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UNDERSTANDING THE DYNAMICS OF PERSONAL LAWS: INTERPRETATION BY SECULAR COURTS AND POLITICS OF REFORMS

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ABSTRACT

The research paper seeks to address the dynamic complexities of personal laws in India through the historical developments and in contemporary context. History is read not only as a set of events over a time, but also through varied conceptions of 'law' as they have evolved during the period. Legal pluralism has been the backbone of India in pre and post British periods that is why enough constitutional debates are found on the questions of continuance and validity of personal laws within the precincts of constitutional provisions. Personal laws being based on religious norms and practices of communities on one hand and our country having adopted secular principles, time and again issues have taken origin with regard to validity and acceptance of personal law practices in consonance with scientific principles of gender equity and egalitarian society. The Constitution of India has itself been a subject of extensive debate regarding personal laws, especially in respect of the scope of Article 13, which deals with laws that are in force but may be inconsistent with or in abrogation of fundamental rights following the adoption of the Constitution in November of 1949. While on one hand Personal Law is not defined in the Constitution, the expression appears in Entry 5 of List 3 of the 7th Schedule. On the other hand the multiplicity of legal norms has been an existing reality; and, we cannot ignore the multiple legal complexities which exist within our society. Where laws and legal systems revolve around the support of authority, it seems equally probable that members of the society also construct authorities that operate legally but at the same time are not recognized as part of the State legal system. The validity of such legal norms and therefore, alternate legal systems, could only be tested at the instance of the State on the grounds of reasonability identified through legislation, an executive order or secular judicial interpretations. This paper will also evaluate the fundamental question that whether family law reforms could be introduced in the most integrative manner that does not compromise the diversity and the plurality that constitutes the core of India's social fabric.

Keywords: Personal Laws, Rights, Constitution of India, Gender Equality

1. INTRODUCTION

India, a land of diverse cultures and religions, presents a unique legal landscape characterized by a multifariousness of personal laws governing various aspects of individuals' lives such as marriage, divorce, inheritance, and succession. However, the coexistence of these personal laws with the comprehensive framework of the Constitution often gives rise to intricate legal complexities and challenges. This analysis seeks examination of this delicate interplay between constitutional provisions and personal laws, exploring the tensions, conflicts, and attempts at reconciliation through judicial interpretations and legislative actions. Thus the dynamics of personal laws in India are shaped by a combination of historical, religious, cultural, and political factors. While there have been attempts at reform and modernization, the issue remains contentious, reflecting the broader complexities of Indian society and governance. The contemporary global trends reveal that Legal pluralism is one of the basic pillars for healthy and prosperous democracy. Because in a

growing multicultural, multi-locational and pluralist world, the signs of greater autonomy, marks of distinctive self-identity and sensitivity to the moral heritages of the disparate cultural groups are indeed encouraged. But the other extreme facet of these trends has been the rise of strong religious and sectarian sentiments across the legal diversity, and hence the debate over personal laws has gained significant public attention, among Jurists, advocates, postcolonial writers, social and religious reformers. The consequences of all this have resulted in making the minorities apprehensive of their identity crisis and from time and again have expressed great reservations in the interference and reformation of personal laws by state. The arguments are presented on both sides but one of the prominent among them presented by majoritarian community is that there is no need within the provisions of the secular Constitution of a country (like India) to uphold those personal laws which violate the fundamental rights. While as it is also true that there is no compulsion submit to the belated call for a uniform civil law, sometimes referred to as 'common civil code' or Secular civil code. Some blame the British colonialist for the mess, with its parallel in the Partition, or after the creation of a separate nation for the Muslims. So, it is asked: why should the system of personal laws continue in the 'secular democratic socialist republic' that India is committed to being or becoming? In this theoretical discussion we will present all perspectives of the debate and to deliberate on this account from legislative, Judicial and Sociological point of view.

2. GENESIS OF PERSONAL LAWS

The dynamics of personal laws – those governing matters such as marriage, divorce, inheritance, and family relations – present a complex intersection of legal, cultural, and societal norms. In many jurisdictions, personal laws are deeply rooted in religious or customary traditions, posing unique challenges for interpretation and reform. So to understand these complexities we have to begin with understanding and analyzing the personal laws through historical constructions and their changing facets in relation to the institution of marriage and divorce.[1] The historical context which determined the frameworks of personal law is vital in any of such ventures. It is misconstrued that personal laws are created on the basis of religious texts. Human relationships within the institution of family are embedded within diverse customary practices. These can be interpreted in the light of divine laws by scholars. These interpretations later underwent modifications during the colonial and postcolonial periods.[2] According to Flavia Agnes, "the term 'personal law' was first introduced in the Presidency of Calcutta, Bombay, and Madras in the late eighteenth century, when the pre-colonial, non-state arbitration were transformed into state-regulated and state-controlled adjudicative system" The transformation was at two levels: (i) through the introduction of a legal structure modelled on English courts which were adversarial in nature (that is, Anglo-Saxon Jurisprudence); and (ii) through principles of substantive law which were evolved and administered in these courts (that is, Anglo-Hindu and Anglo-Mohammedan laws". Hence, the initial genealogical moments of personal laws are the product of colonial interests that were subsequently codified. The policy of the British towards personal laws was dictated by three main considerations. First, they did not desire any break from the past; secondly, their chief object was to have security in social conditions so as to facilitate trade; and thirdly, they had no desire to interfere with the religious susceptibilities of their subjects.[3] This understanding was drawn from earlier developments in the British legal system. Letters Patent issued during the reign of George I. In 1726 enabled the courts to decide "according to justice and right".[4] In the course of time, this was interpreted to mean British notions of justice and right, as understood by lawyers trained in British law. Thus, the judicial officers very naturally drew upon the rich, though somewhat baffling, treasures of the common law of England. Later, in 1832, came the direction that where no specific rules were laid down, the judges were to act "according to justice, equity and good conscience."[5] Thus, Muslim personal law is not the same as the Shariat, but Islamic law as modified by the British law. Before 1857, the October 1840 Lex Loci Report advised that the personal laws of Muslims and Hindus be kept outside of the codification of Indian law, albeit highlighting the significance and need for uniformity in the codification of Indian law pertaining to crimes, evidence, and contracts.[6] Subsequently, after the 1857 First War of Independence and the end of East India Company's rule and direct takeover of India by the Queen Empress, the 1858 Proclamation issued by the British Queen guaranteed

[1] Agnes,Flavia. (2011). Family Law Volume 1 Family Laws and Constitutional Claims. Oxford University Press.
[2] Agnes,Flavia. (2011). Family Law Volume 1 Family Laws and Constitutional Claims. Oxford University Press.p2
[3] Faizan Mustafa, 'Can a Muslim Spurn His Personal Law?' The Statesman (3 April 2014).
[4] J. Stephens, Governing Islam: Law, Empire, and Secularism in Modern South Asia (Cambridge: Cambridge University Press 2018) 22.
[5] ibid.
[6] Tanika Sarkar, Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism (London: Hurst & Company 2001) 199.

complete nonintervention in religious affairs.[7] Therefore, personal laws remained governed by distinct rules for various localities, even as criminal laws were codified and unified into one for the entire nation.

One more historical aspect of personal laws in Indian soil believed is the diversity of customs and a non-state legal edifice has remained the characteristics of ancient India. "The original texts were of Aryan origin but the assimilation between Aryan and non-Aryan tribes led to an amalgamation of customs and practices" . In the early period, the scriptural law was the earliest legal system and there was an association with religion, morality and law which was believed to have divine sanction. It is known collectively as Dharma. Dharma has three main sources, Shruti, Smriti and Sadachara. Shruti evolved with the divine revelations or utterances, primarily the Vedas, Smriti with 'the memorized word-the dharmasutras and dharmashastras' and Sadachara with 'good custom' (Agnes, 2004, p, 12). However, the Hindu marriage and family laws are rules through the medium of Smritis and nibandhas (commentaries and digests). As many scholars pointed out, Hindu laws are codified by the Vedas resulting in the foregrounding of Hindu laws. These texts were however not in written forms and followed with an oral tradition via Brahminical priesthood from one generation to another as guru- shishya parampara. Every generation has interpreted the texts according to societal contexts. It can also be confronted again by Smritikars. Thus, Smritis are always interpreted based on old formulations with contemporary forms and every time the interpreters considered this model of nibandhas whenever smritis were interpreted.

3. CONSTITUTIONAL DISCOURSE ON PERSONAL LAWS

The constitution of India being the lengthiest document of the world was framed and implemented after healthy constitutional assembly debates. But it is quite unfortunate that the position of personal laws even today seems to be ambiguous within this constitutional framework. This is also in spite of continuous legislative efforts and judicial interventions after post-independence era. The Constitution of India lays down certain basic prerequisites which must be met by laws in order to be constitutionally valid.[8] For laws that are pre constitution in nature, 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.[9]Another provision under the same Article, i.e. Article 13(3)(a) states what is meant by the term law. [10]These two provisions are to be understood and applied in light of Article 372.[11]

Under the Constitution of India, there are twelve articles[12]which have an impact upon personal laws and a thorough analysis of these articles can be analyzed into the following three basic principles:

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[7] The Government of India Act, 1858 (21 & 22 Vict. c. 106). See also: Stanley Wolpert, A New History of India (3rd edn, Oxford University Press 1989) 239–240.

[8] The Constitution of India. art. 13.

[9]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.

[10] 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

[11] 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."

[12] Relevant 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;

1) 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.
2) 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.
3) That the state shall gradually lead the nation towards progressive uniformity in the area of civil laws.

The above principles explicitly make it clear the intentions of framers of the constitution with regard applications of personal laws within the framework of constitution i.e. Progressive uniformity of laws based on article 44. Thus after 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. There are at least two situations in which personal laws and Part III of Constitution of India c are most commonly discussed together. Those are:

1) Personal laws coming in contradiction with the provisions of Part III of Constitution of 22 India and 23
2) Personal laws which takes away or repeals the 'existing' personal laws and thereby 24 clashes with that of Article 25 of Indian Constitution.

Ever since the commencement of Indian Constitution to till date, higher judiciary of India, including Supreme Court of India, is facing the dilemma of finding out satisfactory compromise between two extremes: personal laws which are based on religious practices and Part III of the Indian Constitution i.e. chapter on Fundamental Rights . This clash of two extremes is possible in the 25 following situations:

1) When a State or Legislature enacts or codifies or repeals or alters existing personal laws in the form of religious practices. In this context it is possible that those who were following impugned practice of religion in the arena of personal laws may take the plea of invasion on their Freedom of religion in the form of "right to practice" a religion as protected by Article 25 and the legislative action of the state is "Law" within the meaning of Article 13. In case it gets contested, State may take the plea that State is competent enough to legislate on personal law aspect as a constitutional obligation under Article 25 itself and a counterpart in a litigation may say that impugned legislation, invading on 26 the religious practice, is "Law" within meaning of Article 13 and as such action of the State is ultra vires and beyond the Constitution.

2) When a State legislates upon any custom or any religious practice by incorporating it as a part of Personal law, and the said legislation makes distinction or discrimination, say on the grounds only of either "Religion" or "Sex" , State is justified in doing so since it is 27 28 giving "effect" (by codification) to the customary practices of religion or religious practices which are or which may be part of "right to practice religion" if that practice is essential to the community. If such impugned legislation gets contested before Courts, it may be challenged on the basis of a simple and clear rule of Prohibition under Article 15 (1) of Indian Constitution.

4. ELUCIDATING PERSONAL LAWS THROUGH JUDICIAL INTERPRETATIONS AND VERDICTS

The Judiciary through its various judgements time and again has always favored for reformation of personal laws and thus achieving the broader and ultimate objectives of gender justice. In the case of *Mohammad Ahmed Khan* v. *Shah Bano Begum*[13] popularly known as Shah Bano case, the Supreme Court held that "It is also a matter of regret that Article

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

[13] (1985) 2 SCC 556

44 of our Constitution has remained a dead letter." Though this decision was highly criticized by the Muslim Fundamentalists, yet it was considered as a liberal interpretation of law as required by gender justice. Later on, under pressure from Muslim Fundamentalists, the central Government passed the Muslim Women's (Protection of rights on Divorce) Act 1986, which denied right of maintenance to Muslim women under section 125 Cr.P.C. The activists rightly denounced and stated that it "was doubtless a retrograde step. That also showed the extent of involvement of personal laws in politics of India. In *Sarla Mudgal (Smt.), President, Kalyani and others* v. *Union of India and Others*[14] the Apex Court while delivering the judgment directed the Government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter and held that, "Successive governments have been wholly remiss in their duty of implementing the Constitutional mandate under Article 44, Therefore the Supreme Court requested the Government of India, through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for its citizens a uniform civil code throughout the territory of India." the Hon'ble supreme court was of firm opinion that harmonization of personal laws could be brought only by reformation of uniformity of personal laws as mandated by constitution of India also.

Again in *Ahmadabad Women's Action Group (AWAG)* v. *Union of India*[15], a PIL was filed challenging gender discriminatory provisions in Hindu, Muslim and Christian statutory and non-statutory law. In this case the Supreme Court became a bit reserved and held that the matter of removal of gender discrimination and reformations in personal laws involves issues of State polices with which the court will not ordinarily have any concern. The decision was criticized that the apex court had virtually abdicated its role as a sentinel in protecting the principles of equality regarding gender related issues of personal laws of various communities in India.[16] The Apex Court pursued the same line in *Lily Thomas etc*. v. *Union of India* and others [17]and held that the desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when social climate is properly built up by the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change for the betterment of the nation at large. The situation regarding the personal laws for Christians in India was different. In their case, the courts seemed to be bolder and took a progressive stand in terms of gender equality. For instance when the case of *Swapana Ghosh* v. *Sadananda Ghosh*[18] the Calcutta High Court expressed the view that sections 10 and 17 of the Indian Divorce Act, 1869, should be declared unconstitutional but nothing happened till 1995. Again in yet another case, the Kerela High Court in *Ammini E.J.* v. *Union of India* [19]and Bombay High Court in *Pragati Verghese* v. *Cyrill George Verghese*[20] have categorically struck down the section 10 of Indian Divorce Act, 1869 as being violative of gender equality. In *Naveen Kohli* v. *Neelu Kohli*[21] the Supreme Court, boldly laid down that while permitting dissolution of thirty year old mismatch, urged the Government of India to amend Hindu Marriage Act in order to make Irretrievable break down of marriage a valid ground for divorce. The court held that irretrievable break down of marriage was prevalent as a ground for divorce in many other countries and recommended the Union of India to seriously consider bringing an amendment in Hindu Marriage Act, 1955 to incorporate irretrievable break down of marriage as a ground for the grant of divorce. Thus the express introduction of the principle of "irretrievable break" clearly depicts the intention of our higher judiciary that provisions of personal laws which are outdated, gender discriminative & non liberal can't be avoided from being overhaul and reformation. A comparative view of personal laws prevailing in countries like England and Middle East Countries present the same picture. A part from above the Supreme court observed that the administration of justice on the basis of clearly codified law is superior to the adjudication from case to case. For this, Parliament could reintroduce the Marriage Laws (Amendment) Bill, 1981 (No.23 of 1981), which earlier did not fructify into law for expressly introducing irretrievable break down of marriage as the singular ground for divorce, as the bill was allowed to lapse.[22] In the 21st century, as societies evolve and confront the imperative for gender equality and women's rights, Triple Talaq in Muslim law has been the focus of legal reforms and developments. The Landmark Indian Case: *Shayara Bano v. Union of India*,[23]which is watershed moment in the legal journey to reform Triple Talaq came in India. Shayara Bano, a Muslim woman, challenged

[14] AIR 1995 SC 1531
[15] AIR 1997 SC 3614
[16] Rajeev Dhawan, "*The Apex Court and Personal Law*" The Hindu, 14 March 1997
[17] AIR 2000 SC 1650
[18] AIR 1989 Cal. 1
[19] AIR 1995 Ker.252
[20] AIR 1997 Bom. 349
[21] 2006 (4) SCC 558
[22] Ramesh Chander Nagpal, *Modern Hindu Law*, 182 (2008 Butterworths Wadhwa Publications, Nagpur)
[23] (2017) 9 SCC 1

the practice of instant Triple Talaq, contending that it violated her fundamental rights and perpetuated gender discrimination. Subsequently, the legislative changes that followed, including the enactment of the "Muslim Women (Protection of Rights on Marriage) Act, 2019," which codified the ban on Triple Talaq and made it a criminal offense. These developments on the part of judiciary and legislative reflect a positive and progressive approach in making the personal laws more dynamic and open to amendments for the welfare and harmony of all communities in India.

5. CONCLUSIVE REMARKS

As I conclude this research study which basically surrounded with two fundamental issues that is Politics of reforms and Secular interpretations we recognize that our understanding at this point of time is not an endpoint but a continuous process. The quest for understanding this practices of political reformations and secular court interpretations and their broader implications is part of a larger journey toward a more just and equitable world. Both Parliament and the Ho'ble Supreme Court of India have shown highest maturity and prudence in reformation of personal laws for the sake of harmonized society and family relationships. In a very complex and diverse society like India the State must engage in constructive dialogue, advocate for inclusivity, and work toward legal reforms that safeguard the rights and dignity of all individuals, regardless of their gender or religious background. Our journey through the complexities of Triple Talaq and other landmark case laws on Hindu laws reinforces the notion that progress often comes through dialogue, inclusivity, and a steadfast commitment to upholding the dignity and rights of all. It reminds us that our quest for a more just and equitable society is a shared endeavor, and our willingness to engage in this quest defines our commitment of secular interpretations of Courts and progressive political reforms.