PERSONAL LAW VS. FUNDAMENTAL RIGHTS DIVIDE: THE CASE FOR JUDICIAL INTERVENTION

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Abstract

The conflict between personal laws and fundamental rights is not new, however the issue has come into the limelight again with the pronouncement of the Shayara Bano judgement last year. This year, two more petitions have been filed challenging the validity of the personal laws, by attempting to test them on the anvil of fundamental rights. Personal laws have remained static and archaic over the years, whereas fundamental rights have evolved in line with modern sensibilities. Therefore, the conflict between the two is inevitable. However, the uncertain and inconclusive stance of the courts regarding the issue has kept it unresolved. In the instant article, the authors have delved into the divergent views taken by courts on whether personal laws can be or should be subject to Part III of the Constitution. The authors go on to discuss the Shayara Bano judgement, and also present a brief critique on the Muslim Women (Protection of Rights on Marriage) Bill, 2017. Finally, the authors attempt to provide a balanced solution to the issue.

I. Introduction

With the recent Supreme Court pronouncement declaring the practice of triple talaq to be illegal, the questions regarding sanctity of personal laws have again been raked up. Personal Law has been defined as law that governs a person's family matters regardless of where the person goes.[1] It necessarily involves spheres of law such as

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1 *Black's Law Dictionary*, 1326, (Bryan A Garner, 10th Ed.).

marriage, divorce, partition, succession etc. Fundamental Rights on the other hand are those invaluable rights conferred on the people by Part III of the Constitution of India, the derogation of which is not permitted except within the parameters provided in Part III itself.

Personal laws are predominantly archaic, with most of them giving little regard to women rights. This has made clashes between personal laws and constitutional rights imminent in the modern world. In the recent past, we have been witness to several debates both within courts and outside it on whether fundamental rights would override personal laws, especially those which are incompatible with the modern- day ideologies and morality. However, the question has never been answered conclusively, as the Courts have given conflicting views on the subject.

In the instant article, the authors attempt to discuss the question of whether 'Personal Laws' are capable of being tested on the anvil of the Fundamental Rights guaranteed by Part III of Constitution of India, 1950 ("the Constitution"). The authors have endeavoured to throw light on the same by tracing the judicial precedents on the issue to highlight the divergence of views, and then finally attempted to give a balanced solution to resolve the conflict.

II. Personal Law and Fundamental Rights: Divergent Views

Article 13 of the Constitution provides that both 'laws in force' and any 'law' made by the State would be void if they are inconsistent with or in contravention to the rights conferred under Part III. Article 13(3) defines the terms 'laws in force' and 'law' in an inclusive manner. Thus, for Personal Laws to be violative of Fundamental Rights, the particular Personal law has to necessary fall under the ambit of Article 13. In this context, the following

judgments have to be analysed.

One of the earliest and still often cited judgment in this regard is **State of Bombay vs Narasu Appa Mali**[2] ("Narasu Appa").The validity of a state legislation, i.e. Bombay Prevention of Hindu Bigamous Marriages Act, 1946, was the original issue in this case. It was first contended that the Act was violative of Article 14, 15 and 25 of the Constitution. It was held by the Court regarding this that it was within the ambit of the State to enact the impugned legislation for social welfare as per Article 25(2)(b) and that there is no discrimination or arbitrariness as per Articles 14 and 15. It was then contended that the institution of polygamy among Muslims as well as Hindus is void as per Article 13 of the Constitution and hence the impugned legislation is discriminatory since polygamy is criminalised only with respect to Hindus and not Muslims. The Court was thus called upon to interpret Article 13 of the Constitution in the context of personal laws. While answering this question, it was held that although 'custom or usage' is included in Article 13 and hence has to be consistent with Fundamental Rights, Personal Law being different from 'custom or usage' is not included under the ambit of 'laws in force' as provided under Article 13(1).

Thereafter, in the case of **Krishna Singh vs Mathura Ahir**[3] ("Krishna Singh"), the Supreme Court held as erroneous a view propounded by the High Court in the Impugned Judgment. The High Court had held that the erstwhile strict rule against Sudras being capable of entering into the order of Yati or Sanyasi as advanced by Smriti writers has ceased to be valid because of the Fundamental Rights guaranteed under Part III of the Constitution. The Supreme

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2 State of Bombay vs Narasu Appa Mali, AIR 1952 Bom 84.

3 Krishna Singh vs Mathura Ahir, (1981) 3 SCC 689.

Court held in this regard that '*Part III of the Constitution does not touch upon the Personal Laws of the parties*' and that Personal Laws of the parties has to be applied based on recognised authoritative sources of Personal Law and not based on the High Court's own concept of modern times. After the holding thus, the Court went on to discuss the history, scriptures and customs under Hinduism to determine the question at hand, i.e. regarding Sudras being capable of entering into the order of Yati or Sanyasi, and finally answered the question in the affirmative.

In the case of **Mary Roy vs State of Kerala**[4], the question was whether Sections 24, 28 and 29 of Travancore Christian Succession Act, 1092, was unconstitutional as being violative of Article 14 of the Constitution. It was initially observed in the judgment that this question is of great importance since the property rights of women belonging to Indian Christian Community residing in the erstwhile State of Travancore would be affected. However, the Supreme Court subsequently declined to answer the question by holding that since it has been held that the Indian Succession Act 1925 would apply to the former State of Travancore, and Travancore Christian Succession Act, 1092 would have no applicability, there is no need to examine the unconstitutionality of the impugned provisions.

In the case of **Anil Kumar Mahsi v. Union of India**[5],the vires of Section 10 of the Indian Divorce Act, 1869, which governs Christians, was challenged by the husband in the Supreme Court as being violative of Article 14 of the Constitution. The Court, without making any mention of the **Krishna Singhcase**, or the proposition

4 Mary Roy vs State of Kerala, (1986) 2 SCC 209.
5 Anil Kumar Mahsi v. Union of India, (1994) 5 SCC 704.

that Personal Law of parties should not be tested on the anvil of Fundamental Rights, went on to examine the impugned provisions on merits and held that it is not discriminatory and hence not unconstitutional.

Similarly in **Saumya Ann Thomas v. Union of India**[6], the Kerala High Court ("Kerala HC") read down Section 10A(1) of Indian Divorce Act, 1869 without adjudicating on the applicability of Fundamental Rights to Personal Laws. The judgment in Saumya Ann was subsequently followed by Karnataka High Court in **Shiv Kumar v. Union of India**[7]. Further, in **Fazru vs State of Haryana**[8], without referring to **Narasu Appa** and **Krishna Singh**, it was held by the Punjab and Haryana High Court that '*custom or usage or for that matter even Personal Law would be taken to be the law in force*' as per Article 13(1).

However, a more holistic view was adopted by Andhra Pradesh High Court ("AP HC") in **Youth Welfare Federation vs Union of India**[9] ("**Youth Welfare**"). A full bench of the AP HC was called upon to adjudicate on the vires of Section 10 and 22 of Indian Divorce Act, 1869. The issues framed expressly covered the question as to whether Personal Laws are included within the ambit of Article 13(1) and whether legality of Personal Laws can be tested based on Part III of the Constitution. The Court after analysing the judgments of **Narasu Appa** and **Krishna Singh** went on to hold that the view adopted in **Narasu Appa** was the right one. It was held that non-statutory Personal Laws, which existed at the commencement of the Constitution, do not fall under the expression 'laws in force' under Article 13(1) and hence they transcend the Fundamental Rights. It

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6 Saumya Ann Thomas v. Union of India, 2010 (1) KLJ 449.
7 Shiv Kumar v. Union of India, AIR 2014 Kant 73.
8 Fazru vs State of Haryana, AIR 1998 P&H 133.
9 Youth Welfare Federation vs Union of India, 1996 SCC On Line AP 748.

was further held that Personal Laws which '*have been modified or abrogated by statute or varied by custom or usage having the force of law*' can be tested under Part III for its constitutionality. Accordingly, since Indian Divorce Act, 1869, was a statutory law, the Court proceeded to test the constitutionality of the same.

III. Judicial Restraint Exercised

There have been several instances when the judiciary has refrained from delving into questions involving Personal Laws and their constitutionality. In **Maharshi Avadesh vs Union of India**[10], the writ petition filed seeking (i) enactment of a common civil code for all citizens, (ii) declaration that Muslim Women Protection of Rights on Divorce Act, 1986 was void and (iii) to prevent enacting Shariat negatively affecting rights of Muslim women, was dismissed by a very short judgment. The Court simply held that these issues fall under the domain of the legislature and it is not for the Court to legislate on these matters.

A similar position was adopted in **Ahmedabad Women Action Group vs Union of India**[11] ("Ahmedabad Women Action Group"), where writ petitions in public interest were filed praying for a declaration that the practice of Polygamy and Unilateral Talaq by men, in Muslim community were void being violative of Article 14 and 15 of the Constitution. Several other provisions in the statutes pertaining to Hindus and Christians were also challenged as unconstitutional. Relying on various judicial precedents, the court declined to entertain the writ petitions and examine the matter on merits. It was held that these matters wholly involve issues of state

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10 Maharshi Avadesh vs Union of India, 1994 Supp (1) SCC 713.

11 Ahmedabad Women Action Group vs Union of India, (1997) 3 SCC 573.

policies and hence not within the domain of the judiciary. Notably, the judgments of **Narasu Appa Mali** and **Krishna Singh** was cited and relied upon by the Court in the context of whether Part III of the Constitution applies to Personal Laws.

In **Sandhya Rani vs Union of India**[12], the constitutionality of Section 11(i) and 11(ii) of Hindu Adoption and Maintenance Act, 1956, was challenged before the Bombay High Court. Relying on **Ahmedabad Women Action Group** and principles of Hindu Law, the Court refrained from examining the constitutionality of the impugned provisions.

In **P.E. Mathew vs Union of India**[13], the Kerala HC relied on **Ahmedabad Women Action Group** to hold that *'Personal Laws do not fall within Article 13(1) of the Constitution and that they are not laws as defined in Article 13(1).'*

IV. Interference With Non-Statutory Personal Laws

Notably, an interventionist approach with even non-statutory Personal Law was adopted by Kerala HC in **Kunhimohammed vs Ayishakutty**[14] ("Kunhimohammed") and **Nazeer vs Shemeema**[15] ("Nazeer") Both these cases were among other things dealing with the issue of validity of a unilateral triple talaq. In **Kunhimohammed**, the court expressly disagreed with the view propounded in **Narasi Appu** and held that Personal Laws would also be covered by 'laws in force' under Article 13(1) and have to stand the test of Article 14 and 21. It was further held that **Krishna Singh** has not accepted and

12 Sandhya Rani vs Union of India, AIR 1998 Bom 228.
13 P.E. Mathew vs Union of India, AIR 1999 Ker 345.
14 Kunhimohammed vs Ayishakutty, 2010 SCC OnLine Ker 567.
15 Nazeer vs Shemeema, (2017) 1 KLJ 1.

endorsed the dictum in **Narasu Appa**. In **Nazeer case**, it was held that within a religious group or community, discrimination on gender basis between its members cannot be made without any support of religious precepts. The reasoning adopted here was that the test of reasonableness enshrined in Article 14 of the Constitution, would apply within a religious group even though it would not apply between different religious groups.

The view propounded by an Armed Forces Tribunal at Lucknow Regional Bench in the case of **Lance Naik/Tailor Mohammed Farooq vs Chief of Army Staff**[16], that '*Constitution is the mother of all law and has overriding effect over Personal Law as well as other provisions, practices or usage which offend the constitutional rights of persons, collectively or individually*' and that rights conferred by Article 14 and 21 would prevail over Personal Laws was relied upon by the Allahabad High Court in **Aaqil Jamil vs State of U.P.**[17].

V. Shayara Bano – The Missed Opportunity

The entire issue covered by this article could have easily been decided, since the Supreme Court had the opportunity to address a question regarding the same in **Shayara Bano vs Union of India**[18], ("Shayara Bano") - the recent judgment wherein the practice of instantaneous triple talaq was set aside by a 3:2 majority. The judgment, which itself contains 3 separate judgments, is one which invokes the attention of scholars when it comes to culling out the ratio and majority decision on the issues addressed. But for the purpose of the present article, the authors are confining the analysis

16 Lance Naik/Tailor Mohammed Farooq vs Chief of Army Staff, 2016 SCC OnLine AFT 450.

17 Aaqil Jamil vs State of U.P., 2017 SCC OnLine All 1325.

18 Shayara Bano vs Union of India, (2017) 9 SCC 1.

of the judgment to the issue at hand viz. Personal Law and Fundamental Rights.

The minority judgment delivered by Hon'ble Justices J.S. Kehar and S. Abdul Naseer upheld the judgments rendered in **Narasu Appa** and **Krishna Singh**. Correctly or incorrectly, the Hon'ble Justices went one step further to hold that Personal Law is constitutionally protected under Article 25.

In the judgment delivered by Hon'ble Justice Kurien Joseph, the question of whether Personal Law is amenable to Fundamental Rights is not touched upon, and hence it is not relevant for our present discussion to comment on the said judgment.

The third judgment delivered by Hon'ble Justices R.F. Nariman and U.U. Lalit, also considered the question of whether **Narasu Appa** was correct in law. However, after framing the question, instead of deciding the same, the Hon'ble Judges proceeded on a different footing to hold that Muslim Law, including triple talaq is codified under the Muslim Personal Law (Shariat) Application Act, 1937 ("Shariat Act"), and hence, being a statute, it can be tested for violation of Fundamental Rights.

Although the Supreme Court did not conclude on the interplay between Personal laws and Fundamental rights, it went on to hold the practice of unilateral triple talaq unlawful and unconstitutional. Even if one was to construe Hon'ble Justice R.F. Nariman's judgment as holding that statutory personal laws are amenable to a challenge for violation of fundamental rights, it is pertinent to note that such a view would still not be considered as a majority opinion and hence would not be binding.

While the authors agree with the proposition that codified Personal Law can be tested under Part III, the authors disagree with the finding that Muslim Personal Law is codified under the Shariat Act. This is because the Shariat Act was intended to exclude customs or usage and make Shariat the primary law for Muslims[19], and furthermore it contains no substantive provisions regarding how the subjects covered by it are to be dealt with. Notably, the other two judgments rendered by Hon'ble Justice J. S. Kehar and Hon'ble Justice Kurien Joseph also held that Muslim Personal Law is not codified under the Shariat Act, thereby making the basic proposition which lead to Hon'ble Justice Nariman's eventual findings a minority decision.

However, it has to be said that a golden opportunity to decide the controversy of whether Personal Law can be tested against Fundamental Rights, and if it is only codified Personal Law that can be so tested, was missed out by the Constitution Bench in the Shayara Bano case.

VI. The Way Forward - Method to the Madness

The authors are of the opinion that the correct view propounded whilst interpreting the interplay between Personal Laws and Fundamental Rights was the one in Youth Welfare case. The Andhra Pradesh High Court rightly differentiated between statutory Personal Law and non-statutory Personal Law, whilst holding that only the former and not the latter would be covered by Article 13. There is indeed a sound logic behind this reasoning. Once Personal Law is codified into a statute, they undoubtedly fall under the expression 'laws in force' or 'law', depending on whether such statute

[19] S. 2, The Muslim Personal Law (Shariat) Application Act, 1937.

was enacted before or after the commencement of the Constitution. This means that the State has already intervened on that particular sphere of Personal Law and enacted a statute, and any such statute having been enacted by the State has to essentially comply with the prescriptions of Part III.

On the other hand, uncodified Personal Law is different in as much as it is still governed by the religious prescriptions and the State in its wisdom has decided not to intervene in that particular sphere. In such a scenario, it might not be for the judiciary to test the rightness or justness of such Personal Laws based on the concepts of modernity and progressiveness, and whether they are in consonance with Fundamental Rights. This is because religion essentially involves practices that have been carried on over long periods of time and practices which may not necessarily be logical to the modern person. These long practiced traditions and practices is however, the basis for religion, and there are a large number of people who strongly believe in these. Notably, the judgement rendered by Hon'ble Justices J.S. Kehar and S. Abdul Naseer in Shayara Bano expressed the same view.

Furthermore, the authors are of the opinion that the judiciary is ill-equipped to deal with matters of uncodified personal laws, particularly because it is for the legislature to enter into consultations with the relevant affected groups, appoint committees, conduct studies and finally come to the decision of whether to codify the personal law and if so then how it ought to be codified. Ultimately, even in the biggest of cases, all the judiciary has at its disposal is the bar which presents its arguments using materials on record and the bench which scrutinises the materials and arguments and comes to a decision. The diversity of opinion and the voice of the layman is

undoubtedly restricted as compared to a legislative exercise undertaken by the representatives of the people who come from all parts of the country.

VII. The Draftsman's Duty

However, with due regard to the aforesaid opinion, it has to be admitted that there are instances when one feels that maybe the legislature is not utilising the machinery at its disposal, and refrains to undertake a holistic examination of the concerned issue and subject. This is particularly true when one analyses bills like the Muslim Women (Protection of Rights on Marriage) Bill, 2017 ("Bill"), which would be apposite to analyse given the above context. The said Bill is a lacunae filled legislation which is an example of poor draftsmanship. The Bill, which criminalises talaq-e-biddat (instant triple talaq), was introduced in the Lok Sabha pursuant to the Shayara Bano judgement. It was passed in the Lok Sabha without much debate and discussion, and is currently pending in the Rajya Sabha.

On a bare perusal of the Bill, it seems that the Bill is a result of a misreading of the Supreme Court judgement of Shayara Bano.[20] The judgement pronounced instant triple talaq as invalid which essentially means that the marriage will not be dissolved by the pronouncement of the same by the husband. However, the Bill presupposes that the pronouncement of triple talaq would irrevocably dissolve the marriage, and accordingly provides to "void" it under Section 3 of the Bill. Moreover, the Bill provides for imprisonment of the husband for upto three years if he pronounces instant triple talaq to his wife. However, it should be noted that the

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[20] *The Trouble with the Triple Talaq Bill*, The Hindu, available at https://www.thehindu.com/opinion/op-ed/a-very-flawed-law/article22288659.ece, last seen on 25/08/2018.

Shayara Bano judgement only held the practice of instant triple talaq invalid, and it did not criminalize it. Therefore, the Bill envisages an absurd situation where a man would be imprisoned for an act which in itself is an invalid and *non est* act. Moreover, practically, there is a high probability of this provision serving as a breeding ground for unsubstantiated complaints by wives, filed solely with the intention of harassing their husband. Complex evidentiary questions such as whether a single talaq was pronounced (which is still a valid method of divorce under Muslim Personal Law) or whether three talaqs were pronounced would also arise in such a situation.

Further, the Bill goes on to discuss post-divorce issues like maintenance for the wife, completely overlooking the fact that instant triple talaq would not even be recognized in the eyes of law. It seems like the scheme of the Bill leans more towards penalising the husband without any logical justification.

One can only hope that the legislature undertakes a more comprehensive exercise and utilises the mechanism and resources at its disposal in future, before delving into codification of personal laws, which is and will remain a very sensitive issue in a country like India.

VIII. Conclusion

It can thus be seen that there is significant divergence when it comes to judicial pronouncements on the issue at hand. There are judgments which expressly state that Personal Laws do not fall under the ambit of Article 13 and hence are not amenable to a challenge of Fundamental Rights violation. However, in recent times, a contrary view has emerged and even Personal Laws are tested against the anvil of Fundamental Rights. Notably, a non-interventionist approach has

also been adopted in certain cases wherein it has been held that the relief prayed for is not within the domain of the judiciary.

Even though the issue at hand was not decided by the Supreme Court in the Shayara Bano case, other opportunities await with respect to the same. In the matter pending before a Constitution Bench of the Supreme Court - Goolrukh Gupta vs Sam Rusi Chotia[21], the case pertains to the rights of a Parsi born woman who marries a non-parsi, particularly her religious and legal status, including the right to take part in the funeral ceremonies of her parents. It is a question which involves adjudication of uncodified Parsi Personal Law and whether they are violative of Fundamental Rights. The issue of Polygamy and Nikah Halala among Muslims has also been challenged and referred to a Constitution Bench in the case of Sameena Begum vs Union of India[22]. One has to await the outcome of the said cases, to see how it will affect the judicial propositions laid down by previous judgments.

As captured above, even when the legislature deals with the issue of Personal Laws, history shows that many a time, the laws that are ultimately formulated are poorly drafted and less than commendable in their objective.

In light of the above, it is stated that a balance needs to be struck between the enforcement of Personal Laws, which are founded on dated practices, traditions and customs, and Fundamental rights, which encapsulate modern civil rights and liberties. What has to be paid heed to by the judiciary or the legislature, while delving into these issues is the sensitive nature of

21 Goolrukh Gupta vs Sam Rusi Chotia, SLP(C) No. 18889 of 2012.
22 Sameena Begum vs Union of India, WP(C) No. 222 of 2018

the issues involved and the socio-political ramifications of the same. Further, the possibility of the vacuum in law arising from a particular Personal Law being struck down as unconstitutional should also be an important consideration so as to holistically deal with issues pertaining to Personal Laws.

Only time will tell whether the answer in the path ahead lies in codification of all the uncodified Personal Laws, or enacting a Uniform Civil Code, or maintaining the status quo of the judiciary selectively examining the constitutionality of Personal Laws. Due to the complexity of the issue involved, and considering there are various and many a time conflicting interests of the concerned stakeholders involved, any action taken towards dealing with Personal Laws should necessarily involve public consultation, soliciting opinions and extensive (and hopefully reasoned) parliamentary debate.