

EMERGING GENDER EQUATIONS IN THE REALM OF CONTEMPORARY PERSONAL LAWS: A LEGAL CONSPECTUS

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“All human beings deserve equal treatment, no matter their gender identity or sexuality”

-Andreja Pejic¹

ABSTRACT

Dynamism is an element common to both law and society. They both have a cause and effect relationship as the law may become a cause for effectual change in society or *vice versa*. With the advent of new liberal polity at the cusp of the 20th century, the world witnessed a departure from the earlier entrenched notions of gender binaries and having a crystallized perspective towards things. The perception of the populace of the modern world acquired more fluidity and flexibility which provided it with a touch of inclusiveness and a sense of compassion towards fellow human beings. It becomes an indispensable machination to harmonize laws to bring them in commensuration with modified societal perceptions is the majority of the Democratic Egalitarian Societies across the Globe to confer statutory legitimacy to the rights of the ostracized segment. Endeavour has been made to introspect such contemporary legal and societal machinations in contradistinction to the realm of various Personal Laws. The advent of the new constitutional order presents an opportunity to undertake a comparative analysis of the souls of two legal domains in the context of the eras which they dominated and the socially influenced contemporary legal tinkering that they have been subjected to.

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¹Gender Quotes, Brainy Quote, (Sep. 21, 2019 2:43 PM),

https://www.brainyquote.com/quotes/andreja_pejic_921561?srct_gender.

INTRODUCTION

The Global Process of transition into Democratic Egalitarian Societies and Polities acquired its full momentum in the 20th century. While it is needless to say this Project is a Work in progress nonetheless it can be said that we have now traversed far beyond the acceptance of the traditional society founded on the gender binaries. While it is impossible to precisely define the term “Gender Equation”, but the expression is generally used to refer to the interpretation of the perceived and evolving concepts of gender roles and associated values. Today the process of rising and acceptance of emerging Gender Equations is not just limited to change in the status of Women but encompasses a whole gamut of issues including the Changed attitudes towards Social Equality and an end to discrimination against the LGBT community. While in some Jurisdictions, these emerging equations have been crystallized and institutionalized through active support by laws, customs, and behaviors, in others, they are often ignored and suppressed. One of the leading causes of these conflicting developments is the nature of Personal Laws prevalent in different societies many of which are mired with inexplicable dogmas and biases against women and other marginalized sections of the Society. The Judicial Institutions have played an important role in harmonizing these contradictions in the interest of Equity, Justice, and Good Conscience. Thus, the issue of compatibility between the emerging gender equations and Personal Laws is one of widespread Social-Legal significance that warrants an Extensive and Comparative analysis of Constitutions, Statutory Enactments, Personal Laws, Judicial Precedents, and proposed Reforms in the *Corpus Juris*.

CONSTITUTIONAL FRAMEWORK AND GENDER EQUATIONS

The Constitution of the Republic of India adopted in 1950, expressly mentions the Security of all Indian Citizens in its Preamble - Social as well as Economic and Political Justice, Independence of Thought², Expression, Freedom of Belief, Faith and Worship and Equality in the Status as well as in Opportunity. To achieve these noble objectives the Constitution provides for Justiciable Rights under Part III of the Constitution which is Fundamental Rights. These rights form Cornerstone for the constitution. These Rights are encompassed by provisions such as Article 14 that provides for Equal Status before the law, Article 15(1) that

²Chanduilnu, Role of preamble and its objective, Interpretation with Indian Constitution, Legal Services India, (Sep. 21, 2019 2:56 PM), <http://www.legalservicesindia.com/article/1390/Role-of-Preamble-Interpretation-with-Indian-Constitution.html>.

prevents distinction by State unfavouring any citizen of India based on sex as well as Article 15(3) which enables the state to make positive segregation for ladies. Further Article 16(2) prevents segregation in issues of public work by state based on sex and Article 23(1) prohibits human trafficking. Article 19 provides for the Right to freedom and Article 21 protects life and personal liberty.³ The Directive Principles of State Policy are written under Part IV (Article 36-51) of the Constitution of India which are policy guidelines to be adhered to by the State while formulating laws and policies. These provisions include Article 39(a) which forces an obligation on the State to make sure about adequate means for livelihood for both men and women, the Article 39(d) imposes a duty to make sure about equivalent compensation for equivalent work for the two people. Moreover, any state is duty-bound to guarantee that the wellbeing and strength of laborers aren't mishandled and just and empathetic states of work and maternity help are given to working women under Articles 39(e) and 42 respectively.⁴ Article 51-A (e) forces a Fundamental obligation on each resident of India to revoke practices derogatory to the nobility of women.⁵ A summation of these Provisions makes it clear that the overarching Constitutional Framework is in perfect equilibrium with emerging Gender Equations as the Document aims at securing Justice for all, irrespective of one's differences in Genders and Orientations.

SYSTEM OF PERSONAL LAWS IN INDIA

Article 44 of the Constitution gives that the State will attempt to make sure about for the residents a Uniform Civil Code (U.C.C.) all through the domain of India. Such a Code would ensure a single set of rules administering various Domestic as well as Social matters of the entire citizens.⁶ However as the U.C.C. is yet to be implemented, different religions are presently governed by their Laws that deal with matters such as marriage, divorce, maintenance, adoption, minority and guardianship, and succession, etc. Thus, one finds a

³ Krishnendra Joshi, Fundamental Rights in the Constitution of India, iPleaders, (Sep. 21, 2019 2:56 PM), <https://blog.ipleaders.in/fundamental-rights-in-the-constitution-of-india/>.

⁴ Lokesh Vyas, DPSP's under the Indian Constitution, iPleaders (Sep. 21, 2019 2:56 PM), <https://blog.ipleaders.in/directive-principles-of-state-policy-dpsp-under-the-indian-constitution/>.

⁵ Fundamental Duties, Constituent Assembly Debates, (Sep. 21, 2019 2:56 PM), https://www.constitutionofindia.net/constitution_of_india/fundamental_duties/articles/Article%2051A.

⁶ Anubhuti Rastogi, Uniform Civil Code, Law Times Journal, (Sep. 21, 2019 3:06 PM), <https://lawtimesjournal.in/uniform-civil-code/>.

system of concurrent personal laws that apply to members of the various communities in India which is supplemented by the Optional secular system of personal law.⁷

PERSONAL LAWS IN RELATION TO GENDER EQUATIONS AND STATUS OF WOMEN IN INDIA

Women, however mathematically equivalent are a minority bunch as far as power and impact.⁸ But, the status of ladies in India has been dependent upon numerous progressions. Historical Records suggest that female glory reached its zenith in the Vedic period⁹ followed by a period of subordination, which was evident from Practices, for example, female child murder, dowry, and young child marriage, etc.¹⁰ During British Rule in the Country, Social Reform Movements provided an impetus to the enactment of Statutes that sought to ameliorate the Condition of Women and provide them statutory rights. This culminated in the passing of several Legislations such as the Bengal Sati Regulation, 1829, Hindu Widows' Remarriage Act, 1856 and Female Infanticide Prevention Act, 1870, etc.¹¹ Since the last century, several developments such as control of a Woman over her bodily integrity and autonomy, freedom from violence and discrimination, education, participation in democratic governance, equal rights under the law, ownership of property, equal pay for equal work, freedom over reproductive choices and life have led to the emergence of new dynamics in Gender Equations across the world. Consequentially the participation of Women in Labour/Workforce and Managerial Economic Activities, Political processes has increased and they have sought greater freedom in matters of Marriages and Social relationships.¹² While the Constitutional mandate of ensuring equality, dignity, social justice, and freedom from discrimination for Women has largely been followed by the legislative intent resulting in the enactment of several Legislations, yet the Personal laws prevalent in the country are not always harmonious with emerging Gender Equations, not disregarding the

⁷Denkila Bhutia, Development of Personal Laws, Academia, (Sep. 21, 2019 3:06 PM), https://www.academia.edu/37268098/Development_of_Personal_Laws_in_India_an_historical_account.

⁸ Jayashree V. Doddawadmath, Personal Law relating to Women, iii (1st ed. 2011).

⁹ Ibid.

¹⁰P. Srivastava, Status of Women in India: Ancient, Medieval and Modern, Sociology Discussion, (Sep. 21, 2019 3:06 PM), <http://www.sociologydiscussion.com/status-of-women/status-of-women-in-india-ancient-medieval-and-modern-sociology/13526>.

¹¹Mamta Aggarwal, Religious and Social Reform of India – The Indian Renaissance, History Discussion, (Sep. 21, 2019 3:06 PM), <http://www.historydiscussion.net/history-of-india/religious-and-social-reform-of-india-the-indian-renaissance/1637>.

¹²Women's Human Rights, Global Fund for Women, (Sep. 22, 2019 3:45 PM), <https://www.globalfundforwomen.org/womens-human-rights/>.

reforms made in Personal laws to meet the new Socio-Economic circumstances. Some of these Personal Laws relating to Women have been discussed below:

POSITION AND STATUS OF WOMEN UNDER THE HINDU PERSONAL LAW

The Personal Laws of Hindus apply to Hindus, Buddhists, Jains as well as Sikhs in India. The Hindu Marriage Act 1955¹³ regulates marriage amongst the Hindus. It has substantially modified the institution of marriage that was prevalent under ancient Hindu Law. This has helped to bring the law in line with the principles of Gender Equality. Section 5 of the act introduced Monogamy and prohibited Bigamy.¹⁴ Further the Child Marriage Restraint (Amendment) Act 1978 brought about a significant change by amending Section 5 (iii) to prescribe the minimum age of 18 years for the bride as against 15 years before the said amendment.¹⁵ In 1976 the amendment in Marriage Laws Act made several changes in the act. The meaning of “desertion” was statutorily widened to allow a neglected wife to claim an announcement of separation on the ground that her better half is guilty of desertion. Further non-payment of Maintenance was made a ground for divorce to the wife. Further, a minor girl is now entitled to repudiate her marriage, provided she does this after the attainment of fifteen years of age and before attainment eighteen years of age. The interim period between Judicial Separation and divorce has been reduced to one year.¹⁶ Subsequently, the Marriage Laws Amendment Bill 2010¹⁷ was introduced which proposed 'irretrievable breakdown' as an extra ground for divorce. Still, there is a need to reform some provisions of the Act. For instance in the Act, in its Section 9, dealing with Compensation of Conjugal Rights has been criticized for being against the Right to Human Dignity and Privacy.¹⁸ Similarly providing Conversion as a ground for divorce has been criticized as well. Although, the provision in form of “Divorce by mutual consent” defined in Section 13-B is a radical provision, yet divorce has not been made easy since one year must lapse after marriage to file a divorce petition.¹⁹ The Hindu Succession Act, 1956²⁰ regulates intestate succession in Hindus. The act contains separate provisions for succession to Coparcenary property of Hindus dying intestate

¹³The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955.

¹⁴Jayashree V. Doddawadmath, Personal Law relating to Women, 4 (1st ed. 2011).

¹⁵Jayashree V. Doddawadmath, Personal Law relating to Women, 7 (1st ed. 2011).

¹⁶Jigar Bhadra, Changes introduced by the Marriage Laws (Amendment) Act 1976, Share Your Essays, (Sep. 22, 2019 4:03PM), <http://www.shareyouressays.com/knowledge/what-are-the-main-changes-introduced-in-the-hindu-marriage-act-1955-by-the-marriage-laws-amendment-act-1976/114878>.

¹⁷The Marriage Laws (Amendment) Bill, 2010, PRS India, (Sep. 22, 2019 4:03PM), <https://www.prsindia.org/billtrack/the-marriage-laws-amendment-bill-2010-1227>.

¹⁸Jayashree V. Doddawadmath, Personal Law relating to Women, 13 (1st ed. 2011).

¹⁹Jayashree V. Doddawadmath, Personal Law relating to Women, 43 (1st ed. 2011).

²⁰The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956.

in respect of men and women. Sections 14-16 deal with General rules of succession in the case of a Woman. Section 14 of the Act eliminated the incapacity of a lady to secure and hold property as an absolute proprietor. Section 6 of the Hindu Succession Act has been revised by the Hindu Succession (Amendment) Act, 2005 to remove the distinction between son and daughter in property matters. As a result, in a joint Hindu family represented by the Mitakshara law, the girl child of a coparcener will by birth become a coparcener in her privilege in a similar way as the child and will have similar rights and same liabilities regarding the coparcenary property as the son²¹. Hindu Adoption and Maintenance Act, 1956²² removed restrictions on Hindu women to have as it entitles any Hindu woman who is sound and a major, and is unmarried, to adopt a son or a daughter. Section 9 (3) allows a Hindu mother to give a child in adoption. A married Hindu Woman can embrace if she is separated or if her significant other is dead, has revoked the world, or has stopped to be a Hindu. Section 10 of the Act allows the adoption of a Hindu female. However, the provisions of Section 11 which impose certain restrictions as to the person who may be adopted have been contested in Courts. A Hindu spouse is entitled to be kept up by her significant other all through the span of her life as per Section 18 of the act.²³ Section 19 provides for the Maintenance of a widowed daughter-in-law. Several classes of women have the right to maintenance as dependents as defined in Section 22 of the Act.²⁴ Hindu Minority and Guardianship Act which came in 1956²⁵ contains a law regarding guardianship of a minor. Section 6 of the Act gives that the guardian of a Hindu minor, on account of a real kid or an unmarried young lady, is the dad, and after him, the mother. Our Hon'ble Supreme Court in its landmark decision of *Githa Hariharan v. Reserve Bank of India*²⁶ has said that one word 'after' as written in Section didn't necessarily mean that after a lifetime of the father, and thus a mother can be a Guardian in case of father's absence during care of his minor. In the Act, Section 6 allows any Hindu mother to appoint a Testamentary guardian for a minor in certain circumstances.²⁷

²¹Jayashree V. Doddawadmath, Personal Law relating to Women, 179 (1st ed. 2011).

²²The Hindu Adoptions and Maintenance Act, No.78, Acts of Parliament, 1956.

²³Jayashree V. Doddawadmath, Personal Law relating to Women, 154 (1st ed. 2011).

²⁴Jayashree V. Doddawadmath, Personal Law relating to Women, 95 (1st ed. 2011).

²⁵Hindu Minority and Guardianship Act 1956, No.32, Acts of Parliament, 1956.

²⁶*Githa Hariharan v. Reserve Bank of India*, AIR 1999, 2 SCC 228

²⁷Jayashree V. Doddawadmath, Personal Law relating to Women, 140 (1st ed. 2011).

THE MUSLIM PERSONAL LAW IN RELATION TO WOMEN

The Muslim Personal Law (Shariat) Application Act, 1937²⁸ deals with marriage, progression, legacy, and noble cause among Muslims. In Islam, it is a civil contract to have a marriage between a man and a woman. But there is no uniform practice in Islam as to majority, consent, and soundness of mind in certain cases. Many patriarchal practices such as Nikah mut'ah continue in some Muslim sects.²⁹ Under Muslim Law, the male partner may divorce his better half in absence of reason by using extra-judicial methods of divorce while a woman has only limited power of divorce. The Dissolution of Muslim Marriages Act which was made in 1939³⁰ deals with the situations where a Muslim woman may take divorce. Muslim Personal Law on maintenance is imprecise and discriminatory. For instance, during the subsistence of the marriage, the male partner is required to maintain his better half only if she is faithful and obedient.³¹ Under Muslim Law, as a general rule, the share of inheritance of a woman is half that of a man. In the year 1986 a very controversial Muslim Women (Protection of rights on divorce) Act³², had progressed restricted accountability of the male partner to pay the living after divorce during the *Iddat* period.³³ The Muslim Women (Protection of Rights on Marriage) Act³⁴ was made in the year 2019 and it criminalized³⁵ the usage of Triple talaq also known as *Talaq-e-Biddat* after was called unconstitutional by the Apex Court in its judgment in *Shayara Bano and others v. Union of India*.³⁶

²⁸The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Central Legislative Assembly, 1937.

²⁹Satyoki Koundinya, The Concept of Mut'ah Marriage, SSRN, (Sep. 22, 2019 4:03PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666848.

³⁰Dissolution of Muslim Marriages Act, 1939, No. 08, Acts of Central Legislative Assembly, 1939.

³¹Sylvine, Discriminatory Muslim Laws Against Women, iPleaders, (Sep. 22, 2019 4:03PM), <https://blog.ipleaders.in/discriminatory-muslim-laws-women/>.

³²The Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25, Acts of Parliament, 1986.

³³Shubham Shrivastava, Protection of Rights on Divorce) Act, 1986: A Critical Legal Study, Manupatra, (Sep. 23, 2019 5:00PM), <http://www.manupatrafast.com/Articles/PopOpenArticle.aspx?ID=60f84465-26f4-468b-98a7-25cdf308a9e&txtsearch=Text+Search%3A+shubham>.

³⁴The Muslim Women (Protection of Rights on Marriage) 2019, No. 20, Acts of Parliament, 2019.

³⁵Bill criminalizing instant triple talaq passed in Parliament, Times of India, (Sep. 23, 2019 5:00PM), <https://timesofindia.indiatimes.com/india/triple-talaq-bill-passed-in-rajya-sabha/articleshow/70452299.cms>

³⁶*Shayara Bano and others v. Union of India*, Writ Petition (C) No. 118 of 2016.

CHRISTIAN PERSONAL LAWS AND WOMEN

Indian Christian Marriage Act, 1872 is one of the several enactments which deal with Marriages of Christians in India. The Indian Divorce Act, 1869³⁷ regulates the rules which relate to Divorce. This act originally contained harsh and discriminatory provisions for women. For instance, under Section 10, a husband had to only prove adultery on the part of the wife to obtain a divorce, but the wife had to prove several additional grounds.³⁸ The proviso of The Indian Divorce Act, 1869 in its Section 36 imposed restriction on the quantum of Alimony during litigation paid by the husband. The Amendment Act, 2001 finally made reform in the grounds for divorce and Section 36.³⁹ However, despite some minor reforms, the Christian Law has largely remained static. The Indian Succession Act, 1925⁴⁰ regulates succession amongst Indian Christians. There are discriminatory provisions contained in Sections 41-48. For instance, the portion of a Christian widow varies with the presence or nonattendance of lineal relatives, and she gets rights over the whole property just without removed the fellow of the expired spouse.⁴¹ Guardians and Wards Act 1890⁴² governs guardianship of minors amongst Christians in India. Before Personal Laws (Amendment) Act, 2010 the sections are written there provided that if a couple embraces a kid; the dad is the normal guardian, yet now the law permits the mother alongside the dad to be selected as a guardian making the cycle sexually unbiased.

LGBT COMMUNITY IN INDIA: CURRENT STATUS

In 1861, the Indian Penal Code was introduced during the British Rule and it has Section 377. It criminalized “carnal intercourse against “the order of nature,”” encompassing “sodomy, buggery, and bestiality.”⁴³ While the High Court of Delhi in 2009 has given decision that Section 377 of the IPC as unconstitutional in *Naz Foundation v. Govt. of NCT of Delhi*⁴⁴, but

³⁷The Indian Divorce Act, 1869, Act No. 4 of 1869.

³⁸Jayashree V. Doddawadmath, Personal Law relating to Women, 71 (1st ed. 2011).

³⁹Jayashree V. Doddawadmath, Personal Law relating to Women, 118 (1st ed. 2011).

⁴⁰Indian Succession Act, 1925, Act No. 39 of 1925.

⁴¹Archana Mishra, Breaking Silence - Christian Women's Inheritance Rights Under Indian Succession Act, 1925, SSRN, (Sep. 23, 2019 5:00PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2542728.

⁴²Guardians and Wards Act 1890, Act No. 8 of 1890.

⁴³Neerja Gurnani, Unnatural offences under the IPC, Law Octopus, (Sep. 23, 2019 5:30PM), <https://www.lawctopus.com/academike/unnatural-offences-under-the-ipc/>.

⁴⁴*Naz Foundation v. Govt. of NCT of Delhi*, WP(C) No.7455/2001.

this decision was reversed by the Supreme Court⁴⁵ in its decision in *Suresh Kumar Koushal v. Naz Foundation*. As a result, almost 600 detentions were reportedly happened in 2014 itself as per Article 377.⁴⁶ However, after the protracted legal battle Supreme Court in its judgement of *Navtej Singh Johar v. Union of India*⁴⁷ finally decriminalized⁴⁸ any consensual sex among grown-ups in private which included homosexual sex by holding Section 377 of the IPC not valid as it violates Articles 14, 15, and 21 of our Constitution.⁴⁹ This development has accorded some Legal protection to the members of the LGBT community. But the people belonging to the LGBT community continue to face legal and social difficulties despite having gained greater acceptance in urban areas of the country.

HINDU PERSONAL LAW AND GENDER EQUATIONS – LGBT COMMUNITY

The LGBT community continues to face Legal Discrimination, under the Provisions of Hindu Personal Law in spite of diversity and difference of opinion in traditional Hindu views of homosexuality and LGBT issues.⁵⁰ The Hindu Marriage Act, 1955⁵¹ envisages a marriage between a man and a lady. Segment 5(iii) of the act determines the "conditions for a Hindu marriage", states that the would-be husband should be in any event 21 years of age, and the lady who is bride 18 years of age. The words 'husband' and 'lady or bride implies a heterosexual union, and this deprives same-sex couples of social and legal recognition. The Hindu Succession Act, 1956⁵² makes no mention of any Gender other than a Man and a Woman. Section 8 views a widow as a beneficiary of a man passing on intestate (without leaving a will), and Section 15 sees a spouse as a beneficiary of a dead lady. The words 'widow' and 'spouse' clearly allude to a man wedded to a lady, and not the same-sex relationship. In any case of Adoption, Section 6 of the Hindu Adoption and Maintenance Act,

⁴⁵[Supreme Court upholds Section 377 criminalizing homosexual sex](https://www.livemint.com/Politics/FHDQ9yB2jRJM5OINCQrkgL/Supreme-Court-to-rule-on-legality-of-gay-sex-today.html), Live Mint, (Sep. 23, 2019 5:30PM), <https://www.livemint.com/Politics/FHDQ9yB2jRJM5OINCQrkgL/Supreme-Court-to-rule-on-legality-of-gay-sex-today.html>

⁴⁶<https://www.deccanherald.com/content/451095/600-homosexuals-arrested-2014.html>

⁴⁷*Navtej Singh Johar v. Union of India*, W. P. (CrI.) No. 76 of 2016.

⁴⁸Nupur Anand, [The world's biggest democracy just decriminalized sex between gay couples](https://qz.com/india/1380715/section-377-verdict-indian-supreme-court-decriminalises-gay-sex/), Quartz India, (Sep. 23, 2019 5:30PM), (<https://qz.com/india/1380715/section-377-verdict-indian-supreme-court-decriminalises-gay-sex/>).

⁴⁹[Full text of Supreme Court's verdict on Section 377 on September 6, 2018](https://www.thehindu.com/news/resources/full-text-of-supreme-courts-verdict-on-section-377-on-september-6-2018/article24880713.ece), The Hindu, (Sep. 24, 2019 5:30PM), (<https://www.thehindu.com/news/resources/full-text-of-supreme-courts-verdict-on-section-377-on-september-6-2018/article24880713.ece>)

⁵⁰[Stances of Faiths on LGBTQ Issues: Hinduism](https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-hinduism), Human Rights Campaign, (Sep. 26, 2019 2:30PM), <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-hinduism>.

⁵¹ The Hindu Marriage Act, 1955, *supra* note 17.

⁵² The Hindu Succession Act, 1956, *supra* note 24.

formed in 1956⁵³ states that one of the Requisites of adoption is that one who is adopting must have, to take in adoption, the capabilities, and the rights. Sections 7 and 8 deal with the Capacity of a Hindu Man and Woman to take in adoption respectively. Further Sections 9 and 11 impliedly refer to adoption only by a Male and a Female and not by Persons in homosexual relations.⁵⁴In matters of Guardianship which are governed by the Hindu Minority and Guardianship Act, 1956⁵⁵ exact position of Law with respect to the LGBT community is not clear. Segment 6 of the Act gives that the Natural guardian of a Hindu minor on account of a kid or an unmarried young lady is the dad, and after him, the mother. Section 9 of the Act deals with the power of appointment of Testamentary guardians (appointed by Will) which is vested with both Hindu father or Hindu Mother (or Widow) subject to procedure as described in the section. This Section however does not mention the Qualifications for a person to be appointed a Testamentary Guardian. Thus while it is not possible to exactly rule out the appointment of a person belonging to the LGBT community as a Testamentary Guardian, but Perhaps it is reasonable to speculate that prevailing legislative intent would be biased against such appointments.⁵⁶Thus, it is clear that the Hindu Personal Laws require amendments and reforms for achieving the Constitutional mandate of Fundamental Rights and Dignity of the people, irrespective of gender.

POSITION OF LGBT COMMUNITY UNDER OTHER PERSONAL LAWS

The LGBT community faces a multitude of challenges under the Muslim Personal Law. While some modern scholars believe that Islam, at its actual center, doesn't denounce non-heterosexual closeness as the religion does provide for Freedom of Choice and Expression,⁵⁷ yet Homosexual acts are forbidden in traditional Islamic jurisprudence and are liable to different punishments.⁵⁸ Needless to say that the use of Heterosexual terminology in the Shariat Application Act, 1937⁵⁹ and Dissolution of Muslim Marriages Act, 1939⁶⁰

⁵³ The Hindu Adoptions and Maintenance Act, 1956, *supra* note 27.

⁵⁴ Markandey Katju, Section 377 Verdict: Gay marriage, inheritance, adoption laws unlikely; 'majoritarian' view will keep State, SC away, First Post, (Sep. 26, 2019 2:30PM), <https://www.firstpost.com/india/section-377-verdict-gay-marriage-inheritance-adoption-legislation-unlikely-majoritarian-view-will-keep-state-sc-away-5134701.html>

⁵⁵ Hindu Minority and Guardianship Act, 1956, *supra* note 30.

⁵⁶ Anjali Dhingra, All you need to know about Hindu Minority and Guardianship Act, 1956, iPleaders, (Sep. 26, 2019 2:30PM), <https://blog.iplayers.in/hindu-minority-and-guardianship-act/>

⁵⁷ Muhsin Hendricks, Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society, Equal Rights Trust, (Sep. 26, 2019 2:30PM), <https://www.equalrightstrust.org/ertdocumentbank/muhsin.pdf>

⁵⁸ Homosexuality in Islamic Law, Encyclopedia Iranica, (Sep. 26, 2019 2:30PM), <http://www.iranicaonline.org/articles/homosexuality-ii>.

⁵⁹ The Muslim Personal Law (Shariat) Application Act, 1937, *supra* note 33.

indicates that these Legislations were not enacted to provide any civic rights to any citizen belonging to the LGBT community under Personal Laws of Muslim. Accordingly in Personal Laws of Christian, there has been little evidence of support for Civic rights in favour of the LGBT community. The statutes in question namely the Indian Christian Marriage Act 1872⁶¹, Guardians and Wards Act 1890⁶², and Indian Succession Act, 1925, etc.⁶³. Have "heteronormative underpinnings" and have been construed not to recognize the rights of a LGBT person pertaining to Marriage, Succession, Adoption, and Guardianship, etc.⁶⁴

LEGISLATIONS FOR WOMEN'S WELFARE

Several legislations have been enacted in India independently of the existing Personal Laws for securing the Welfare of Women.⁶⁵ These include the Dowry Prohibition Act, 1961⁶⁶ which consolidated the anti-dowry laws which had been passed on certain states. Further Equal Remuneration Act, 1976⁶⁷ provides for the same salary and same wages for equal work, and the Maternity Benefit (Amendment) Act, 2017⁶⁸ ensures the work of ladies during the hour of her maternity and entitles her of a 'maternity advantage'. The Medical Termination of Pregnancy Act, 1971 forbids the endeavor of end of pregnancy by an individual who is anything but an enrolled clinical specialist and even by a clinical professional without the assent of the pregnant lady or her gatekeeper. Pre-Natal Diagnostic Technology (Regulation and Prevention of Misuse) Act, 1994 restricts any individual responsible for a medical clinic or research facility from undertaking any test to decide the sex of the Fetus of a kid in the belly. Security of Women from Domestic Violence Act, 2005 was authorized to shield ladies from aggressive behavior at home that incorporates physical, emotional, verbal, and sexual violence.

⁶⁰ Dissolution of Muslim Marriages Act, 1939, *supra* note 35.

⁶¹ The Indian Christian Marriage Act, 1872, *supra* note 42.

⁶² Guardians and Wards Act 1890, *supra* note 48.

⁶³ Indian Succession Act, 1925, *supra* note 46.

⁶⁴ Vern L. Bullough, Christianity and Sexuality, Springer Link, (Sep. 26, 2019 2:30PM), https://link.springer.com/chapter/10.1007/978-94-015-7963-6_1.

⁶⁵ Ankit Raj, Legislations in relation to women rights, Legal Service India, (Sep. 26, 2019 2:30PM), <http://www.legalservicesindia.com/article/1751/legislation-relation-to-women-right.html>.

⁶⁶ The Dowry Prohibition Act, 1961, No. 28, Acts of Parliament, 1961.

⁶⁷ Equal Remuneration Act, 1976, No. 25, Acts of Parliament, 1976.

⁶⁸ The Maternity Benefit (Amendment) Act, 2017, No. 6, Acts of Parliament, 2017.

LEGISLATIONS FOR THE PURPOSE OF WELFARE OF LGBT COMMUNITY

While the landmark verdict of *Navtej Singh Johar v. Union of India*⁶⁹ saw decriminalization of consensual homosexual sex,⁷⁰ but the Judiciary is not inclined to entertain further pleas to provide all civil rights to members of the LGBT community through Judicial decisions. Instead, the Hon'ble Supreme Court has reiterated that only Legislations can provide such rights. Thus, in absence of specific legislation the social equality, for example, same-sex marriage, selection, and surrogacy are currently not available to the LGBT community.^{71,72} Nonetheless, the following bills have been introduced in the Parliament for the welfare of the LGBT community.

TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019

Following Apex Court's decision in *National Legal Services Authority v. Union of India*⁷³ declared transsexual individuals to be a 'third sexual orientation', which certified that the transgender people are entitled to Fundamental Rights granted under the Constitution and gave them the privilege to self-ID of their sexual orientation as male, female or third-sex, the Government of India presented The Transgender Persons (Protection of Rights) Bill, in 2019.^{74,75} The objective of the legislation is to accommodate the security of privileges of transsexual people and advance their government assistance. Segment 3 of the bill gives that No individual or foundation will oppress a transsexual individual. Section 4 gives that a transsexual individual will reserve a privilege to a self-saw sexual orientation. Section 9 provides that Government shall take steps to secure the inclusion of transgender persons in society. Section 10 provides that No foundation should distinguish against any trans-sexual

⁶⁹*Navtej Singh Johar v. Union of India*, W.P. (CrI) NO.76 of 2016.

⁷⁰Mirza Wardah Beg, *Navtej Singh Johar v. UOI- Judgment which Decriminalized Homosexuality*, iPleaders, (Sep. 26, 2019 2:30PM), <https://blog.ipleaders.in/navtej-singh-johar-v-uoi-judgment-which-decriminalized-homosexuality/>.

⁷¹*SC rejects review plea seeking same-sex marriage for LGBTQ*, Millennium Post, (Sep. 26, 2019 2:30PM), <http://www.millenniumpost.in/nation/sc-rejects-review-plea-seeking-same-sex-marriage-for-lgbtq-368647>.

⁷²*Supreme Court dismisses petition seeking civil rights for homosexuals*, Business Standard, (Sep. 26, 2019 2:30PM), https://www.business-standard.com/article/pti-stories/sc-dismisses-plea-seeking-civil-rights-for-homosexuals-119041500965_1.html.

⁷³*National Legal Services Authority v. Union of India*, WP (Civil) No 400 of 2012.

⁷⁴*The Transgender Persons (Protection of Rights) Bill, 2019*, PRS India, (Sep. 27, 2019 3:45 PM), <https://www.prsindia.org/billtrack/transgender-persons-protection-rights-bill-2019>.

⁷⁵*India: Transgender Bill Raises Rights Concerns*, Human Rights Watch, (Sep. 27, 2019 3:45 PM), <https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns>.

individual in matters of employment. Section 17 tells that the Centre should constitute a National Council for Transgender Persons.⁷⁶

THE ARMED FORCES LAW (AMENDMENT) BILL, 2018

In December 2018, The Armed Forces Law (Amendment) Bill, 2018 was introduced⁷⁷ in the parliament to give equivalent rights and occasions to individuals from the Lesbian, Gay, Bisexual and Transgender people group to serve in the Armed Forces. Chapter II in the Bill contains provisions to amend Sections 45, 46, and 63 of the Army Act, 1950 by permitting consensual sexual intercourse committed between grown-ups of the same gender. Chapter III contains provisions for similar amendments to the Navy Act, 1957 (Sections 53, 54, and 74) and the Air Force Act, 1950 (Sections 45, 46, and 65).

CASE STUDY: UNITED STATES

The United States of America has seen significant progress in the context of Women and LGBT during the late twentieth century and early 21st century. While in U.S. Constitution doesn't explicitly ensure equivalent rights for ladies, several reforms have taken place related to the rights of women in the United States.⁷⁹ This involves new Statues and improvements by Case Law precedents. The U.S. Congress in the year 1964 passed the Civil Rights Act⁸⁰ which prohibits biasness based on Gender. There is no nationwide Federal Family Law, with each state having its laws and guidelines on the matter. Nonetheless, the US Apex court has in its judgement of *Craig v. Boren*⁸¹ that legal or regulatory sex arrangements were liable to intermediate scrutiny under the Fourteenth Amendment. Still many proposed Constitutional amendments such as the Equivalent Rights Amendment which tries to end the lawful differentiation among people regarding divorce, property, business, employment, and other matters are pending in the Country.⁸² There is no federal law outlawing LGBT

⁷⁶Lok Sabha passes transgender protection Bill, The Hindu, (Sep. 27, 2019 3:45 PM), <https://www.thehindu.com/news/national/lok-sabha-passes-transgender-persons-protection-of-rights-bill/article28822526.ece>.

⁷⁷The Armed Forces Law (Amendment) Bill, 2018, Lok Sabha Bill Texts, (Sep. 27, 2019 3:45 PM), <http://164.100.24.219/billtexts/LSBillTexts/AsIntroduced/2641as.pdf>.

⁷⁸Press Release, Ministry of Parliamentary Affairs, (Sep. 27, 2019 3:45 PM), <https://mpa.gov.in/sites/default/files/Postm18.pdf>.

⁷⁹Ellen Wulfhorst, *The US constitution doesn't guarantee equal rights for women*, World Economic Forum, (Sep. 27, 2019 5:30 PM), <https://www.weforum.org/agenda/2019/05/decades-old-fight-for-womens-equal-rights-goes-before-u-s-lawmakers/>.

⁸⁰Civil Rights Act, Pub.L. 88-352, 78 Stat. 241.

⁸¹*Craig v. Boren*, 429 US 190 1976.

⁸²Tara Law, *The U.S. Constitution Doesn't Guarantee Equal Rights for Women. Here's Why*, Time, (Sep. 27, 2019 5:30 PM), <https://time.com/5657997/equal-rights-amendment-history/>.

discrimination nationwide, leading to the Supreme Court playing a prominent role in the expansions of LGBT rights.⁸³ For instance, in its decision in *Lawrence v. Texas*⁸⁴, the Apex Court held the State laws denying private homosexual acts between consenting grown-ups are unlawful. It was followed by the landmark decision in *Obergefell v. Hodges*⁸⁵ in which Court ruled the fundamental option to wed is ensured to same-sex couples by the Fourteenth Amendment to the United States Constitution. As a result, each state license and recognize wedding between homosexual couples. In absence of any Federal Law, the Equality Act has been given in the U.S. Congress, which would ban segregation dependent on sexual direction and sex character.⁸⁶

CASE STUDY: FRANCE

French Civil Law encompasses the fields of family and inheritance law. The traditional French Family Law was conservative as it was founded on distinct gender roles.⁸⁷ However, the Civil Code has been reformed to allow for Gender Equality.⁸⁸ The family law which governs Marital Agreements, Divorce, Maintenance, and Guardianship, etc. has been codified in the French Civil Code (FCC). French law only recognizes marriages with free consent and without impediments to marriage.⁸⁹ In 2005, the French divorce laws were reformed and the procedure was simplified, as the separation time was diminished from 6 years to 2 years.⁹⁰ Before French Revolution, inheritance law in France was extremely complicated and discriminated between men and women. However, the inheritance system since then has been greatly simplified. In 1891, a law was passed to amend the Civil Code under which the surviving spouse can inherit either the usufruct of the deceased's property or the ownership

⁸³Beth Rowen, Important Supreme Court Decisions in LGBT History, Infoplease, (Sep. 27, 2019 5:30 PM), <https://www.infoplease.com/us/government/judicial-branch/important-supreme-court-decisions-in-lesbian-gay-bisexual-and-transgender-history>.

⁸⁴*Lawrence v. Texas*, 539 U.S. 558.

⁸⁵*Obergefell v. Hodges*, 135 S. Ct. 2584.

⁸⁶German Lopez, the House just passed a sweeping LGBTQ rights bill, Vox, (Sep. 27, 2019 5:30 PM), <https://www.vox.com/policy-and-politics/2019/5/17/18627771/equality-act-house-congress-lgbtq-rights-discrimination>.

⁸⁷Savitri Goonesekere, Child Rights Series Number 1, UNICEF International Child Development Centre, (Sep. 27, 2019 2:32 PM), https://www.unicef-irc.org/publications/pdf/crs1_low.pdf.

⁸⁸Nicolas Boring, France: Inheritance Laws in the 19th and 20th Centuries, Library of Congress, (Sep. 27, 2019 2:32 PM), https://www.loc.gov/law/help/inheritance-laws/france.php#_ftn34.

⁸⁹Charlotte Butruille-Cardew, Family law in France: overview, Thomson Reuters Practical Law, (Sep. 27, 2019 2:32 PM), <https://uk.practicallaw.thomsonreuters.com/6-615-354>.

⁹⁰Divorce in France, Anglo Info France, (Sep. 27, 2019 2:32 PM), <https://www.angloinfo.com/how-to/france/family/marriage-partnerships/divorce>.

of one quarter, at his/her choice.⁹¹Law 75-17⁹² which was passed on 18 January 1975 legalized abortion in the French Republic. In the context of LGBT rights in the region, France is seen to have a relatively liberal jurisprudence. Before the French Revolution, Homosexual activity was considered not in favour of nature was capital punishment which was to be punished with the death penalty. However, all Sodomy laws were canceled after the Revolution in 1791. In 1960 the Indecent Exposure Law was passed which targeted homosexuals, which was repealed in 1980.⁹³ Subsequently, Laws denying separation based on the sexual direction and sex character were authorized in 1985 and 2012. Law 2013-404⁹⁴ legalized Homosexual weddings in the country since 18 May 2013.⁹⁵ Since 2017, transsexual individuals have been permitted to change their lawful sex without going through any clinical procedure.

CASE STUDY: PAKISTAN

Some of the most controversial and discriminatory laws against women and the LGBT community in Pakistan were formulated and implemented during Zia-ul-Haq's regime.⁹⁶ While the country has formulated Laws to increase the position of women and the LGBT community, the radicalization of the State has complicated the efforts for the actual implementation of these legislations. The Politico-Cultural patterns in Pakistan don't let women enjoy their legal and religious rights.⁹⁷ The native administrative apparatus such as the Jirgas and Panchayats in the country are prejudicial towards women and work against their interests.⁹⁸ Many customs, usages, traditions, and practices such as Forced Marriages, Honour Killings, Bride Sales, and Purchases, etc.⁹⁹ continue in the country which undermines the

⁹¹Inheritance right of spouse, Notaries de France, (Sep. 27, 2019 2:32 PM), <https://www.notaires.fr/en/donation-succession/succession/rights-surviving-spouse>.

⁹²French Lawmakers vote to relax abortion legislation, France 24, (Sep. 27, 2019 2:32 PM), <https://www.france24.com/en/20140122-france-lawmakers-vote-relax-abortion-legislation>.

⁹³Homosexuality in France, Behavior and Not a Person, (Sep. 27, 2019 2:30 PM), <http://www.banap.net/spip.php?article231>.

⁹⁴Law 2013-404, Act No. 2013-404 of 17 May 2013

⁹⁵Steven Erlanger, Hollande Signs French Gay Marriage Law, The New York Times, (Sep. 27, 2019 2:30 PM), <https://www.nytimes.com/2013/05/19/world/europe/hollande-signs-french-gay-marriage-law.html>.

⁹⁶Nadeem F. Paracha, How Zia Set the Rules, Dawn, (Sep. 27, 2019 2:30 PM), <https://www.dawn.com/news/1446325>

⁹⁷The Pakistani woman: Where does she stand and where is she going? Herald, (Sep. 27, 2019 2:30 PM), <https://herald.dawn.com/news/1153689>.

⁹⁸All You Need to Know about Pakistan's 'Jirga Law', India Times, (Sep. 27, 2019 2:30 PM), <https://www.indiatimes.com/news/india/all-you-need-to-know-about-pakistan-s-jirga-law-that-ordered-rape-for-a-rape-as-justice-327296.html>.

⁹⁹Rehman, Honor Killings and Women's Rights In Pakistan, Berkeley MDP, (Sep. 27, 2019 2:30 PM), <https://mdp.berkeley.edu/honor-killings-and-womens-rights-in-pakistan-between-the-middle-ages-and-modernity/>.

norms of Gender Justice. Blatantly discriminatory laws such as the Hudood Ordinances 1979, Zina Ordinance continue to be a part of the Pakistani Legal System.¹⁰⁰ In the context of the LGBT community, the Pakistani Constitution doesn't expressly deny fundamental rights to a citizen on grounds of sexual direction or sexual personality. However, other Constitutional provisions do impact the constitutional rights of LGBT persons.¹⁰¹ There is no lawful acknowledgment of same-sex common associations or relationships, and same-sex couples can't embrace kids in the country. Since 2012 the Pakistani Government has allowed transgender persons to enlist them as third sex on their Computerized National Identity Cards (CNICs). Section 377 of the Pakistan Penal Code (PPC) recommends discipline for carnal intercourse against the request for nature with any man, lady, or creature, hence making Homosexuality illegal in the Country.¹⁰² The Transgender Persons (Protection of Rights) Bill in the year 2018 was passed by the National Assembly of Pakistan, which allowed transgender people to register for obtaining driver's license and passport, as well as to change their gender in the national records.¹⁰³

CASE STUDY: EGYPT

The contemporary Egyptian Legal system has witnessed reforms about the issues of Gender Equality. The 2014 Constitution tends to address ladies' issues in a moderately exhaustive way than previously. The Preamble expresses that the Constitution guarantees correspondence in rights and obligations with no separation. The Constitution incorporates more than 20 Articles that address ladies straightforwardly. The Constitution commands that State submit towards accomplishing fairness among ladies and men in common, financial, and social matters. While the Inheritance Law has reformed providing women the right to have a defined share of inheritance in the estate, yet the general rule under which daughter inherits half the amount that a son continues. The minimum age of marriage for a female has been raised to 18 years.¹⁰⁴ Even though Egyptian law doesn't explicitly criminalize

¹⁰⁰C.H. Kennedy, *Islamisation in Pakistan: Implementation of the Hudood Ordinances*, 307-316, (28th ed. 1988).

¹⁰¹LGBT Rights in Pakistan, Equal Dex, (Sep. 27, 2019 2:30 PM), <https://www.equaldex.com/region/pakistan>.

¹⁰²Pakistan Penal Code, OECD, (Sep. 27, 2019 2:30 PM), <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46816797.pdf>.

¹⁰³Transgender Persons (Protection of Rights) Bill, 2018, National Assembly of Pakistan, (Sep. 27, 2019 2:30 PM), http://www.na.gov.pk/uploads/documents/1526547582_234.pdf.

¹⁰⁴Constitution Assessment for Women's Equality, International Institute for Democracy and Electoral Assistance, (Sep. 27, 2019 2:30 PM), <https://www.idea.int/sites/default/files/publications/constitution-assessment-for-womens-equality.pdf>.

homosexuality yet owing to cultural and religious traditions, laws pertaining to public morality and public order continue to be used against LGBT people.¹⁰⁵

CONCLUSION

In the past few decades, there has been a seminal shift in the global struggle for Gender Justice, marked by the emergence of change in the status of Genders. This shift has led to the emergence of new Gender Equations. Consequentially, the formerly marginalized sections of Society including Women and the LGBT communities have asserted their rights in new ways. The Legislatures and the Judiciaries have taken a raft of measures in form of Statues, Reforms, and Judicial Precedents to tackle this challenge. But at the same time, Personal Laws prevalent in different countries such as India have complicated the path to a progressive democratic polity, that would not only ensure equality between the genders but would complement the Emerging Gender Equations. In the Indian context, many of these Laws while undoubtedly having mass appeal are founded on principles that have Patriarchal and heteronormative underpinnings, and thus there is a need to undertake systematic restructurings and reforms. Indeed, it is regrettable that the Country has failed to enact a Uniform Civil Code, notwithstanding express Constitutional Guidelines. Further, this much-needed step would ensure that these Laws are in line with the Constitutional framework that seeks to ensure equality, dignity, and social justice to all. Nonetheless, it would be wrong to deny that there have been substantial amendments to Personal Laws pertaining to Marriage, Divorce, Succession, Adoption, and Maintenance, etc., which have progressively corrected many prevailing Gender biases against Women. Unfortunately, the LGBT community is yet to avail the benefits of Civil rights under the *Lex loci*, despite the recent Landmark verdict on Homosexuality. A study of diverse polities from around the World including the Secular and Theocratic states reflects a varying rate of success in meeting the path of establishing equilibrium between Gender Equations and Community Traditions. But what the common experience indicates is that this path will be traversed only with an accompanying change in public opinion since no Law exists in Vacuum. Only these steps would ensure Gender justice for all people, irrespective of the gender with which they identify.

¹⁰⁵Jane Arraf, After Crackdown, Egypt's LGBT Community Contemplates 'Dark Future', National Public Radio, (Sep. 27, 2019 2:30 PM), <https://www.npr.org/2018/06/18/620110576/after-crackdown-egypts-lgbt-community-contemplates-dark-future>.