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Addressing the Complex Relationship between Personal and Constitutional Law: Advocating for a Uniform Civil Code

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India is a nation governed by its Constitution, which holds the highest authority in the country's legal framework, surpassing all other laws. However, India is also a diverse country with numerous religions and cultures, and people continue to place great importance on their faith and family institutions. They often align their lives with their religious beliefs, which significantly influence their actions. Recognizing this diversity, the framers of the Indian Constitution ensured that it protected a wide range of religious and cultural rights. Personal and religious laws have considerable freedom within the constitutional framework. This leads to a conflict between the liberal principles of equality, freedom, and privacy enshrined in the Constitution on one side, and often gender-biased personal laws on the other. Legislators and courts are often hesitant to interfere with personal laws due to potential backlash from communities. In light of this, this paper aims to explore the interaction between personal laws and constitutional law in modern society and its evolving dimensions. Central to this discourse is the pressing need for a Uniform Civil Code (UCC) as a means to reconcile the divergence between personal laws and constitutional principles. A UCC, by establishing uniform laws governing matters such as marriage, divorce, inheritance, and adoption, would serve to harmonize legal frameworks while upholding constitutional values. The paper begins by explaining the fundamental reasons behind the tension between personal laws and constitutional law. It then briefly outlines the various forms of conflicts that arise between constitutional principles and personal laws. The subsequent part of the study examines how the judiciary has addressed this issue.

Keywords: UCC, personal law, constitutional law, succession.

INTRODUCTION

The Uniform Civil Code (UCC) is a proposal to replace India's personal laws, which are based on religious scriptures and customs, with a common set of laws applicable to all citizens. Personal laws govern areas such as marriage, divorce, inheritance, adoption, and maintenance, and they currently vary across religious communities. The need for a UCC stems from the desire to ensure equality and justice in personal matters, eliminate discrimination based on religion, and promote national integration by establishing uniformity in laws across different communities.

A UCC is considered essential for upholding the principles of equality, secularism, and justice enshrined in the Indian Constitution.¹ It aims to provide equal rights to all citizens, regardless of their religion, gender, or community, thus aligning with the constitutional goal of non-discrimination. Implementing a UCC would address issues of gender inequality inherent in some personal laws and ensure that all citizens are treated equally under the law. The intersection of UCC with constitutional morality is significant because it seeks to uphold the fundamental rights guaranteed by the Constitution. The Supreme Court of India has frequently emphasized the importance of a UCC to ensure that personal laws do not violate constitutional values. Thus, the UCC represents a crucial step toward creating a more unified and equitable legal system in India.

THE CAUSE OF FRICTION

India boasts a rich and diverse cultural heritage, encompassing a wide array of religious beliefs and customary traditions. Within this intricate tapestry, India's personal laws present a complex and sometimes paradoxical landscape where the 'traditional' coexists with the 'modern.' During British colonial rule, India saw the imposition of uniform civil and criminal codes, yet personal laws were left untouched, as they pertained to matters deeply intertwined with religious convictions. Consequently, personal laws in India, determined by an individual's religion, have

¹ Constitution of India 1950

endured to the present day. These personal laws govern various aspects of life, including marriage, divorce, inheritance, and succession, and they differ significantly from one religion to another. They are intricately linked to an individual from birth and continue to apply regardless of their geographical location. These personal laws draw their legitimacy from the time-honoured customs and practices of their respective religions. The religions being ancient reflect the social milieu of the past, wherein women were given a subordinate status to that of men.² The prevalent practices related to marriage, divorce and other parts of family law are based on patriarchal norms and are more or less discriminatory on the part of women.

Following independence, the Indian Constitution has assumed paramount authority over all other legal frameworks. The constitutional vision aspires to create a society founded on principles of equality, liberty, and the elimination of discrimination. Gender equality stands as a fundamental pillar of the Indian Constitution. Within the realm of women's rights, there exists a spectrum where personal laws, rooted in traditions and religious texts, occupy one end, while constitutional, statutory, and jurisprudential reforms stand at the opposite end.

Two predominant perspectives exist concerning the interplay between constitutional law and personal law. One perspective argues that personal laws receive special protection directly from the Constitution itself, and therefore, these laws should not be undermined in light of the fundamental rights under the Indian Constitution. This viewpoint also maintains that matters of religion and personal laws inherently pertain to private affairs, and the state should refrain from imposing its rationale and modernity on these private concerns. Conversely, another perspective contends that the Constitution holds supreme authority in the nation, and no law, whether personal or otherwise, can supersede constitutional principles. Advocates of this viewpoint assert that the Constitution cannot simultaneously grant rights such as equality, liberty, and privacy while permitting their infringement through the enforcement of gender-biased personal laws.

² Ministry of Women and Child Development, *'Report of the High-Level Committee on Status of Women in India'* (2015)

THE PROBLEMATIC PROVISIONS

Personal law is a broad term encompassing both written and unwritten laws within a community. The process of codifying personal laws in India was initiated during British colonial rule. While many aspects of personal laws remain uncodified to this day, certain elements related to succession, marriage, divorce, and so forth have been formalized by legislative acts. Examples include the Hindu Marriage Act of 1955³ (referred to as 'HMA'), the Hindu Minority and Guardianship Act of 1956⁴ ('HMGA'), and the Indian Divorce Act⁵, among others. When the legislature codifies personal laws, they gain official state recognition.

Scholars argue that, at the very least, codified personal laws should align with constitutional provisions. However, others contend that these laws were not created by the state but rather codified by it, and as such, they maintain their connection with the community rather than the state. While numerous practices within uncodified personal laws may infringe upon fundamental rights, the discussion below specifically addresses problematic provisions within codified personal laws.

Section 6(a) of the HMGA provides that the father, and *after him*, the mother, is the natural guardian of a minor and his/her property. The section reads as follows:

“Natural guardians of a Hindu minor – The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property.”

(excluding his or her undivided interest in the joint family property), are –

*(a) “in the case of a boy or an unmarried girl – the father, and **after him**, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.”⁶*

³ Hindu Marriage Act 1955

⁴ Hindu Minority and Guardianship Act 1956

⁵ Divorce Act 1869

⁶ Hindu Minority and Guardianship Act 1956, s 6(a)

Section 19(b) of the Guardians and Wards Act, 1890⁷ (hereinafter 'GWA') is analogous to s. 6(a) of HMGA⁸. These sections reflect an inherent bias against the mother and restrict her from being a natural guardian till the lifetime of the father. The constitutional validity of this section was challenged in the case of *Githa Hariharan v Reserve Bank of India*⁹. The court did not take a literal interpretation of the section and concluded that the phrase 'after him' should not be understood to mean 'after the husband's death' because such an interpretation would discriminate against women. Based on this interpretation, the court affirmed the constitutionality of Section 6(a) of the Hindu Marriage Act¹⁰ and Section 19(b) of the Guardians and Wards Act.¹¹ The courts also considered the doctrine of the best interest of the child in this case. However, despite the court's interpretation, the presumption that the father is the primary natural guardian still exists. This presumption can be challenged, but the mother must meet the criteria established in the *Githa Hariharan* case¹² to be recognized as the natural guardian during the father's lifetime.

Section 15(2)(b)¹³ of the Hindu Succession Act also reflects a tinge of discrimination against women in succession matters. According to the provision, the property inherited by the deceased female from her husband shall upon her death, and in the absence of any son or daughter, be devolved to the heirs of the husband.¹⁴ This means that even the farthest of the relatives of the husband's family can get a share from the deceased female's property, but even the closest of her natal family heirs are ineligible to be considered. On the contrary, the natal family of the wife cannot stake a claim on the deceased husband's property who has died intestate without survivorship. This provision runs contrary to Article 15(2)¹⁵ of the Constitution of India and has been challenged in the court of law. However, the court has surprisingly (or rather unsurprisingly!) upheld the constitutionality of the section the court decided that the purpose of the law was to ensure that property became part of the joint family upon marriage, bringing both males and females together into a single unit. This legal approach recognized that

⁷ Guardians and Wards Act 1890, s 19 (b)

⁸ Hindu Minority and Guardianship Act 1956, s 6(a)

⁹ *Githa Hariharan v Reserve Bank of India* (1999) 2 SCC 228

¹⁰ Hindu Marriage Act 1955, s 6 (a)

¹¹ Guardians and Wards Act 1890, s 19(b)

¹² *Ms. Githa Hariharan & Anr v Reserve Bank of India & Anr* (1999) 2 SCC 228

¹³ Hindu Succession Act 1956, s 15(2)(b)

¹⁴ *Ibid*

¹⁵ Constitution of India 1950

when a wife's inheritance became available, the group known as the husband's beneficiaries was given preference. This was due to the unity formed in marriage, where the wife became part of her husband's family.¹⁶ The scheme of s.15 of the HSA¹⁷ including its nomenclature and description suggests that the legislature has accepted the general mentality of the society that a woman is the responsibility of her father before her marriage and that of his husband after the marriage.¹⁸ These provisions serve to highlight the fact that personal laws are mostly in conflict with the principles outlined in the Constitution.

THE JUDICIAL INTERPRETATIONS

Having realized that there exists a conflict between personal law and constitutional provisions, the obvious curiosity is regarding the role of the courts in interpreting these laws. Every so often, several of these laws have been challenged in the court of law based on their conflict with the Fundamental Rights. In most of these cases, the courts have taken an ambiguous stance.¹⁹ Taking into account the sensitivities of various communities, the courts have adopted a policy of refraining from interference. They have employed two methods to achieve this. Firstly, in specific situations, the courts have determined that the challenged aspects of personal law do not contradict Fundamental rights. Secondly, the courts have established that personal laws do not fall within the definition of 'law' as outlined in Article 13 of the Constitution²⁰, and thus, they cannot be subject to scrutiny based on Fundamental Rights.

The Ghost of Narasu

*State of Bombay v Narasu Appa Mali*²¹ was the first landmark case in which personal laws were challenged based on constitutionality. In this case, a challenge was made against the Bombay Prevention of Hindu Bigamous Marriage Act of 1946,²² which mandated monogamy among

¹⁶ *Sonubai Yeshwant Jadhav v Bala Govinda Yadav* (1983) 1 BOM CR 632

¹⁷ Hindu Succession Act 1956, s 15

¹⁸ Kusum and Poonam Pradhan Saxena, *Introduction Laws of Intestate and Testamentary Succession in India* (LexisNexis Butterworths 2008)

¹⁹ Jan M. Broekman, 'Changes of Paradigm in the Law' (1984) 176 *Theory of Legal Science* <https://link.springer.com/chapter/10.1007/978-94-009-6481-5_11> accessed 12 May 2024

²⁰ Constitution of India 1950, art 13

²¹ *State of Bombay v Narasu Appa Mali* (1951) 53 BOMLR 779

²² Bombay Prevention of Hindu Bigamous Marriage Act 1946

Hindus in Bombay. The petitioners argued that this legislative requirement conflicted with Articles 14 and 15 of the Indian Constitution²³ because it imposed monogamy on Hindus while allowing Muslims to have up to four wives. They also contended that, with the introduction of the Indian Constitution, the practice of polygamy among Muslims had become null and void. Their argument was based on the premise that Article 13²⁴ declared any 'customs and practices' inconsistent with Part III of the Constitution as invalid. Furthermore, they argued that personal laws were derived from customs and traditions. Consequently, the practice of polygamy among Muslims, which permitted men to have four wives but not women to have multiple husbands, was seen as a violation of the principle of equality. In addressing the issue of polygamy among Muslims, the Division Bench, consisting of Chief Justice Chagla and Justice Ganjendragadkar, employed a reasoning approach that has remained a subject of academic discussion to this day. According to Indira Jaisingh, "A judgment given in defence of gender justice has become an albatross around their neck making them bound hand and foot to personal laws."²⁵ The court ruled that the expression 'laws in force' in Article 13(1)²⁶ did not cover 'personal laws' within its ambit as observed by Justice Chagla.

The framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution (viz., Fundamental Rights). They must have been aware that these personal laws needed to be reformed in many material particulars and they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged because of the Fundamental Rights and so they did not intend to include these personal laws within the definition of the expression laws in force.²⁷

Gajendragadkar J. observed that "Article 13(1)²⁸ applied to what may compendiously be described as statutory laws, that is, laws, 'passed or made by a legislature or other competent

²³ Constitution of India 1950

²⁴ Constitution of India 1950, art 13

²⁵ Indira Jaisingh, 'The Ghost of Narasu Appa Mali is stalking the Supreme Court of India' *The Leaflet* (28 May 2018) <<https://www.theleaflet.in/specialissues/the-ghost-of-narasu-appa-mali-is-stalking-the-supreme-court-of-india-by-indira-jaising/>> accessed 28 October 2024

²⁶ Constitution of India 1950, art 13(1)

²⁷ Bombay Prevention of Hindu Bigamous Marriage Act 1946

²⁸ *Ibid*

authority’.” He added that “Muslim and Hindu personal laws, whose foundations were their respective ‘scriptural texts’, could not be said to have been passed or made by the legislature or competent authority and therefore do not fall within the purview of Article 13 (1).”²⁹ Therefore, personal laws cannot be challenged on the touchstone of Fundamental Rights.

The Supreme Court, in various of its later judgments, had either affirmed the decision of *Narasu Appa Mali*³⁰ or ducked the question of its correctness.³¹ In the case of *Ahmedabad Women Action Group v Union of India*,³² the practice of polygamy was once more brought into question through public interest litigation. The petitioners contended that this practice contravened Articles 14 and 15 of the Constitution³³. The court, however, rejected the petition stating that “*the questions involved in the case were the issue of State policies with which the court will not ordinarily have any concern.*”

In some of the cases³⁴³⁵, The court has also employed a scrutinizing approach, but it has not overturned the *Narasu Appa Mali*³⁶ decision. In the case of *Shayara Bano v Union of India*³⁷ (commonly known as the 'Triple Talaq case'), The Court examined triple talaq from the perspective of gender justice and equality under Articles 14, 15 and 21.³⁸ It found the practice to be manifestly arbitrary, enabling the unilateral divorce of Muslim wives without consideration of their rights. Allowing such an arbitrary practice would go against constitutional guarantees of equality and non-discrimination based on sex. the court in this case had an opportunity to address the *Narasu Appa Mali*³⁹ judgment. However, the majority opinion, as expressed by Justices R.F. Nariman and U.U. Lalit chose not to reevaluate the correctness of the judgment. Justice Nariman stated that it was unnecessary...to determine the validity of the judgment in *Narasu Appa*. However, he doubted the correctness of the judgment noting that “*However, in a*

²⁹ *Ibid*

³⁰ *State of Bombay v Narasu Appa Mali* (1951) 53 BOMLR 779

³¹ *Krishna Singh v Mathura Ahir* (1982) 2 SCR 660

³² *Ahmedabad Women Action Group v Union of India* (1997) 2 SCR 389

³³ Constitution of India 1950

³⁴ *C Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525

³⁵ *Danial Latifi v Union of India* (2001) 7 SCC 740

³⁶ *Krishna Singh v Mathura Ahir* (1982) 2 SCR 660

³⁷ *Shayara Bano v Union of India* (2017) 9 SCC 1

³⁸ Constitution of India 1950

³⁹ *Krishna Singh v Mathura Ahir* (1982) 2 SCR 660

suitable case, it may be necessary to have a relook at this judgment in that the definition of “law and “laws in force” are both inclusive definitions, and that at least one part of the judgment of P.B. Gajendragadkar, J., (para 26) in which the learned Judge opines that the expression “law” cannot be read into the expression “laws in force” in Article 13(3) is itself no longer good law.”⁴⁰

The case of the Indian Young Lawyers Association v The State of Kerala⁴¹ (‘Sabrimala case’) It marks an important point in the discussion about how personal laws relate to constitutional law. In this instance, even though the majority of the court avoided addressing the validity of the Narasu case⁴², Justice D.Y. Chandrachud, in his concurring opinion, thoroughly examined the case. Justice Chandrachud delved into the case in-depth, titling his discussion ‘The Ghost of Narasu,’ drawing inspiration from an article authored by senior Advocate Indira Jaisingh. Criticizing the reasoning of the Narasu judgment, Chandrachud, J. noted that,

“The decision in Narasu, in restricting the definition of the term ‘laws in force’ detracts from the transformative vision of the Constitution. Carving out ‘custom or usage’ from constitutional scrutiny denies the constitutional vision of ensuring the primacy of individual dignity. The decision in Narasu is based on flawed premises. Custom or usage cannot be excluded from ‘laws in force’. The decision in Narasu also opined that personal law is immune from constitutional scrutiny. This detracts from the notion that nobody of practice can claim supremacy over the Constitution and its vision of ensuring the sanctity of dignity, liberty and equality. This also overlooks the wide ambit that was to be attributed to the term ‘laws in force’ having regard to its inclusive definition and constitutional history.”⁴³ The Narasu case is yet to be overruled but the observation of Justice Chandrachud has been hailed by scholars as the beginning of the end of the 67-year-old judgment in the Narasu case.⁴⁴

⁴⁰ *Danial Latifi v Union of India* (2001) 7 SCC 740

⁴¹ *Indian Young Lawyers Association v The State of Kerala* (2018) SCC OnLine SC 1690

⁴² *State of Bombay v Narasu Appa Mali* (1951) 53 BOMLR 779

⁴³ *Ibid*

⁴⁴ Murali Krishnan, ‘The beginning of the end of 67-year-old Narasu Appa Mali and a tale of two judges’ *Bar and Bench* (28 September 2018) <<https://www.barandbench.com/columns/end-67-year-old-narasu-appa-mali-tale-two-judges-supreme-court-sabarimala>> accessed 15 May 2024

UNIFORM CIVIL CODE

The Uniform Civil Code (UCC) provides a uniform legal framework for personal issues about marriage, divorce, inheritance, custody, and adoption that applies to all citizens of the nation. Article 44⁴⁵ of the Indian Constitution mandates that the State works towards creating a civil code that is consistent throughout the nation of India. The idea and origin of India's Uniform Civil Code (UCC) date back to the colonial era, namely to the British government's attempts in 1835 to bring about the codification of Indian laws about contracts, evidence, and crimes. This effort suggested that the personal laws of Muslims and Hindus be kept out of this kind of codification. Under the British administration, laws about private concerns became more frequent, therefore in 1941 the B N Rau Committee was formed to codify Hindu law⁴⁶. This committee's recommendations led to the adoption of the Hindu Succession Act in 1956⁴⁷, which codified laws about intestate succession among Hindus.

It is clear from the history of modern India that the British government let different Indian communities keep their civil laws regarding adoption, divorce, marriage, and succession. The goal of this strategy was to reform the legal system. Entire legislative authority was vested in the Governor-General by the Charter Act of 1833⁴⁸. Codification of current laws fell within the purview of Lord Macaulay, who headed the Indian Law Commission. This resulted in the passing of important laws that changed the course of Indian legal history, including the Indian Penal Code⁴⁹ and the Code of Civil⁵⁰ and Criminal Procedure⁵¹, which were implemented nationally.

⁴⁵ Constitution of India 1950, art 44

⁴⁶ G. R. Rajagopaul, 'The Story Of The Hindu Code' (1975) 17(4) Journal of the Indian Law Institute <<https://www.jstor.org/stable/43953841>> accessed 15 May 2024

⁴⁷ Hindu Succession Act 1956

⁴⁸ Charter Act 1833

⁴⁹ Indian Penal Code 1860

⁵⁰ Code of Civil Procedure 1908

⁵¹ Code of Criminal Procedure 1973

Additionally, acts like the Indian Contract Act 1872⁵², Transfer of Property Act 1882⁵³, Indian Partnership Act 1932,⁵⁴ and the Indian Evidence Act 1872⁵⁵ had nationwide applicability, although states made amendments, leading to some diversity in their application. Despite recent efforts such as the enactment of the Uniform Motor Vehicle Act 2019⁵⁶, several states have opted out of its jurisdiction, indicating resistance to uniform legislation. Article 44⁵⁷ of the Constitution indicates that the idea of a Uniform Civil Code (UCC) is not new to Indian law. The judiciary has also stressed that to foster national unity and do away with competing ideologies, there should be a unified code governing personal laws. The judiciary's position on the topic was emphasised by cases such as *Ms Jordan Diengdeh v S.S. Chopra (1985)*⁵⁸, *Sarla Mudgal & others v Union of India (1995)*⁵⁹, and *Mohd. Ahmad Khan v Shah Bano Begum (1985)*⁶⁰, highlighted the state's responsibility to ensure a UCC for every citizen.

A unified code will safeguard women and other vulnerable groups in society, as well as members of minority religions, and foster a sense of solidarity among nationalists. It will also make it easier for all residents, regardless of faith, to navigate the complexities of various marriage rituals, adoption, planning for inheritance, etc. It is possible to argue that the introduction of UCC will end personal law altogether and eradicate gender discrimination in all current legal frameworks.

CONCLUSION

To address the inconsistencies between personal laws and constitutional laws, India's complicated relationship between personal and constitutional law highlights the necessity for a Uniform Civil Code (UCC). The conflict results from the coexistence of the liberal values enshrined in the Indian Constitution with a variety of religious and cultural practices. Personal laws are important because they are based on religious traditions, but they also frequently

⁵² Indian Contract Act 1872

⁵³ Transfer of Property Act 1882

⁵⁴ Indian Partnership Act 1932

⁵⁵ Indian Evidence Act 1872

⁵⁶ Motor Vehicles Act 2019

⁵⁷ Constitution of India 1950, art 44

⁵⁸ *Ms. Jordan Diengdeh v S.S. Chopra (1985)* 3 SCC 62

⁵⁹ *Sarla Mudgal & other v union of india (1995)* 3 SCC 635

⁶⁰ *Mohd. Ahmad Khan v Shah Bano Begum (1985)* 2 SCC 556

support discrimination and gender bias, which goes against the equality, liberty, and privacy guaranteed by the Constitution. Judicial interpretations, such as the famous *Narasu Appa Mali*⁶¹ case, have consistently maintained the independence of personal laws without being subject to constitutional examination. Nevertheless, dissenting opinions – such as Justice Chandrachud's criticism – draw attention to the necessity of re-examining these cases and ensuring that constitutional values take precedence over state regulations. To maintain constitutional principles uniformly throughout all communities and align legal systems, the development of a Uniform Civil Code is essential. Even if there may be difficulties and opposition to a UCC, it is still an essential step in achieving the constitutional goal of a fair and just society. It is a confirmation of India's ongoing commitment to development, inclusion, and safeguarding of people's rights and dignity. The adoption of a Uniform Civil Code is a beacon of hope for a more just and equal society as the country moves forward.

⁶¹ *State of Bombay v Narasu Appa Mali* (1951) 53 BOMLR 779