The Constitutional aspect of Personal Laws and the Dictate of Judiciary in such matters: An Analytical study with special reference to Hindu law

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Abstract

As we all know that the Indian Constitution is known to be an organic and living document. which makes it susceptible to changes as per time and need of the contemporary society. Among the many changes that society needs, one such need is that in Personal laws. Apart from the question as to Personal laws in force gaining recognition under the foundation of Right to freedom of religion under Article 25 is evident, simultaneously the question arises as to the differing stand of the judiciary in matters of Personal law when it comes in conflict with the basic principles of the Constitution and Fundamental rights. Does the judiciary consider these matters highly volatile and tend to interpret them in a way that feeds the sensitive ego of different religious sections of society. In the famous case of State of Bombay v. Narasu Appa Mali, a black judgement arrived by declaring that the personal laws are not "laws in force" under Article 13 of the Indian constitution as they find their roots in religious precepts and customary practices, therefore the basic principles of the Indian Constitution cannot be applied. The paper focuses on variety of such discriminatory judgements in Hindu personal law and the paradigm shift in the stand of Judiciary. Also the research tries to take into account the current position of law by analysing and dissecting the rationale behind the judgments, thereby concluding that these laws should not go scot free from the critical eyes of judicial review and should be scrutinised under Article 13 of the Indian Constitution. The researcher has adopted a doctrinal approach of research for the research problem by analysing the decisions of the adjudicatory body through relevant and available literature on this topic.

Keywords: - Personal law, Religion, Hindu, Constitution of India

Introduction

"Freedom prospers when religion is vibrant and the rule of law under God is acknowledged"

- ***Ronald Reagan (4th US President)***

The people of India belong to different vibrant communities, each being governed by their own set of rules and laws governing their private sphere of lives. These set of laws based on community religion, faith and culture form Personal laws. There has been a long discussion on the status of personal laws in the Indian Constitution and till date it is ambiguous and requires clarity. If we observe the power structure, there is theoretically no barrier on the legislative competence and power of the state with respect to personal laws. The Governments too have taken caution while interfering in the personal laws to avoid direct confrontation.[1]

Basic Constitutional Provisions dealing with Personal Law

In order to deal with the authenticity of pre and post constitutional personal law, the conditions prescribed under Article 13 and Art 372 have to be met.

Article 13 reads as follows:-

13 -Laws inconsistent with or in derogation of the fundamental rights.

1. All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

2. The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention be bad.

3. In this Article, unless the context otherwise requires,- (a) "law" includes any Ordinance, order, by law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force: includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and

[1] Saloni Kabra "A Judicial Shift in Personal Law Paradigm in India", Journal of Critical Reviews, Vol 6, Issue 6,2019 http://www.jcreview.com/fulltext/197-1577637461.pdf(accessed on 27th June 2020)

not previously repealed, notwithstanding that any such law or any part of may not be then in operation either at all or in particular areas."[2]

Article 372 reads as follows:-

"372. Continuance in force of existing laws and their adaptation.: (1) Notwithstanding the repeal by this Constitution of enactments referred to in Article 395, but subject to the other provisions of this Constitution, all the laws 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."[3]

By this particular constitutional provision, the parts of pre constitutional part of personal laws which include both codified and uncodified laws applicable to different communities which have been untouched by the competent authority remain very well in force like before.

Concurrent list Entry 5 of Schedule VII is as follows:-

Marriage and divorce; Infants and Minor; adoption; wills, Intestacy and succession; joint family and partition; All matters in respect of which parties in judicial proceedings were immediately before the commencement of this constitution, subject to their personal law.[4]

Other laws

Other than the provisions of the constitution, newly made personal laws have been enacted by the parliament for different communities. As this paper focuses on aspect of Hindu law, it is penitent to mention that Hindus, Sikhs, Jains and Buddhists were bought under the same umbrella, keeping intact the traditional customs of these communities.

Tussle between fundamental rights and Personal laws

The testing yardstick of any law whether pre constitutional or post constitutional is Article 13. If found inconsistent with the fundamental rights, are void to the extent of such inconsistency, thus cease to exist.

These fundamental rights are namely- Right to Equality, Right to freedom, Right to Education, Right to religion, Right against exploitation, Cultural and educational rights and Constitutional remedies. Here a controversial question that arises is whether personal law come under the

[2] The Constitution of India, Art. 13
[3] The Constitution of India, Art. 372
[4] The Constitution of India, Concurrent List, Entry 5

hawk eyes of judicial review under Article 13? Or are these laws a different class altogether and are above fundamental rights?

Seeking answers for these questions, one may deduce that the required answer depends purely on the interpretation of the phrase used in Article 13(1), "all laws in force". However on dissecting Article 13, we do not find any mention of Personal laws and can only find the terms "ordinance, order, by-law, rule, regulation, notification, custom or usage. If we go by the term "include" under Article 13(3), then we can presume that the list of what "law in force" is not exhaustive and can include a lot of other rules not specified therein. However it becomes essential at this point to discuss the intent of the constituent assembly to include provisions like Article 19, 25 and 44 which gives a hint that the makers did not plan to keep personal laws away from the legislative power of the State.

Constituent Assembly Debates

While discussing draft Article 35, which was an endeavour by the state to secure for all its citizens a uniform civil code throughout the territory of India, there were a lot of suggestions and provisos put forth by different members.[5]

According to Mohamad Ismail Sahab following proviso was supposed to be added-

"Provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law."

In his words – "*The right of a group or a community of people to follow and adhere to its own personal law is among the fundamental rights and this provision should really be made amongst the statutory and justiciable fundamental rights. It is for this reason that I along with other friends have given amendments to certain other articles going previous to this which I will move at the proper time. Now the right to follow personal law is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture. If anything is done affecting the personal laws, it will be tantamount to interference with the way of life of those people who have been observing these laws for generations and ages. This secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people. The matter of retaining personal law is nothing new; we have precedents in European countries. Yugoslavia, for instance, that is, the kingdom of the Serbs,*

[5] CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII, 23rd November 1948, loksabha/writereaddata/cadebatefiles/C23111948.pdf(accessed on 27th June 2020)

Croats and Slovenes, is obliged under treaty obligations to guarantee the rights of minorities. The clause regarding rights of Mussulmans reads as follows we find similar clauses in several other European constitutions also. But these refer to minorities while my amendment refers not to the minorities alone but to all people including the majority community, because it says, "Any group, section or community of people shall not be obliged" etc. Therefore it seeks to secure the rights of all people in regard to their existing personal law.

Again this amendment does not seek to introduce any innovation or bring in a new set of laws for the people, but only wants the maintenance of the personal law already existing among certain sections of people. Now why do people want a uniform civil code, as in article 35? Their idea evidently is to secure harmony through uniformity. But I maintain that for that purpose it is not necessary to regiment the civil law of the people including the personal law. Such regimentation will bring discontent and harmony will be affected. But if people are allowed to follow their own personal law there will be no discontent or dissatisfaction. Every section of the people, being free to follow its own personal law will not really come in conflict with others."[6]

However Shri Alladi Krishnaswami Ayyar had a different view altogether and on inclusion of proviso. In his words-

"A Civil Code, as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform civil code throughout the territory of India? The second objection was that religion was in danger, that communities cannot live in amity if there is to be a uniform civil code. The article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. What it aims at is to try to arrive at a common measure of agreement in regard to these matters. It is not as if one legal system is not influencing or being influenced by another legal system. In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. The future Legislatures may attempt a uniform Civil Code or they may not. The uniform Civil Code will run into every aspect of Civil Law. In

[6] *Ibid*.

regard to contracts, procedure and property uniformity is sought to be secured by their finding a place in the Concurrent List. Therefore, for those reasons, I submit that the House may unanimously pass this article which has been placed before the Members after due consideration."[7]

Dictate of judiciary in cases with special reference to Hindu law

We can see that over the years, the Supreme Court has taken differing stands with respect to personal laws. Over the years, the Supreme Court has taken differing views while dealing with personal laws and thus, no uniformity can be traced. It has been observed by the judgements in a number of cases that in some cases it makes the personal law unchallengeable even if they are violative of Article 14, 15 or 21 and in other cases it takes Article 13 into consideration, testing personal laws on the touchstone of fundamental rights.

(A) Personal laws cannot be challenged

All these cases have effectively held that personal laws, whether codified or uncodified, whether in force at the time of coming into force of the Constitution or enacted thereafter, ado not need the validity of the Chapter on fundamental rights and cannot be held void

(i) In Krishna Singh v. Mathura Ahir [8] where a question of a shudra's possibility of becoming a sanyasi was being dealt with, a two judge Bench of the Supreme Court, while holding the importance of custom, held that if custom permitted he could become, but if custom did not permit, he could not be ordained. That if the custom and usage permitted he could so become, the Court held that in the absence of such usage or custom he could not be so ordained. However the High Court had previously held that this kind of restrain shall be violative of Article 14 or 15 of the constitution The High Court had held that any handicap suffered by a Shudra according to the personal law would be in violation of Articles 14 and 15 of the Constitution.

According to the Apex Court "In our opinion, the learned judge failed to appreciate that part III of the Constitution does not touch upon the personal laws of the parties."

(ii) A Division Bench of the Punjab and Haryana High Court also incidentally touched a question in Gurdial Kaur v. Mangal Singh, where it was contended that the custom

[7] *Ibid.*
[8] AIR 1980 SC 707

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 Art.15 of the Constitution. However, this claim was rejected. In this case the Learned Judge did not consider that personal laws were laws within the meaning of Art. 13(1) for in that case it would not have been necessary to hold that the law in question was violative of Art. 15.

(iii) In the case of State of Bombay v. Narasu Appa Mali[9] the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 which rendered all bigamous marriages of Hindus void was in question. Here, arguing the discriminatory rule where polygamy was allowed for males under Hindu and Mohomedan Law but strictly prohibited women from doing so was violative of Article 14 and 15 of the Constitution, therefore, the relevant provisions of the personal laws of both the Hindus and the Mahomedans became void and inoperative from the commencement of the Constitution. As a result both the Hindus and the Mahomedans became equally liable and punishable under Section 494, Indian Penal Code for contracting bigamous marriage. But the Bombay Act singled out the Hindus only and made the offence of bigamy under the Act graver and more serious than under Section 494, Indian Penal Code, by making it cognizable. In this case the question that arose before the learned High Court for consideration was "*whether the personal laws of the Hindus and Mahomedans, fell within the definition of 'law' as laid down under Article 13(1" and the other question was "whether Article 372(1) and Article 13(1) should be subjected to meet the requirements of Part III, particularly Articles 14 and 15?".*

To these questions the Learned Chief Justice Chagla and Justice Gajendragadkar had held that the personal laws do not fall within the scope of Article 13(1) and Article 372(1) of the Constitution.

[9] AIR 1952 Bom 84.

(B) No interference by the Courts

Here without assigning proper reasons in these cases, the Courts denied to enter into the domain of personal laws and stated that they were out of the judicial competence

(iv) Pannalal Pitti v. State of A.P[10] where the validity of provisions of Andhra Pradesh Charitable Hindu religious and endowments Act, 1987 were in question and was argued that laws should be uniformly applicable to all religious or charitable endowments of different persons from different communities. Here, the Apex Court observed that it is inappropriate to expect uniform applicability of laws in one go and can only be achieved in a phased manner.

(v) Anil Kumar Mhasi v. Union of India[11]. In this case, additional grounds given to a woman for claiming divorce under the Indian Divorce Act were challenged as being discriminatory towards men. The Supreme Court did test the validity of some sections of the Indian Divorce on the touch stone of fundamental rights but on merits found the challenge to be unsustainable.

(C) Shift in the approach of the Apex Court

On the other hand, in the following decisions the Supreme Court has tested aspects of personal laws on the touchstone of fundamental rights.

1. In the case of Madhu Kishwar V. State of Bihar[12], some provisions of Chotanagpur Tenancy Act, 1908 were challenged as being discriminatory towards women. While keeping the door open for challenge "...*Under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the court.*" Here the Court plunge into the constitutionality of the law so as to bring them in consonance with women right to livelihood under Article 21 of the Indian Constitution.
2. In the case of Githa Hariharan v. Reserve Bank of India [13] the Supreme Court was considering the Constitutional validity of S. 6 of the Hindu Minority and Guardianship Act. The challenge was on the basis that the section discriminates against women, as the father is the natural guardian of a minor and not the mother. Allowing the petition,

[10] 1996 2 SCC 498
[11] 1994 5 SCC 704
[12] 1996 5 SCC 125
[13] 1999 2 SCC 228

the Apex Court read Sec 6 to form a parity with Article 14 and 15. Observations of the Court were as follows in para 9,

"*Is that the correct way of understanding the section and does the word 'after' in the section only mean 'after the lifetime'? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e. six years after the Constitution. Did the Parliament intend to transgress the Constitutional limits and ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion - no. ""Similarly S. 19(b) of the Guardians and Wards Act would also have to be construed in the same manner in which we have construed Section 6(a) Supra).*

3. In the case of N. Adithyan v. Travancore Devaswom Board & Ors.[14] The Supreme Court was concerned with the issue whether in respect of certain temple in Kerala only Brahmins could be ordained as priests. Longstanding usage and custom was cited in support of this claim. The Court rejected the plea and following observation was made: *"Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country."*
4. There were instances were not only did the Apex Court test the personal laws on the touchstone of constitutional principles but also struck them down. One such case is that of *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* [15],the observations of the three judge Bench are as follows :

   "The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights.

[14] 2002 8 SCC 106
[15] 1996 8 SCC 525

"The General Assembly of the United Nations adopted a declaration on 4.12.1986 on "The Right to Development" in which India played a crusading role for its adoption and ratified the same. Its preamble recognises that all human rights and fundamental freedoms are invisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfillment of human beings, denial of civil, political, economic social and cultural rights. In order to promote development equal attention should be given to the implementation, promotion and protection of civil, political economic, social and political rights.

"Article 1, (1) assures right to development an inalienable human right, by virtue of which every person and all people are entitled to participate in contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6 (1) obligates the State to observance of all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub- article (2) re-joins that ... equal attention and urgent consideration should be Sub-Article (2) enjoins that ... equal attention and urgent consideration should be given to implement, promotion and protection of civil, political, economic, social and political rights. Sub-article (3) thereof enjoins that:-

"State should take steps to eliminate obstacle to development, resulting from failure to observe civil and political rights as well as economic, social and economic rights. Article 8 casts duty on the State to undertake...necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources ... and distribution of income. "The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

"Article 15 (3) of the Constitution of India positively protects such Acts or actions. Article 21 of the Constitution of India reinforces "right to life". Equality dignity of person and right to development are inherent rights in every human being. Life in is expanded horizon includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full

measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on a footing of equality. Equally in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Articles 51-A (h) (j) of the Constitution of India, facilities and opportunities not only are to be provided for, but also for all forms of gender-based discrimination should be eliminated.

"But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the Constitutional goal." [16]

5. In Harvinder Kaur v. Harmander Singh[17], Section 9 of the Hindu Marriage Act was challenged on the ground of violating Article 14 and Article 2. In the previous decision, the Andhra Pradesh High Court in T. Sareetha v. T.Venkata Subbaiah[18], had declared Section 9 of the Hindu Marriage Act for restitution of conjugal rights to be unconstitutional as if offends Articles 14 [Right to equality] and Article 21[Right to liberty which includes right to privacy]. The Delhi High Court did not agree with this decision and stated that the object of Section 9 was not to infringe the privacy or liberty but to promote harmony in married life which was also supported by the Supreme Court in Saroj Rani v. Sudarshan Kumar[19]

(D) Personal laws are laws

i. In the case of Bajya v. Gopikabai [20] the Supreme Court held that even the enacted Hindu Laws including the four laws passed during 1955-56 were part of the personal laws.

[16] Mihir Desai "Flip-flop on personal laws" Combat Law, Volume 3, Issue 4, http://indiatogether.org/combatlaw/vol3/issue4/flipflop.htm (accessed on 27th June 2020)
[17] AIR 1984 Del 66.
[18] AIR 1983 AP 356
[19] AIR 1984 SC 1562.
[20] AIR 1978 SC 793

ii. In the case of Narsingh Pratap Deo v. State of Orissa[21] the Supreme Court observed that "*though theorists may not find it easy to define a law" "the main features and characteristics of law are well recognized*" and that "*stated broadly, a law generally is a body of rules which have been laid down for determining legal rights and legal obligations which are recognized by courts."*

Conclusion

After going through the cases mentioned above the ambiguity in matters of constitutional status of personal laws continues to remain. The status of personal laws under the Constitution of India is ambiguous and requires clarity. What we need is clarity in the position of personal laws, whether it is a 'Law' or 'Law in force' or a 'Custom' having the 'Force of law', the personal laws will continue to remain a controversial issue, the position of personal laws under the Constitution becomes would be dubious, and the controversy surrounding the personal laws will continue to exist.

1. The Parliament has no doubt taken steps to reform and bring changes I personal laws, however these steps seem to be inadequate Right to equality and prohibition on the discrimination of sex, religion etc. is the two important Fundamental Rights besides other rights guaranteed by Part III of the Constitution of India. On the other hand differing rights is provided to people under their separate personal laws. There exists inequality between the sexes under separate personal laws irrespective of the fact that the Constitution clearly guarantees 'equality to all' without any discrimination.
2. The Judiciary have been proactive and in many cases Judicial Activism has addressed matters of personal laws. However, they have been conflicting judgements of the courts on the status of personal law i.e. 'whether or not Part III of the Constitution governs personal laws'.

In my opinion as per Article 13 all laws must be in consonance with Part III of the Constitution and if the laws violated the fundamental rights such law can be declared as void. This however, had to be declared expressly by way of laws enacted by the Parliament. And if Parliament was hesitant to introduce such legislation, the Court had a mandatory duty to declare such laws as unconstitutional or rather still has the duty to clear its stand.

[21] AIR 1964 SC 1793