History of Personal Laws in India

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Personal laws are a set of laws that applies to a certain class or a group of people or a particular person, based on religion, faith and culture. In India, personal laws that are guided by religion are applicable in the civil realm which covers aspects like marriage, divorce, guardianship, adoption and succession. At present, Hindus, Muslims, Christians, Sikhs and Parsis are governed by their set of personal laws in India. Despite calls for a Uniform Civil Code from the time of the drafting of the Constitution, personal laws have been largely been left untouched by all the governments in power. The reforms that have taken place so far in the personal laws have been within the ambit of individual codes and the changes proposed have come under the criticism of interfering with the religious freedom guaranteed by the Constitution.

Historical Background of Personal Laws

In ancient India, religion and law were intertwined with the wisdom imparted by 'Shruti' and 'Smriti' serving as the primary sources[1] codifying the ways of life. The 'Shruti' contained all four Vedas, namely Rig Veda, Sama Veda, Yajur Veda, and Atharva Veda. The Smritis' were teachings and commentaries handed down by sages of the Hindu religion.

Through these texts and learnings, the society functioned as a well-structured unit. One of the major flaws that a system like this had was that there was seldom any distinction made between social, civil and religious laws. This was addressed in the later years by treatises which came under 'Smriti' like Manu Smriti that established clear difference between these laws and dealt at length with each of them through the twelve chapters. The first eight chapters deal with civil and criminal laws and the rest deal with religion and morality. The personal laws were outside the ambit of monarchy and were subject to the rules as laid down by the ancient texts and the sages. The other two 'smritis' were Yajnavalkya, and Narada.

[1]Principle Sources of Indian Law, *Business Law*

The history of medieval India was predominantly dictated by Islamic laws as most of the rulers were Muslims. The primary source of the Muslim personal law was Quran. This was supplemented by the teachings of Prophet Mohammed, Ijma (consensus) – the agreement of Muslim scholars on points of Islamic Law, Qiyas – an analysis made using the available sources when the existing laws are not applicable to a particular case and commentaries of Muslim law by ancient Muslim scholars.

In most parts, Islamic public law was applied to all subjects irrespective of their religion. But when it came to matters of personal law, Islamic private law was applied to Muslims only and people of other faiths were given the freedom to follow their traditions and culture. In this period, due to intermixing of population, there are many instances where in a Muslim majority area, Hindu traditions were followed and people existed in harmony.

This changed with the onset of British rule in India. Though in the initial years they had maintain a policy of non-interference with religious practices in India, their codification of a common criminal procedure while leaving behind the civil laws created an imaginary division that in the later years would prove to be a potent weapon to de-stabilise India.

Initially through the Charter of 1753, The British gave both Hindus and Muslims freedom to practice their personal laws. It was clearly established that there will be no interference from the British unless the two parties in a dispute willingly submitted to the jurisdiction of the court. In 1772, the Governor General of India, Warren Hastings had laid down that the laws of Quran will be applied to Muslims and those of the Shastras to the Hindus. This stance was again re-established in the Cornwalis Code of 1793. Similar provisions were enacted by an Act of 1797 and by the Government of India Act, 1915.

It was from the Hastings Plan that placed administration of justice in the hands of English judges that personal laws in India started undergoing a change. Even though the judges consulted

Pandits and Maulvis, the judgements were written from an essentially western perspective of rights and wrong. The religious practices came to be codified through judgements and through the doctrine of precedent, a system was established where the role of religious scholars became diminished. Also, the formula of "justice, equity and good conscience" came to be increasingly applied in the judgements of the court that began to be disputed for its subjective outlook.

In 1834, the first Law Commission was appointed with Lord Macaulay as its Chairman. The Commission prepared a draft penal code and submitted it to the Government of India on 14 October 1837. This again left the personal laws untouched and they continued to be governed by religious tenets. But this situation changed with the appointment of the Third Law Commission. From 1862 to 1872, there was a wide spread call for social reforms in India and several landmark legislations were enacted. They include: The Indian Divorce Act, 1869; Hindu Wills Act, 1870; Special Marriage Act, 1872; The Indian Evidence Act 1872 and The Christian Marriage Act 1872, which has now been amended by the Child Marriage Restraint (Amendment) Act, of 1978. The important legislations were the Married Women's Property Act 1874; The Indian Majority Act 1875 and Divorces Registration Act 1876.

Changes were also made in the Muslim Personal Law with the enactment of the Avadh Laws Act of 1876. The important laws that followed this were: The Kazis Act 1881; Transfer of Property Act 1882; The Guardians and Wards Act 1890; The Bengal Protection of Mohammadan's Pilgrim Act 1896.

The stark difference between the legislations pertaining to the Hindu and Muslim laws was that the former was focused on reforms while the latter was to reinstate some of the old practices and maintain the status quo. For example, the major social reform legislations brought forth by the British were the abolition of Sati by Lord William Bentick and the enactment of the Hindu Widow Remarriage Act 1856 that was drafted by Lord Dalhousie. The other important acts enacted include: The Hindu

Wills Act of 1870 which for the first time conferred a power of testamentary disposition on Hindus; The Indian Majority Act 1875 which fixed 18 as the age of majority; The Hindu Inheritance (Removal of Disabilities) Act 1928; The Hindu Law of Inheritance (Amendment) Act 1929; Child Marriage Act of 1929; Hindu Women's Right to Property 1937 etc.

When it comes to Muslim law, four central statues were enacted; The Mussalman Validating Act, 1913; The Muslim Personal Law (Shariat) Application Act of 1937; The Insurance Act of 1938 and The Dissolution of Muslim Marriage Act 1939.

The Indian Muslims had always followed a complex mix of local customs and Islamic law, the Shariat. It needs to be noted that the Shariat Act[2] came into existence only in 1937 and since then it has become mandatory for Muslims to follow Muslim personal law. It was during the colonial period that stress was laid on the Muslim identity and the divisions between Muslim and non-Muslim became sharp. The British courts played a major role in establishing a separate identity that went against the way society functioned till then in India. The aim was to stop the intermixing of traditions and customs that gave Indians a sense of unity.

In 1866, the first step was taken towards this end when the Judicial Committee of the Privy Council, the highest court of appeal in the British Empire, placed the Shariat above local customary law. In situations where it allowed the use of local customary law, it called for "proof of special usage". In the years that followed, the High Courts of Calcutta (1882) and Allahabad (1900) disallowed the use of customary law for Muslims. But in 1913, the Judicial Committee of the Privy Council changed its earlier stance and ruled that customary law played a major part in Muslim life and allowed its use in the courts of the Raj.

The advent of modern nationalism and the founding of the Muslim League had a lasting impact in the creation of a Muslim

[2] Shoaib Daniyal, 'A short history of Muslim personal law in India', *Scroll.in*

identity. The League felt that it was necessary for Muslims to identify with their religion if they have to succeed in rallying people in the name of religion. So, they started codifying Muslim laws and the Shariat Act was passed that even now form the basis of Muslim personal law in the country.

While there were many compromises made in the passing of the Shariat Act like excluding 'agricultural land' from its purview to ensure that women in Punjab are not given inheritance rights, there were also occasions when the Muslim personal law was way ahead of the Hindu customary laws. In 1939, the League passed the Dissolution of Muslim Marriages Act, which gave Muslim women the right to divorce their husbands – a right that was denied to Hindu women till two decades after this Act was passed.

Major reforms were seen in the Hindu laws only with the passing of the Hindu Code Bills by Parliament in the 1950s that overlooked customary laws and addressed many of the gender inequalities that were prevalent in Hinduism.

Important Reforms in Personal Laws

Throughout the history of India, efforts were made to address the deep-seated issue of gender bias perpetrated by personal laws. Every religion has taken small but important steps ushering in reforms within its fold even though they are not enough to ensure a just and equitable society.

As discussed earlier, in 1829, the Bengal Sati Regulation was passed which abolished the practice of Sati. In 1856, Hindu Widows Remarriage Act gave widows the right to remarry which was prohibited under social norms. The Act also gave a woman the right to property of her new husband but her claim over property of deceased husband was withdrawn. This right was given back in 1956 with Hindu Succession Act. In 1869, the Indian Divorce Act was passed which provided grounds for divorce, mutual consent for divorce, nullity of marriage and also gave wife the right to file petition against husband for divorce. This step meant that marriage was no longer seen as a holy union and gave it some characteristics of a civil contract. In 1872, the

Indian Christian Marriage Act was passed which applied only to the Christians domiciled in India except Goan Christians and laid down the conditions required for a marriage to be considered valid. In 1909, efforts were made to mark the validity of Sikh marriage by passing the Anand Marriage Act. But it was only in 2o12 that registrations under the Act were allowed after some amendments were passed.

In 1929, the focus was again on far reaching social reforms. The Child Marriage Restraint Act was passed which set the minimum age of marriage for men as 18, and women as 15. But this was met with opposition from the Muslim community and that led to the passing of the Muslim Personal Law (Shariat) Application Act of 1937 which had no minimum limit and allowed parental or guardian consent in case of Muslim marriages. Years later, in 2016 this Act was overridden by The Prohibition of Child Marriage Act which fixed the marriageable age at 21 for boys and 18 for girls for all communities.

In 1939, the Dissolution of Muslim Marriages Act was passed which dealt with the circumstances in which Muslim women can obtain divorce and rights of Muslim women who have been divorced by their husbands.

In 1954, an important first step towards the realization of a Uniform Civil Code was taken with the passing of the Special Marriage Act which allowed civil marriages between individuals belonging to same or different religions. The following year, in 1955, the Hindu Marriage Act was passed which addressed many of the underlying biases in Hinduism and codified laws relating to marriage among those Indians who were not Christians, Muslims, Jews and Zorastrians. It also introduced the concept of separation and divorce that did not exist in religious laws as marriage was considered sacrament. Further, in 1976 The Marriage Law Amendment Act broadened the grounds for divorce of a Hindu marriage, widened meaning of desertion and gave minor girls right to repudiate their marriage besides other provisions. In 1956, Hindu Succession Act, Hindu Minority and Guardianship Act and Hindu Adoptions and Maintenance Act were enacted to cover the other areas.

In 1973, in K. Kumar v. Leena case, Court mentioned that Christian Marriage Act has no provision for maintenance, but such right is available under the common law. Wife and children are dependents under section 9 of Civil Procedure Code, 1908.

In 1985, the controversial Shah Bano case led to the passing of Muslim Women (Protection of Rights on Divorce) Act which enabled Muslim women to get alimony but only during the period of 90 days post-divorce.

In 2005, the Hindu Succession (Amendment) Act was passed giving equal rights in property to daughters of Hindu Sikh, Jain and Buddhists. In 2017, the Supreme Court deemed the practice of triple talaq unconstitutional and in 2019, the Indian Parliament passed the Muslim Women (Protection of Rights on Marriage) Act making triple talaq a cognizable offence with maximum three years imprisonment and fine. The wife is also entitled to subsistence allowance.

Why are the personal laws still discriminatory?

As can be seen, efforts were made throughout the history of India to bring about reforms in personal laws. For example, after a 20-year legal battle [3], Hindu daughters were given equal rights in the ancestral property and the Christian Divorce Act of 1869 was amended to give women the right to obtain divorce on grounds of adultery. Earlier, only the men were given this right and women had to prove that in addition to adultery, they were subjected to cruelty, bestiality and sodomy.

Despite the steps taken to address the inherent inequality in personal laws, gender justice remains a far-fetched goal. Many of the prevalent laws deny women the right to dignity and equality. This is a factor that is common across personal laws of all religions. For example, Parsi daughters who marry outside the community are not given property rights and non-Parsi wives of Parsi husbands are given only half of husband's property as per the personal law. Even women from tribal communities have also been demanding equal property rights.

The amended laws are also not without problems. Though the Hindu Succession Act gives equal property rights to women,

[3] Vibuti Patel, 'All personal laws in India are discriminatory', *Livemint*

there is a clause [4]which states that if a Hindu woman dies without a will, her property will go to the husband's heirs in the absence of a spouse or children. There is that inherent notion that after marriage a woman has no place in her family and her husband's family can exert all her rights over her being. The Hindu Minority and Guardianship Act, 1956 also has provisions that are equally discriminatory. Section 6 of the Act considers the father to be the natural guardian of a Hindu child and the mother is given guardianship rights only if the child is below five years or in the absence of the father.

Though reforms were made in the Christian Divorce Act, there are still a number of inherent biases. One such is that women cannot claim property rights in the event of a divorce even if her financial contribution was involved. She is entitled only to maintenance under Section 125 of the Code of Criminal Procedure.

Another personal law that robs women of a dignified life is the practice of polygamy that is permitted under the Muslim personal law. According to the law[5], a Muslim husband is permitted to have four wives at a time. Quran says: 'Marry of the women, who seem good to you, two or three or four, if you fear that you cannot do justice to so many, then one (only)'.

Under the same law, while a Muslim man is given unrestricted powers to dissolve a marriage, a Muslim woman has no such rights. She can dissolve her marriage only according to the provisions of Dissolution of Muslim Marriage Act, 1939. Hence the grounds available are limited and the same constraint follows. A Muslim woman can opt for divorce only when she can support herself or somebody is there to support her. But a Muslim woman can have only one husband. If she contracts a second marriage during the subsistence of the first marriage, then the second marriage is void. She can be punished for bigamy under the Indian Penal Code, 1860. A Muslim man can marry a

[4]Sudhanshu Neema , Nayi Disha, '7 Indian Laws that Discriminate Against Women',
[5]P Lakshmi, 'Personal Laws and the rights of women', *Christ University Journal*

Muslim girl, a Christian or a Jewish girl. But a Muslim girl can marry only a Muslim man. If she marries a Hindu, Jew or a Christian man, the marriage is void.

The property rights under the Muslim personal laws are also unjust. Though under the law, men and women have equal right of inheritance. If a Muslim man dies, and his heirs include both male and female, both will inherit the property simultaneously. But a man's share of the inheritance is double that of a woman in the same degree of relationship to the deceased. The quantum of property inherited by a female heir is half of the property given to a male of equal status. It is a manifest sample of unequal treatment of women under Muslim law.

Even in a state like Goa that follows a uniform civil code, the practise of bigamy is permitted. A Hindu man is permitted to marry the second time if his wife fails to deliver a child by the age of 25 or a male child by the age of 30.

The laws that were enacted to protect the interests of the women have also perpetuated inequalities. The Prohibition of Child Marriage Act, 2006 which set the marriageable age for men in India as 21 and 18 for women is one such example which denied women of an equal footing and it reinforced the bias the bias that women have to be younger than men for marriages to work.

Important observations of the Supreme Court

In the Mohd. Ahmed Khan vs. Shah Bano Begum case[6] of 1985, Chief Justice Y.V. Chandrachud in his judgement observed:

"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any offic ial activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of

[6] *Smt. Sarla Mudgal, President, ... vs Union Of India & Ors on 10 May, 1995*

national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made is the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts, because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case."

In the Sarla Mudgal vs Union of India case[7], 1995, Justice R M Sahai in his judgement made the following argument for the implementation of a Uniform Civil Code:

"Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression. Therefore, a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity. But the first step should be to rationalise the personal law of the minorities to develop religious and cultural amity. The Government would be well advised to entrust the responsibility to the Law Commission which may in consultation with Minorities Commission examine the matter and bring about the comprehensive legislation in keeping with modern day concept of human rights for women."

[7] 'Conceptual Analysis and Background of Uniform Civil Code', *Shodhganga*

What India can learn from the world

There are many nations that have successfully implemented a common civil code and with time, they are making the necessary changes to ensure gender justice. A common civil code was established in France under Napoléon I and it remains one of the most enduring legacy of the French Revolution. Four judges wrote the Code for Napoleon, to replace the many different kinds of law in different places. It did not allow privileges based on birth (such as nobility). It allowed freedom of religion. It also set up a system of Civil service where government jobs would go to the most qualified.

The Code survived unaltered in France[8] for more than 150 years. But with the advent of the gender justice movement in Europe, calls were made to amend many of the discriminatory provisions of the Code. So, in 1965, French wives were given the right to work without their husband's permission. In 1970, the husbands forfeited the rights that came with their status as head of the family. Despite these reforms, the Code still has many problems. The French wives are still required to "obey" their husbands, only the husbands are given property rights and the women do not have the legal right.

In the United Kingdom, where the English Common Law[9] prevailed, the doctrine of coverture was practiced whereby, upon marriage, a woman's legal rights and obligations were subsumed by those of her husband, in accordance with the wife's legal status of feme covert. An unmarried woman, a feme sole, had the right to own property and make contracts in her own name. Coverture arises from the legal fiction that a husband and wife are one person.

During the women's rights movement in the mid-19th century, coverture came under increasing criticism for its oppressive nature. It was first modified by the 19th century Married

[8] '"The Wife is Obliged": The French Civil Code (Napoleonic Code) 1800-1820', *Women in World History*
[9] Chernock (2010), pp. 18, 86

Women's Property Acts and was eventually eliminated by subsequent reforms.

A country that has modelled its civil code after the French Civil Code is Egypt[10]. But when it comes to family laws, Islamic Shariah applies to all Muslims and other religions are allowed to follow their own community standards.

When it comes to Asia, the case of Japan[11] stands out. Part IV of the Civil Code covers family law. The Japanese law initially gave importance to family as a unit and it did not concern so much with the rights of individuals. This changed after the Japanese society began to transition to a nuclear family system. The family law does not recognize any religious ceremony for registering a marriage and can be a reference point for other Asian countries to enact a common civil code. But the Code in its present form has a number of problems and it needs far reaching reforms to do away with the gender discrimination. Article 733 of Japan's Civil Code prohibits women, but not men, from remarrying within 100 days after the dissolution or annulment of a marriage. There are many such provisions that spread inequality in Japanese society and unless and until these issues are not addressed, it may defeat the very purpose of having a common code for all.

The way forward

It is evident from these examples that a common civil code even if enacted will have to undergo constant evolution to suit the needs of the changing times. India with its much diversity has seen opposition to a uniform code for all. But that opposition may go away once there is a realization that all personal laws discriminate women and there is a need for a common code where these issues are addressed and which does not give any legal sanctity to gender bias. Taking a cue from others countries which have successfully enacted a civil code, India must make it a point that a Uniform Civil Code does not give women the status of second-class citizens and is formulated only after

[10]Ministry of Justice, Egypt
[11]Japan - The Civil Code, *Equality Now*

addressing all the inherent equalities in personal laws of every religion.

The reforms that India has carried out in its personal laws time and again are a positive indication of the will to give an equal platform for all citizens. But it needs to be noted that women had no part to play in the drafting of the personal laws. They were codified by the men in power on the basis of religious texts and other teachings. While reforms were carried out in the Hindu personal laws with the enactment of four Acts and in the Muslim personal law with the banning of triple talaq, what came to fore were views that women held on matters of religion and religious practices. If India as a country has to become inclusive, it is necessary to hear and address the biases that women feel on a daily basis as a result of discriminatory laws in the name of religion.