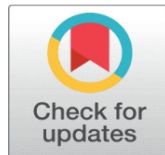


LEGAL PLURALISM AND GENDER DISCRIMINATION: HOW PERSONAL LAWS ACROSS DIFFERENT RELIGIONS IMPACT WOMEN'S RIGHTS

Anjali Bhatia¹, Dr. Aditya Tomer²

¹Research Scholar, Amity University, Noida

²Professor of Law, Addl. Director, Amity University, Noida



DOI

[10.29121/shodhkosh.v5.i3.2024.3393](https://doi.org/10.29121/shodhkosh.v5.i3.2024.3393)

Funding: This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

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ABSTRACT

Legal pluralism refers to the coexistence of multiple legal systems within a society, with each system governing specific aspects of social relations. India being a large and diverse nation, with indigenous beliefs, cultural practices of various ethnic groups and multiple religious customs has a complex legal landscape that includes personal laws based on religion.

In articles 25 and 26 of the Indian Constitution religious beliefs of individuals are safeguarded. Article 13 recognizes customs as laws in force and article 29 enshrines protection of minority group's culture. While it is commendable that the Constitution of India is an inclusive and secular document, its view of religious freedoms is idealistic. Religion when used to govern political matter or public matters is frowned upon, but the same beliefs when used to regulate personal and family matters are given legal recognition. This has led to a situation where personal laws based on religion perpetuate gender discrimination and inequality. This paper aims to explore the concept of legal pluralism in India and its impact on gender discrimination. The personal laws of various religions in India, such as Hindu, Muslim, and Christian laws, often contain provisions that discriminate against women. And the courts while applying these personal laws, often uphold discriminatory practices and norms under the guise of religious freedom and cultural diversity. However, when it comes to gender discrimination, the existence of personal laws based on religious norms within legal pluralistic systems can create significant challenges.

These personal laws, which are based on religious principles and beliefs, often perpetuate gender inequality and discrimination against women. In order to achieve gender equality, it is crucial to address the discriminatory aspects of personal laws and work towards a more uniform legal framework that upholds fundamental rights and principles of gender equality. In the context of gender discrimination, legal pluralism plays a crucial role in shaping the rights and status of women as it reflects the coexistence of various sets of personal laws that may differ in their treatment of women. This research aims to delve into the impact of personal laws derived from different religions on women's rights, shedding light on the intersection of legal pluralism and gender discrimination.

Keywords: Religion, Gender, Pluralism, Secularism, Personal Laws

1. INTRODUCTION

The legal system envisioned by the Indian Constitution is multifaceted and reflects the diverse religious, cultural, and social fabric of the country¹. By virtue of articles 25 and 26, not only is secularism weaved into the fabric of the Indian legal system, but it also recognizes the importance of personal laws that govern various religious communities². The

¹ Merry, E. S. (1988) Legal Pluralism. Available at: <https://doi.org/10.2307/3053638>.

² KANORIA, A. V. (no date) HINDU CODE BILL AND ITS RAMIFICATIONS ON UCC

constitution as a transformative document envisions co-existence of different personal laws alongside a commitment to gender equality and women's rights³. This vision also holds true in various judgements of the Supreme Court. The court not only examines the validity and constitutionality of personal laws but also intervenes to uphold women's rights within the framework of these laws⁴. The court has devised the Essential Religious Practices Test to determine whether a particular religious practice is essential to that religion or infringes upon fundamental rights guaranteed by the Constitution. The test was first devised in the *Shirur Matt*⁵ case of 1954, since then the court has used the ERP to determine the legality of practices and customs of all religions being practiced in India. Whether it is the practice of appointing priests⁶, ritualistic excommunication⁷, or head scarf worn by women⁸. The ERP test puts theological beliefs of any religion to test against the legalistic principles of the judges. Although the political and public views of religion have always been under the courts purview, it is only recently that the court has lifted the veil and made forays into the personal realm of society and used the ERP in *Shayara Bano*⁹ case to determine that the practice of triple talaq is analogous to rituals of Islam. Thus although the court recognises the pluralism present in Indian society and the relevance of various customs regulating the personal and family lives of Indian citizens, it still sees these customs through a majoritarian and patriarchal lens.

2. LEGAL PLURALISM

Legal pluralism refers to the coexistence and interaction of multiple legal systems within a single society¹⁰. This coexistence of multiple legal systems is often seen in societies that are composed of diverse religious and cultural groups¹¹. These diverse religious and cultural groups often have their own personal laws that govern various aspects of their lives, including marriage, divorce, inheritance, and property rights¹². These personal laws are shaped by the religious beliefs and traditions of each community, and they can have a significant impact on women's rights¹³. Women in many societies face gender discrimination and inequality, and personal laws across religions can contribute to this systemic issue¹⁴. For example, in some Muslim-majority countries, personal laws based on Islamic principles can restrict women's rights in areas such as marriage, divorce, and inheritance. The personal laws may grant men greater authority and control over women, limiting their autonomy and perpetuating gender inequality. Personal laws rooted in other religions can also have similar negative impacts on women's rights. Furthermore, personal laws in Hinduism, Christianity, and other religions may also contain provisions that discriminate against women¹⁵. These provisions may reinforce traditional gender roles and norms, denying women equal rights and opportunities. For a comprehensive understanding of the Indian context, an in-depth examination of formal written personal laws and informal customary practices is necessary. This would involve analysing discussions that span pre-colonial, colonial, and post-colonial periods to provide a holistic view of the traditional, religious, and legal aspects.

³ Nagaraja, B. (2013) Empowerment of Women in India: A Critical Analysis. Available at: <https://doi.org/10.9790/0837-0924552>.

⁴ Mohita, N. (2014) Judicial Review: Significances and Utility of the Power of Judicial Review in India. Available at: <https://www.yourarticlelibrary.com/essay/judicial-review-significances-and-utility-of-the-power-of-judicial-review-in-india/24910>.

⁵ 1954 SCR 1005 (the commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Sri Shirur Mutt

⁶ (1972) 2 SCC 11 (Seshamal and others v state of Tamil Nadu)

⁷ AIR 1962 SC 853 (Sardar Syedna Taher Sifaiddin v The State of Bombay)

⁸ (2023) 2 SCC 1 Aishat Shifa v The State of Karnataka and others

⁹ AIR 2017 SC 4609 (Shayara Bano v Union of India and others)

¹⁰ See *supra* note 1

¹¹ Sinha, C. (2015) Rhetoric, Reason and Representation: Four Narratives in the Hindu Code Bill Discourse. Available at: <http://uu.diva-portal.org/smash/record.jsf?pid=diva2:874167>.

¹² See *supra* note 2

¹³ See *Supra* note 6

¹⁴ Coundouriotis, E. (2007) Can Literature Promote Justice? Trauma Narrative and Social Action in Latin American Testimonio (review). Available at: <https://doi.org/10.1353/hrq.2007.0013>.

¹⁵ See *Supra* note 2

A significant distinction exists between non-state customary laws based on diverse caste and tribal traditions adjudicated by local panchayats or bodies, and state-enacted personal laws within the formal legal system handled by civil courts. While there are similarities between these two systems, it is important to recognize that they also diverge in terms of their sources of authority, enforcement mechanisms, and the level of gender justice they provide. Understanding these nuances is essential for examining the impact of legal pluralism on gender justice in India particularly in the context of northeast where the tribal laws of the region are awarded special protection under Article 371 of the constitution.

3. ORIGINS OF PERSONAL LAWS IN INDIAN LEGAL SYSTEM

The concept of "personal laws" in the Indian legal system has its roots deeply embedded in the country's rich and diverse cultural heritage. India's legal history can be broadly divided into the Hindu, Muslim, British, and post-Independence periods, each contributing to the evolving nature of the legal framework.¹⁶

The concept of "personal laws" was first introduced in the 18th century during the transition from pre-colonial, informal arbitration systems to state-regulated adjudication in the presidencies of Calcutta, Bombay, and Madras. This transition occurred on two levels: the establishment of a legal framework modeled on adversarial English courts, and the development and application of substantive legal principles in these courts. The substantive laws related to personal laws were shaped by the explicit protection granted to Hindus and Muslims to apply their own personal laws in civil matters, as per the Warren Hastings plan of 1726. However, there was ambiguity regarding whether the native laws of Hindus and Muslims referred to religious laws or customary practices. Consequently, the courts relied on pundits and qazis to ascertain the respective religious laws, but the diversity of customs led to contradictory views from these theologians. This prompted the administrators to believe that translating the original scriptural texts containing these religious laws would enable them to adjudicate directly. In line with the tradition of Roman Canon law, the scriptures were accepted as the source of both Hindu and Muslim laws, and their translation became a priority for the British administrators. This process resulted in the Brahminization and Islamization of the laws. The term "personal law" at that time was broader than family law and included matters concerning caste, religious institutions, land rent, and contracts, which were adjudicated under the category of civil law. The presidencies were relatively independent in their administration, with the administrators of Bengal following the Hastings scheme to trace and apply the law through correct and original sources while disregarding local customs, while the Bombay Presidency gave due recognition to local customs as an important source of law.

The shift in India's administration from the East India Company to the British Crown after the upheaval of 1857 led to the development of a unified system of governance across the three presidencies. This transition also brought about significant changes in the legal structure. The Supreme Courts in Calcutta, Bombay, and Madras were replaced by integrated High Courts, with the Privy Council becoming the final appellate authority, thereby ending the relative autonomy of these regional courts. The new legal system, modeled on the English court structure, necessitated the enactment of statutes. Although personal laws were exempt from such codification due to the Queen's proclamation, the establishment of courts with procedures and a clear hierarchy emulating the English system nonetheless induced a significant transformation in family laws. Consequently, the personal laws in India evolved from a complex tapestry of customs, traditions, and religious injunctions to a more uniform and predictable set of rules.¹⁷

The supremacy of the Indian legislature to legislate and thereby abrogate the existing state of personal law in British India remained undoubted. For instance, the Women's Right to Property Act, 1937 superseded Hindu personal law to confer property rights on women. It is, therefore, unsurprising that the Constitution has, under Entry 5 of List III of the Seventh Schedule, empowered the legislature to enact laws on matters relating to personal law.

4. INTERSECTION OF PERSONAL LAW AND WOMEN'S RIGHTS

The existence of personal laws across religious communities in India raises complex issues concerning women's rights. These personal legal frameworks often contain provisions that discriminate against women in various aspects of their

¹⁶ Narayan, U. (2009). Basic Indian Legal Literature for Foreign Legal Professionals**. In U. Narayan, International Journal of Legal Information (Vol. 37, Issue 3, p. 333). Cambridge University Press.
<https://doi.org/10.1017/s0731126500005382>

¹⁷ (Acevedo, 2013) (Denault, 2009) (Sengupta, 2010) (Hertel & Singh, 1985)

lives, including marriage, divorce, inheritance, and maintenance. Such discriminatory provisions perpetuate gender inequalities.¹⁸

For instance, the Hindu Code Bill, which aimed to modernize Hindu practices and introduce women-centric laws, faced fierce opposition and criticism. Opponents argued that the codification of Hindu laws would undermine cultural practices and might not effectively protect women's rights. Additionally, there has been ongoing debate about the introduction of a uniform civil code, intended to create a consistent legal framework for personal matters irrespective of religious background. This proposal has faced opposition due to concerns about religious freedom, cultural diversity, and persistent gender inequality within existing personal laws. It is essential to address and rectify gender discrimination in current personal laws before simply adopting them into a uniform civil code, in order to prevent perpetuating gender inequality during the transition. Therefore, it is crucial to evaluate the impact of personal laws from different religions on women's rights and consider the implications of legal pluralism in this context.¹⁹ Legal pluralism, defined as the coexistence of multiple legal systems within a society, has significant implications for women's rights. It can lead to inconsistent and discriminatory treatment of women based on their religious affiliation. The intersection of legal pluralism and gender discrimination in the context of personal laws across religions in India is a pressing concern.

While examining the need for a consistent set of family laws that apply to all social groups, it is critical to question whether the concept of 'women' is universally applicable without considering specific socio-cultural contexts. Additionally, it raises the issue of analyzing personal laws while accounting for their historical and colonial implications. The call for a Uniform Civil Code presents gender as detached from contemporary political processes, portraying minority women as lacking influence within their own communities or through legal means. It emphasizes legislative action in the form of implementing a uniform code as the sole avenue for achieving gender equality for minority women. The rights of women from minority groups should not solely be viewed in terms of transitioning from community jurisdiction to state control but must be situated within diverse power dynamics and intricate negotiations among community, nation-state, and female individuals in contemporary majority-minority interactions. In the midst of escalating tensions and hostility toward minority groups, "personal laws" have become significant symbols of community/religious identity for these communities. Women play a crucial role in this identity and are singled out as primary targets during periods of uncertainty and identity politics. While the term "women" is used broadly, it cannot be ignored that there are substantial distinctions among women. Given that not all women experience similar circumstances, it is important to consider the specificities of women from marginalized communities. Since women's oppression varies in nature and does not stem from a single root cause, there cannot be one ideology or solution that applies universally. Pluralistic and non-state customary laws have faced scrutiny within international human rights discussions, particularly under the concept of "women's rights are human rights." Concerns such as violence against women and the trafficking of women for sex work have also been significant focal points in these conversations. However, there have also been challenges such as polygamous unions and child marriages. There is much to examine on the call for a universal implementation of human rights advocated by international women's organizations from the Western world, preferring instead a more nuanced approach that is specific to each culture when it comes to women's rights. The feminist critique of the liberal conception of equality, which is based on sameness and difference, is a valuable contribution to the ongoing discourse on gender justice. This critique argues that gender inequality is rooted in structures of dominance and subordination rather than solely in difference, and thus requires a rethinking of equality to address these complex power dynamics.

Mohanty's analysis highlights the Eurocentrism present in Western discourses on modernity, underscoring how racial, sexual, and class-based assumptions shape these discussions. According to Mohanty, gender essentialism involves making broad generalizations about women, assuming they share a monolithic group identity across diverse cultures prior to social interactions. These generalizations are hegemonic, primarily representing the experiences of privileged women who are typically white, Western, and middle-class. These generalizations, rooted in a theoretical concept of universal sisterhood, overlook the challenges, perspectives, and political issues faced by women marginalized due to their class, race, religion, ethnicity, or sexual orientation. The proposal for compulsory marriage registration and nullification of unregistered and child marriages requires careful consideration within the context of increased state

¹⁸ Mitra, K. S. and Fischer, A. (2002) Sacred laws and the secular state: An analytical narrative of the controversy over personal laws in India. Available at: <https://doi.org/10.1080/14736480208404635>.

¹⁹ Ahmed, F. (2015) Religious Freedom under the Personal Law System. Available at: <https://doi.org/10.1093/acprof:oso/9780199458066.001.0001>.

regulation, raising concerns about whether such regulation would benefit or undermine women's current rights. Legislation should not be a limited and myopic effort influenced by specific interest groups following certain international human rights mandates. For instance, in some Hindu personal laws, women may encounter discriminatory practices such as dowry demands and restrictions on property ownership. Additionally, personal laws may uphold practices like child marriage and marital rape, further marginalizing and harming women. These personal laws often reflect patriarchal values and reinforce gender norms and hierarchies within society. Furthermore, the process of codifying personal laws can have unintended consequences for women's rights, potentially leading to the erosion of cultural and religious practices, as well as misinterpretation of nuances within these religions. This can result in the loss of women-centric provisions that may have existed within these personal laws. Overall, personal laws across religions play a significant role in shaping women's rights and gender discrimination, either reinforcing traditional gender roles and inequalities or providing avenues for women's empowerment and equality.

5. CONCLUSION

The challenges surrounding the intersection of legal pluralism and gender justice are multifaceted and complex, requiring a nuanced understanding of the historical, social, and political contexts in which they are embedded. As this paper has demonstrated, the incorporation of Islamic and customary laws into colonial and postcolonial legal systems has often reinforced or exacerbated gender inequalities, with women's rights frequently subordinated to the preservation of traditional male-dominated structures and norms²⁰. At the same time, the plurality of legal frameworks can create space for contestation and negotiation, as women mobilize to challenge discriminatory laws and practices through various legal and extra-legal strategies.²¹

To address these issues, a multifaceted approach is necessary. This must involve policy reforms and legal interventions to harmonize personal laws with constitutional guarantees of equality and non-discrimination, as well as efforts to empower women within their respective religious and cultural communities.²²

- Realize the potential for a more unified, gender-just legal system that can accommodate diverse cultural and religious identities while upholding the fundamental rights of women.
- Create intersectional, context-specific solutions that address the diverse lived experiences and legal needs of women from different socioeconomic, religious, and ethnic backgrounds.
- Policy reforms and legal interventions to address gender discrimination inherent in personal laws and promote gender equality across different religious communities.
- Balancing individual rights and minority group rights, as well as upholding the principles of non-discrimination and substantive equality enshrined in international human rights law
- Invest in decolonial, feminist approach to legal pluralism is crucial to empower marginalized women and challenge the patriarchal structures perpetuated through religious and customary laws

Ultimately, the pursuit of gender justice within a pluralistic legal landscape requires a careful balance between individual rights and minority group rights, as well as a steadfast commitment to the principles of non-discrimination and substantive equality enshrined in international human rights law.

²⁰ Captroni, P., & Shahar, I. (2012). Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain. In P. Captroni & I. Shahar, *Journal of the Economic and Social History of the Orient* (Vol. 55, Issue 4, p. 637). Brill. <https://doi.org/10.1163/15685209-12341274>

²¹ Salaymeh, L. (2019). Imperialist Feminism and Islamic Law. In L. Salaymeh, *Hawwa* (Vol. 17, Issue 2, p. 97). Brill. <https://doi.org/10.1163/15692086-12341354>

²² Victoria, M. (2014). Women, law, and human rights in Cameroon: Progress or status quo? In M. Victoria, *Journal of Law and Conflict Resolution* (Vol. 6, Issue 1, p. 1). Academic Journals. <https://doi.org/10.5897/jlcr2013.0161>