profession, the political parties, and the government apparatus.⁵⁷⁸

So far, secularism in Nepal has not meant the strict separation of state and religion and seems to be inspired by the Indian model, according to which the State maintains all the religious traditions of its people alike. It does not make religion a private matter or a secular society. By contrast, through secularism, religious minorities seek recognition on equal terms with the majority, and religious and ethnic groups involved in identity making processes have tended to strengthen their traditions by ensuring that they invite the President or the Prime Minister to New Year's festivals. The multiplication of the religious festivals in the national calendar and in the public space is considered as well as a secular development and an important symbolic recognition of the religious and ethnic minorities.

Secularism has changed the nature of the relationship between Hinduism and minority religions – from a paradigm of remote control under a hegemony tolerant to a situation of competition and negotiation between equals. Secularism has been an essential step in the project of creating a new, inclusive and republican Nepal, but it has also led to a public debate about the relationship between religion and the state that has sometimes become fractious. Religion continues to be a crucial modality for building individual and collective identities, including at the national level, which explains the lasting sensibility around the idea of secularism. Except for a few isolated incidents, however, secularism did not give rise to religious conflicts. Despite the fact that the principle is highly divisive, it is still evolving,

⁵⁷⁸ *Id.* at 110.

and actual secular practices and accommodation can be built and worked over time, without resorting to identity politics.⁵⁷⁹

7.4. Bhutan

The kingdom of Bhutan was a theocracy since the reign of the first Zhabdrung⁵⁸⁰, Ngawang Namgyal, Tibetan Buddhist abbot, who ruled from 1616 till the time he died in 1651.⁵⁸¹ Bhutan, famously known as the Land of the Thunder Dragon has been perceived as a Be Yul (Hidden Land) preserving the Buddha dharma, which is why its traditions and culture are closely related to the Buddhist religion.⁵⁸² Majority of the population in Bhutan practices Mahayana Buddhism, with three-quarters of Bhutan's population hold on to the Drukpa Kagyupa or Nyingmapa schools.⁵⁸³

In the year 2008 the Himalayan kingdom adopted its first written Constitution and transformed itself from theocracy to a constitutional monarchy. The person responsible behind this political transformation of Bhutan was King Jigme Singye Wangchuk. This initiative was taken by the said King, as he was apprehensive that the kingdom could one day encounter the 'misfortune of inheriting a King of dubious character'.⁵⁸⁴ Keeping into consideration the historical and cultural connection of Bhutan with the Buddhist religion, Buddhism has played a significant factor in shaping the Bhutanese constitutional order. Under the Constitution the role of the monarch and the role of the legislature in supporting Buddhist values have been clearly defined.

Even though Bhutan had taken a conscious decision of not declaring Buddhism as the official religion, however the Chairman of the constitutional drafting committee had continued to declare Buddhism as the 'spiritual heritage of Bhutan'. As mentioned above Buddhism had always been an integral part in Bhutan, however, in the Parliament when the debate on the

⁵⁷⁹ Ibid.

⁵⁸⁰ King, literally "the feet before which he submits".

⁵⁸¹ Tashi Wangyal, "Ensuring Social Sustainability: Can Bhutan's Education System Ensure Intergenerational Transmission of Values?" 4 *JBL* 106 (2001).

⁵⁸² Richard W Whitecross, "Separation of Religion and Law? Buddhism, Secularism and the Constitution of Bhutan", 55 *BLR* 707(2007).

⁵⁸³ Darius Lee, "Here There Be Dragons! Buddhist Constitutionalism in the Hidden Land of Bhutan" *AJAL* Vol 15 No 1, Article 2: 1-19 (2014).

⁵⁸⁴ Aim Sinpeng, "Democracy from Above: Regime Transition in the Kingdom of Bhutan" 17 *JBS* 21 (2007)

Article 3(3)⁵⁸⁵ i.e. of not mixing religion and politics together was being discussed, it stirred a controversy. The Chairman of the drafting committee in response to disagreement on Article 3(3) had given two reasons; the first reason was change from theocratic order. The Chairman noted that ‘Lord Buddha was the first to divide religion from politics by renouncing His Kingdom to pursue enlightenment’, having perceived that otherwise ‘it would be the sentient beings who would ultimately suffer.’ The second reason was historical. The aim was to carry on in the written constitution the theocratic system that was established by Zhabdrung Ngawang Namgyal, who had administered a dual system, consisting of a religious branch and a civil branch. Je Kenpo (Lord Abbot), headed the religious branch of the system and he had the influence over the Buddhist monasteries in Bhutan and Druk Desi (Dragon Regent) headed the civil branch of administration. The process of political modernisation had merely reformed the civil branch of government into a democratically-elected legislative branch under a constitutional monarchy. Although Article 3(3) of the Constitution establishes a ‘secular political system’, however, it is evident that secularism in Bhutan does not have the same connotation as universally understood in academic literature. Nonetheless there is retention of strong Buddhist values in the constitution. The Preamble of the constitution honours the triple jewels of Buddhism, i.e., the Buddha, Dharma (the teachings of the Buddha), and Sangha (the monastic order). The responsibility of upholding dharma which previously was the duty of the king has been now been handed over to the state.⁵⁸⁶

a. Respect for Religious Freedom under the Constitution

Buddhism as the state’s ‘spiritual heritage’ is recognised under the constitution of Bhutan and it lay down that it is “the responsibility of all religious institutions and personalities to promote the spiritual heritage of the country.”⁵⁸⁷ The constitution of Bhutan guarantees to every citizen the right to freedom of thought, conscience, and religion and it prohibits discrimination based on religion. The constitution enumerates that the king ought to be Buddhist and he shall be the protector of all religions.

The constitution of Bhutan spells out the duty on the Bhutanese citizens towards respect for each other, to promote tolerance and promote brotherhood amongst each other.⁵⁸⁸

⁵⁸⁵ Article 3(3): It shall be the responsibility of religious institutions and personalities to promote the spiritual heritage of the country while also ensuring that religion remains separate from politics in Bhutan.

⁵⁸⁶ *Supra* note 9 at 8.

⁵⁸⁷ Article 3(1), Constitution of Bhutan.

⁵⁸⁸ Article 8(3): to ‘foster tolerance, mutual respect and spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities’.

The constitution states “no person shall be compelled to belong to another faith by means of coercion or inducement.”

Coercion or inducement to convert as a misdemeanour is punishable by up to three years’ imprisonment under the penal code. Oral or written communication “promoting enmity between religious groups” is prohibited and is punishable with sentence of up to three years’ imprisonment for violations.

Under the penal code it provides that if any individual is found guilty of promoting civil unrest by advocating religious abhorrence, disturbing public tranquility, or committing an act prejudicial to the maintenance of harmony between religious groups shall be punished with imprisonment of five to nine years’. Under Article 9(20) of the Constitution, the state is obligated with the duty to ‘create conditions that will enable the true and sustainable development of a good and compassionate society rooted in Buddhist ethos and universal human values.’⁵⁸⁹

b. Religious Demography

The total population of Bhutan is 750,000 (July 2016 estimate) and 75% of the population follows the Drukpa Kagyu or Nyingma schools of Buddhism. The Hindus comprise approximately 22 % of the total population and they reside mostly in southern region of the country.⁵⁹⁰ The population of the Christian community range from 2,000 (from the Pew Research Center) to 15,000 (from the Bertelsmann Foundation’s Transformation Index 2016 country report). The estimates by local and international Christian groups range from 3,000 to 15,000. The Christians are reportedly residing in the towns in the south region of the country. Irrespective of the fact that besides the majority Buddhist population, people belonging to Hindu and Christian community also reside in Bhutan, however, the Bhutanese constitution is silent on the minority rights.

⁵⁸⁹ International Religious Freedom Report for 2017 United States Department of State • Bureau of Democracy, Human Rights, and Labor <file:///G:/2017%20report/bhutan%202017.pdf> (Visited on 6 October, 2018).

⁵⁹⁰ According to the Pew Research Center, available at: <https://www.state.gov/documents/organization/269172.pdf> (last visited on October 8, 2018).

c. Personal Laws in Bhutan

In present day Bhutan there is no issue concerning personal law. Since almost all controversies around personal laws, start and end with the rights of the women and gender equality and since women in Bhutan are equal to men in all respects; personal law is not an issue.⁵⁹¹ The situation is rooted in two sociological phenomena; in the first place; Bhutan guarantees the same legal rights to men and women and secondly it has a fluid marriage system. This means in this marital system, partners can live together as married couples without any formality. Men and women are free to choose their partners and leave them freely. As such divorce in the context of formal marriages is also quite simple. Because women retain their property rights, they are economically independent.⁵⁹²

Most marriages in Bhutan are still performed in the traditional way and most disputes, if any are to be settled traditionally through some kind of panchayat system. But in case any such dispute has to be adjudicated, then the marriage needs to be registered. If a marriage is not already registered, it can be done by paying a fine or fee.⁵⁹³ The judicial system is structured as a three layered system. The lowest level is the sub district court (Drungkhag), above which is the district court (Dongkhag) and at the top is the high court (Thrimkhag Gongma). The judicial rules are still uncodified and largely, the tradition based Ngalong norms apply across the board irrespective of whether one is Ngalong (elite Buddhists of Tibetan origin), Sarchop (the majority population, living mostly in the eastern and central parts, who, though Buddhist, have little say in the government) or Lhotshampa (ethnic Nepalese of southern Bhutan). The disputes arising within the Nepali, who are mostly Hindus, are settled at the local levels by the community elders or the village headmen, who are officially appointed. Since hardly anything exists in written form including judgements, case law has little significance. Increasingly, however, disputes are being settled in formal courts. The reason is that court procedures are being streamlined and made cost-effective.⁵⁹⁴ One of the rare codified situations is in respect of the maintenance to be paid for children in case of divorce, as per Marriage Act, 1980. All such children must be with the mother till they are nine, after which they can choose either of their parents to stay with. Earlier the father was supposed to pay

⁵⁹¹ Partha S. Ghosh, *The Politics of Personal Law in South Asia, Identity, Nationalism & Uniform Civil Code* 210 (Routledge, 2007).

⁵⁹² Reiki Crins, *Religion and Gender Values in a Changing World*, in Karma Ura and Sonam Kinga (eds.), *The Spider and the Piglet* 581-95 (Centre for Bhutan Studies, Thimpu, 2004).

⁵⁹³ *Supra*.

⁵⁹⁴ Lungten Dubgyur, *Review of Judicial Reforms in Bhutan*, in Karma Ura and Sonam Kinga (eds.), *The Spider and the Piglet* 379-87 (Centre for Bhutan Studies, Thimpu, 2004).

20% of his salary or income to the mother for each child, with a ceiling of 40%. But there has been a change in the law. Now if divorce is on account of the adultery of the wife, then the rate is 10%, the ceiling, however, remaining at 40%. From the discussion it seems to be clear that personal law is not an issue in Bhutan.⁵⁹⁵

7.5. Srilanka

Sri Lanka, formerly known as Ceylon, is a small island country in South Asia. It is also known as a 'legal museum' since various kinds of law has influenced the development of Sri Lankan law. The SriLankan justice system includes a variety of different systems and traditions, and the interplay between legal systems can be clearly understood when it is explained in a historical perspective. The existence of many laws in Sri Lanka is the result of the historical development that was followed by the attack of the various European powers. The 1600s heralded the beginning of the Western era with the arrival of the Portuguese in 1505.⁵⁹⁶

Portugal was the first European power in Ceylon. They only won part of the island. At that time, the two main components of the population were Sinhalese who spoke Sinhalese and Tamils who spoke Tamil. The southern and western parts of Srilanka were occupied by Buddhist Sinhalese; while the Tamils, who were Hindus, occupied the northern regions. The others were a community of Muslim merchants who had settled on the west coast.

Although the Portuguese occupied Ceylon in the years 1505-1656, they did not introduce their own laws in Ceylon for reasons that the Portuguese legal system had not developed sufficiently. Before the Portuguese arrived there was a single system that was governing the Sinhalese region. However, at the time of the Portuguese regime, a clear distinction was made between the laws and customs of Kandyan (including the center and the north of the island) and the low country (coastal areas outside Kandyan). Portugal having not occupied the province of Kandyan, they had no influence on the laws in this region. The laws and customs of the maritime province, however, have had the effect of Portuguese customs and the laws and customs of the Sinhalese have changed in due course.

After Portugal, the Dutch ruled over some parts of Ceylon from 1656 to 1796. A Roman-Dutch law was introduced in Ceylon as they applied the law of their own country to their

⁵⁹⁵ *Supra* at 212.

⁵⁹⁶ Fathima Azmiah Bary, "The Legal System of Sri Lanka" available at: <http://klibredb.lib.kanagawa-u.ac.jp/dspace/bitstream/10487/4132/1/kana-14-26-0009.pdf> (last visited on October 10, 2018).

colonies scattered in the East and West Indies. The initial policy of Dutch was to apply its laws to Europeans and local population. However, it was obvious that the non-recognition and annihilation of local customs led to the hostility amongst the local population.⁵⁹⁷

Thus, the Dutch had applied its laws in criminal matters and allowed the local customs to be applied in civil matters. The law of the Dutch was applied when the customary laws were silent or the Dutch considered them inappropriate. Since the Dutch never occupied the Kandyan provinces, they had no effect on the Sinhalese laws of that province. Jayawardena, in his book, 'The Roman-Dutch Law in Ceylon', states that Dutch law was not the primary law applicable to Sinhalese in the maritime provinces in the Dutch time. He also notes that, it is clear that the Dutch were mercenaries and considered colonies as sources of income. The Dutch were not interested in implementing their laws in such colonies. However, at the end of the eighteenth century, colonial legislators codified the rules of inheritance, marriage and divorce law in order to facilitate the application of the family law of Muslims. These special laws were maintained and approved after the British conquered the Dutch in 1796.

In 1796, the British conquered the island. The kingdom of Kandy in the central mountainous region of Ceylon, had throughout the Portuguese and Dutch governments, maintained its territorial integrity. However, in 1815, the King of Kandy was overthrown and the whole island passed under British sovereignty. Britain acquired Sri Lanka and the existing law, which existed prior to cessation, continued to exist until it was changed. The laws of each colony remained in force until they were changed by the new sovereign.⁵⁹⁸

This principle was also given legislative guarantee that the laws which were in force in the former government of the United Provinces i.e., during the Dutch should continue subject to such changes in the prescribed manner by the legal authority. As a result the Roman-Dutch laws and the customary laws of the Sinhalese, the Tamils and the Muslims continued to be in force. The laws of the Muslim law were applied as a strict personal law. A personal law is a law that applies to a certain part of the population taking into account certain common factors. Thesavelamai, a personal law was administered only on the Tamils residing in the Jaffna district. Kandyan's law was applicable to the Sinhalese people in the Kandyan Kingdom. Buddhist law and Hinduism influenced the development of the laws of the Sinhalese and the Tamils but were not given effect by the courts as separate and distinct systems. Religious laws were given effect if observed as custom or if the religious dispute affected the civil rights. Under the British, a Roman-Dutch law was applied under the British

⁵⁹⁷ *Id.* at 116.

⁵⁹⁸ *Id.* at 167.

administration for residents of Europe, the Sinhalese outside the Kandyan provinces and for those subject to the personal laws where these laws were silent.

a. The Personal laws

The applicability of the personal laws does not depend on the place of residence of the person but it applies to the population of a given region, taking into account certain common factors. Srilanka's personal law is divided into three; that is to say, the general law of marriage established by the Roman-Dutch law applicable to the lowland Sinhalese residing around the centre of Colombo, the Kandyan law applicable to the highland Sinhalese residing around Kandy, Thesavelamai and the Tamils of Jaffna, and Muslim law applicable to Muslims. These legal systems are not universally applicable, but apply to special communities within Srilanka.

b. Kandyan Law

Kandyan's law is another name for the laws and customs in force under the Sinhalese kings, whose sovereign powers were limited to the central hilly areas of Sri Lanka from 1505 to 1815.⁵⁹⁹ Between 1815 and 1853, the British considered the Kandyan law as a territorial law rather than a personal law and were applicable to the inhabitants of that territory, including Hindus and Europeans who were domiciled there.⁶⁰⁰ Before 1859, the Kandyans had no written laws and marriages were solemnized on the basis of the customary rituals and by recognition by the general public. Polygamy and polyandry were also prevailing in Kandyan law. It has been legally recognized that the Kandyan law is a personal law of Kandyan Sinhalese.⁶⁰¹

⁵⁹⁹ Marsoof,.,n.d. *Insights into Sri Lankan Family Law*. [Online] Available at: https://www.academia.edu/9940386/Insights_into_Sri_Lankan_Family_Law (last visited on 10 October 2018).

⁶⁰⁰ Bari, F. A., 2013. The Legal System of Sri Lanka. *Departmental Bulletin paper*, 19 11, 165-180.

⁶⁰¹ *Ibid*.

c. Muslim Law

The Muslims of Ceylon were descendants of Ceylon Moors, Indian Moors and Malays. Their communities are scattered across the country. In the south-western province and in the central highlands, they live with the Sinhalese; in the eastern and northern provinces, they live with the Tamils. Unlike other customary laws in Ceylon, Muslim law is a religious law and is applicable to anyone of any race who is a believer of Islam whether by birth, or conversion. Although Muslim law was originally codified as a collection of customary law, and as a part of a colonial policy recognizing different laws governing different segment of the population, however, Muslim law has a broader application in the modern law. When the Muhammad code of 1806 was repealed the law to which a Muslim belongs to in terms of marriage and divorce, inheritance, and certain types of gifts was introduced by way of an enactment. Srilanka Muslims belong to the Sunni sect and the majority is followers of Shafi'i school of law. Statutory provisions thus make it possible to apply Muslim law as a personal law governing the Muslims.

The factor which administers Muslim law is not whether a person belongs to a particular race or community, but whether or not the person professes Islamic religion. People born to Muslim parents are supposed to be Muslim. A person can also become a Muslim by conversion. In a case where the conversion was not genuine - for example, a man who gets married for the second time by converting himself to Muslim, when the first wife is alive, the burden falls on the person who allegedly professes Islam to refute the evidence of an dishonest conversion.⁶⁰²

However, in the case of *Katchi Mohamed vs. Benedlct*, the accused was a Muslim man married to a Muslim woman according to Muslim ceremony. Later, the husband became a Catholic and married a Catholic woman without getting divorced from his first wife. It was held that he was guilty of bigamy because the second marriage came within the definition of

⁶⁰² In *Reid v. Attorney General*, is a case in which a man had contracted a marriage according to Muslim rites. He had, as a Roman Catholic, contracted an earlier marriage and his first wife was still alive. He was charged with the offence of bigamy. He pleaded that he was a convert to Islam and that hence his second marriage was a valid one. The accused and his second wife had become converts to Islam on 13th June 1959, and they registered their marriage on 16, July, 1959. Chief Justice Basnayake said that although the proximity of the date of the second marriage to the date of conversion gave room for the suspicion that the change of faith was with a view to overcome the provisions of the marriage ordinance, such circumstances do not affect the validity of the second marriage. Basnayake C.J. referred to the evidence of the Muslim priest had testified to the conversion. The inference that may be drawn is that if there is such conversion, the court will not go into the circumstances that led to such conversion.

marriage as laid down under Section 84 of the Marriage (General) Registration Ordinance, and was therefore an invalid marriage.

d. Thesavelamai Law

The word Thesavelamai means ‘customs of the land’. The origin of these customs can be traced to those of the Dravidians from the Malabar coast of South India. When they ruled Jaffna, the Portuguese allowed the customs to continue. But their successors, the Dutch, felt it necessary to codify them, because there were no clear principles for the proper administration of justice. Much of the codification of Thesavelamai in the twentieth century has been through case laws. Thesavelamai applies to all persons who come within the description of Tamil inhabitants of Jaffna. But certain sections of the law apply to lands in the Northern Province, irrespective of the race or nationality of the owner. In essence, it applies to transactions relating to land owned by Jaffna Tamils. It does not apply to Tamils from other areas. Under the law, land has to be offered either to the co-owners or the persons having their hereditary rights before it is sold to others. Is Thesavelamai a personal law or a territorial law? According to Cooray:

“The Thesavelamai is not a personal law in the real sense of the term. The application of a personal law depends on the existence of a personal link among a class of persons who are subject to a single system of law. But unlike Muslim law which applies to all who answer to the description of Muslims, Part I of the Thesavelamai applies to a class of persons namely Tamils, who are bound together by a personal link, but who must in addition be resident in a particular territory. It is thus a personal law in some respects, with a territorial limitation. Persons subject to the Thesavelamai could change the law by which they are governed by changing their inhabitancy. All persons subject to Kandyan law however cannot rid themselves of its incidence except by marriage.”⁶⁰³

e. Calls for amendments to Personal Laws over two centuries

The customary practices of every community have changed over the last two centuries in Sri Lanka. The common law and the customary laws have changed steadily, both with and without resistance to change. In the case of common law promulgated in 1815, for example,

⁶⁰³ Partha S. Ghosh, *The Politics of Personal Law in South Asia; Identity, Nationalism and the Uniform Civil Code* 206 (Routledge, 2007).

Regulation No. 7 1815 was amended at least thirteen times in the 18th century, and sixteen times in the 19th century until the enactment of Marriage Registration (Amendment) Act No. 12 1997. Between the year 2000 to 2016, there was at least one amendment, with the Marriage Registration (Amendment) Act No. 11 of 2001.⁶⁰⁴

Despite this history of revision, there is still the demand for change. In 2007 the Law Commission proposed enactment of Matrimonial Causes Act relating to family matters applicable to all marriages except those contracted under Kandyan and Muslim law. Calls for reform of Kandyan law were not new in the legal domain. It has been stated that the law of Kandyan Sinhalese community and Tamil communities in Sri Lanka need to be modified in parallel with the process of law reform.⁶⁰⁵ Further so called customary laws contain many provisions which are in fact derived from English colonial law and the colonial Roman-Dutch law and these are in clear conflict with constitutional and human right standards.

With regard to the ‘Thesavelamai’ law, it has been stated that ‘every positive system of law that came in contact with the ‘Thesvealamai’ left its imprint on it.’⁶⁰⁶ The Hindu Law, the Mohammedan law, the Roman-Dutch Law and even the English Law have in turn made their contributions in development of the Thesavelamai’. Thesavelamai was codified by the Dutch in 1706. Subsequently the British enacted the Thesavelami Regulation No. 18 of 1806. Other relevant laws are Ordinance No. 5 of 1869, the Matrimonial Rights and Inheritance Ordinance of 1911, amended by Ordinance No. 58 of 1947, the Thesavelamai Ordinance and Thesavelamai Pre-Emption Ordinance, and the Jaffna Matrimonial Rights and Inheritance Ordinance No.1 of 1911.⁶⁰⁷

Unlike ‘Kandyan’ and ‘Thesavelamai’ laws, changes to the Muslim personal law have been relatively fewer during the last two centuries. The Mohammadan Code of 1806 was amended in 1929, nearly after 120 years after its enactment. It was then repealed around 20 years later, by the Muslim Marriage and Divorce Act of 1951.⁶⁰⁸ Subsequently, several efforts were made to reform the act, in 1959, 1973 and 1992. In 1992, the recommendation of the ministerial committee on Muslim Personal Law, initiated by a memorandum submitted to it

⁶⁰⁴ [Sri Lankan personal laws between justice and freedom – A value based perspective](https://groundviews.org/2016/12/01/sri-lankan-personal-laws-between-justice-and-freedom-a-value-based-perspective/), available at: <https://groundviews.org/2016/12/01/sri-lankan-personal-laws-between-justice-and-freedom-a-value-based-perspective/> (Visited on October 12, 2018).

⁶⁰⁵ Savitri Goonesekar, *Violence, Law and Women's Rights in South Asia* (Sage Publication, New Delhi, 2004).

⁶⁰⁶ H.W.Thambiah, *The Laws and Customs of the Tamils of Jaffna* (Women's Education Centre, 2004).

⁶⁰⁷ A.V.Tambimuttu, *Srilanka: Legal Research and Legal System* (2009) available at: http://www.nyulawglobal.org/Globalex/Sri_Lanka.html (Visited on October 12, 2018).

⁶⁰⁸ M.A. Numan, *Understanding Srilankan Muslim Identity* (International Centre for Ethnic Studies, Colombo, 2002).

by Muslim Women's Research and Action Forum (MWRAF), were met with outrage by conservative groups. Reform efforts were ultimately shelved.

f. Need for Reform

The personal laws that prevail in Sri Lanka are discriminatory towards women. In fact, certain provisions of the Theswami and Kandyan laws have provisions that are incompatible with women's rights. For example, according to the Theswasai law, followed by the Tamils in the northern province of Sri Lanka, a woman must obtain her husband's consent to dispose any immovable property. In addition, Articles 11 and 12⁶⁰⁹ stipulates that women may not possess property in the event where the property was not gifted by her husband.

The existing law dealing with Marriage and Divorce is discriminatory towards the rights of Muslim women.⁶¹⁰ The law itself permitted child marriage under an authorization of Quazzi. Also the Muslim men, according to their wishes can divorce their wife while the Muslim women must prove the fault of their husband. In addition, the law gives the greatest freedom to Muslim men to marry up to four times, while the same freedom is not available to Muslim women.⁶¹¹

In the Srilankan Constitution, the equality before law is substantiated from the Article 12 (1).⁶¹² However, the article does not provide protection to the Muslim women who have been victims of such unfair legal restrictions.⁶¹³ This absurd article created a legal uncertainty as to its applicability because in the interpretation of this article the whole law which was enacted before 1978 will be treated as valid even if they are infringing the fundamental rights granted to all citizens.⁶¹⁴ The discriminatory status of women under the Sri Lanka personal rights system has received the attention of the international organisation.⁶¹⁵

⁶⁰⁹ Kandyan Law Ordinance No. 38 of 1939.

⁶¹⁰ As an example in Sri Lanka age 18 is the legally approved age for marriage, but this is not applicable under Muslim Marriage and Divorce Act in Sri Lanka.

⁶¹¹ Gender Discrimination by Unjust Law of Personal Laws in Sri Lanka, available at: <https://www.slguardian.org/gender-discrimination-by-unjust-law-of-personal-laws-in-sri-lanka/> (last visited on October 14, 2018).

⁶¹² Article 12 (1): Right to equality; All persons are equal before the law and are entitled to the equal protection of the law.

⁶¹³ This is because of the reason that Article 16(1) of the Constitution of Sri Lanka stipulates that all laws i.e. written and unwritten which existed before the 1978 Constitution is valid and binding.

⁶¹⁴ The Muslim women activists in the country consider that this article should be annulled by the Constitution as it impedes the rights conferred by Article 12(1), of the Constitution. But by looking at the facts on ground it is certain that none of parties representing the communal demands of the Muslim community in Sri Lanka

The issue dealing with eradication of provisions which undermines the dignity of women under the personal laws have become a major challenge for the authorities.⁶¹⁶In December 2017, there was uproar among the Indian Muslims when the Lok Sabha in India passed a Bill which sought to prosecute Muslim men who divorced their wives by way of "triple talaq", or an instant divorce. The same response can be expected in Sri Lanka if the government decides on changing personal laws. The Sri Lankan government should either make a law on the unification of family law, in accord with the Convention guaranteeing equal rights for both women and men.

g. Why resistance to reform personal laws

Today, the customary laws of various communities in Sri Lanka are considered to be part of their identity and increasingly patterned in the context of their constitutional right to freedom to practice religion. Requests for reform are seen as attempts by other communities, including the West, to suppress their identities. Contrary to this notion, all those personal laws were drafted by the same west during their colonial rule to limit the flexibility embodied in the customary laws. During the colonial period, the fear of losing religious beliefs and customs was common to the three communities, and led them to adopt a defence and isolation strategy to protect their culture and customs.

With all these factors put together, each community encompasses the negative perceptions of others, and any call to reform is seen as a conspiracy to annihilate their identity. Resistance in the Sri Lankan Muslim community is no exception to this home-grown mentality. Whenever a certain Muslim section has proposed reforms, it is opposed by the other section which, in turn, prevents politicians from making proposals for reform because they fear losing their vote banks.

attempt to raise these issues openly as they have to appease the Muslim population. Mainly the male hegemony over the Quazzi positions in spite of many of the educated Muslim women in Sri Lanka having exposed a tip of the iceberg and it has been reported that in many occasions Conservative Muslim groups have created a hostile environment among their community which has deviated the voice of Muslim women activists. However, in observing the facts, there is no doubt that none of the parties representing the claims of the Muslim community in Sri Lanka are trying to raise these issues openly because they want to pacify the Muslim population.

⁶¹⁵The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee requested the Government to abolish all existing discriminatory provisions in all personal laws. In addition, CEDAW underlined that gender identity and sexual orientation should be taken into account in the proposed Constitution making process.

⁶¹⁶This is because Muslims and Tamils in Srilanka can become frantic about such a movement as an act of attacking their rights.

Furthermore, reform initiatives by a segment of Muslim society over a decade also failed to succeed in their effort due to public outcry within the same customary group. Also many Muslims view that these projects also part of the western agenda aimed at systematic abolishment of the customary and religious practices and identities of the Muslims.

Although Sri Lanka has been influenced by foreign laws, SriLanka's law retains strong traditional factors. There is a mixed interface of various laws in the Sri Lankan society. Thesavelamai, embodied in the social structure, and the Kandyan law, as practiced among the people seem to have contributed to the formation of the culture of Sri Lanka, whether in harmony or discord with each other. The Islamic law was then added to this blend of transplanted law. Although not well integrated into a single law system, indigenous law and previous transplanted laws together form the indigenous structure of the Ceylon law. These transplanted laws have retained their basic traits, as evidenced by their adoption in contemporary official law. The personal laws prevailing in SriLanka are discriminatory with respect to women's rights.

The Srilankan government was asked, “to amend all the personal laws in order to remove discriminatory provisions regulating ownership, inheritance, transfer and disposal of land and property, and provisions regulating legal capacity, marriage, divorce and custody of children.”⁶¹⁷ However, the lack of progress in reforming the provisions of the Kandyan law and the Thesavelamai law was reported.⁶¹⁸

⁶¹⁷United Nations Convention on Elimination of Discrimination against Women, Committee had recommended to: (a) Formulate a uniform family code in conformity with the Convention in which equal rights of women and men in the family relations, including marriage, divorce, inheritance, property and land are addressed; (b) Amend the General Marriage Registration Ordinance to ensure that Muslim women have the free choice to opt out from the Muslim Personal Law, so as to be registered under the general law; (c) Ensure that property rights are governed by general civil contractual and property law rather than religious law; (d) Increase the minimum age of marriage for all women in the State party to 18 years of age; (e) Eliminate any restriction on women's eligibility to be appointed as Quazis, as Members of the Board of Quazis, Marriage Registrars and adjudicators; and, (f) Amend article 363 of the Penal Code to ensure that the crime of statutory rape applies to all girls under the age of 16, without exception in order to abide by the Convention the country is party to. *See*, Zahrah Imtiaz, CEDAW asks Sri Lanka to amend personal laws, Daily News dated Mar., 8, 2017 available at: <http://www.dailynews.lk/2017/03/08/local/109743/cedaw-asks-sri-lanka-amend-personal-laws> (last visited on October 16, 2018).

⁶¹⁸ Ibid.

7.6. Maldives

The Republic of Maldives, located about 900 km from the southwest coast of India and Sri Lanka, is made up of a group of 26 atolls in the Indian Ocean. The atolls cover an area of 1,192 islets, of which about 200 are inhabited by people. Although small, the country has been populated for over 2000 years. Because of its strategic location, the inhabitants of Maldives are of different ethnic origins. The language of the country is Dhivehi, which is of Indic origin. In 1153, the Maldives converted to Islam, prior to which it was a Buddhist country. Because of the distances from one island to another, the conversion did not take place simultaneously and many years passed before the whole country became Muslim.⁶¹⁹

The origin of Muslim law in the Maldives dates back to the arrival of Ibn Battuta on the island in 1343. Ibn Battuta was the great Moorish traveler from Tangier, who had interpreted his journey to occupy, for several years, the position of Maliki Chief Qazi at the court of the Sultan of Delhi. As there was no qualified judge in the Maldives, he was asked to act as chief justice. He only spent a year and a half in the country when he fell out of favour with the Maldivian Prime Minister. Ibn Battuta was very impressed by the Maldivian people and their pious nature, but he found their obedience to the Islamic legal precepts deficient: "The first bad practice I changed was the practice of divorced women who remain in their ex-husband's house, I put it in order." As Qazi he tried to make the woman to wear a breast-cover, but failed to implement it.⁶²⁰

Over the centuries, the saints and sultans who visited the country tried to impose stricter Islamic norms, that included men growing beards, women to wear veils and to cover their bodies and prohibited the use of the silver belt, but they did not succeed. After the Portuguese rule in Male, from 1558 to 1573, there was a religious resurgence in the country, after which the Maliki system of jurisprudence was replaced by the stricter Shafi School. This school was founded in the early 19th century. It was introduced for the first time in the central Islamic lands and southern Yemen, from which it was transported to the Maldives by Sheikh Muhammad Jamal-ud-din. Their rules are different in a minor ways: one cannot touch a marriageable person after ablutions before praying, women must wear the veil in the presence of men (not observed in the Maldives) and some of the hours for praying are different. However, in general, Maldivian society is quite modern in terms of gender equality; women are present in all professions, even if the country offers only limited opportunities.

⁶¹⁹ Tahir Mohamed, Common Civil Code, *Personal Laws and Religious Minorities* 109-110 in Mohammed Imam (ed.), *Minorities and the Law* (N.M.Tripathi, Bombay 2002).

⁶²⁰ Clarence Maloney, *People of Maldivian Islands* 228 (Orient Longman, Madras, 1980).

a. The Constitution and Freedom of Religion or Belief

The Maldives, after transferring power to their first democratically elected government in 2008 under the presidency of Mohamed Nasheed, implemented a new constitution aimed at ensuring equal protection of human rights; however, it grants these freedoms only to the extent that they are compatible with Sunni Islam, in accordance with Sharia law.

In the non-discrimination clause of the Constitution, it should be noted that religion does not appear in the clause, but it is incumbent on all Maldivian citizens to preserve and protect the state religion of Islam.⁶²¹

Therefore, there is no freedom of religion or religious expression in the Maldives, as the Constitution prohibits the practice of any religion other than Islam. Only Muslims obtain citizenship, whereas formerly-Muslim religious converts are punished by the revocation of citizenship. As a result, it is unlikely that the Maldives will strive for freedom of religion for non-Muslims, as Islam, as an official religion, holds both political and religious power. "In the Maldives, Islam is so closely linked to politics that it is the only country in the world where it is illegal for a citizen to be anything other than a Muslim."

The Constitution of the Maldives states that "a non-Muslim cannot become a Maldivian citizen". In addition, the Maldivian government has incorporated into its legal system an aspect of Sharia law that states that "citizens who have converted to another religion can have their citizenship revoked" or be sentenced to death.⁶²²

b. Protection of Religious Unity Act

The Protection of Religious Unity Act, 1994 states that "the government and the citizens of the country must protect the religious unity they have created". Despite the "grave concern" of the 2010 Working Group for religious freedom which applies the Religious Unity Act, the Government of Maldives has ratified and published the new draft of the Regulations in 2011. The legal provisions of the Religious Unity Act prohibit from propagating a religion other than Islam in Maldives or participating in any effort to convert a person into a religion other

⁶²¹The Constitution of Maldives states that "everyone is entitled to the rights and freedoms set forth in this chapter without discrimination of any kind, including race, national origin, color, sex, age, physical or mental disabilities, political or other opinion, property, birth or other status, or native island.

⁶²² Religious Freedom in the Maldives: Present and Future Challenges, available at: <https://hrwf.eu/religious-freedom-in-the-maldives-present-and-future-challenges/> (last visited on October 16, 2018).

than Islam. "It is also illegal to publicly portray or display non-Islamic religious books and writings, and it is unlawful to translate non-Islamic religious writings into Dhivehi, the Maldivian language. The articles that disseminate information about various disciplines, intellectual and comparative studies between Islam and other religions, description of sayings and expressions on Islam by people of other religions and dissemination of Muslim expressions on other religions, remain exempted under the said Act.

In addition, it is "illegal to publicly display any symbol or slogan belonging to or belonging to any religion other than Islam." This regulation, in addition to the regulation on the protection of religious unity, prohibits the media from publishing documents "humiliating Allah or his prophets, the Quran or Sunnah of the Prophet (Mohammed) or the Islamic religion" This authorized the Maldivian Ministry of Islamic Affairs to block eight websites in 2008 and 2009 for allegedly publishing anti-Islamic and pro-Christian content in the Dhivehi language.⁶²³

c. **Apostasy Law**

The growing influence of Islamists is a major concern for the country. In addition to the constitutional provisions that grant equal protection of human rights only to the extent that they are compatible with Islam, there has also been talk of integrating and fully implementing Islamic law in the country. Even under the current legislation, some aspects of Sharia law are incorporated into the legal system. For example, from the age of seven, apostasy is punishable by death.

In May 2010, during a public question-and-answer session with Islamic Speaker Dr. Zakir Naik, Mohamed Nazim stated that he was "Maldivian and not a Muslim". Nazim was the first Maldivian to publicly announce he was not a Muslim. The Islamic Foundation, a local religious organisation, urged that Mohamed Nazim be stripped of his nationality and he shall be sentenced to death if he did not apologize and embraced Islam. Nazim's statement questioned the constitutionality of annulment for renouncing the Muslim religion. The 2008 Maldivian Constitution states that anyone who was a Maldivian citizen at the commencement of the Constitution is a citizen of the Maldives. It also states that "no citizen of the Maldives may be deprived of citizenship". Thus, Maldives' adherence to Sharia law, which punishes

⁶²³ Ibid.

apostasy with revocation of citizenship, is contradictory to the Maldivian Constitution. Nazim said, “When I did what I did, legally I was absolutely convinced that there was no way I could not be a Maldivian”.⁶²⁴

In the end, Nazim returned to Islam after being detained for five days in Dhoonidhoo prison, where he received advice from religious scholars. However, he said that "the extremism that was taking root in the Maldives was growing so fast". I needed to talk about it." Nazim said that "someone had to do it, you had to talk about it. The repression of thought, the absence of debate and the lack of a public sphere in which such a discussion can take place are dangerous.

There is no freedom of religion or religious expression in the Maldives because the practice or propagation of a religion other than Sunni Islam is not only prohibited, but is also punishable by the revocation of citizenship or of death. With Islamic extremists gaining political power in the Maldives, freedom of religion will continue to deteriorate, even within the Muslim community. Currently, there have only been limited demonstrations of religiously motivated instability and violence. But as radical Islamist groups continue to increase their power, moderate Muslims and non-Muslim will begin to experience severely restricted religious freedom. Therefore, the Working Group should stress the importance of freedom of religion and freedom of expression, and particularly urge the Government of Maldives not to adhere to radical Islamic ideals.

8.1. Afghanistan

a. Islamic Law in the Afghan State

Afghanistan was founded by Ahmad Shah Durrani in 1747, who ruled till 1773. During his term of office, the administration drafted a legal code and the courts were in the hands of the ulemas (religious scholars), with the exception of the death penalty to be approved by the king or a governor. After Ahmad Shah's government, the main judicial base remained in the Pashtunwali tribal code (Pashtun code of conduct), although Sharia courts was existent in urban centres until the late 19th century. To date, the official legal system is not available mainly in the rural and tribal areas of Pashtun. The Pashtun social code, Pashtuwali and other customary laws fulfill the function of law in social decisions and judicial decisions. However,

⁶²⁴ Ibid.

at the time of Amir Abdur Rahman (1880-1901), Islam was the driving force of his centralized government. He has made all the laws to act in accordance with Islamic law and has given Sharia importance over customary laws. Thus, Islam influences not only the legal system, but also plays an important role in the affairs of the state.

The King Amanullah (1919-1929), initiated the secularisation process and introduced numerous changes intended to develop Afghanistan. He abolished the traditional veil for women and opened a number of co-educational schools. Later it designed the basis for democratization and the proclamation of the 1964 Constitution under Zahir Shah (1933-1973). The Republican government of Muhammad Daud has established a one-party government, a "democracy based on social justice". With the intention of giving power to the majority - farmers, workers, and youth, he introduced the Afghan Constitution, 1977. After the Daub government, the Marxist government pursued land reform. Despite brutal political executions aimed at suppressing the resistance of agrarian reform, this did not succeed.⁶²⁵

There was strong politicization of Islam during the resistance of the mujahideen to defend the country against the Soviet invaders between 1979 and 1989. An Islamist movement was created in 1958 at the University of Kabul, particularly by the faculty of Islamic law, but their strength has only come when Soviet was defeated. After the Soviet defeat, the Islamic State of Aghanistan was formed and a religious leader assumed the political function of the state. Nevertheless, the religious leader and the mujahideen were not experts in assuming political responsibility and leading the state. At the same time, rivalries between the mujahideen groups and the civil war compounded the problem of the political stability of the weak state.⁶²⁶

The resistance of the Mujahids to the defense of the country against the Soviet invaders was strongly politicized between 1979 and 1989. After the defeat of the Soviet, the Islamic State of Aghanistan was created with a political function. However, the religious leader and the mujahideen were not experts in political accountability and ran the state. Meanwhile, rivalries between the mujahid groups and the civil war compounded the problem of political stability. During this period of political instability from 1992 to 1994, the Taliban appeared in the Afghan political scenario with the promise of greater security and the end of the civil conflict. The Taliban set up a theocratic regime under the leadership of Mullah Muhammad Omar, who proclaimed himself "Commander of the Faithful". The government officials and leaders

⁶²⁵ Legal System in Afghanistan, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/18418/9/09_chapter%203.pdf (last visited on October 18, 2018).

⁶²⁶ Ibid.

were mainly members of the ulema. The Taliban strictly enforced Islamic religious laws largely based on Wahhabism. However, the reign of Afghanistan with religious laws has ended with the fall of Taliban in 2001.

One of the main objectives of the Taliban that controls Afghanistan was to establish Islamic states and rule on the basis of Islamic laws. The Taliban, after settling in Afghanistan, adopted the name of "Islamic Emirate of Afghanistan" and applied rigid Islamic laws. The Taliban's decision on any issue is based on the will and advice of the ministers Amir Al-Mu, who are supposed to guide on the basis of the Sunnah. In the name of liberating Afghanistan from the influence of the unfaithful government and ideology, the Taliban have adopted Puritan politics. The Taliban interpreted the Qur'an to reflect their political interests and personal whims and used Islam to hide their brutal crimes. The Taliban's religious policies were not only opposed to the international community, but also to Islamic believers. Under the Taliban regime, the conservative interpretation of Islam was introduced. The most severe law used by the Taliban in the name of Sharia law is Hudud, the stoning of adulterer and amputation of the thief.

The implementation of Shari'a and Hudud laws, by the Taliban, is aimed at the security of life and property of the people.⁶²⁷ The implementation of Shari'a and Hudud laws, by the Taliban, is aimed at the security of life and property of the people. Men and women were regulated in their behaviour and dressing. Men had to wear traditional clothes, avoid Western-style clothes and avoid shaving. Men were asked to strictly observe their religion and to pray five times a day, preferably in mosques. Women were the worst victim under the Taliban government. According to Taliban, "women face corrupt men", and the women were prohibited from accessing public space. The women were invited to observe the Hejab by using a burqa to cover her whole body. The women were prohibited from working outside their home and access to education, public washrooms were barred and they were even asked to screen or paint the window to prevent men from seeing them inside.

The Constitution states that Islam is the official religion of the state and declares that no law can contravene the beliefs and provisions of the "sacred religion of Islam." In addition, it stipulates that the provisions of the Constitution should not be modified with regard to respect for the fundamental principles of Islam. According to the constitution, followers of other religions other than Islam are "free to practice their religion and perform their religious rites

⁶²⁷*Id.* at 63.

within the limits established by law." According to the constitution, "the state must design a cohesive curriculum on the basis of the provisions of the sacred religion of Islam" and develop courses on religion based on Islamic sects.

The penal and civil codes derive their authority from the Constitution. The constitution specifies that the courts will apply the constitutional provisions as well as the law in the settlement of cases. For cases in which neither the Constitution nor the Penal or Civil Code deals with a particular case, the Constitution states that the courts can apply Hanafi Sunni jurisprudence in the limits established by the Constitution to obtain justice. The constitution also allows the courts to apply Shia law in cases involving Shia supporters. Non-Muslims cannot testify on matters requiring Sharia jurisprudence. The constitution does not mention separate laws applicable to non-Muslims.

Conversion from Islam to another religion is apostasy according to the Hanafi school of jurisprudence applicable in the courts. If someone converts to another religion from Islam, he or she shall have three days to recant the conversion. If the person does not recant, then he or she shall be subject to the punishment for apostasy. Proselytizing, to try to convert individuals from Islam to another religion is also illegal according to the Hanafi school of jurisprudence applicable in the courts and subject to the same punishment. Blasphemy, which may include anti-Islamic writings or speech, is a capital crime according to the Hanafi school. The law prohibits the production, reproduction, printing, and publishing of works and materials contrary to the principles of Islam or offensive to other religions and denominations. It also prohibits publicizing and promoting religions other than Islam and bans articles on any topic the government deems might harm the physical, spiritual, and moral wellbeing of persons, especially children and adolescents.

Sum Up

South Asia as a region connotes Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Srilanka. They all form the regional institutional grouping called SAARC (South Asian Association for Regional Cooperation). In South Asia, Muslim-majority Pakistan, Bangladesh, Afghanistan and the Maldives are Islamic states. Although Buddhist-majority Sri Lanka stops short of declaring Buddhism as the state religion, it does

place it foremost. Bhutan, in its 2008 constitution, declared Buddhism as the spiritual heritage and Constitution of Hindu-majority Nepal have defined Nepal as a secular state.

Pakistan and Bangladesh were part of India before 1947 and both are predominantly Muslim countries. In Pakistan non-Muslims are allowed to follow their respective personal laws. Bangladesh is a pluralistic society with four major religious communities -Muslims, Hindus, and Christians as well as a number of ethnic minority communities who follow these or other religious-cultural practices. The constitution of Bangladesh guarantees freedom of religion to all citizens of the country and allows each religious community the freedom to live according to the separate personal laws that have governed their communities since much before the partition of the Indian sub continent. The Hindus constitute the largest minority group in Bangladesh. The Buddhist community also follows the Hindu personal family. However, there are some anomalies existing in the religious laws.

In the year 2008, the Himalayan Kingdom adopted its first written Constitution and transformed itself from theocracy to a constitutional monarchy. The Buddhism as the states's spiritual heritage is recognised under the Constitution of Bhutan and it lay down that it is the responsibility of all religious institutions and personalities to promote the spiritual heritage of the country. The Constitution of Bhutan guarantees to every citizen the right to freedom of thought, conscience and religion and it prohibits discrimination based on religion. In Bhutan there is no issue concerning personal law. Since almost all controversies around personal laws start and end with the rights of the women and gender equality and since women in Bhutan are equal to men in all respects, personal law is not an issue.

The first three constitutions of Nepal, namely The Government Act 1948, Interim Government of Nepal Act 1951, and The Constitution of Kingdom of Nepal 1959, guaranteed fundamental rights which were protected by the due process of law. They contained directive principles of state policy, and the rule of law was assured. They provided to the citizen of Nepal freedom of person, speech, assembly, and worship, but they did not mention anything about the right to freedom of religion or anything regarding personal laws. From the year 1950s, the grave and most common demands of secularism emerged only in 1990 after the fall of the partyless Panchayat regime. Secularism in Nepal has not meant the strict separation of state and religion and seems to be inspired by the Indian model, according to which the State maintains all the religious traditions of its people alike. It does not make religion a private matter or a secular society. Secularism has changed the nature of the relationship

between Hinduism and minority religions. Secularism has been an essential step in the project of creating a new, inclusive and republican Nepal, but it has also led to a public debate about the relationship between religion and the state that has sometimes become fractious.

In respect of Srilanka, the SriLankan justice system includes a variety of different systems and traditions, and the interplay between legal systems can be clearly understood when it is explained in a historical perspective. Srilanka's personal law is divided into three; that is to say, the general law of marriage established by the Roman-Dutch law applicable to the lowland Sinhalese residing around the centre of Colombo, the Kandyan law applicable to the highland Sinhalese residing around Kandy, Thesavelamai and the Tamils of Jaffna, and Muslim law are applicable to Muslims. These legal systems are not universally applicable, but apply to special communities within Srilanka. Today, the customary laws of various communities in Sri Lanka are considered to be part of their identity and increasingly patterned in the context of their constitutional right to freedom to practice religion. Requests for reform are seen as attempts by other communities, including the West, to suppress their identities.

Maldives is an Islamic country and after transferring power to their first democratically elected government in 2008 a new constitution aimed at ensuring equal protection of human rights was adopted. However, it grants these freedoms only to the extent that they are compatible with Sunni Islam, in accordance with Sharia law. In the non-discrimination clause of the Constitution, it should be noted that religion does not appear in the clause, but it is incumbent on all Maldivian citizens to preserve and protect the state religion of Islam

Therefore, there is no freedom of religion or religious expression in the Maldives, as the Constitution prohibits the practice of any religion other than Islam.

Lastly, with regard to Afghanistan, the Constitution states that Islam is the official religion of the state and declares that no law can contravene the beliefs and provisions of the "sacred religion of Islam." In addition, it stipulates that the provisions of the Constitution should not be modified with regard to respect for the fundamental principles of Islam. According to the constitution, followers of other religions other than Islam are "free to practice their religion and perform their religious rites within the limits established by law." According to the constitution, "the state must design a cohesive curriculum on the basis of the provisions of the sacred religion of Islam" and develop courses on religion based on Islamic sects.

CHAPTER VIII

SUMMATION AND SUGGESTIONS

In the present India sickness of our personal laws has been almost every Tom, Dick and Harry's cup of tea. From the early days of independence ailments of this branch of the country's legal system have been talked about by all and sundry. This problem child of the Indian statute-book has received the fullest attention of the legislators, judges, lawyers and legal academicians-who may be regarded as the doctors and physicians of law. At the same time it has also suffered at the hands of unlicensed quacks, charlatans and mountebanks who, having little knowledge of the real issues involved, have been freely talking of its diseases and suggesting measures for their treatment. Their hurly burly has confused even many of the rightful physicians and misled them to wrong conceptions and prejudices. This has resulted into misdiagnosis of the problems, wrong prescriptions for their solution and overdoses detrimental to our socio-moral values.⁶²⁸

Commencing from the constitution-making process, the issue of personal laws in the country has been a major site of strife.⁶²⁹ In the Constituent Assembly, furious debates took place about whether independent India should continue with the practice of religion specific personal laws for different religious groups devised by the colonial masters or whether this system should be done away with and replaced by a Uniform Civil Code.⁶³⁰ Caught in a deadlock, the constitutional architects devised a pragmatic strategy. They accepted the practice of governing different religious groups in accordance with their personal laws

It has already been stated that the term 'Personal Law' means the law that governs a person's family matters. Though, the meaning of the term personal law sheds some light on its nature and scope, but it does not help to understand its subject-matter. The Constitution of India, though, does not define the term personal law, but Entry 5 of List III of the VII Schedule throws much light on its subject-matter.⁶³¹ Apart from these subject-matters of personal law which are expressly provided, the residuary clause of the Entry makes it necessary to enter

⁶²⁸Tahir Mahmood, *Personal Laws in Crisis* 95 (Metropolitan, New Delhi, 1986).

⁶²⁹See, Subrata Mitra & Alexander Fischer, "Sacred Laws and the Secular State: An Analytical Narrative of the Controversy over Personal Laws in India" 1(3) *IR* (2002).

⁶³⁰See, Constituent Assembly Debates, Vol. VII, November 28, 1948 speech by LOKANATH MISRA 175; Constituent Assembly Debates, Vol. VII, December 1, 1948 speech by C. Subramaniam 87; Constituent Assembly Debates, Vol. XI, November 21, 1949 speech by Jaspat Roy Kapoor 194.

⁶³¹Entry V says 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."

into the pre-constitutional position of personal laws to ascertain their subject-matter, if any, apart from those specified in the Entry 5 of List III of the VII Schedule.

8.1. Status of Personal Law in India: what is

Insofar as the question of constitutionality of laws is concerned, the Constitution of India prescribes certain requirements which must be met by laws in order to be constitutionally valid.⁶³² For laws that pre-date the constitution, such as personal laws the relevant constitutional provision is Article 13(1) which provides that all the pre-constitution laws should not violate the fundamental rights under Part III of the Constitution; else such laws will be treated as void.⁶³³ Another provision under the same Article, i.e. Article 13(3)(a) elucidates what is meant by the term 'law'.⁶³⁴ These two provisions are to be read in light of Article 372.⁶³⁵

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

An early depiction of this is visible in the judgment of the Madras High Court in *Dwaraka Bai v. Prof. Nainan Mathews*,⁶³⁶ in this case, the petitioner challenged Section 10 of the Indian Divorce Act, 1869 which allowed a husband to obtain divorce only on the ground of

⁶³²The Constitution of India, art. 13.

⁶³³ Article 13(1): All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

⁶³⁴ Article 13(3)(a): 'law' comprises any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

⁶³⁵ Article 372(1): All the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. Further, according to Explanation 1 of Article 372, the expression 'laws in force' means: "...a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

⁶³⁶ AIR 1953 Mad 792.

adultery, while the wife had to prove cruelty or desertion in addition to adultery. The court while upholding the said provision held that such discrimination was justified as it considered the differing consequences which the act of adultery could have when done by a man and woman.⁶³⁷ On similar lines, in *Harvinder Kaur v. Harmender Singh Choudhury*,⁶³⁸ the Delhi High Court upheld Section 9 of the Hindu Marriage Act, 1955. In doing so, the Court observed that: “Introduction of constitutional law in the home is most inappropriate and will prove to be a ruthless destroyer of the marriage institution and all that it stands for.” The court further observed that if Articles 14 and 21 were applied to matrimonial homes then the institution of marriage will collapse.”⁶³⁹

Another instance when the hegemony of Narasu reasoning comes out starkly in the Supreme Court in respect of personal laws is in the case of *Shri Krishna Singh v. Mathura Ahir*. In this case the Apex Court held that, Personal Laws are immune from being subjected to Part III of the Constitution. Going through the above cases, one can clearly see that the courts have avoided dealing with the issue concerning constitutionality of personal laws. The court may have adopted such an approach as they might have apprehended that if personal laws were tested on the touchstone of fundamental rights, it may have led to some conflict.

Although, the Narasu reasoning played a major role in fashioning the personal law jurisprudence in the country, but as every idea is subject to change, adaptation, reformulation, and abrogation, it gradually started to lose its stronghold and the approach of Indian courts in matters pertaining to personal laws also shifted. Consequently, the courts adopted a more activist stance and began to test personal laws on the touchstone of Fundamental Rights. This approach enabled the courts to either strike down any particular statutory provision in any law or to reinterpret them harmoniously with Part III of the Indian Constitution.⁶⁴⁰

An early depiction of this approach is visible in the judgment of Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah*.⁶⁴¹ In this case, the petitioner challenged the constitutionality of Section 9 of the Hindu Marriage Act, 1955 dealing with restitution of

⁶³⁷ *Id.* at 35.

⁶³⁸ AIR 1984 Del 66.

⁶³⁹ *Ibid* at 34.

⁶⁴⁰ Agnes, *Supra* note 10 at 909.

⁶⁴¹ AIR 1983 AP 356.

conjugal rights for reason that it infringes Articles 14, 19, and 21.⁶⁴² The Court struck down the relevant provision, finding it to be violative of Article 21 and observed that:

“...the remedy of restitution of conjugal rights constitutes the starkest form of governmental invasion of personal identity and individual's zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being.”⁶⁴³

However, later, the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha*⁶⁴⁴ expressly overruled the view taken by the Andhra Pradesh High Court.

On similar notes, in *Ammini EJ v. Union of India*,⁶⁴⁵ the Kerala High Court quashed the words ‘incestuous’ and ‘adultery coupled with’ from Section 10 of the Indian Divorce Act, 1869 on the grounds of being arbitrary and violative of Articles 14, 15, and 21 of the Constitution.⁶⁴⁶ Following this verdict, several other High Courts held this provision to be discriminatory. Resonating with these verdicts, the Indian Parliament amended the said Act in 2001 bringing it in consonance with personal laws of other religious groups.⁶⁴⁷ In *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*,⁶⁴⁸ the Apex Court held that the right of a Hindu woman to execute a will in relation to the property possessed by her under Section 14 of the Hindu Succession Act, 1956 is protected under Articles 14, 15, and 21 of the Constitution.⁶⁴⁹ Similarly, in *John Vallamattom v. Union of India*,⁶⁵⁰ the Apex Court struck down Section 18 of the Indian Succession Act, 1925 as being violative of Article 14.⁶⁵¹

Another important judicial pronouncement depicting Supreme Court’s liberal, rights-based and activist approach is *Daniel Latifi v. Union of India*.⁶⁵² In this case, inapplicability of

⁶⁴²*Id.* at 17.

⁶⁴³*Id.* at 29.

⁶⁴⁴ (1984) 4 SCC 90.

⁶⁴⁵ AIR 1995 Ker 252; *See also Mary Sonia Zacharia v. Union of India*, 1995(1) KLT 644 (FB).

⁶⁴⁶ AIR 1995 Ker 252, p. 40, 41, 47.

⁶⁴⁷*See* Werner Menski, “The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda” 3 *GLJ* (2008).

⁶⁴⁸ (1996) 8 SCC 525.

⁶⁴⁹*Id.* at 15, 27, 29.

⁶⁵⁰ (2003) 6 SCC 611.

⁶⁵¹*Id.* at 66, 70.

⁶⁵² (2001) 7 SCC 740.

Section 125 of the Criminal Procedure Code to Muslim women was challenged.⁶⁵³ It was brought to the attention of the Court that at the same time, under Section 3(1)(a) of the 1986 Act, a divorcing Muslim husband had become liable to potentially much higher maintenance payments to his ex-wife than under Section 125 of the Criminal Procedure Code.⁶⁵⁴ The constitution bench of the SC while upholding the Act made following important conclusions for the benefit of divorced Muslim women:

“(1). A Muslim husband is liable to fair and reasonable provision for the future of the divorced wife including her maintenance and should be made within the iddat period. (2). Such Liability of Muslim husband is not confined to the iddat period.”⁶⁵⁵ These cases, among others,⁶⁵⁶ point towards the shift in the attitude of Indian courts when dealing with issues concerning personal laws. Indian courts, which in the beginning were not inclined towards interpreting personal laws in light of the Fundamental Rights guaranteed by the Constitution, have gradually adopted a more liberal as well as rights-based stance. And in the recent *Shayara Bano v. Union of India*⁶⁵⁷, the Supreme Court of India pronounced a verdict which set aside the practice of instant triple talaq or talaq-e-biddat as unconstitutional. The above-discussed approaches provide an insight into the trajectory of courts’ engagement with personal laws.

8.2. Status of Personal Law in India: What is expected to be

Article 44 is not only an evidence of the fact that all the Personal Laws are differently recognized; but it is also a clear proof that the same should not be perpetuated. Article 44 illustrates that the personal laws are of ‘provisional nature’. Therefore, Mr. Masani, a member of the Sub-Committee, suggested a common civil code to all citizens while discussing draft Article XI.⁶⁵⁸ But the suggestion was overruled by majority,⁶⁵⁹ saying that

⁶⁵³ In this case the petitioners challenged the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986, under which Sec 125 of Cr.P.C does not apply to Muslim women.

⁶⁵⁴ See, The Muslim Women (Protection of Rights on Divorce) Act, 1986, §3; See, also Menski, *Supra* note 59, 219.

⁶⁵⁵ Daniel Latifi v. Union of India, (2001) 7 SCC 740.

⁶⁵⁶ The activist approach of the Indian courts is visible in several other cases, See generally *Mrs. Pragati Varghese v. Cyril George Verghese*, AIR 1997 Bom 349; *Debra Clare Seymour v. Pradeep Arnold Seymour*, (2002) 98 DLT 34; *Shamim Ara v. State of Uttar Pradesh*, (2002) 7 SCC 518.

⁶⁵⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁶⁵⁸ Draft Article XI: *Right to Freedom of Family Relations*: (1) Every Person has the right to be free from interference in his family relations. (2) No marriage valid according to the law of the Union or a State, shall be dissolved unless permitted by the law of the Union or the law of the State concerned and in accordance with the forms and under the conditions of the State concerned. See, B. Shiva Rao, *Id.*, Vol. 2, at 78.

⁶⁵⁹ The Minority consisted of Mr. Masani, Rajkumari Amrita Kaur, Mrs. Hansa Mehta and Dr. Ambedkar. B. Shiva Rao, *Id.* at 128.

this was out of the scope of fundamental rights.⁶⁶⁰When the Draft Constitution was moved for consideration and approval in the Constituent Assembly, draft Article 35 providing for a uniform civil code was opposed by four Muslim members on the ground that it would interfere with the way of life and the religion of the people. This argument was countered by Shri K. M. Munshi, Shri Alladi Krishna Swami Ayyar and Dr. B. R. Ambedkar: who pointed out that personal law was never in the purview of religion and as such there was no question of any danger to the religion. Ultimately, the present Article 44 was adopted on November 1949, without any amendment.⁶⁶¹

The short historical account, as stated above, makes it clear that the present ‘distinct and separate status’ of personal laws ‘based on religion’ is not expected to be continued perpetually.⁶⁶²This fact of separation of religion from personal laws is also clarified in the Constituent Assembly by K.M. Munshi, member of the Draft Committee. He says that there has to be a separation of religion from personal law and religion must be limited to spheres which justifiably relate to religion.” This is a paradigm shift from the ‘British policy of duality’ and ‘plurality of personal laws’ to the ‘Indian policy of unification’ of personal laws. National policy of unification of personal laws in the form of a common civil code is expressly envisaged in Article 44. Apart from Article 44, there are many other policy indicators which go on similar line of unification of personal laws and consolidation of India into nationhood which was, and in fact is, the chief objective of the Uniform Civil Code. Article 51-A, for example, prescribes the duty of every citizen of India to abide by the Constitution and respect its ideals.⁶⁶³The Preamble, which opens the minds of the makers of the Constitution, evidently makes it clear spells out the spirit of the Constitution.⁶⁶⁴ These indicators direct the legislature and the executive in what manner they are to exercise the legislative and the executive power they have.

What has been discussed in the foregoing paragraphs reveals that, though the status of personal laws, at present, is separately recognized and maintained, but the same is not

⁶⁶⁰Nonetheless the provision for a uniform civil code was incorporated in the directive principles of state policy See, B. Shiva Rao Ibid, Vol. 2, at 128.

⁶⁶¹See, Meghe, Dinkar R., *Uniform Civil Code and Hindu Personal Law 5* (Pathik Prakashan, Nagpur, 1973).

⁶⁶²In the Constituent Assembly Debates it was laid down categorically that the object of Article 44 is to bring a uniform personal law for the purpose of national integration. It advances on the conjecture that there is no necessary relationship between religion and personal law in a civilized society. See Sarala Mudgal, *supra*note 73.

⁶⁶³Article 51-A : ‘to uphold and protect unity and integrity of India; and to promote harmony and the spirit of common brotherhood amongst all the peoples of India transcending religious diversities.’

⁶⁶⁴The Preamble of the Constitution says that, “The people of India have resolved to constitute ‘secular’ India; and have secured for themselves, amongst other things, the fraternity assuring the dignity of the individual and the unity and integrity of the nation.”

expected to be perpetuated. In a joint note of dissent, women members in the Constituent Assembly i.e., Mrs. Hansa Mehta and Rajkumari Amrit Kaur had categorically said that the uniform civil code should be granted within few years from now.⁶⁶⁵ Thus, Uniform Civil Code is not only due, but it is overdue.

8.3. Government's Lip Services vis-à-vis Judiciary's Lament

Article 37 although is just a guidelines and not justiciable but they are very much important in the governance of the country. It is a 'moral duty' of the State to apply these principles in making laws. Dr. Ambedkar in the Constituent Assembly stated that "the legislature and the executive should not merely pay lip services to these principles but they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country."⁶⁶⁶

A period of more than six decades has elapsed since India got independence. Unfortunately, the government is merely paying lip services to the principle of uniform civil code. "The command of Article 44 is yet to be realized."⁶⁶⁷ Being dissatisfied with this attitude of the Government, the Supreme Court many times expressed regret. The Supreme Court in *John Vallamattan*⁶⁶⁸ regretted that Article 44 has still now not seen the light of the day.⁶⁶⁹ In *Ms. Jorden Diengdeh v. S.S. Chopra*⁶⁷⁰ the Supreme Court suggested that it is time for the law makers to intervene in the matters dealing with matrimonial issues and to enact a uniform law for the same.⁶⁷¹ Chandrachud, C.J., in *Shah Bano Begum*⁶⁷² had observed Article 44 still has not seen the light of the day and had expressed regret for its non-implementation.⁶⁷³ Learned

⁶⁶⁵Mrs. Hansa Mehta and Rajkumari Amrit Kaur had stated that, "We are of the view that a uniform civil code should be guaranteed to the Indian people within a period of 5 or 10 years...."

⁶⁶⁶Cited in, Basu, *Supranote* 58 Vol. 3, at p. 4026.

⁶⁶⁷See, *S.R. Bommai v. Union of India*, AIR 1994 SC 1918, at p 2066.

⁶⁶⁸*John Vallamattan v. Union of India*, AIR 2003 SC 2903 at p. 2913.

⁶⁶⁹The learned judge observed that, "It is a matter of regret that Article 44 of the Constitution have not been given effect to. Parliament is still to step in for framing a common civil code in the country." It reminded that, "A common civil code will help the cause of national integration by removing the contradictions based on ideologies." Ibid.

⁶⁷⁰AIR 1985 SC 935 pp. 940 – 41.

⁶⁷¹The learned court had suggested that "the time has come for the intervention of the legislature in these (judicial separation, divorce and nullity of marriage) matters to provide for a uniform code of marriage, divorce and to provide by law for a way out of the unhappy situations..." Ibid.

⁶⁷²*Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1989 SC 945.

⁶⁷³Chandrachud, C.J., had observed Article 44 still has not seen the light of the day and had expressed regret for its non-implementation. on behalf of the five judge Bench of the Supreme Court that, "Article 44 of our Constitution has remained a dead letter . There is no evidence of any official activity for framing a common civil code for the country. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in

Justice Kuldip Singh, in *Sarala Mudgal*⁶⁷⁴ expressed his agony: “One wonders how long it will take for the Government of the day to implement the mandate of the framers of the Constitution under Article 44 of the Constitution of India.”⁶⁷⁵

8.4.Problems with Uniform Civil Code

Adoption of uniform civil code is viewed as an answer to the controversy surrounding personal laws. As stated above the judiciary time and again has in many cases urged the government to implement uniform civil code whenever they were confronted to decide on matters pertaining to personal laws. Adoption of uniform civil code is viewed important for achieving equal status to all the citizens and for promoting national integration. One of the most important reasons, because of which civil rights groups are backing the Uniform Civil Code, is to ascertain equal rights to women.

Uniform Civil Code is always harped on around the movement around the rights of women. It is lauded as the ultimate solution to do away with many of the discriminations between the genders that have seeped through religious edicts and social structure. Even in the Constituent Assembly Debates the discrimination against women and much needed social reforms for elevation of their status in the society was the moot point in favour of Article 35.

The members against a common civil code ignominiously dodged the question of elevation of the status of women and focused only on the cultural disparity and dominance of the majority. No one tried to question the practical working of a common civil code and how would it be beneficial in the drive for rights of women in our country. Ironically, none of the women members participated in the debate on Article 35 and the proposed future prospect of securing a uniform civil code. K.M. Munshi appealed to the House that absence of uniform personal law would amount to all discriminatory practices being covered under the purview of religious freedom and hence rendering impossible for legislative reforms to correct them as they would be struck down on the premise of religion.

the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because; it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.” *Id.* at para 32.

⁶⁷⁴*Sarla Mudgal v. Union of India*, 1995 3 SCC 635.

⁶⁷⁵*Id.* at para 32, 1538.

8.5. National Integrity and “Women’s Rights”

The argument that presents national integrity as the rationale for a Uniform Civil Code along with its conflation with “women’s rights” is unacceptable because of its implicit homogenizing thrust. To begin with, it is wrong to assume that while Hindus have willingly accepted reform, “other” communities continue to cling to diverse and retrogressive anti-women laws and threaten the integrity of the nation-state. It is misleading to claim that Hindu Personal Law was reformed: it was merely codified. Laws intended to overhaul marriage and inheritance were dropped from consideration in parliament in response to pressure from conservatives in the Congress party on the eve of the first general election, held in 1951. B.R. Ambedkar, who drafted the original Hindu code bill, even resigned as law minister in protest. Eventually, in 1955-1956, Prime Minister Nehru did move forward in this endeavour by enacting four pieces of legislation with regard to Hindus.⁶⁷⁶ What these laws achieved was the codification of the vast and heterogeneous practices of all communities that were neither Muslim, Parsi, nor Christian, bringing them into conformity with what were assumed to be “Hindu” norms, but what were, in fact, North Indian, upper-caste practices. Other practices that did not match these norms were explicitly dismissed during the debates in parliament as being “un-Indian.”⁶⁷⁷ These mid-1950s laws were by no means an unqualified advance for women’s rights. On the contrary, codification put an end to the diversity of Hindu laws practiced in different regions, in the process destroying existing and often more liberal customary provisions. Conversely, there are features of Muslim Personal Law that are more advantageous for women than Hindu Personal Law; the Muslim marriage-as-contract protects women better in cases of divorce than the Hindu marriage as sacrament; the Muslim law of inheritance protects women’s rights better than Hindu law; and the mehr (bride-price) is the exclusive property of the wife. Also, Muslim men who marry more than once are legally bound to fulfil responsibilities toward all their wives, whereas Hindu men who contract polygamous relationships (illegal since the 1955 Hindu Marriage Act) escape this responsibility in their second or third marriages. In practice, the BJP position that a Uniform Civil Code will take into account “positive features” of all personal laws is actually untenable. Another problem with the national integrity argument is that this imagined national integrity is constructed through the marginalization and exclusion of a multiplicity of

⁶⁷⁶ The four legislations were; Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoption and Maintenance Act.

⁶⁷⁷ Nivedita Menon, “A Uniform Civil Code in India: The State of the Debate in 2014 Feminist Studies” 480-486 40 Special Issue: Food and Ecology (2014).

other interests and identities, and therefore it is not a value that feminists can espouse. At the same time, feminists cannot accept unqualified claims of minority religious communities to their unreformed personal laws in the name of cultural identity. For one thing, the cultural identity contained within personal laws that is claimed today as “natural” and prior to all other identities is no more primordial than the nation. Here, it is important to keep in mind the genesis of personal laws: the British colonial government, in consultation with self-styled community leaders, simplified vastly heterogeneous family and property arrangements within the ambit of four major religions: Hindu, Muslim, Christian, and Parsi. The resultant personal laws of each of these religions that are being defended today in the name of tradition and religious freedom are, thus, colonial constructions of the late nineteenth and early twentieth centuries. Feminists reject the notion of a religious community exerting rights over women through their personal laws because the gender discriminatory provisions of the personal laws are based on the same logic of exclusions that characterize the coming-into-being of the Indian nation itself.

8.6.Suggestions

First of all, the ambiguity surrounding the “status” of Personal Laws in India needs to be removed. Whether the personal laws it is at par with the concept of ‘Law’ or ‘Law in force’ or Customs having the “force of Law” under Article 13 of the Constitution. Unless the status of Personal Laws is clarified and expressly made at par with the status of any other secular Laws the ideology of securing equality of law and equal protection of law between men and women will continue to be an illusion leading to gross failure of social justice.

Moreover, even though the status of personal laws remains ambiguous, Time and again the apex court have relied upon Narasu Appa Mali’s case and as stated in most of the cases in the preceding chapters have maintained a reluctant approach in testing the personal laws in the touchstone of fundamental rights. However, in some cases Judiciary has recognised as ‘law’ and has reviewed personal laws and tested it within the touch stone of constitutionality. However, an express clarification is needed to ensure progressive equality in the domain of personal laws. Time and again the courts have been relying upon Narasu’s ruling whenever the dispute concerning personal laws have been brought up in the forefront. The first step in order to remove the ambiguity with regard to the status of personal laws can be achieved by overruling Narasu Appa Mali’s judgment.

Even though a constitutional directive, the enactment of Uniform Civil Code is fraught with problems. For one thing, little clarity exists as to the contours of Uniform Civil Code; whether it would be limited to issues of inheritance, marriage and divorce, etc, or cover other aspects as well. Second, the legal diversities existing in the country are so massive (in some places the law changes every two hundred kilometres) that any attempt to enact Uniform Civil Code will generate widespread resentment and strife. Third, the existing laws are founded on at least four clearly distinct jurisprudential philosophies. Enactment of Uniform Civil Code cannot be based on any arbitrary selection of one jurisprudence over another (there is no basis for presuming, for example, that one jurisprudence is superior to another, or that Anglican jurisprudence should be the basis for all personal laws - Hindu, Muslim and tribal). It will involve reconciliation of the different jurisprudences, a basis for which still remains to be worked out. Finally, personal laws of some communities, particularly tribal communities of North-east India such as the Nagas, Mizos, etc, enjoy constitutional or political sanction. Enactment of Uniform Civil Code would entail constitutional amendments which would not be easy.⁶⁷⁸

Against this growing tension between certain provisions of the personal laws of the different communities and the constitutional laws the argument of the antagonists of Uniform Civil Code that within democratic framework communities ought to have the right to adhere to their personal laws cannot be pushed too far. While the principle that the democratic framework should allow space for existence of personal laws is unexceptionable, it cannot by the standards of that very democratic logic be allowed to degenerate into a licence for the different communities to deny sections of their members rights to which they are entitled as citizens. In other words, the democratic principle that communities should enjoy space for practising their personal laws has to be subordinated to the internal restriction that the external protection to the personal laws would not be used to dominate the weaker groups within the communities. For, unless consensus exists on such internal restriction, the very idea of autonomous space for communities to follow their personal laws would stand in jeopardy. Any member within the community who feels aggrieved or oppressed would be free to approach the court that his or her fundamental right is being infringed and the cannot be allowed merely because the community is assured an autonomous space in respect of practising its personal law. We would then return to square one and the state would have little

⁶⁷⁸Imtiaz Ahmad, Personal Laws: Promoting Reform from Within, *EPW* Vol. 30, No. 452851-2852. (Nov. 11, 1995).

option except to foist an imperfectly articulated Uniform Civil Code. Enlightened public opinion has recently begun to veer round the view that in the face of enormous difficulties implicit in the enactment of Uniform Civil Code the appropriate course would be for the communities themselves to undertake to rationalise through entirely internal initiative those aspects of their personal laws which stand in conflict with the constitutional laws or fail to pass the test of equity, justice and good conscience, a doctrine of Roman law followed in India. This course is recommended as it vests the right to rationalise or even to reform their personal laws within the different communities and upholds the principle imperative to a democratic polity that culturally distinct communities possess a degree of autonomy to exist alongside a majority nation.⁶⁷⁹

The fundamental question in the pursuit of this course of action would be how the internal initiative within the different communities should be activated to translate itself into concrete action. Since the orientation to look towards the state for initiating any kind of public action is strong in our country, one course would be for the state to create an institutional framework within which such internal initiative might take effect. For instance, the state could set up consultative machinery within the different communities to bring about consensus around the rationalisation of the different questionable provisions. Such a course would be wholly counter-productive if not downright self-defeating. It would contradict the principle of autonomous space for cultural communities which rest precisely on the argument that in a polyethnic society the state stands in danger of becoming the carrier of the values of the dominant community. It would also contradict the principle of separation of the sacred and the secular upon which the idea of a secular state is founded. Therefore, quite irrespective of the nobility of intentions, a secular state cannot take upon itself to promote reform within the different communities and were it to do so its intentions would remain eternally suspect.

Under these circumstances, both the initiative for rationalisation and reform as well as the creation of appropriate institutional structures for building consensus over such rationalisation or reform has to come from within the different communities. Since the different cultural communities in India are at varying stages of social development, it is to be expected that the possibility for emergence of such initiative and for a consensus to be eventually evolved would be varied. Even so, a beginning has to be made somewhere and this beginning has to be made by concerned sections in the different communities. These concerned sections would first have to create an institutional structure for rationalisation

⁶⁷⁹ Ibid.

and/or reform and then go about dialoguing with the different segments of their community to work out a consensus.

There can be no uniform prescription for the process the concerned opinion in the different communities should follow. Allowance for variation in this respect has to be made depending on the advancement level of the communities. For example, with regard to the Muslims it appears that two alternative possibilities exist. One course can be for concerned Muslims to begin lobbying for codification of Muslim personal law. The other course can be to work for piecemeal reform and take up on a priority basis those provisions where the contradiction between the constitutional law and the personal law is severe or the law as understood and applied at present is clearly in dissonance with the principles of equity, justice and good conscience. Undoubtedly codification can go a long way toward removing the existing contradictions between the constitutional and personal laws as well as making them consonant with the principles of equity, justice and social conscience. However, there are two catches in this. First, codification led from the top often ends up creating unforeseen difficulties which are subsequently difficult to rectify. Second, codification can only follow emergence of an agreed upon draft code of Muslim personal law. Such an agreed upon code will present the same difficulties as those implicit in the rationalisation and/or reform of specific provisions. Indeed, there is every possibility that the difficulties may be greater as the process of codification of their law may be seen by the community as a wholesale change of Muslim personal law against which a strong sentiment already exists. Therefore, since social reform is a piecemeal process, the appropriate course would be to make a small beginning and work towards an eventual codification of the entire corpus of Muslim personal law. Concerned Muslims or any group of them of whatever persuasion or bent of mind - progressive, conservative, fundamentalist or modernist - should first begin by identifying those specific areas where tensions between the constitutional and Muslim personal law are already evident. On the basis of general impressions, it is possible to suggest that the areas relate to inheritance, marriage and divorce, but saying this alone would not do. One would be required to take a harder and more detailed look at the whole corpus of Muslim personal law to pin down very narrowly and pointedly the specific provisions which need rationalising.

Once identification of the specific provisions that need rationalising has been made, the second step would consist of finding out the Koranic position on them. Since Muslims argue that their personal law is divinely ordained (which contention for the time being need not be contested), it would help matters greatly if it can be shown to what extent the specific

provisions as understood and applied in India are actually at variance with the Koranically ordained position. Such scrutiny would actually strengthen the legitimacy for rationalisation and/or reform.

After these preliminary exercises have been gone through, a campaign specifically addressed within the community should be mounted to enlist popular support for rationalisation and/or reform in the desired direction. This campaign should have two thrusts. On the one hand, it should attempt to approach the sections which are directly affected by the existing provisions in order to convince them about the necessity of rationalisation and/or reform from their viewpoint and to enlist their support in favour of such initiative. On the other hand, it should try to create a framework for dialogue and debate between the protagonists and antagonists of contemplated rationalisation.

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Development of Personal Laws in India: an historical account

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Abstract

The personal law is one of the unique components of the Indian legal system. India is a multicultural society and different groups in India have separate personal laws. The personal laws tell the stories about the culture, behaviour, beliefs and values that are social constructs that shape the views of the people about their antecedents and roots. In India such social constructs have received legal recognition. Over centuries, through invasions and migrations various religious groups like Islam, Parsi, Christians have made India their home. The invasions and migration have led to the advent of various personal laws in India. The paper will focus into the status and policy on personal laws in India in a historical perspective. Thus, the paper will focus on the growth and development of various personal laws in India during different eras till the post independence period.

Introduction

Personal law systems are legal systems where, in the same country, different bodies of law are applied to different persons according to their ethnic or religious identity.¹ The personal law² is one of the unique components of the Indian legal system. India is a multicultural society and different groups in India have separate personal laws. Any one acquainted with the operation of the various personal laws in India would and can entertain no doubt that the applicability of these laws depends solely on religion.³ The personal laws tell the stories about the culture, behaviour, beliefs and values that are social constructs that shape the views of the people about their antecedents and roots. In India such social constructs have received legal recognition. The colonial invasion has had an immense impact on the structure and substance of personal

¹Hadas Tagari, *Personal family law systems – a comparative and international human rights analysis*, CAMBRIDGE I.J.L. 231.

²Personal Law would mean law relating to personal status, and the matters which are to a greater or lesser extent governed by the personal law are essential validity of marriage, mutual rights and obligations of husband and wife, parent and child, guardian and ward, the effect of marriage on property, divorce, annulment of marriage (though only to a limited degree), legitimation and adoption, certain aspects of capacity, testamentary and intestate succession to movables. See G.C. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 150 (4d ed. Clarendon Press 1952).

³A.M. BHATTACHARJEE, *MATRIMONIAL LAWS AND THE CONSTITUTION* 2 (Eastern Law House 1996).

law systems in India.⁴ Over centuries, through invasions and migrations various religious groups like Islam, Parsi, Christians have made India their home. The invasions and migration have led to the advent and development of various personal laws in India. After India gained independence the personal law system continued to be retained even after the adoption of the Constitution. Thus, this paper shall discuss the personal law system in the historical perspective and also the social and political factors that contributed towards the growth and retention of personal laws in India over the period of time.

Personal Laws in the Hindu Era

During the ancient times, there was no question of state neutrality or intervention in matters of religion in India.⁵ In Hindu India⁶ the general public enjoyed complete independence in the matters concerning their personal laws. The leaders of the society were Hindu sages and they relied upon the Vedas and other religious scriptures in matters concerning personal laws. The Hindu sages by relying upon the religious scriptures laid down norms to govern the society. These rules governed not only the religious ceremonies and rites of a Hindu but acted as a code of ethics and morality and governed the religious social intercourse and even matters of politics and government.⁷

There were universal laws which were laid down by the religious leaders of the society. Civil laws and religious and social rules were not differentiated from each other. During this period the society was based on 'Dharma'.⁸ There was no clear line of demarcation between law and religion.⁹ Initially, society was an organizational unit, but in the latter part of the Hindu India, especially in the *Smriti* period, state began to take shape. It consisted of *Saptangas*¹⁰ and the king was the head of it. The king and his subjects both were subjected to the rule of law formulated and enunciated by the sages. The king had very little power to

⁴TAGARI, *supra* note 2, at 231.

⁵KIRAN DESHTA, UNIFORM CIVIL CODE IN RETROSPECT AND PROSPECT, 7 (Deep and Deep Publication 2002).

⁶From the early ages, the advent of Aryan civilization the pantheon people were termed Hindus by the British as they lived on the banks of the river Sindhu. Hindu India is the period from the beginning of the Indian History (i.e. 1000 B.C.) to the establishment of an effective Muslim rule in the early 12th century. See, P.B.Gajendragadkar, *Secularism and the Constitution*, 20 *The American Journal of Comparative Law* 4, 25-26 (1972).

⁷A.S.ALTEKAR, STATE AND GOVERNMENT IN ANCIENT INDIA, 55 (3d ed. Motilal Banarsidass:Delhi 1958).

⁸The word Dharma is derived from the root 'dhru' means 'to hold'. *Dharma*, thus, was a principle of social cohesion, holding the society together in a harmonious relationship. See, M.S. PANDIT, *OUTLINES OF ANCIENT HINDU JURISPRUDENCE* 3 (N.M. Tripathi Private Limited: Bombay 1989).

⁹HARI SINGH GOUR, *THE HINDU CODE* 5 (Allahabad Law Publishers 1973).

¹⁰*Saptangas* (i.e., seven limbs). Apart from the king, the other six limbs were king's ministers, capital, realm, treasury, army and allies.

make laws and he was bound to rule in accordance with the Dharma. The king was required to take a vow at his coronation that he would respect the laws and he would not change them as per his wishes.¹¹

Thus it is clear that *Dharma* was the governing rule in Hindu India. The king was bound to do justice according to the *Dharmashastras* and the well-established customs. *Shastras* (i.e., religious texts) on one hand provided various rules for guidance regarding what should be done or what should not be done. On the other hand, the *Shastras* themselves, again and again, declared that customs must be enforced when they either overrule or supplement the rules in the religious texts. Therefore Privy Council, in *Collector of Madura v. Mootoo Ramalinga*¹², held that, “Under the Hindu system of law, clear proof of usage will outweigh the written text of the law.”

The conspicuous feature of the Hindu law was that it governed its entire Hindu community on a uniform conviction that law and religion have a common source of its growth.¹³ In the absence of other communities, any dispute in matters of personal laws did not receive any attention. Thus, with slight difference of opinions about personal laws in the small Hindu communities’ uniformity of law was a general rule than an exception. Thus, the clear existence of personal law can be found in ancient India. Thus the laws were regarded by the Hindus as an integral part of their religion.¹⁴

Personal Laws in the Muslim Era

The advent of the Muslims in India marked the foundation of a new era in the legal history of India. In the eighth century it was the Arab Muslims who first came and settled down in the Malabar Coast and in the Sind.¹⁵ Towards the end of the eleventh and the beginning of the twelfth century began the downfall of the Hindu period.¹⁶ The old Hindu kingdom began to disintegrate gradually. The political history of this period is full of constant struggles between a few powerful states for supremacy.¹⁷ A proper leadership capable of controlling and guiding the political and military talents and uniting Indians against the common foreign enemy was also lacking. The enemy took full advantage of

¹¹ The king had to follow *Rajdharma* that is to do his function of justice delivery according to the norms of *Dharmashastras* and the well established customs. He was the foundation of justice but not the source of law. The Vedas, the Smritis including commentaries and digests on them, and the Customs were the sources of law.

¹² (1868) 12 MIA 397.

¹³ U.C. Sarkar, *Hindu Law: Its character and Evolution*, 6 I.L.I 213 (1964).

¹⁴ A. CHAKERBARTI, NEHRU, HIS DEMOCRACY AND INDIA, 61 (1961).

¹⁵ A.B.M. HABIBULLAH, THE FOUNDATION OF MUSLIM RULE IN INDIA, (1945), quoted in V.D. KULSHRESHTHA, LANDMARKS IN INDIAN LEGAL AND CONSTITUTIONAL HISTORY. 16 (Eastern Book Company 1989).

¹⁶ U.N. GHOSHAL, STUDIES IN INDIAN HISTORY AND CULTURE 353-373 (1d. ed).

¹⁷ V.A. SMITH, THE OXFORD HISTORY OF INDIA 371 (Oxford University Press 1923).

these weaknesses.¹⁸ Subsequently the Muslims invaded and acquired the territory of India.

With the establishment of Muslim rule in India, Muslim law¹⁹ became enforceable through the machinery of the state.²⁰ However the Muslim rulers had to decide the law they were to apply to govern the large number of non Muslims inhabitants of India. The holy Koran did not afford much guidance in this regard. As the rulers were strangers to this country, they did not accept Hindu law for themselves, nor did they abolish the Hindu system of law altogether. Hindu law was allowed to be reserved for the Hindus and the Mohammedan rulers did not interfere with the system so far as its civil aspect was concerned.²¹ The result was that in this way the Muslim followed their own law and the Hindus were allowed to stick to their own system of law. This was with regard to civil laws only.²² Islamic law had a very clear demarcation between public law and private law.²³ Under this demarcation criminal law and public administration were placed in the first category while marriage, family relations, successions, etc., were regarded as private law. In matters falling in

¹⁸DESHTA, *Supra* note 3 at 13.

¹⁹Muslim law is founded upon 'Al-Quran' which is believed by the muslimans to have existed from eternity, subsisting in the very essence of God. The Prophet Mohammad himself declared that it was revealed to him by the angel 'Gabriel' in various portions and at different times. Its texts are held by the Muslims to be decisive as being the words of God transmitted to man through the Prophet. Besides inculcating religion and theology, the Quran contains also passages which are applicable to jurisprudence, which form the principal basis of the 'Sharia'. See, AQIL AHMAD, MOHAMMEDAN LAW 1-2 (23d ed. Central Law Agency 2009).

²⁰M. RAMA JOIS, LEGAL CONSTITUTIONAL HISTORY OF INDIA 4 (Universal Law 1990).

²¹SARKAR, *supra* note 4, at 200.

²²DESHTA, *supra* note 3 at 13-14.

²³Note: The extent of the application of Islamic and secular laws during the Muslim rule were as follows: (i). Civil law: a. The purely personal law of Islam relating to inheritance, succession, marital rights, guardianship, will, endow-ment, gift etc., was applied to Muslims only. b. The secular portion of the civil law relating to trade, barter, exchange, sale, contract, etc., was made applicable to muslims and non-muslims alike. (ii). The laws of the land: the system of taxation relating to land revenue, minerals, quarries, manufacture, agriculture, excise, merchandise, sea-borne trade, etc., were adopted from the people of this country by the muslim sovereigns of India with necessary modifications. These taxes and imports were levied on and realised from all races (including muslims) alike. (iii). the Religious and Personal laws of the non-muslims: suits involving points of personal law of the Hindus, were used to be decided with the aid of learned Hindu Pundits, in the case of other races, with the aid of their learned men. (iv). Criminal Law: The portion of the Islamic Canon law which deals with religious infringement, was applied to muslims only, such as drinking, marrying within prohibited degree, apostasy, etc. For such offences non-muslims were not liable to punishment under the laws of Shariat. (v). The Edicts and Ordinance: continued in the Farman's and Dastur-ul-amal for the guidance of the officers of the state. They were the common law of the people of the country as opposed to the Canon law. These Qanuns were binding upon the judicial and executive officers and in compliance therewith the courts of common law were established in India. See WAHED HUSAIN, ADMINISTRATION OF JUSTICE DURING THE MUSLIM RULE IN INDIA 14-16 (Calcutta: University of Calcutta).

the domain of private law all non-Muslims were left free, to follow their own religious laws and customs and there was no compulsion on non-Muslims. In actual practice, Muslim rulers did not enforce in many places, Islamic private law even for the Muslims-leave alone non-Muslims. Probably that is the reason that in India the British found many Muslim communities (convert from Hinduism) continuing with their indigenous customs and usages and decided not to make any change in this respect.²⁴ Thus during the Muslim era all non-Muslims with regard to their personal laws were governed by their own religious and traditional laws.

In the British Era

The British initially came to India as trading merchants but with the passage of time the British managed to establish their control over India. The British made efforts to establish systematic and modern legal framework in India. One after another various schemes for the administration of justice in different parts of the country were framed and enforced. The judicial system set up in the major part of India under the Mughals and in some places under local rulers, were gradually replaced with courts constituted by the British.²⁵ While assuming powers and functions of judicial administration, the British faced the question as to which law should in different kinds of cases be applicable by the hierarchy of their courts. The legal system adhered to and followed by the courts which had preceded them was based mainly on Hindu and Islamic religion. Civil, criminal, commercial and procedural laws were all religion based. The dominant element in that legal system was the traditional law of Islam. The courts in the regions ruled by the Mughals applied Islamic law relating to crimes, evidence and court procedure. Ancient Indian laws and custom relating to the same were applied by the courts in those places where the local rulers were not Muslim. In civil matters religious and customary laws were invariably adhered to in almost all parts of the country.²⁶

Contractual transactions, commercial affairs, family relations and transfer of and succession to property were all regulated by religious laws and customs of the parties approaching the court. The law or custom of one or the other

²⁴TAHIR MAHMOOD, UNIFORM CIVIL CODE: FICTIONS AND FACTS 43 (India and Islam Research Council 1995).

²⁵The Charter of 1726 issued to East India Company by King George I on September 24, 1726, established for the first time Mayor's courts in the three Presidency towns of Calcutta, Madras and Bombay. These courts derived their authority from the king, and could therefore, be designated as Royal Courts. Thereafter, the Supreme Court of judicature was established at Calcutta, Madras and Bombay in 1774. Subsequently by way of Indian High Courts Act, 1862, High Courts were established in Calcutta, Madras and Bombay. These High Courts so established became successors of the Supreme Court.

²⁶ TAHIR MAHMOOD, MUSLIM PERSONAL LAW: ROLE OF THE STATE IN THE INDIAN SUBCONTINENT 2 (2d ed., All India Reporter 1983).

religion, thus, formed the rule of decision in every case. To the British the system appeared complicated and anachronistic. This they set out to change.²⁷ The religion based criminal laws of India were reformed piece meal, eventually culminating in the enactment of the Penal Code and the Criminal Procedure Code, both of a secular nature and divorced from religion. On the similar lines were enacted the Evidence Act and the Civil Procedure Code. All religious and customary laws in these areas were repealed and replaced with new codes. Likewise the British could also have given to the country a civil code.²⁸ Their policies in regard to civil laws gave birth to the system of communal personal laws.²⁹ This system has survived in the entire subcontinent till the present day.

A civil code, in the modern sense of the term would include laws relating to contract, transfer of property, intestate and testamentary succession, marriage, divorce, adoption and all other family relations. Since in pre-British period all these matters were regulated by religious and customary laws, enforcement of secular and uniform laws in these areas would be viewed by the natives as displacement of religion.³⁰ The British were conscious of the possibility of such repercussions and therefore refrained from enacting a comprehensive civil code on the lines of the penal and procedural codes.³¹ These codes too had replaced religion and custom, but only in areas which were not regarded by the natives as vital to religion as civil matters. In the latter areas the British came forward with piece meal legislation.³² In regard to other subjects which a civil code should ordinarily include they adopted a cautious approach. They decided to leave religious and customary laws intact in those areas at the same time they did not want to abjure them altogether. To begin with they just overlook those areas without making a commitment as to where they stood in their plans for legal reform and codification. They could not however maintain their silence for long. Cases involving civil matters were being frequently received in the civil courts

²⁷*Id.*

²⁸*Id.*

²⁹ The Britishers enacted common laws for the Indians but with regard to personal laws the British did not interfere. When the Mayor's courts were established in the three Presidency towns the question arose as to the courts competence to decide the religious matters of the natives. The Governor and council of the company expressed the opinion that the Mayor's court had no jurisdiction to determine causes of religious nature or disputes concerning castes among the natives, unless both parties submitted themselves to the jurisdiction of the court. See SARKAR, *supra* note 4.

³⁰ MAHMOOD, *supra* note at 3.

³¹ The British considered that religion was a sensitive issue for the Indians and that interference in the religious matters would in turn threaten the existence of the British. No attempt was thus made to prepare a comprehensive code of either Hindu or Muslim law in British India.

³² E.g. The British enacted a Contract Act in 1872 and a Transfer of Property Act in 1882.

which they had set up and they had to make known the laws which the courts would apply in such cases.³³

With regard to the application of Hindu and Muhammadan laws in the higher courts of the Presidency towns of Calcutta, Madras and Bombay, the Judicial Charter of 1753 had barred the jurisdiction of the Mayor's courts which were courts of English law to try cases between the Indians, unless asked to do so by the parties to a particular case.³⁴ The Act of Settlement enacted in the year 1781 reconstituted the powers and jurisdiction of the Calcutta Supreme Court and also gave recognition to 'laws and usages' of Hindus and Muslims.³⁵ Later the rule regarding the application of laws and usages of Hindus and Muslims became applicable to the Supreme courts of Bombay and Madras.

The High Courts Act enacted by the British in 1861 replaced the Supreme courts functioning in the three Presidency towns of Calcutta, Madras and Bombay. The High Courts Act laid down that in exercise of its appellate jurisdiction, the court would apply Hindu and Mohammadan laws and usages as the lower courts ought to have applied in a particular case. Thus, it was clear that the British did not interfere in the religious matters and granted autonomy to the natives in respect of personal laws. Moreover the British as discussed above secured the religious laws of the Indians.

Despite the colonial authorities distancing from the religious usages and personal laws of the natives, history is witness to the fact that there were interventions with the same. Generally speaking, different laws were applied by village, district and provincial courts. This led to confusion and chaos. On the other hand there were many Hindu reformist who were exerting pressure upon the British to bring changes in some aspect of their religious law.³⁶ Though the initiative for reform was taken by the Hindu society, at least a section of it; the same is not the case with the Muslim Community. However, the British did not intrude in matters of personal laws of the Muslims and the reforms the British brought in the Muslim personal law was done with an intention to safeguard

³³MAHMOOD, supra at 4.

³⁴*Id.*

³⁵Sec 17 of Act of Settlement provided: 'All matters arising out of succession to lands, rents and goods and all matters of contract and dealings between party and party shall be determined in case of Muhammadans by the laws and usages of the Muhammadans and in the case of Gentoos (Hindu) by the laws and usages of Gentoos'.

The Act of Settlement, 1781 did not specify as to what was meant by 'laws and usages' of Hindus and Muslims.

³⁶Note: As a result the British enacted important enactments like Sati Prevention Act, 1829, Hindu Widows' Remarriage Act, 1856, Guardians and Wards Act, 1890, The Anand Marriage Act, 1909, Hindu Disposition of Property Act, 1916, Hindu Inheritance (Removal of Disabilities) Act, 1928, Hindu Gains of Learning Act, 1930, Hindu Women's Right to Property Act, 1937, Aryan Marriage Validation Act, 1937, Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, etc.

them.³⁷ The British enacted Indian Divorce Act, 1869 and Indian Christian Marriage Act, 1872 for the Christians and the Parsi Marriage and Divorce Act, 1936 for the Parsis. A number of other statutes³⁸ were also passed which affected both, the Hindus and the Muslims as well and they were applied to all the people irrespective of their religious affiliations. There was nothing restraining the government in British India for making laws in the areas traditionally regulated by personal laws. The British were hopeful that with the passage of time a common civil code can be adopted.³⁹

In the Post-Independence Period

After India's independence not much efforts were made by the then leaders in matters concerning personal laws. The British colonial legal and judicial structure were virtually retained intact by the then leaders. In the late 1940s when the Constituent Assembly⁴⁰ while engaged in drafting of the Indian Constitution they faced the dilemma of the issue of personal laws, 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.⁴¹ Most were of the view

³⁷The enactments made for the Muslims were with the objective of restoring the orthodox doctrine of Muslim law and to undo the effect of liberalizing judicial decisions. Mussalman Wakf (Validating Act, 1913, Muslim Personal Law (Shariat) Application Act, 1937, Dissolution of Muslim Marriage Act, 1939, etc. were enacted during the British rule in India

³⁸ Those statutes are – Caste Disabilities Removal Act, 1850, India Penal Code, 1860, Indian Evidence Act, 1872, Indian Contract Act, 1872, Transfer of Property Act, 1882, Child Marriage Restraint Act, 1929, which is subsequently repealed by re-enacting the Prohibition of Child Marriage Act, 2006, Indian Succession Act, 1865, which was subsequently amended in 1925, Special Marriage Act, 1872, which was subsequently re-enacted in 1954, etc.

³⁹The First Law Commission set up under the Charter Act 1833 had expressed a hope that in the near future codes of Hindu and Muslim law would be prepared. In 1861 another Law Commission was appointed for the preparation of draft code regarding civil law in India. On February 11, 1879, the fourth Law Commission was appointed with a goal of codifying all the substantial law prevailing in British India. By the efforts of various Law Commissions criminal laws were codified and the Indian Penal Code, 1861 and Criminal Procedure Code, 1898, came into force and is applicable to all India irrespective of their religious belief. But there was no Common Civil Code. See B.P. OJHA, COMMON CIVIL CODE AD ITS PROBABLE EFFECT ON SOCIETY 35.

³⁹TAHIR MAHMOOD, PERSONAL LAW IN CRISIS 3 (Metropolitan Book Co. New Delhi 1986).

⁴⁰The Constituent Assembly of India which held its sessions from 9 December 1946 to 24 January 1950, considered whether it was possible to introduce a family code uniformly applicable across the communities. One of the greatest champions for the cause was B.R.Ambedkar, the chairman of the Drafting Committee. There was some debate in the Constituent Assembly about how much constitutional protection should be given to the personal laws and about the establishment of a Uniform Civil Code for all the Indians regardless of religion. It provided neither any timetable for establishing uniform code, nor any guidelines as to how such code could be established, nor what the content of the laws might be. Instead it merely laid out a desired goal of state policy.

⁴¹The then Prime Minister Jawaharlal Nehru, felt it was important to include the principle of a uniform code in the Constitution for the sake of national unity.

that it would be best for the legislature to be given the task of reforming the personal laws and achieving the goal of a uniform civil code.

They were many Muslim members who raised their objection towards adoption of Uniform Civil Code. One Muslim member argued that draft Article 35 (now Article 44) did not empower the state to legislate on personal laws and that the words 'Civil Code' occurring in draft 35 does not cover strictly personal law of a citizen.⁴² The Muslim members asserted that the secular state of India should not be endowed with the legislative power to encroach upon the beliefs and practices of any religious communities. They further opposed the enactment of draft Article 35 on the ground of expediency and practicability.⁴³ Finally the Muslim members demanded an amendment to draft Article 35.⁴⁴

Muslim politicians in the Constituent Assembly opposed the inclusion of the article in the Constitution. They wanted the personal laws to be constitutionally guaranteed. They argued that their personal laws were intimately connected to religion. Thus, they argued that inclusion of an article advocating a uniform civil code would violate the fundamental right to freely profess and propagate religion. They argued that incorporating an article on uniform code will lead to discord and unrest particularly among the minority communities.⁴⁵ It was argued further that a uniform code was opposed not only on the ground that it would hurt the religious sentiments of the minority communities but they were many in the majority community i.e. the Hindus who seemed to be divided on the issue.⁴⁶ The issue of non interference on matters of personal laws was also argued during the debate.⁴⁷

⁴² See, Shri Mahboob Ali Baig Sahib Bahadur Constitution Assembly Debates, (1948), Vol. VII, p.543.

⁴³ Mr. Hussian Imam remarked : 'India is too big a country with a large population so diversified that it is almost impossible to stamp them with one kind of anything'. See Constitution Assembly Debates, (1948), Vol. VII, p. 546.

⁴⁴ Ismail Sahib demanded an inclusion of following proviso in draft Article 35: 'Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law.'

See Constituent Assembly Debates, Vol. VII, 4 November 1948-8 January 1949: p. 540-43.

⁴⁵ The opponents to the adoption of uniform civil code asserted that: 'people want a uniform civil code...to secure harmony through uniformity. But [such] regimentation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law there will be no discontent or dissatisfaction. Every section of the people, being free to follow its own personal law will not really come in conflict with others. See Constituent Assembly Debates, Vo. VII, 4 November 1948-8 January 1949:540-41).

⁴⁶ One member argued that: 'there are ever so many sections of the Hindu community who are rebelling against this and who voice forth their feelings in much stronger language that I am using. If the framers of this article say that even the majority community is uniform in support of this, I would challenge them to say so. It is not so.' See B.Pocker Saheb Bahadur, Constituent Assembly Debates, (1948) Vol. VII, p 545.

⁴⁷ One of the member in the Constituent Assembly who was opposing the adoption of a uniform code argued that : 'one of the reasons why the Britisher has been able to carry on the administration of this country for the last 150 years and over was that he gave a guarantee of following their own personal laws

On the other hand the members advocating the adoption of uniform civil code did not accept the argument that a uniform code will violate freedom of religion. In fact they questioned the assumption that personal law is related to religion. One of the supporters strongly advocated the uniformity of civil law to serve as a vehicle of societal growth in which in the larger interest, some sacrifices were inevitable. Dr. B.R. Ambedkar did not agree with the arguments of the Muslim members. However Dr. Ambedkar tried to assuage Muslim sentiments by talking about his position on the optionality of the uniform civil code.⁴⁸

The amendment that was proposed by the Muslim members was not accepted and draft Article 35 (now Article 44) was added to the Constitution.

The result of long debate on Article 35 was that the proposed article was carried out without any amendment and was renumbered as Article 44 of the Constitution.

Conclusion

The history of Hindu laws opens with an entirely personal concept of law. In the early Hindu history, religion came to be closely associated with the growth of law. The people were God fearing and they easily accepted to everything that was being pronounced by the religious leaders. The study of Hindu period shows that laws in Hindu society were uniform as the entire Hindu society was an organisational unit and the leaders of the society were Hindu sages who expounded laws on the principles rooted deep in the Vedas and revealed Hindu scriptures. Though there was some difference of opinion on the interpretation of Hindu personal law yet we do not find much difference in this respect. It is evident from the foregoing study that the Dharmasutras representing earliest Smriti epoch support the argument that the treatment of civil laws and religious and social laws was not differentiated in any marked degree. During this period the uniformity of law was therefore a general rule rather than an exception.

to each of the various communities in the country. This is one of the secrets of success and the basis of the administration of justice on which even the foreign rule was based. See B.Pocker Saheb, Bahadur Constituent Assembly Debates, Vol. VII (23 November 1948), p. 11.

⁴⁸Ambedkar summed up his argument on this point by saying: 'I quite realise their feelings in the matter, but I think they have read rather too much into Article 35, which merely proposes that the state shall endeavour to secure a civil code for the citizens of the country. It (the Draft Article 35) does not say that after the code is framed the state shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of th code may be purely voluntary. Parliament may feel the ground by some such method. This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North – West Frontier Province. The law said that here is a Shariat law which should be applied to Mussalmans provided a Mussalman who wants that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successor. It would be perfectly possible for the Parliament to introduce a provision of that sort, so that the fear which my friends have expressed here will be ltogether nullified. I therefore, submit that there is no substance in these amendments and I oppose them. See, Constituent Assembly Debates, Vol. VII, 4 November 1948-8 January 1949, p. 550-52.