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 tells 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]

[73]Hadas Tagari, *Personal Family Law Systems- A Comparative and International Human Rights Analysis*, *CIJL* 231.
[74]A.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.
[77]The 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 India[78] 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 Smrities 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 Caliph[93] who was at a distant place. Thus, some people have had to take

[86]U.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 law[94] 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

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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 musalmans 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 wer e 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.

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[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 custom[105] 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

[107]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. *Supra* note 5.

[108]*Id.* at 3.

[109]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.[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 1827as 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 Govenor 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 laws[121] that affected both Hindus and Muslims were also approved and

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

[116] There 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.

[119] The 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.

[120] Indian 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

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[122]The 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.

[124]The 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]S*upra* 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 Assembly[126] 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]

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[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 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 (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 out grow 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 Marumakkathayyam 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,

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

[140]Ambedkar 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.