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Loopholes in various Family Laws and the need for their Rectification

Vaibhvee Jangid[a]

[a]Symbiosis Law School, Nagpur, India

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India is a culturally diverse country, has people from different religions and thus historically the people of India are governed by different personal laws. The difference among the personal laws is mostly in the matters related to marriage, divorce, adoption, and family planning in general. This article will focus on various loopholes in family laws that need to be rectified and amended by the legislature. A lot of such reforms have been made by judicial decisions, however, there arises a conflict between different courts at different levels of the judiciary which can be corrected by making the statutes much clearer and more precise so as to reduce any kind of doubt. Nonetheless, there are a number of sections in different legislations that will be enumerated in this article that are ambiguous and enlist the attempts of the judiciary to interpret them with the principles of justice, equity, and good conscience. Furthermore, it discusses the need to enact Uniform Civil Code to weed out these ambiguities. (It is just to clarify that this article is not at all exhaustive about the loopholes present in different family laws and there would be more that may have been overlooked by the researcher.)

Keywords: *family laws, personal laws, uniform civil code, reforms, loopholes.*

INTRODUCTION

India can also be termed as a nation within a nation. This is so because of the vast and prolific diversity in all the regions of the country. Even within a state, there is so much diversity that a person traveling north to south and east to west can encounter the brilliance of the traditions and the principles that the country still holds on to and is proud of. This diversity is because of the different traditions that the people have and thus are governed by their own personal laws. What are personal laws? It's an expression not difficult to understand but also not very easy to define. In ***Mitar Sen v Maqbul Hasan,***[1] It was held that 'Personal law' and 'law of religion' are almost synonymous.

ORIGIN OF PERSONAL LAWS IN INDIA

Hindu law is considered to be 6000 years old and with Muslim traders and invaders coming to India, Islamic law also got its place in the Indian subcontinent. The first State code of Muslim law prepared in India was the Fatwa-e-Ghiyasiya promulgated under the authority of Balban who ruled India during 1266-1288 AD, which was followed by the Fatwa-e-Qarakhania of the Tughlaq rulers and Fatwa-i-Babari and Fatwa-e-Alamgiri of the Mughals. The laws governing Christians are shaped by two distinct colonial influences- the Anglo-Saxon jurisprudence introduced by the British and the Continental system introduced by the French and the Portuguese within their respective territories. Thus before colonization, Hindus and Muslims were governed by their respective personal laws with very few exceptions and even the Britishers followed the same. However, the personal laws we have today are having a British gloss over them because of the interpretations that were given by the British courts during that time.

[1] *Mitar Sen v Maqbul Hasan* AIR 1930 PC 251 (252)

WHETHER PERSONAL LAWS "LAWS" OR "LAWS IN FORCE"?

The Constitution of India under Part III provides the freedom of religion within articles 25-28[2]. The same part of the constitution also guarantees to its citizens the right to equality before the law and equal protection of the laws, the prohibition of discrimination on grounds of religion, caste, sex, etc, and the right to liberty.[3] Thereby according to the constitutional scheme any law enacted by Parliament or State legislature if it violates any of the fundamental rights can be struck down by the Supreme Court and the High Courts. But then, why do there still exists some personal laws which are prima facie patriarchal and discriminatory against women and move against the fundamental rights but still exist and manage the scrutiny of fundamental rights?[4] Article 13[5] of the Constitution deals with "Laws inconsistent with or in derogation of the fundamental rights" and Article 372[6] deals with "Continuance in force of existing laws and their adaptation." Through these articles, we can understand that the pre and post-constitutional laws have to be in consonant with the fundamental rights. Going by this argument all the discriminatory personal laws must have been struck down by the courts till now. However, there is no uniformity of decisions by the courts on the question of whether the personal laws are 'laws' or 'laws in force under Article 13 of the Constitution of India. The most famous case on this is ***State of Bombay v NarasuAppa Mali***[7]. The issue was: under section 4 and section 5 of the Hindu Bigamous Marriages Act, it rendered the bigamous marriages among the Hindus void and made them punishable with maximum imprisonment of 7 years. And this was challenged on the grounds of articles 14, 15, and 25[8]. Both the judges i.e. Chagla J. And Gajendragadkar J. gave their separate judgments and reached the same conclusion that the Personal laws don't come under the definition of 'Law in Force' under article 13 and therefore cannot be subjected to the Judicial Review under the Indian

[2] Constitution of India, 1950, art.25-28
[3] Constitution of India, 1950, art.14, and art.15
[4] Ashwani Malhotra, 'Personal Laws and the Constitution: Revisiting NarasuAppa Mali' (*SSRN E-Journal,* 18 July 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201090> accessed 07 June 2022
[5] Constitution of India, 1950, art.13
[6] Constitution of India, 1950, art.372
[7] *State of Bombay v NarasuAppa Mali* AIR 1952 Bom 84
[8] Constitution of India, 1950, art.14, art.15, and art.25

Constitution.[9] Likewise in ***Ahmedabad Women Action Group & Ors. v Union of India[10]***, different organizations had challenged through various PILs a number of discriminatory aspects of personal laws, both codified and un-codified across religions. The Court, relying on the earlier decisions held that the matters with respect to Muslim personal law systems pertained to legislative action and the Court could not interfere.[11]

A number of cases followed the above-mentioned decision but also the courts in the various other cases tested the validity of the personal laws on the touchstone of the fundamental rights like:

- In ***Githa Hariharan v Reserve Bank of India,***[12] The court tested the validity of section 6[13] of the Hindu minority and guardianship Act 1956 and interpreted the word "after" as not after the lifetime of the father but held that the mother can be a natural guardian even when the father is alive but is unfit for providing for the child.
- In the case of ***Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil[14]***, it was observed by the three-judge Bench: "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 lest they become void under Article 13 if they violate fundamental rights."

But in a very recent landmark judgment that is, ***Shayra Bano v Union of India[15]***The question of whether personal laws are "laws in force" as per article 13 remained unanswered. The question was very important as accordingly the discriminatory practice of the personal laws

[9] Ashwani Malhotra (n 3)
[10] *Ahmedabad Women's Action Group v The Union of India* (1997) 3 SCC 573
[11]Akhila Kolisetty, 'Unilateral talaq and the Indian Supreme Court's Responsiveness to perceptions within India's Muslim community' (*Islamic Law Blog*, 2 June 2015) <https://islamiclaw.blog/2015/06/02/unilateral-talaq-and-the-indian-supreme-courts-responsiveness-to-perceptions-within-indias-muslim-community/#_ftnref8> accessed 07 June 2022
[12] *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228
[13] Hindu Minority and Guardianship Act, 1956, s 6
[14] *Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525
[15] *Shayra Bano v Union of India* AIR 2017 SC 4609

would have been dealt with. Thereby as the court remained silent on this issue and Justice Kehar and Justice Nazeer held that the same cannot be tested against the fundamental rights and hence the "elephant of NarasuAppa Mali still remains intact all through these years." [16]

Recently a California court ruled that "bumblebees are fish" so as to protect them because they are endangered.[17] The court interpreted that the term of art employed by the legislature for the term "fish" is not limited only to aquatic animals.[18] However, the common understanding of the word says otherwise. Therefore the purpose of this article is to enumerate the prima facie loopholes that through the Legislature can be amended and be made in tune with the changing times of the modern world.

HINDU MARRIAGE ACT 1955 (HMA)

Under section 2[19] of the Act, the statute is not very clear on the "Atheists." One of the reasons is that very few family matters go to the Supreme Court as they are majorly heard by family courts or trial courts. The problem is that the trial courts do not recognize the atheist if he is claiming it because if they apply that clause they will be facing a lot of problems in solving the issue. A very significant development in the regard to section 2(2)[20] is the ***Satprakash Meena v Alka Meena***[21] case in which the HMA was made applicable to scheduled tribes as they were completely hinduised and left their customary practice voluntarily and thereby cannot claim special status because the court held that otherwise, it would completely defeat the purpose of S.2(2). As if the members of the tribe choose to follow Hindu customs, traditions, and rites then they cannot be kept out of the purview of HMA, 1955. However, what needs to be kept in mind is that the court did not alter their status as a 'Schedule tribe'.

[16] Ashwani Malhotra (n 3)
[17] BibekDebroy, 'Laws in the dark' (*Indian Express*, 9 June 2022) 13 <https://indianexpress.com/article/opinion/columns/bibek-debroy-writes-vague-laws-bees-are-fish-cats-are-dogs-lord-byron-endangered-species-7959676/> accessed 12 June 2022
[18] *Ibid*
[19] Hindu Marriage Act, 1955, s 2
[20] Hindu Marriage Act, 1955, s 2(2)
[21] *Satprakash Meena v Alka Meena* (2021) SCC OnLine Del 3645

In section 5(iii)[22] the boy's age should be 21 years and the girl's age should be 18 years. This is discriminatory and must be made at par with each other thus the minimum age of marriage of the bride and the groom must statutorily be made 21 years. Under Muslim law, the age of puberty is the minimum age for marriage and there are variations in it as well. The Indian majority Act that fixes the minimum age as 18 years is not applicable to Muslims. However, the consummation of marriage makes a very important role if the girl wants to repudiate the marriage, and thus this is in direct conflict with the Child Marriage restraint Act (CMRA).

The Hindu, Muslim, Christian, and Parsi statutes are not clear on child marriages. Child marriages are still not wiped out. Due to this confusion, the ***Prohibition of Child Marriages Act, 2006 (PCMA)*** was passed. It is applicable to all religions and is been made more stringent than the Child Marriage Restraint Act, of 1929. In the case of ***Lajja Devi v State,***[23] It was held that PCMA will override the provisions of HMA and thus held that the child marriages will be voidable. The same was reiterated by Karnataka High Court in ***Mis. Seema Begaum D/O Khasimsab v State Of Karnataka***[24]. However, even in this, there is a lot of ambiguity as this act made the child marriage voidable but there are a number of judicial decisions which held otherwise. The state of irregularities is not yet resolved.

In section 7[25] the term "sacred fire" is not defined in the law and that's why in a Bombay High court judgment it was held that saptapadi taken around 'agarbatti' or 'candle' will be a valid marriage. According to The Hindu Marriage Act, 1955 (Section 13B)[26] and The Parsi Marriage and Divorce Act, 1936 (Section 32B)[27] the parties must be living separately for at least one year, and only then can they file a petition for the divorce by mutual consent. However the Divorce Act, 1869 by which Christians have governed states that under Section 10A[28] that the aforementioned period should be a minimum of two years. Now, this is prima facie

[22] Hindu Marriage Act, 1955, s 5(iii)
[23] *Lajja Devi v State,* (2012) DEL 1535
[24] *Mis. Seema Begaum D/O Khasimsab v State Of Karnataka* (2013) Writ Petition No. 75889/2013
[25] Hindu Marriage Act, 1955, s 7
[26] Hindu Marriage Act, 1955, s 13B
[27] Parsi Marriage and Divorce Act, 1936, s 32B
[28] Parsi Marriage and Divorce Act, 1936, s 10A

discriminatory in nature and violates the fundamental rights i.e. A.21 & 14[29]. But in the case of ***Saumya Ann Thomas v Union of India,***[30]This period of two years was read down as one year. Therefore even though there are lacunas and ambiguities in the statutes the judiciary is doing its part to render justice to everyone.

Lastly, under Section 13B of HMA i.e. divorce by mutual consent, the act provides a cooling-off period of 6 months between the first motion and the second motion. But there are certain cases in which the parties file a divorce petition under other clauses of section 13[31] and the case goes on for years but after which they mutually decide to dissolve their marriage and file a joint petition under section 13(B)(1)[32]. In such cases where the divorce proceedings were going on before filing the petition under S.13(B), the cooling period should be waived as it just prolongs the sufferings of the parties. In ***Shamsher Singh v SunitaJamwal (2019)***[33], the high court of Punjab and Haryana on the plea of a couple, ordered waiver of the compulsory six-month cooling-off period after it found that there was no possibility of reconciliation and the couple was firm in their resolve to get divorced. Thus an amendment by the legislature would be helpful.

HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 (HAMA)

As per section 7[34] i.e. adoption by a Hindu male, there are two critiques:

- As the consent of the wife is required for any male Hindu to adopt unless the wife has renounced the world, ceased to be a Hindu, or has been declared of unsound mind. So if the wife ceases to be Hindu but the husband doesn't divorce her under S.13 of the Hindu Marriage Act, 1955 that means that they still are legally wedded but even though she still being a legally wedded wife, taking her consent is not required according to S.7

[29] Constitution of India, 1950, art.21, and art.14
[30] *Saumya Ann Thomas v The Union of India, Represented by the Secretary, Department of Law & Justice & Another* (2010) LNIND 2010 KER 143
[31] Hindu Marriage Act, 1955, s 13
[32] Hindu Marriage Act, 1955, s 13B (1)
[33] *Shamsher Singh v SunitaJamwal,* (2019), CR no. 7995/2018
[34] Hindu Adoption and Maintenance Act, 1956, s 7

and thus if the husband takes a child in adoption without the wife's consent then it would be like a punishment for her.

- If there is more than one wife then the consent of all of them is required but section 14(2)[35] of the same act states that the first wife will be the adoptive mother and all others will be the stepmothers so why is their consent required?

According to S.11(v)[36] of Hindu Adoptions and Maintenance Act, 1956 simultaneous adoption by two or more persons is prohibited and the only exception to this rule is that of a husband and a wife and also two people living in a live-in relationship can adopt when their relationship is in the nature of marriage. But this sub-section is problematic in the case of homosexual couples. As only one of them can adapt and it won't create rights and liabilities for the other partner. This problem can be solved if same-sex marriage is legalized in India.

HINDY MINORITY AND GUARDIANSHIP ACT 1956 (HMGA)

As per section 6[37] of the Act, unsoundness of mind is not statutorily mentioned as a ground for denying the guardianship of the minor but in such cases, the welfare principle is incorporated by the judiciary. Also in the leading case of ***GithaHariharan v Reserve Bank of India***[38] the word 'after' was interpreted as "in absence of" instead of "after the lifetime" but there is a grave error in this case that is, if the father is mentally or physically unable to take care of the child and the minor is in exclusive care and custody of the mother, she would be entitled to act as its natural guardian and all her actions would be valid even during the lifetime of the father. This superficially brings the mother at par with the father because the mother is at par only when she is able to prove the exclusive charge of the child for whatever reason and the father's absence. And the Supreme Court also failed to deliberate on the simultaneous guardianship when the child is in the mutual care of both the parents. There is a critique of section 6(c)[39] about the guardianship of a minor married girl who passes to her husband upon

[35] Hindu Adoption and Maintenance Act, 1956, s 14(2)
[36] Hindu Adoption and Maintenance Act, 1956, s 11(v)
[37] Hindu Minority and Guardianship Act, 1956, s 6
[38] Githa Hariharan (n 12)
[39] Hindu Adoption and Maintenance Act, 1956, s 6(c)

marriage. The restriction from the Prevention of Child Marriage Act makes the marriage erroneous but because of the ambiguity over the validity of child marriages, how can a husband if is a minor will be a guardian- even though as per section 10[40] there is a restriction that a minor cannot act as guardian of the property of the minor. Then as per section 10 statutorily a minor husband can act as a guardian of the minor's person but not her property. It defies logic and clarity must be provided in this regard. Section 7 deals with the natural guardianship of an adopted son but nowhere does it states about the adopted daughter. There may be two arguments: first, classical Hindu law did not consider the adoption of a daughter, and second, it is implied that an adopted son will also include an adopted daughter. But the counter to it will be because of section 12[41] of the Hindu Adoptions and Maintenance Act, 1956 which states that the adoptive parents will act as the natural guardians, in presence of this section, Section 7 of HMGA is not required and it also doesn't state any disqualifications like conversion, renunciation of the world or unsoundness of mind.

SPECIAL MARRIAGE ACT, 1954

As interfaith marriages are not recognized in both Hindu and Muslim personal laws so Special Marriage Act is made to deter conversion only for marriage.

Section 6[42] provides that the true copy of the notice for the intended marriage is to be displayed at a conspicuous place in the office but then the issue which arises, is about the infringement of privacy and if 'honour killing' happens then the issue of life and liberty is also involved. This is a very contentious topic because there are arguments from both the sides like the notice is put to raise objections if any, for eg. If one of the parties is already married then the notice will be helpful to not proceed with the marriage and the other contention is that by displaying their names their marriage can be disrupted by anyone which in turn disrupts their privacy. However, the right to privacy can be waived because it is not an absolute right but the government should protect this right because of the increase of vigilantism (Love Jihad). According to an Allahabad High Court judgment, voluntary publishing can be done as a

[40] Hindu Adoption and Maintenance Act, 1956, s 10
[41] Hindu Adoption and Maintenance Act, 1956, s 12
[42] Special Marriage Act, 1954, s 6

blanket ban cannot be put on publishing. As aforementioned, there are strong arguments from both sides but the hate crimes can be reduced if there is no publishing and this issue should be looked at from the societal perspective rather than from two sects/person perspectives.

MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2019

In ***Shayara Bano v Union of India and others,***[43] The Supreme Court set aside the practice of instant triple talaq. However, under section 3[44] the pronouncement is made illegal and void, in that case, what will happen to their marriage is not provided in the Act; there is over-criminalization of a civil law i.e. 3 years of imprisonment; if the husband is put behind bars then who will give the woman subsistence allowance as per section 5[45]; custody of the child is given to the mother but what if the mother is not ready to keep the child. These are some of the critiques of the Act.[46]

CONCLUSION

When there is a conflict and the question involves the balance of morality and rights of individuals then the legislature and Courts must take care of the constitutional mandate i.e. the right to life (A.21). There are many possibilities that need to be taken into account while framing legislation. As mentioned in this article, there are many more lacunas and the list is not at all exhaustive. These loopholes are food for thought and thus bringing legal reforms becomes necessary.

The problem arises when the courts apply their own interpretation in deciding the cases related to Hindu and Muslim laws. There is a need for Uniform Civil Code (UCC) but the problem is in its implementation. Hindu law differs in North and South India. Muslim personal law differs in Kashmir and other parts of India. The difference is not just in religious aspects but also in regional aspects. Government should come up with a blueprint of it first so

[43] Shayara Bano (n 15)
[44] Muslim Women (Protection of Rights on Marriage) Bill, 2019, s 3
[45] Muslim Women (Protection of Rights on Marriage) Bill, 2019, s 5
[46] Ahmar Afaq & Sukhwinder Singh Dari, 'The Muslim Women (Protection of rights on marriage) Act, 2019: An Insubstantial Addition to the Realm of Law'(2021) 10 (2) International Journal of Modern Agriculture

as to know what it would look like. The problem can be solved when the belief system of the society at large will change and thus the reforms from the society are required. Rather than naming it as 'Uniform Civil Code' it should be named as 'Common Civil Code' as the variations and exceptions will be there. For eg. the contention among the Hindus that- what is prohibited in North India is allowed in South India; special status is given to Jammu & Kashmir and North-eastern states; Hindu law is not applied to the Scheduled Tribes. These all differences have to be incorporated and compiled in a common civil code otherwise the UCC would not see the light of the day. There are a number of developments happening in other areas of family law as well such as the issue regarding same-sex marriages though not still legalised in India however after the Navtej Singh Johar case homosexuality is decriminalised. The talk regarding a civil union for same-sex couples is not a fair alternative as it will give them a lower status than marriage even though it will face less opposition at least on the religious grounds but such exclusion from marriage would be discriminatory. The other issue regarding live-in relationships is also constantly evolving with the changing times of the 21st century. There has been a lot of judicial development in the rights of the couples living in a live-in relationship like they get the protection under the Domestic Violence Act, 2005. This area of law is governed by judicial precedents as there is still no statutory regulation on it in India. The only requirement is that their relationship should be in the "nature of marriage" to get the benefits of the already available statutes. Thus the more ambiguous legislation is, the more they need for judicial interpretation. Therefore these loopholes and lacunas need to be amended and rectified so as to reduce legislative ambiguity.