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AN ASSESSMENT OF STATUS OF PERSONAL LAWS IN INDIAN CONSTITUTION

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ABSTRACT:

Personal law is one of the only elements of the Indian legal system. It is a rule that regulates marriage, the heritage, etc. of persons of a certain religion. Such social systems have been legally recognised in India. India is a multicultural society and various groups have different personal laws in India. The role of personal law within the Indian legal system should be ensured in the absence of clarification with regard to the status of personal law, whether it is a "law in force" or a "law in force" or a tradition which has "force of law.' The problem of personal law reforms was also resisted by the religious denominations, especially by the Muslims, in an aggressive way. In a social welfare state such as India, the judiciary must take a militant stand to abolish all prejudice it does as a judicial activism. Judicial advocacy has in many cases dealt with personal law issues. It is only by doing so that the massive forms of discrimination in personal laws are curbed and the constitutional values of equality and fraternity are thus achieved. Not considering Personal Laws 'Law' under Article 13 of the Constitution and keeping it outside the purview of Judicial Review gives rise to dangerous situation where women will be made victims of male dominance and abuse and social exploitation without any legal remedy. The object of the study is to see the status of the Personal Laws vis- a- vis the need of social justice and if a common civil code is adopted will it be treated as a 'Law' in the secular domain.

1. INTRODUCTION:

In order to be legally legitimate, the Indian Constitution prescribes certain conditions that must be fulfilled by statute. Article 13 is applicable to laws which predate the constitution such as personal laws (1). Article 13(1) stipulates that no clause of Part III of the Constitution shall be violated by any pre-constitutional law. The same Article offers other clause, i.e. The

word 'law' is specified in Article 13(3)(a). In the light of Article 372, all of these clauses should be read.[1]

In a harmonious reading of these provisions, it is obvious that any statute that is legally valid shall not infringe upon the fundamental rights enshrined in India's Constitution. However, the courts were very vigilant when adjusting for the constitutionality of personal rules, irrespective of such clauses. The courts so far have adopted a very contradictory approach starting from NarasuAppa Mali's[2] case where the Hon'ble Bombay High Court had held that "the personal laws are not 'laws' under Article 13(3)(a) of the Indian Constitution".

2. PERSONAL LAWS IN THE CONSTITUTIONAL FRAMEWORK:

In the Constituent Assembly when the matter concerning Article 8[Article 13 of the present Constitution] was being debated before the Constituent Assembly, Dr. B.R. Ambedkar had proposed an amendment to original draft Article 8 and had made recommendations to incorporate sub-clause 3 to Article 8. Dr. Ambedkar's argument on the point was:[3]

"The explanation for the change is this: it is noted that two expressions are found in Article 8. The term "laws in force" is used in paragraph (1 of Article 8) while the phrase "any law" appears in paragraph (2). All that was done was to describe the word 'rule' in the original draught introduced to this Chamber (3). There was no definition of the word 'laws in effect.' The purpose of this modification is to correct the lacuna. The term "Law" as enshrined in the original subsection (3) is to be divided into two sections (a) and (b), (a) is to be defined as a "law" and (b) is to be defined as "law in force" as defined in subsection (1) of Article 8. I don't believe any additional explanations are needed."

When the proposed amendment was placed before the Constituent Assembly for deliberation it was submitted by Mr. Naziruddin Ahmad that the words[156] which has been mentioned in the proposed amendment to original Article 8 by Dr. Ambedkar be deleted. Dr. Ambedkar expressed his observations as follows to the views expressed by Mr. Naziruddin Ahmad:[4]

"The amendment of Mr. Naziruddin Ahmad, I think, creates some difficulty which it is necessary to clear up. His amendment was intended to remove what he called an absurdity of the position which is created by the draft as it stands. His argument, if I have understood it correctly, means this, that in the definition of law we have included custom, and having included custom, we also speak of the state not having the power to make any law. According to him, it means that the state would have the power to make custom, because according to our definition, law includes custom. I should have thought that construction was not possible, for the simple reason, that sub-clause (3) of Article 8 applies to the whole of the Article 8, and does not merely apply to sub-clause (2) of Article 8. That being so, the only proper construction that one can put or it is possible to put would be to read the word 'Law' distributively, so that so far as Article 8, sub-clause (1) was concerned, 'Law' would include custom, while so-far as sub-clause (2) was concerned, 'Law' would not include custom. That would be, in my judgment, the proper reading, and if it was read that way, the absurdity to which my friend referred would not arise."

Keeping into consideration the views expressed by Mr. Naziruddin, Dr. B.R. Ambedkar suggested the incorporation of more words to the proposed amendment sub-clause 3 of Article 8. Dr. Ambedkar's further observation on this matter was:

[1] Article 372: "All the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority"

[2] State of Bombay v. NarasuAppa Mali AIR 1952 Bom

[3] Constituent Assembly Debates, Vol. VII, 26th November 1948, p. 640.

[4] Id. at 641.

"So, if the context in Article 8 (1) requires the term 'law' to be used so as to include custom, that construction would be possible. If in sub-clause (2) of Article 8, it is not necessary in the context to read the word 'law' to include custom, it would not be possible to read the word 'law' to include custom. I think that would remove the difficulty which my friend has pointed out in his amendment."

Accordingly, the amendment proposed by Dr. B.R. Ambedkar to original draft Article 8[Article 13 of the present Constitution] was adopted by the Constituent Assembly.

As discussed above the Constituent Assembly members remained divided on the issue with regard to the personal laws. Ambedkar initially aspired for 'essential uniformity in fundamental laws-civil and criminal'.[5] There were heated discussions among eminent public men and political leaders towards the issue of personal laws. However the controversy was set at rest in the Assembly when the learned chairman of the drafting committee, Dr. Ambedkar explained the distinction between the state's theoretical "power to legislate" and an "obligation" to do that in 1619ractice. However when the Constitution was promulgated in 1950, a number of principles and provisions relating to personal laws-or affecting the personal laws in some way, found a place in the Constitution in its four various parts, viz:

a. Part III: Fundamental Rights;
b. Part IV: Directive Principles of State Policy;
c. Part XI: Relations between Centre and States, and
d. Part XXI: Temporary Transitional and Special Provisions

Under the framework provided by these Constitutional principles and provisions, over the past six decades and more a lot has been said and done in respect of the Constitutional status of personal laws. The legislature, the executive and the judiciary, both at the centre and in the state have exhibited their innovativeness in the matter, and all sections of the people such as the bench and the bar, academicians, politicians, writers and the journalists, the media, theologians and clergymen, reformers, social workers and the masses have been quite vocal and active in this process. No other aspect of the Constitution has perhaps attracted such a nation-wide interest, rather anxiety regarding principles and provisions concerning personal laws.

Therefore, from the very outset of the debate in the Constituent Assembly it was not clear whether personal law as "law in force" as defined in 8(1) [Article 13(1) of the present Constitution] or custom having the force of law in 8(2) [Article 13(3)] and it was left for contextual interpretation. Such decision of contextual interpretation/reading was destined to give rise to further complication.

3. PERSONAL LAWS AND THE FUNDAMENTAL RIGHTS:

Although in theory, the state's legislative power to make laws on personal laws is not subject to any constitutional restriction. However, the successive governments at the center have adopted a strategy of exempting the personal laws from any direct reform. Of course, all these laws have been subjected to the few legislative measures [for example, the law on child marriage and the dowry] that have been adopted for all Indian citizens. In addition to these laws, Parliament enacted new personal laws for the majority community and the Sikh, Jain and Buddhist minorities-all of which are included within the expression 'Hindu' [not used in its religious sense]. The recognized laws of each and every one these communities not falling under these new laws remain in force in this country; for example-

[5] Constituent Assembly Debates, Vol VII 552 (1949).

a. The pre-1950 laws of Muslim, Christians, Parsis and Jews [some of them partly codified];
b. The post-1950 codified laws of Hindus, Buddhists, Sikhs and Jains;
c. Some traditional laws of these four communities, not yet repealed; and
d. Laws commonly applicable, or available to all Indians.

As regards the requirement of conformity of all these laws to Part III of the Constitution, two different issues are to be closely examined:

a) Is the system of community-wise personal laws in itself conducive to Article 14 of the Constitution, or will statutory reform of some of these laws will be repugnant on to the extent of their contravention of Article 14?
b) Are the diversities found within a particular personal law, codified and uncodified, hit by Articles 14-15 of the Constitution and be subject to reasonable classification?

These questions are important because a personal law of each community is distinct and the content of each of them are to a large extent discriminatory in various ways.

In case the un-codified personal laws are discriminatory whether or not they can be declared unconstitutional in the light of Articles 14 and 15 of the Constitution. Under the personal laws especially that of the Hindu and Muslim personal laws, differing rights is provided to men and women, thus it violates Articles 14 and 15 of the Constitution. Time and again the discriminatory provisions under the personal laws have been challenged before the courts; however, the courts in majority of the cases have been reluctant to decide on the said matter. With such an approach the courts have in general left these laws intact.

4. PERSONAL LAWS UNDER ARTICLE 13:

If personal law is law as understood in modern jurisprudence and if the same was in force in the territory of India, then a plain reading of the provisions of Article 372(1)[6] and Article 13(1) of the Constitution should leave no doubt that the personal law have continued to be in force, since the adoption of the Constitution i.e., 26th January, 1950.

When the Constitution was adopted, it 1620ecognize1620 the continuation of various personal laws in India and accordingly Article 44 was included in the Constitution. The framers of the Constitution were optimistic that a day will come when the people themselves will adopt a uniform civil code for themselves. Such recognition is also apparent from Entry No. 5 of List of the Seventh Schedule of the Constitution Therefore, even a cursory perusal of all these provisions would give rise to this impression that personal laws operating in India immediately before adoption of the Constitution have been continued by Article 372(1) subject to the provisions of the Constitution by Article 13(1), to the provisions in Part III, in particular.

Justice Vivian Bose while speaking for a three judge bench of the Supreme Court, observed that the more learned a person is in law, the more puzzled he would be, "for it is not till one is learned in law that subtleties of though and bewilderment arise at the meaning of plain English words which any ordinary man of average intelligence, not versed in law, would have no difficulty in understanding." If, however, as noted by the eminent judge, law learning brings some kind of amblyopia, it is surprining to find that there are very high judicial and legal authorities who consider that the personal laws of Muslims and Hindus do not apply within the context of Article 372(1) and Article 13(1) and even though they do indeed apply as laws. Thus, the question arises whether personal laws in force immediately before the Constitution were in the legal sense of the word or not and whether they still enjoyed

[6] Article 372: Continuance in force of existing laws and their adaptation

exemption from restrictions and limitations imposed by the constitution, as in force immediately before the Constitution began.

If the personal laws were law in the accepted sense of the term, then the fact that it was also in force and operation immediately before the commencement of the Constitution cannot but be beyond all doubt and dispute. For example; as discussed in Chapter II, Regulations from the time of Warren Hastings and then a series of enactments generally referred to as the Civil Courts Acts, and thereafter the central enactment being the Shariat Act of 1937 have all along continued to mandate the courts to apply and administer Muslim law to the Muslims on a number of matters specified therein. And as noted at the outset, the Constitution itself has 1621ecognize1621 the personal laws as laws having provided in Entry No.5 of the Concurrent List read with Article 246(2). All these should leave no doubt that the Muslim law was very much a law in effective force and operation immediately before the commencement of the Constitution, though it may be noted that the expression laws in force in Article 372 as well as in Article 13 has been defined to include even laws which though, existing, were not in actual operation. But as pointed the authorities in many of their decisions have laid down contrary views in regard of personal laws being subjected to the requirement/s laid down under Article 13 of the Constitution.

In Krishna Singh v. Mathura Ahir,[7] the Apex court had held that the personal laws cannot be challenged on the ground of violating Part III of the Constitution. But this observation was not clarified by the Honorable Court. However if personal laws are not affected by the Constitution's Section III, then one must infer that the personal rule of Muslims or Hindus did not fall within the scope of 'laws' as laid down in Articles 13(1) and 372(1) of the Constitution even if they were valid and ruled by millions of Indians before and even immediately before the start of the Constitution. Since, if they were, then it would be difficult to understand how to obtain some immunity from the application of the primary law that, while the earlier laws have been in place, has subjected all of them to, in particular, the provisions of the Constitution and Part III. The case of Mathura Ahir does not aid us in understanding this problem.

In SrinivasaAiyar v SaraswathiAmmal,[8] similar question that were raised in Narasu's case was also raised in this case. But the Division Bench did not think it necessary to decide that question. In this case, the Madras Hindu (Bigamy Prevention and Divorce) Act of 1949, which criminalises and disqualifies Hindus bigamy, was challenged as being violative of Article 14 and Article 15's right to equal rights in compliance with Article 25 of the Constitution, and of religious freedom. The contested act denied equality and equal protection of the Hindus rules, discriminated against them on the basis of religion and violated the right to freely profess and 1621ecogniz and encourage religion by banning, punishing and invalidating polygamy only between Hinnus, while leaving Muslims' rights to exercise such polygamy totally unaffected. It was contended that. However, it has been held that, while the subjecting of the Hindu and Muslims to separate sets of laws would be classification, the essence of that classification was "not based solely on the grounds of religion, but based on considerations which are specific to each of the communities." However, with regard to the issue of whether the word 'all laws in effect' in Article 13(1) of the Constitution includes or doesn't include any personal rule, it has been observed that it was "not appropriate to deal with the more complicated question" and, even if presumed, the Act does not, in our view, violate Article 15 of that ruling."

A decision in Abdulla Khan v. Chandni Bi[9] may also be referred here. In that case it was held that a Hindu wife can ask for a separate residence and maintenance from her husband if the

[7] AIR 1980 SC 707 (712)
[8] AIR 1952 Mad 193
[9] AIR 1956 Bhopal 71 (72)

latter married again, but a Muslim wife had to submit to her husband's polygamy without any demur, yet these different provisions were not violative of the Equality Clause in Article 14 being grounded on reasonable classification of the Hindus and the Muslims into two separate classes "based upon the outlook of persons belonging to the two communities". This decision clearly accepted the amenability of the Personal Laws of the Hindus and the Muslims to the provisions of the Constitution and their obligation to satisfy the requirements of Part III for their post Constitutional survival.

In Mysore decision in Sudha v. Sankappa,[10] Justice Hedge while repelling the contention that Section 10 of the Madras Aliyasanthana Act, 1949 was violative of Article 14 for having provided an easy unilateral judicial divorce not available to the Hindus governed by the Hindu Marriage Act, proceeded to examine further that the differing provisions relating to marriage and divorce among the Hindus, the Muslims, the Christians and the other communities "are the result of past history, difference in culture etc." The obligation of the Personal Laws to satisfy the criterion of Part III of the Constitution was also accepted by Justice Hedge in this Mysore decision and the relevant provisions were held to be within the permissible limits of reasonable classification under Article 14. It is true that the provisions which were being considered in this Mysore decision were statutory; but personal laws do not cease to be so in spite of their being enacted or codified and as pointed out by the Supreme Court in Bajya v. Gopikabai,[11]all our Hindu Law enactments, including the major four Acts of 1955-56, are personal laws. Infact in the Miscellaneous Personal Laws (Extention) Act, 1959, all the statutory enactments noted therein and relating to the personal laws of the Hindus and the Muslims have been referred to as personal laws.

A Division Bench of the Punjab & Haryana High Court also incidentally touched a cognate question in GurdialKaur v. Mangal Singh,[12] where it was contended that the custom prevailing among the Jats of Punjab, under which a mother was disinherited on her remarriage, discriminated against the Jats merely on the ground of caste or race as compared to the other Hindus and was therefore, void under Article 15 of the Constitution. This claim has been dismissed. Therefore, it would appear that the Bench Division did not 1622ecognize Personal Laws as specified in Article 13(1), since in that case the Bench Division should have held as it did that the law involved was not in violation of Article 15. The Banc Division was not liable. The tendency for judgement is that, according to the provisions of Articles 14 and 15, and other related Articles of Part III, individual laws were in force within the scope of Article 13(1), but that a continuance of different categories of individual law was not contrary to the provisions on equality set out in Part III.

Where, in essence, personal law was in place and in force before the start of the Constitution of India it is difficult to understand why all the law in force under Article 372(1) or Article 13(1) does not fall under the term unless it has been found because of some unique or peculiar meaning or clarification or restriction regulating the Art. It is difficult to understand.

But for some insignificant verbal variations, the expression laws in force has been defined in similar terms in Explanation I to Article 372 and clause 3(b) of Article 13. Both the definitions, as well as the definition of law in Article 13(3) (a), are ex facie inclusive and obviously not exhaustive. For otherwise, even a statutory enactment, not having been expressly included in the definition of law in Article 13(3) (a), would not have been law and the mandate in Article 13(2) would have been entirely useless as the state then would have been free to take away or abridge all the fundamental rights by and through ordinary legislations. It is now settled by a series of decisions of the Supreme Court that the 'laws in force' used in Article 372(1) comprise not only laws made by the Parliament, but also the

[10] AIR 1963 Mysore 245 (247).
[11] AIR 1978 SC 793 (797).
[12] AIR 1968 Punjab 396 (398)

laws administered by the courts and non-statutory laws and customs and usages having the force of law, though the definition and the Explanation, as quoted above, expressly refer only to statutory laws.

Thus, not anything can be found in Article 372 or in Article 13 or anywhere else in the Constitution to indicate that the Constitution intended and/or purported to exclude the personal laws from the operation of these Articles. If the personal laws of the Muslims or the Hindus were laws in force within the meaning of Article 372(1), they could have and must have continued, as expressly provided in that clause, only "subject to the other provisions of Part III and in particular, if they were laws in force within the meaning of Article 13(1), they were obviously subject to all provisions of Part III.

Some observations of the Delhi High Court in HarvinderKaur v. Harmander Singh[13] are to be noted. In that case the learned single judge was required to decide as to whether the provisions of Section 9 of the Hindu Marriage Act, 1955 providing for restitution of conjugal rights is violative of the right to equality under Article 14 and the right to personal liberty under Article 21 of the Constitution.

In Mohd. Ahmed Khan v. Shah Bano Begum[14]the Supreme Court had held that a Muslim wife, like any other Indian wife, was entitled to invoke the general law provisions relating to maintenance under Chapter IX of the Code of Criminal Procedure. Further in JordanDiengdeh v. S.S. Chopra,[15]Justice O. Chinnappa Reddy had observed that the law on judicialseparation, divorce and the nullity of marriage is far from uniform and to reform the same is the need of the hour.

In Saumya Ann Thomas vs. Union of India,[16]the Constitutional validity of Section 10-A of Indian Divorce Act was challenged on the ground of infringing Articles 14 and 21 of the Constitution. In this case the court had said that: "All laws whether pre constitutional or postconstitutional will have to pass the test of constitutionality". In the recent judgment of theSupreme Court in the case of ShayaraBano v. Union of India,[17] the Hon'ble Apex Court had declared the practice of talaq-e-biddat(Triple Talaq) as 'unconstitutional'. Looking into the judicial trend on matters concerning personal laws, there seems to be ambiguity with regard to the status of personal laws under the Constitution. In some cases as mentioned above the learned court has categorically held that the personal laws are outside the purview of Part III. However, they have also been cases where personal laws have been challenged on the ground of violating the fundamental rights and the learned court has tested the personal laws on the touchstone of Part III.

From the discussion above the approach of the courts towards personal laws matter have been conflicting. In some cases the courts have tested the personal law as per the requirement laid down under Part III of the Constitution and in some cases the courts have in order to avoid controversy kept the personal laws outside the ambit of Part III of the Constitution. As a result, the uncertainty surrounding personal laws continues to remain.

5. CONCLUSION:

The short historical account, as stated, makes it clear that it is not intended to continue on a permanent basis the existing 'distinction and separate status' of personal laws based on religion. In the Constituent Assembly, K. M. also explained this fact of separation of faith from personal laws. The Draft Committee member, Munshi. He says that a distinction

[13] AIR 1984 Delhi 66 (75)
[14] AIR 1985 SC 945.
[15] 1985 AIR 935: 1985 SCR Supl. (1) 704.
[16] 2010 (1) KLT 869.
[17] ShayaraBano v. Union of India, (2017) 9 SCC 1.

between religion and personal law must take place, and that religion should be restricted to places that are justifiably associated with religion." This is a change between 'British duality politics' and 'personal rights diversity' and 'Indian policies of personal laws integration.' Article 44 specifically provides for national unification policy in the form of a common civil code. In addition to Article 44, there are also many policy indicators which go along similar lines, which was and indeed was the primary objective of a Uniform Civil Code, in unifying personal laws and consolidating India as a country. For example, Article 51-A prescribes the obligation of every citizen of India to respect and comply with the Constitution. It clearly sets out the spirit of the Constitution in the preamble that opens the minds of the builders. The legislative and executive powers of the legislative and executive authorities are driven by these indicators.

REFERENCES:

[1]. Article 372: "All the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority"
[2]. State of Bombay v. NarasuAppa Mali AIR 1952 Bom
[3]. Constituent Assembly Debates, Vol. VII, 26th November 1948, p. 640.
[4]. Id. at 641.
[5]. Constituent Assembly Debates, Vol VII 552 (1949).
[6]. Article 372: Continuance in force of existing laws and their adaptation
[7]. AIR 1961 SC 808.
[8]. AIR 1980 SC 707 (712)
[9]. AIR 1952 Mad 193
[10]. AIR 1956 Bhopal 71 (72)
[11]. AIR 1963 Mysore 245 (247).
[12]. AIR 1978 SC 793 (797).
[13]. AIR 1968 Punjab 396 (398)
[14]. AIR 1984 Delhi 66 (75)
[15]. AIR 1985 SC 945.
[16]. 1985 AIR 935: 1985 SCR Supl. (1) 704.
[17]. 2010 (1) KLT 869.
[18]. ShayaraBano v. Union of India, (2017) 9 SCC 1.