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Personal Laws and their (UN) Constitutionality: Exposing Inconsistencies in Hindu and Muslim Personal Laws

Himanshi[a]

[a]Maharshi Dayanand University, Rohtak, India

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India is a land of diverse cultures having different religions. These faiths have personalized laws that govern matters like marriage, divorce, guardianship, and other such things. These laws infringe on some of the fundamental rights guaranteed by the Indian constitution. The dichotomy between fundamental rights and personal laws has existed for a long time, but as time has passed, the Supreme Court's verdicts have demonstrated its liberal and expansive approach to preserving the law in force and the primacy of fundamental rights. Numerous cases involving women were judged to be arbitrary, whether it be taboos around menstruation cycles, triple-talaq, or polygamy, all of these also highlight the stigmas and bigotries towards women. The issue that was raised is how some of the personal laws being authoritarian and, on the surface, prejudiced towards women can still exist and withstand inspection of basic rights while being against them.

Keywords: *fundamental rights, personal laws, gender inequality, faith.*

INTRODUCTION

In India, the Supreme Court is the highest authority we rely on to protect and entrench constitutional socio-economic rights. The system of legal precedents offers an opportunity to modernize fundamental constitutional ideas, societal advancement, and the recognition of new

rights. These precedents can be reversed, and the process is intrinsically reactive, presupposing an existing wrong that has been brought before the courts for arbitration. The Apex Court has adopted a range of positions concerning the arbitration of personal laws. The fundamental point of controversy has been the dichotomy between gender equity and personal laws. However, it should be noted that Article 13 is an inclusive provision, which means it covers all customarily recognized statutes. The Indian Constitution's Article 13[1] addresses the applicability of fundamental rights. However, the country's Constitution makes no mention of it. It should be noted that Article 13 is an inclusive provision, which means it covers all customarily recognized statutes.

PERSONAL LAWS

India is home to a variety of religions like Hindu, Muslim, Christian, and many more; the principles of each faith must be preserved and guarded. Their faith is determined by the body of law. These laws are formulated by taking into account the various customs practised by that religion. Even though the word "secularism" is enshrined in the preamble, there is a conflict in the entire notion of secularism, especially when interpreted per personal laws. Each faith has its laws that govern and regulate matters or areas that are under the purview of the private realm, including marriage, divorce, inheritance, minors, trusteeship, and so on. Since the colonial period, Indians have abided by these laws. Some of the codified personal laws are-

1. The Child Marriage Restraint Act, enacted in 1929
2. The Indian Divorce Act, enacted in 1869
3. The Muslim Personal Law (Shariat) Application Act, 1937
4. The Kazis Act, enacted during 1880
5. The Converts' Marriage Dissolution Act, enacted during 1866
6. The Anand Marriage Act, enacted in 1909
7. The Parsi Marriage and Divorce Act, enacted in 1936
8. The Special Marriage Act, enacted during 1954

[1] Constitution of India, art 13

9. The Hindu Marriage Act, enacted in 1955, and many more

PERSONAL LAWS AND FUNDAMENTAL RIGHTS

However, even after 75 years of independence, India's laws have not been updated to the point where they can guarantee equality and anti-discrimination. The main barrier is that personal laws are not included in the Constitution because they are frequently treated separately, sometimes eroding and negating fundamental rights. The privilege to freely exercise one's religion is outlined in Articles 25 and 26 of the Indian Constitution[2]. Accordingly, personal laws are constitutionally protected by two means:

Firstly, all pre-constitutional law is declared invalid by the Constitution to the extent that it violates fundamental rights. Furthermore, it forbids the state from passing laws that might violate fundamental rights. For this reason, the Constitution imposes restrictions on the enjoyment of religious liberty under Art. 15(1). The right to freedom of religion under Articles 25 and 26[3] is constrained by other fundamental rights. The latter will take precedence over the former, maintaining public order, morality, and health in conflict. Therefore, logically, personal laws will also be constrained by the interaction of other basic rights enshrined in Part III of the Constitution.

However, interpreting the term "law" under Article 13[4] presents a barrier to enacting reform under personal law (1). The Indian Constitution's Article 13 outlines the applicability of fundamental rights. Art. 13 (3) (a) defines the term laws as "any Ordinance, order, bylaws, rule, regulation, notification, custom or usage having in the territory of India force of law." This definition does not talk about personal laws. Especially, Personal legislation that falls under the purview of Articles 13 and 372[5] of the Constitution is unconstitutional in the sense that they are incompatible with Articles 14,[6] 15,[7] and 21[8]. This implies that any Personal Law that has been

[2] Constitution of India, art 25
[3] Constitution of India, art 26
[4] Constitution of India, art 13
[5] Constitution of India, art 372
[6] Constitution of India, art 14
[7] Constitution of India, art 15
[8] Constitution of India, art 21

determined to violate the provisions of the aforementioned Articles should have been immediately struck down by the Court. The Judiciary has been given the authority to not only interpret different existing laws but also to modify such laws near shifting social and political conditions. This inevitably calls into question the judiciary's authority over the provisions of personal laws and those listed in the constitution.

In various instances, the court considers personal laws to be exempt from Part III, consequently not subject to judicial review for violating fundamental rights under Articles 14, 15, or 21. In numerous other cases, the Supreme Court said, contrary to its judgment, that Personal laws serve as the foundation for basic rights and are interpreted in a way that is compatible with those rights. A few of these laws' provisions may have been overturned by the court to safeguard people's fundamental rights, but some still stand as of this writing.

ILLUSTRATIONS OF PROVISIONS THAT CONTRAVENE PART III OF THE CONSTITUTION

Marriage: In India, bigamy is considered to be utterly obscene and a crime that is punishable by law. Sections 494[9] and 495 of the Indian Penal Code[10] consider this to be an offence. The 'Shariat Act,'[11] on the other hand, allows Muslim males to practice polygamy, allowing them to marry up to four times. However, Muslim women are only permitted to marry once, which is blatantly discriminatory. Articles 14, 15, and 21 are being violated.

Natural guardianship: According to Section 6[12] of the Hindu Minority and Guardianship Act, 1956 "The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property are—in the case of a boy or an unmarried girl—the father, and after him, the mother." It shows that the 'natural guardianship' of a Hindu minor boy and a Hindu unmarried girl can only be bestowed to a father, and the mother only inherits the right after the father's death. Section 6 breaches Article 14 by granting natural guardianship to the

[9] Indian Penal Code 1860, s 494
[10] Indian Penal Code 1860, s 495
[11] Muslim Personal Law (Shariat) Application Act 1937
[12] Hindu Minority and Guardianship Act 1956, s 6

child's father while overlooking the mother. As equals in parenting, both parents must have an equitable voice in decisions affecting their child's interests. Gender neutrality must be incorporated into the guardianship concept.

Inheritance: Muslim women's fundamental right, guaranteed by Articles 14, 19, 21, and other pertinent Constitutional regulations, was violated by both the statutory law and the discrimination based on customary law. Islamic law states that if the couple has children, the wife should be entitled to 1/8 of the deceased husband's estate If there are no offspring from the marriage, she is entitled to one-fourth of the assets. In stark contrast, if they have children, men receive one-quarter of their wife's estate upon her death. A daughter will receive half of what a son receives.

Adoption: Hindu women are not permitted to adopt under Section 8 of the Hindu Adoption and Maintenance Act, 1956, but the husband is permitted to do so with the wife's consent, which is blatantly gender-biased and in violation of Articles 14 and 15. This issue was brought up in the "Malti Roy"[13] case, and the court determined that only the husband may adopt, and that adoption by the wife was not legal. Islam only recognizes "Acknowledgement of Paternity," not the idea of adoption. This principle determines a child's legitimacy. When a Muslim recognizes a child as him, paternal responsibilities are bestowed upon him. The legitimacy of an illegitimate child cannot, however, be established by such an act. Although the Supreme Court recently permitted Muslims to adopt, personal law will inevitably continue to interfere.

Offenses: According to a recent ruling by the Karnataka High Court, in cases involving heinous crimes like rape or marriage to minors, personal law cannot supersede special laws as basic legislation like the Indian Penal Code, the POCSO Act, or the PCM Act. A child's caste cannot supersede or jeopardize his or her security and well-being, the Gujarat High Court ruled in a previous ruling, so the POCSO Act takes precedence over the Atrocities Act.

[13] *Malati Roy Chowdhury v Sudhindranath Majumdar* [2001] AIR SC

LANDMARK CASES

In the 1951 Narasu Appa Mali[14], the petitioner said that article 13 rendered Muslim personal law invalid since it discriminated against Muslim women by allowing them to only have one husband and as a result, violated their right to equality. Does Hindu or other quasi-laws qualify as law for Article 13 (3) and (b) and Article 372 (3)? Interpretation? Does it breach equality if one community's private law is changed without the same thing happening to the laws of the others? Article 13 indicates that any laws that were in effect on Indian land before the adoption of this constitution shall be illegal to the extent that they clash with its provisions in Part III.

Because of this, the court ought to have considered whether personal law violates articles 14 and 15(1), but instead, it decided to consider whether the phrase "all laws in effect" includes "Personal laws" as part of its purview. Both judges, Chagla J. and Gajendragadkar J. delivered different rulings but came to the same conclusion: Personal laws do not fall under the purview of "Law in Force" as defined by article 13 and cannot, therefore, be the subject of judicial review under the Indian Constitution. This indicated a breach of the Rule of Law and the Precedence of Lex Loci since it granted undue supremacy to personal laws by keeping them out of constitutional scrutiny.

In the 1954 Shirur Mutt[15] case, a 7-judge bench established the essential practice test, which required the court to be a theological expert and delve into the complexities of religion and personal law in issue to determine if the activity fits into the category of essential practice and so gets protection under Art. 25 and 26 but not those practices which fall into the category of non-essential practice and hence do not enjoy protection under the aforementioned art. These essential- practice criteria have been applied in several different situations to distinguish between fundamental religious practices and those that are just ornamental and impede the rights of others.

[14] *State of Bombay v Narasu Appa Mali* [1951] AIR SC
[15] *Lakshmindra Theertha Swamiar, Shirur Mutt v Commissioner, Hindu Religious Endowments, Madras* [1951] AIR SC

In the Shayara Bano v UOI case[16], polygamy, triple talaq, and Nikah Halala were three fundamental aspects of the Islamic law that were in dispute. However, the court solely addressed the problem of triple talaq, particularly talaq-e-bidder, which permits the husband to end their marriage by simply by uttering the word talaq in a single breath. The husband had the authority to dissolve the marriage on his own, which violated Art. 14 and diminished the dignity of women, and the court found this practice to be arbitrary. In conclusion, the Bench ruled with a 3:2 majority that the 1937 Act does not codify triple talaq, and with a different 3:2 majority that the exercise of triple talaq is not an essential religious practice for Islam under Article 25 and is thus unconstitutional.

The Supreme Court dealt with the concerns raised by the Personal Laws in entirety in the Sabarimala case[17]. The relevant state legislation was Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, Rule 3(b) which authorized the exclusion of women between the ages of 10 and 50. An appeal to the Kerala High Court was made against a specific state law provision, but it was denied. A PIL was subsequently submitted to the Supreme Court. The Supreme Court sided with the applicants, finding that the practice violated Article 14, the right to equality, Article 15 (1), which forbids discrimination based on sexual orientation, and, most importantly, Article 17, which outlaws untouchability. Untouchability is not defined in the Constitution, but it is commonly understood to refer to practices that denigrate and discriminate against people based on their caste and occupation. It is unacceptable to treat women differently due to their physical characteristics or hormonal changes.

Recently, The Karnataka High Court's order prohibiting females from wearing "Hijabs" to schools is the subject of conflict before the Supreme Court. Former Chief Justice Ritu Raj Awasthi, together with Justices Krishna S. Dixit and J.M. Khazi, had ruled in a three-judge panel that:

- The hijab is not a part of the essential religious practices of Islam;

[16] *Shayara Bano v Union of India & Ors* [2017] AIR SC
[17] *Indian Young Lawyers Assn v State of Kerala* [2018] AIR SC

- According to Article 19(1) (a), the need for uniforms is a fair constraint on the freedom of speech;
- There is no evidence to support the invalidation of the GO; the government is within its rights to pass it.

In the Supreme Court hearings, the petitioners adamantly argued that the prohibition of the hijab in schools is a clear infringement of the "Right to Dress as a Fundamental Right.[18] To this Justice Hemant Gupta responded "Counsel, you can't take it to illogical lengths. Hypothetically, if 'Right to Dress' is a Fundamental Right, then so is 'Right to Undress'. The top court had questioned the appellants during the hearing on September 5 as to whether students may attend a government institution with a required uniform while wearing whatever they like. The Karnataka government's ruling permitting college development committees to prescribe uniforms did not appear to infringe on the right to education, according to a bench of justices Hemant Gupta and Sudhanshu Dhulia.

UNIFORM CIVIL CODE - THE LAST RESORT

The Uniform Civil Code (UCC) supports the creation of a uniform Indian law that would apply to all religious sects regarding issues like adoption, inheritance, and divorce. Article 44[19] of the Constitution, which specifies that the state must strive to guarantee that a uniform civil code is in place for the nation's residents throughout the whole Indian subcontinent, mandates the existence of the code. The Supreme Court initially addressed the problem of UCC in the famous Shah Bano Case and afterward in many major judgments such as the Sarla Mudgal[20] Case.

Justice Kuldip Singh reaffirmed in the Sarla Mudgal Case of 1995 that a Uniform Civil Code should be drafted by Parliament to remove ideological inconsistencies and further the aim of national unification. The UCC strives to uphold Ambedkar's ideal of protecting vulnerable

[18] 'Hijab Hearing Day 2: Will Right To Dress Include Right To Undress, Asks SC' (*The Quint*, 7 September 2022) <https://www.thequint.com/news/law/karnataka-hijab-ban-supreme-court-hearing-details-updates-7-septemeber-2022#read-more> accessed 17 September 2022

[19] Constitution of India, art 14

[20] *Sarla Mudgal v Union of India* 1995 AIR SC

groups, including women and religious minorities, while also creating nationalistic enthusiasm via collaboration. When put into effect, the code will work to harmonize laws that are now differentiated based on religious beliefs, including Sharia law, Hindu law, and other laws. The code will streamline and consolidate the complex laws governing marriage, inheritance, succession, and foster children. Then, regardless of their religious identity, all citizens will be governed by the same statute. The notion comes from Article 44 of the Constitution. It mandates that every effort be made to create a uniform civil code for all people across the entirety of India.

Article 37 of the Constitution defines the guiding principles of State policy as follows:

"*The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws*."

In other words, while the idea of a Uniform Civil Code is a goal that the country should work toward and is enshrined in the Indian Constitution, it is not a fundamental right or a guarantee of the Constitution. One cannot go to court to ask for a UCC. Despite the mounting hype, it is uncertain whether the Uniform Civil Code will be written and enacted any time soon because minorities stand to suffer the most from a UCC with lousy writing (which is likely to be the case under hurried legislation) and will undoubtedly voice their concerns.

CONCLUSION

Patriarchal and discriminatory regulations against women, whether linked to marriage, divorce, or even maintenance, must be scrutinized under Part III of the constitution. It is important to keep in mind that Art.25 and 26 have been designated as fundamental rights, which means that they cannot be curtailed at any cost. Moreover, this does not necessarily mean that they are absolute; these rights do not exist in isolation as absolute rights but coexist with reasonable constraints, which means that they can be curtailed when other people's rights are violated. It is challenging for people to quickly change their superstitions in a country like India where practices, customs, and beliefs are valued highly, but such initiatives encourage those who are willing to change and eager to affect a change in the populace. Prejudices against women are

counterproductive, so it's critical to comprehend the significance of menstruation and the associated hygiene issues.

The goal of the entire discussion is to make personal laws subject to fundamental rights. We should examine the sources of personal laws where the role of customs in the development of customary personal laws has been acknowledged by the courts. We must ask why personal laws are not included in the definition of "law" under Art.13(1) if customs and usages are. Additionally, I consider that personal laws are an integral part of a society with a rich cultural past and that they should be acquired, safeguarded, and, at the same time, interpreted in a manner that gives everyone an equal chance to embrace the culture. The Supreme Court's ruling is commendable, and the position it took will set a strong precedent for future disputes involving personal laws.