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# Constitutionality of Personal Laws

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*Indian Constitution's part three gives people the right to be who they are, to freely practice, promote, and teach their religion, and to run their own religious businesses. Part III of our constitution also assures citizens of the "rights to equal protection under the law, the prohibition of discrimination on the basis of religion, caste, sex, or other factors, the right to liberty, which incorporates the right to live in dignity, and the right to religious freedom", which is subject to the other fundamental rights and therefore is not definite. As a result, how can anti-feminist and patriarchal laws like those that don't respect basic human rights, like equality for women, stay in place and be upheld by the courts? Here, I've used a lot of important court decisions and judges' opinions to show how many personal laws are constitutionally valid and how far Article 13 goes.*

**Keywords:** *article 13, constitution, personal laws.*

## INTRODUCTION

Indian citizens are subject to personal laws that control their marriage, divorce, support, inheritance, and succession. Family laws are the general term used to describe this kind of legislation. Different cultures' religious practises have a big influence on how these rules are established. In all other respects, India is a secular nation; nevertheless, when it comes to its

personal laws, it is primarily pluralistic in character.[1] Although India's Constitution promises "equality before the law" and "equal protection of the law", its personal laws treat persons differently since they are implemented according to the religious beliefs of the individual in question. The effect of religiously driven personal rules on the exercise of people's constitutional rights, particularly women's rights, as a consequence, acts as a key representational battleground on which conventional and continuous authorities attempt to realize their respective future visions.[2] Diverse court precedents have experienced a transformational shift through time regarding the subject of whether personal law falls within Part III of the Constitution or may be counted as law, resulting in various discussions and arguments. The "war" over the applicability of "Article 13[3] of the Indian Constitution" to "Religious Personal Laws" is the most important of these "fights".

## WHAT IS 'PERSONAL LAW'?

'Personal law' is described as a set of laws that apply to a certain class or group of people, or a single individual, based on religion, faith, or culture. It is one of the most distinctive features of the Indian legal system. India is a cosmopolitan culture in which many religious groups practise their own faiths and beliefs. Their beliefs are governed by a system of laws. And these rules are created by taking into account the religion's various practises. Accordingly, several religious groups in India are governed by their own set of laws. People of a particular religious group's social constructions,' such as their customs, beliefs, and values, are described in the personal laws, which provide historical context for that people's current worldviews. Social constructions like these have been legalised in India. Throughout the ages, numerous religious groups, including Muslims, Christians, and Parsis, have found a home in India. A variety of personal laws have developed in India as a result of invasions and migration.

[1] Khushboo Dev, 'Personal Laws Vis-à-Vis Fundamental Rights, Part III of the Constitution' (*CJP,* 26 August 2021) <https://cjp.org.in/personal-laws-vis-a-vis-fundamental-rights-part-iii-of-the-constitution/> accessed 13 February 2022

[2] *Ibid*

[3] Constitution of India, 1950, art. 13

***The need for 'Personal Laws in India-*** Personal laws in India have a long history that stems from the country's colonial past. Personal laws, both Islam and Hindu, were introduced in the initial time of the twentieth century to defend the personal province of the family from the colonial authority.[4] Given the current situation, various personal laws are being enacted to encourage the subjection of women and other minorities. From a constitutional standpoint, 'personal laws' must come inside the concept of "law" or a "law in effect" as specified in Article 13 of the Constitution.

**SCOPE OF 'PERSONAL LAW' IN 'ARTICLE 13'**

***Article 13 -*** Article 13 of the "Indian constitution" allows for judicial review, which allows courts to overturn legislation that violates "fundamental rights"-

**Laws inconsistent with or in derogation of the fundamental rights[5]-**

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."

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

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

(a) "**Law** includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) '**laws in force**' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously

[4] Samapika Mohapatra, 'Personal Laws, Uniform Civil Code & Gender Justice In India' (2022) <https://www.cusb.ac.in/images/cusb-files/2020/el/ds/MADVS2003C04%20Gend%20Dev%20Week%202.pdf> accessed 14 February 2022

[5] Constitution of India, 1950, art. 13

repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

***The Narasu Appa Mali[6] judgement, 1951 -***

**Facts -** This case centred on whether or not the "**Bombay Prevention of Bigamous Hindu Marriages Act, 1946[7]**" was constitutionally valid in the first place. The main dispute against the Act was that it breached "Articles 14[8] (Right to Equality)" and "15[9] (Prohibition of Discrimination)" since it showed prejudice amongst Hindu and Muslim males based on their specific rights (or absence of) to perform polygamy. Polygamy was cited as a violation of Article 25[10] (Freedom to Practice One's Religion), which claimed that the Act impacted on Hindus' freedom to practise the practise, which was said to be a part of Hindu tradition. It is specified in Part III of the Constitution that only a "law" or a "law in effect" which is defined in Article 13 of the Constitution and which invalidates any laws that are not consistent with the "fundamental rights", may be subject to the protections afforded to those rights under that section of the Constitution. Rather than delving into the before mentioned concerns, the Court preferred to focus on the more basic question as to whether Personal Laws constitute as "laws" or "laws in force" as defined by Article 13 of the Constitution. The Division Bench of the case unanimously responded "no, with each judge providing slightly different reasons for their conclusion. I'll look at both of them independently.[11]

**PERSONAL LAWS AS 'LAWS IN FORCE' OR NOT AS 'LAWS IN FORCE'**

The reasoning of Justice Gajendragadkar is based on two points. First, Article 13(1) only applies to statutory laws, and second, personal laws are not statutory laws and so do not fall within the purview of Article 13. To grasp the scope of Article 13(1) "laws in effect", we should

[6] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84
[7] Bombay Prevention of Bigamous Hindu Marriages Act, 1946
[8] Constitution of India, 1950, art. 14
[9] Constitution of India, 1950, art. 15
[10] Constitution of India, 1950, art. 25
[11] Gautam Bhatia, 'Personal Laws and the Constitution: Why the Tripal Talaq Bench should Overrule State of Bombay vs Narasu Appa Mali' (*Indian Constitutional Law and Philosophy*, 8 May 2017) <https://indconlawphil.wordpress.com/tag/personal-law/> accessed 15 February 2022

first look at Article 13(3)(b), which explains the concept: *"laws in force' **includes** laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."*[12]

When it comes to the interpretation of Article 13(3)(b) definition of "laws in force", the 'ordinary' or 'natural' meaning of the phrase must be given weight. A "law in force", according to the definition, is any rule toward which parties are legally obliged and on which a Court may rely to solve conflicts. Even if one accepts the argument that Article 13(1) only applies to statutory declarations, the Narasu dictum must be supported by evidence that a clear separation exists between "law" under Article 13 and personal laws. J. Gajendragadkar puts it this way:

"Personal laws are well-known for not having their legitimacy based on the fact that they were enacted or made by a Legislature or other competent body in India's territory. Both Hindu and Mahomedan laws have their foundations in their corresponding scriptural texts."[13] Personal laws, according to this view, are founded on an unrestricted interpretation of the scripture's standard principles "to which they owe their allegiance". This logic, on the other hand, neglects the contribution made by the Judicial system and the Legislative branches in shaping holy texts in view of existing norms of the constitution – principles that have been approved by the schools in charge of their execution in a variety of cases – and which have been authorised by the schools in charge of their implementation in a variety of cases. As a consequence, the High Court's sole justification, which is the exclusion of personal legislation from Article 13, is devoid of any significance.

**PERSONAL LAWS: A PARADIGM SHIFT**

In this, we will analyse how the "Narasu Appa Mali" judgement is overruled by different cases.

[12] *Ibid*
[13] *Ibid*

***India Young Lawyers Association v State of Kerala*[14] ("Sabrimala Temple case"):** Ayyappa's Sabarimala temple does not allow women between the ages of 10 and 50 to worship there, due to a long-standing custom and usage. The majority of the court (Indu Malhotra, J., dissented) held that this practise violates constitutional morality and the fundamental rights of women devotees, and is in direct violation of the Preambular values of **"dignity", "liberty"**, and **"equality"**, which run through the entire temple. Justice D.Y. Chandrachud makes a point on the necessity of personal laws when it comes to 'fundamental rights' - "Customs, usages, and personal laws have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny is to deny the primacy of the Constitution."[15] Personal laws should be subjected to constitutional analysis as a first step toward achieving a constitutional vision. As a result, the verdict in the Narasu Appa Mali case, which included immunization, uncodified personal laws, and unique traditions and use, must be reconsidered.

***Shayara Bano v Union of India*[16]:** Shayara Bano v Union of India & Ors was considered by a Supreme Court bench of five judges, who questioned the 'constitutionality' of the talaq-e-bid'a (Instant Triple Talaq), which empowers a husband to divorce his wife abruptly and unilaterally. Earlier The Supreme Court has previously ruled in *Shamim Ara v State of Uttar Pradesh*[17] that a simple declaration of talaq in response to a maintenance petition filed by a woman cannot be considered a declaration of talaq. In *A. Yousuf Rawther v Sowramma*[18], *Krishna Iyer J.* held that instant Triple Talaq is not a component of Muslim Law and thus excluded from the **Muslim Personal Law (Shariat) Application Act, 1937**[19], and that "talaq must be pronounced as per Quranic injunction, as such triple talaq is not an essential religious practise

[14] *Indian Young Lawyers Assn. v State of Kerala* (2019) 11 SCC 1
[15] *Ibid*
[16] *Shayara Bano v Union of India* (2017) 9 SCC 1
[17] *Shamim Ara v State of Uttar Pradesh* AIR 2002 SC 3551
[18] *A. Yousuf Rawther v Sowramma* AIR 1971 Ker 261
[19] Muslim Personal Law (Shairat) Application Act, 1937

of Islam and is invalid"[20]. Because no other provision of the constitution affirms the creation of a constitution bench when a court is required to determine a considerable question of law incorporating the interpretation of constitutional law, it is possible that the Hon'ble Supreme Court will revisit the issue of whether personal laws qualify as **"laws"** for the purposes of "**Article 13**" now that the matter has been referred to a five-judge council. The apex court ruled in Shyra Bano that the practise of instant triple talaq/talaq–ul–biddat is unlawful by 3:2 majorities. On the one hand, Justice R. F. Nariman (writing for himself and Justice Lalit) and Justice Joseph backed the opinion that triple talaq is unconstitutional, while Justice Nazeer and Chief Justice Kehar, supported the practise of triple talaq and left it to the parliament to pass legislation.

Ultimately, they determined that the 1937 Act doesn't really regulate the practise of triple talaq and that the practice of triple talaq does not qualify as a significant religious practise for Islam under Article 25, and hence is prohibited under the law. The judgments of **Nariman** and **Lalit JJ and Joseph J**. were silent on the fundamental issue as to whether personal laws are "laws in force" under article 13, a concern that was crucial to fundamentally subject other unfair practices of personal laws to the constitution; however, **Kehar and Nazeer JJ** held that "the same could not be tested against part iii of the Constitution; and, regrettably, the elephant of Narasu Appa Mali continues to conquer the legal landscape". However, despite the fact that the All India Muslim Personal Law Board was victorious in the case, the decisions of Justices Kehar and Nazeer, as well as the decision of Justice Joseph, elevated the status of personal law to that of a "fundamental right" under Article 25 of the "Constitution of India."

## GOVERNMENT OF INDIA ACT, 1915[21] ABOUT PERSONAL LAW SCOPE

The Court also focused on the Government of India Act, 1915, which used the phrase "Personal law or custom having the force of law" to argue that personal laws did not have the force of law in and of themselves and that this was a valid argument. The Government of India

[20] Ashwani Malhotra, 'Personal Laws and the Constitution: Revisiting Narasu Appa Mali' (*SSRN Paper,* 18 July 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201090> accessed 15 February 2022
[21] Government of India Act, 1915

Act, 1915 utilised the terms 'personal laws' and 'custom' separately, and as article 13 is built on Section 112 of the GOI Act, it may be concluded that the constituent assembly purposefully excluded the phrase "personal laws" from the text of article 13. However, the court overlooked the fact that the Government of India Act, 1935, which used the term "all laws in force", had been interpreted in United Provinces v Atiqua Begum 12 AIR 1941 FC 16 as "including not only statutory enactments then in force, but also all laws, including personal laws, customary laws, and case laws", which the court did not mention. Furthermore, where states have been granted the authority to make legislation in connection to personal laws under entry 5 of List III, there seems to be no reason why the same cannot be submitted to judicial review under part III. The use of the word includes in article 372 (it talks about "*Continuance in force of existing laws and their adaptation*") – implies that the definition is not exhaustive and that the expression 'all the laws in force' in article 372(1) is not limited and extends even to customary law, personal law such as Hindu and Muslim law, thus being more thorough than the concept of existing law in article 366. (10) (It states that "Existing law means any law, ordinance, order, bye-law, rule, or regulation enacted or made before the beginning of this Constitution by any Legislature, authority, or person with the power to do so").

## AN OVERVIEW ANALYSIS OF THE NARASU APPA MALI JUDGMENT FROM A LEGAL PERSPECTIVE

As a result, although the Narasu Appa Mali decision seems to be a well-established precedent on the relationship between Article 13 and Indian personal law, its implementation remains, in practice, utterly disparate and arbitrarily interpreted. The logic behind the *Narasu Appa Mali* decision has been called into question for a number of reasons, including the following:

**Firstly,** The Supreme Court of India defined law as "laws that regulate legal rights and responsibilities" in the case of *Narsingh Pratap Deo v State of Orissa*.[22] When it came to customary laws, the Federal Court ruled in *United Provinces v Antiqua Begum*[23] that they were "laws in effect". Consequently, to the extent that personal laws are formed, they control legal

[22] Khushboo Dev (n 1)
[23] *Mt. Atiqa Begum And Anr. v Abdul Maghni Khan And Ors.* AIR 1940 All 272

rights and obligations and are considered to be "in effect". Their absence from Article 13 is, as a result, completely arbitrary.

For the second time, according to the court in *Sant Ram v Labh Singh*[24] (Para 4) and Indian *Young Lawyers Association v State of Kerala*[25] (the Sabarimala ruling – Para 278), the term of "laws" in Article 13 is not complete and covers legislations that are similar in nature. Personal laws should be put under Section 13 as well, particularly when they are derived from customs regulations. This is nonsensical, given that customs regulations belong under Section 13.

**Thirdly,** Personal laws are divided into three categories: codified laws, uncodified laws, and customary laws. This distinction is not made by the court in his decision. It is incorrect that codified laws, which are laws passed by the Parliament itself, are exempt from the provisions of Article 13 of the Constitution.

**Fourthly,** as stated in the "***Narasu Appa Malli***" decision, the argument that personal laws have really been exempted from Article 13 in order to prevent Articles 17 and 25 from becoming redundant is unfounded, as the concept of coinciding among different articles has been acknowledged and accepted in Indian Judicial decisions since the case decided in 1971[26].

**Final point:** it is manifestly unjustifiable that, on the one side, the state persists to engage in Personal Laws to enact civil rights such as Succession and Inherence Rights, as well as other civil rights and rights of inheritance, while on the other hand, the state absolutely refuses to intervene in cases involving infringements of constitutional provisions.

## GENDER JUSTICE VS PERSONAL LAWS

Even with India's legal system for women have advanced to this stage and shown such tremendous promise, one noteworthy anomaly stands out in particular. When it comes to applying sex equality standards to personal legislation, the judiciary is out of step with the times. Face discrimination and sex-based disparities have been included in the personal laws

[24] *Sant Ram v Labh Singh* (1965) AIR 166
[25] Indian Young Lawyers Assn. (n 14)
[26] *Rustom Cavasjee Cooper (Banks Nationalisation) v Union of India* (1970) 1 SCC 248

of all of India's religions, although to varying degrees, to the disadvantage of women. Despite the fact that this is true in the area of family law, the courts frequently permit them, even when the standards are stretched (often to the crisis point) in order to produce an estimate or the perception of gender parity in the final outcome. *C.B. Muthamma v Union of India*, A.I.R. 1979 S.C. 1868, 1869 - "A provision requiring a woman working in the Indian Foreign Service to acquire permission from the government before marrying was unceremoniously declared unconstitutional by the Supreme Court without hesitation."[27]

**INDIAN DIVORCE ACT, 1869**

A married Christian woman is denied equal protection of the laws in two ways under Section 10 of the Indian Divorce Act, 1869, as previously mentioned. First, she is denied equal protection of the laws in relation to the grounds of divorce. First and foremost, it deprives her of the other actual grounds for divorce that are accessible to women who are married under the other personal laws. Second, it distinguishes against Christian women as compared to Christian males only on the basis of sexual orientation. A married woman is on an equal footing with other married women, regardless of the religion to which she belongs or the legal framework under which she is wedded. A Christian wife is denied of the basis for divorce - adultery, cruelty, desertion, and so on - per se or simpliciter, which means that the above-mentioned three are not grounds for divorce on their own; instead, she must prove incest or bigamy, cruelty with adultery, or desertion with adultery in order to obtain a divorce from her husband. As a result, the burden of evidence is higher on a Christian wife claiming divorce than it is on any other kind of wife. Also barred from claiming grounds for divorce are incurable insanity, leprosy, venereal illnesses, the presumption of death, reciprocal consent, bigamy simpliciter (simple marriage), impotency, seven-year incarceration, and other similar circumstances. In accordance with Article 14, this leads to the denial of equality. This cannot be rationalized as a legitimate categorization since it would amount to discrimination only on the basis of religion, which is forbidden under Article 15 (1).

[27] Catharine A. MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects, and Personal Laws' (2006) 4 International Journal of Constitutional Law, 181

Section 10 has already been challenged in the case of *Dwaraka Bai v Prof. Nainan* in this case; the Court confirmed the legality of the contract notwithstanding the obvious disparity. In this particular case, Panchapakesa Ayyar J. made the following observation: "I may also add that adultery by a wife is different from adultery by a husband. A husband commits adultery somewhere but he does not bear a child as a result of such adultery and make it a legitimate child of his wife's to be maintained by the wife... But, if the wife commits adultery she may bear a child as a result of such adultery and the husband will have to treat it as his legitimate child... It is obvious that this-very difference in the result of the adultery may form some grounds for requiring a wife, in a petition for divorce not only to prove adultery by the husband but also desertion and cruelty, whereas the husband need only prove adultery by the wife."

The act of adultery itself, rather than the outcome of the conduct, is what the law recognises as a basis for divorce in most cases. If this line of thinking is followed, then infidelity by husbands will never be a valid basis for divorce. It is simply a reflection on the anti-women attitude of the system that such double standards are allowed to continue. In the 1985 case *Jorden Diengdeh v S.S. Chopra*[28], the Supreme Court recommended a comprehensive revision of the law of marriage and divorce, as well as the establishment of a Uniform Civil Code, among other things. In a recent decision, the Kerala High Court, taking into consideration the primitive nature of the reliefs available under the Act, directed the Union of India to take a decision within six months of receiving a copy of the order on the recommendation of the Law Commission in its 90th report for amending Section 10 of the Indian Divorce Act, which was published in December. Divorce laws for Christians have also been the focus of the efforts of a number of Christian voluntary organisations and campaigners. A group of persons affiliated with the Christian faith in Kerala has drafted the 'Christian Marriage and Matrimonial Causes Bill 1990', in which they propose an altered section that is progressive in character.

The legislature has not made any steps toward reforming the divorce laws till this moment. According to the Court's findings in a case, which were based on a variety of international and

[28] *Jorden Diengdeh v S.S. Chopra (*1985) 3 SCC 62

domestic statutes and principles, the goal of enacting Article 14 of the Constitution was to, among other things, erase pre-existing disparities and limitations based on sex, like the Hindu women's right to own property.[29] As per the Court, "The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women are anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution, least they became void under Article 13 if they violated fundamental rights. Right to equality is a fundamental right……..Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14(1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it."[30]

## CONCLUSION

Beginning with the application of the Narasu Appa Mali decision, there is clearly substantial uncertainty and inconsistency over its applicability. Second, although the Narasu Appa Mali decision was reached after a thorough analysis of constitutional laws and jurisprudence, there are several errors and inconsistencies in the decision that must be addressed and explained before it can be implemented. Additionally, it is argued that, although maintaining personal laws is vital to preserving the variability of Indians, they cannot be used to supersede the Constitution's provisions, since the most supreme law of the country is the Constitution. To summarise, alongside the court rapidly evolving to a more investigation perspective, it is necessary to evaluate the Narasu Appa Mali judgement and to appropriately integrate personal laws into Article 13 in order to avoid repeated judicial errors and disputes.

[29] *C. Masilamani Mudaliar v Idol of Sri Swaminathaswami Swaminathaswami Thirukoil* (1996) 8 SCC 525
[30] Khushboo Dev (n 1)