Judicial And Legislative Review Of Matrimonial Laws In India

-Akansha Ghose[1]

India as a country takes pride in its diversity; every religion has its own set of norms overseeing personal relations in family set ups. In most cases, these personal laws derive substance from their respective religious scriptures and texts which dates back to centuries. The Constitution of India came into force on 26th January 1950 and guarantees certain fundamental rights under Part III thereof; these rights are considered sacrosanct and essential for physical and intellectual development of every individual. Since many aspects of personal laws arebased on archaic customs and outdated beliefs, they tend to come in conflict with Part III of the Constitution. In this paper changes brought forth in various matrimonial laws by way of judicial activism and legislative amendments in order to bring them in consonance with Part III of the Constitution have been discussed.The paper is segregated into the following: Introduction that lays down various customs and usages that culminated into distinct personal laws and its validity under Part III of the Constitution; Judicial review under Article 13 of the Constitution and the trend of Judicial Activism throughout the world and particularly in India; Rationale of Supreme Court of India in deciding validity of severalmatrimonial laws in light of precedents such as State of Bombay v. Narsuappa Mali, Mohd. Ahmed Khan v. Shah Bano Begum and the recent case of ShayaraBano v. Union of India also known as Triple Talaq case amongst others; Legislative amendments deliberating upon The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Hindu Marriage Act, 1955 and; Conclusion suggesting progressive reforms in various matrimonial laws in the spirit of Uniform Civil Code prescribed under Article 44 of Part IV of the Constitution.

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Introduction

"one of the special features of archaic society was theblending of laws with religion without there being a clear line of demarcation betweenthe two. And the first great step in the progress of lawis when the distinction between theacts that are harmful to human society and the acts that may not be so, but are hateful tosupernatural being, is thoroughly grasped….for this distinction lies at the root of all legaldevelopment[2]."

- *Sir Hari Singh Gour*

Customs and usages are the primordial sources of personal laws in India. India has a pluri-legal structure of family laws. Faith runs deep into the veins of Indian citizens so much so that the major personal laws place themselves safely in a zone which is free of legislative and judicial intervention. In the case of *Ahmedabad Women Action Group &Ors. Vs. Union of India*[3], the Supreme Court of India (hereinafter referred to as the "Supreme Court") held that personal laws cannot be challenged under Part III of the Constitution of India.In this case, challenge to the applicability of the customary law that it discriminated between males and females as regards the respective shares was found to be not maintainable, since operation of personal laws is a matter of state policy over which the courts would have no concern. However, the recent times have seen a spark amongst the population revolting against discriminatory laws. The customs and usages which up until now were protecting under the umbrella of "untouchable personal laws" are now being challenged by the fundamental rights envisaged under the Constitution of India. The Hindu right argument that Indian Muslims invoke secularism for the safety and security of their existencebut aggressively fight against any move for secular change or reform in their religious tradition has gained currency, especially in the last decade or two[4]. The religious personal law systems of India have not helped Indian women, nor have they been effective in protecting the rights of the religious communities in which Indian women live. Rather, the preservation of these separate laws has served to deepen the division between the majority Hindu population and minority religions, particularly Islam. The personal laws have also perpetuated- and arguably enhanced- tensions between these two groups by reinforcing identities that oppose

[2]1 Gour Sir Hari Singh,THE HINDU CODE5 (Law Publishers Allahabad 1973).
[3] AIR 1997 SC 3614 (India)
[4] Nalini Ranjan,*Personal Laws and Public Memory*, 40 ECON POLIT WKLY 2653, 2653-2655 (2005)

one another[5]. The broad perception about India is that India is a secular State, drawing a fine line of distinction between religion and State. However, the Constitution of India, which has laid down the principles of inter-relationship between State and Religion, does not refer expressly to the concept of the secular State, and the question may arise whether the classification of India as such a State is justified from the legal and particularly constitutional point of view[6]. The regressive practices mandated by certain personal laws give an impression of an autochthonous society that still persists within India. One of such practice was that of *Talaq-ul-biddat* popularly known as *triple talaq* or *teen talaq* which has been rendered unconstitutional by the Supreme Court in a recent landmark judgment which will be discussed in brief in the subsequent section. The globalizing world is emphasizing on equal rights for men and women thereby obfuscating the thin line of demarcation between personal laws and legislative or judicial intervention. No longer can the discriminatory personal laws attack a section of community without attracting public rebuke and in pursuance of such pressure, stronger than existing laws and reprimanding judicial decision.

Judicial Review and Judicial Activism

"The correct way of interpreting the provisions of Part III is that attempt of the court should be to expand the reach and ambit of fundamental rights rather than to attenuate their meaning and content."

\- *Bhagwati, J.*

In the case of ManekaGaandhi Vs. Union of India[7]

Judicial review is the power of courts to pronounce upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void[8]. In the landmark judgment of *Keshvananda Bharti Vs. State of Kerala*[9] famously known as the *Fundamental Rights case* Khanna, J. said that

[5]Shalina A Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code*, 83 Ind. L.J. 695 (2008)
[6]C.H. Alexandrowicz, *The Secular State in India and in the United States,* 2 JILI, 273 ,273-296 (1960)
[7] AIR 1978 SC 597 (India)
[8] E.S. Crown,*Essay on the Judicial Review,* 8 Encyclopedia of Social Sciences, 457 (1933)
[9] AIR 1973 SC 1461 (India)

"judicial review has become an integral part of our Constitutional System and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of the provisions of the statutes. If the provisions of the statutes are found to be violative of any of the articles of the Constitution which is the touchstone for the validity of all laws the Supreme Court and the High Courts are empowered to strike down the said provisions."

Judicial Review is not an indigenous concept. It derives its validity from the American Judicial system; taking birth in the 1800s. The momentous decision of the Supreme Court of America in the case of *Marbury Vs. Madison*[10] paved way for judicial review which inspired and was subsequently adopted by other States pan world including India. Marshall C.J., held the following in this case "the Constitution is either superior paramount law unchangeable by ordinary means or it is on a level with ordinary legislative Acts, and like other Acts is alterable when the legislature shall please to alter it… Certainly, all those who framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation and, consequently, the theory of every such Government must be that an Act of the legislature repugnant to the Constitution is void. And further, it is emphatically province and duty of the Judicial department to say what law is…"

Under the Constitution of India, the horizon of Judicial Review was, in the logic of events and things, extended appreciably beyond a formal interpretation of federal provisions; the debates of the Constituent Assembly reveal, beyond any dispute, that the Judiciary was contemplated as an extension of the rights and an arm of social revolution; Judicial Review was accordingly desired to be an essential condition for the successful implementation and enforcement of the Fundamental Rights[11]. Constitution makers of India adopted a solid approach to Judicial Review that is- Article 13 of the Constitution. In the case of *State of Madras Vs. V.G. Row*[12] Patanjali Sastri, C.J., observed "Our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteen Amendments. If then, the courts in this

[10] 2L Ed. 60
[11] Samirendra Nath Ray, *The Crisis of Judicial Review in India*, 29 Indian Journal of Political Science, 29, 29-35 (1968)
[12] AIR 1975 SC 196 (India)

country face up to such important none too easy task, it is not out of any desire to tilt at legislative authority and a crusader's spirit, but in discharge of duty plainly laid upon them by the Constitution. This is specially true as regards the fundamental rights as to which the Court has been assigned the role of sentinel on the *qui vive."*

The judiciary is rightfully treated as the guardian of fundamental rights of the people of our diverse country with multitude of wants cropping from plural communities. In relation to the interpretation of statutes, courts have a positive role to play. If a section yields two different interpretations, that which leads to an arbitrary or shockingly unreasonable result has to be eschewed; If an interpretation is such that it will expose the enactment to a distinct peril of invalidation as offending a constitutional provision, the courts would be fully justified in reading down the provision and giving it an interpretation consistent with its constitutionality; Even the courts, without much of enthusiastic exuberance of judicial activism, can bring about just results by a meaningful interpretation[13]. Our Constitution does not expressly encompass provision relating to "judicial activism" yet it is present in our judicial ideals. Judicial activism reflects the situation when the judiciary comes out of its sphere of traditional rote and becomes active in its working while laying down the policies and programs to ensure the protection of rights and liberties of the people which otherwise is within the discretion of the executive and the legislature[14]. Through this concept of judicial activism, the apex court of India has brought forward noteworthy precedents embracing the lives of citizens of this country. Hegemony of legislature and judiciary is duly checked by way of these two noble concepts of judicial review and judicial activism.

The court has exercised its activism in the field of personal laws as well, especially in the recent times and has done away with barbaric practices like triple talaqin light of equal rights of Muslim women of India, which will be elaborately dealt with in the foregoing section.

Rationale OfSupreme Court Of India In Deciding Validity Of Matrimonial Laws

13Bindra N.S., INTERPRETATION OF STATUTES 3 (Amit Dhanda ed., Lexis Nexis 2017) (1997).

[14] M. Semwal and Sunil Khosla, *JUDICIAL ACTIVISM*, 69 The Indian Journal of Political Science, 113, 113- 126 (2008)

Matrimonial laws are a subset of the broad scheme of personal laws. The rules pertaining to marriage such as solemnization of marriage, maintenance, divorce amongst other concomitant issues are different for various religions. This section will explore the reasoning of High Courts and Supreme Court in deciding cases such as *State of Bombay v. Narsuappa Mali*, *Mohd. Ahmed Khan v. Shah Bano Begum* and the recent case of *ShayaraBano v. Union of India* also known as *Triple Talaq case.*

State of Bombay v. Narsuappa Mali AIR 1952 Bom 84

This case marked the beginning of filtration of oppressive rules which had housed themselves under the safety net of personal laws. Writ petition challenging the Prevention of Bigamous Marriage Act, 1952 which prevented a Hindu man from marrying another woman at the time when his spouse was living, was filed before the Bombay High Court on the ground that customs and usages which form part of personal laws cannot be encroached upon by Part III of the Constitution (Fundamental Rights). The court taking first of its liberal approaches in the personal law realm decided that the State had full power to prohibit polygamy even though it was then considered to be part of Hindu religious practice. This case gave fire to the torch which was carried on by Supreme Court in subsequent decisions touching the scope of personal laws, more specifically matrimonial laws in India. The Bombay High Court also held in this case that "the State can legislate with regard to social reform under Article 25(2)(b)[15] of the Constitution of India notwithstanding the fact that it may interfere with the right of a citizen to freely profess, practice and propagate religion". However, this case couldn't deliver much in comparison to what it promised. The judicial perception was that personal laws did not fall within its purview; scriptures and religious texts were not subject to judicial review, which was thereafter corrected by the Supreme Court in *Shah Bano Begum case*[16].

Mohd. Ahmed Khan Vs. Shah Bano Begum 1985 SCR(3) 844

[15] Article 25(2):
Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus
[16]SanghamitraPadhy, *Secularism and Justice: A Review of Indian Supreme Court Judgments*, 39 Econ Politic Wkly, 5027, 5027-5032 (2004)

In this milestone case, the Supreme court rightfully fulfilled its role as guardian of citizens and extended equity and justice to Muslim Women who have scant rights under the personal law. The major issues involved in the case were as follows:

1. Whether Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Criminal Procedure Code") is applicable upon Muslim women or not to which allows maintenance to wife. The word "wife" is not qualified by Hindu, Muslim, Christian etc. Hence, it applies to women of every religion equally. Policy of Section 125 of Criminal Procedure Code is to prevent vagrancy and destitution of women by giving them financial assistance and this policy is equally applicable upon Muslim women. Not applying section 125 of Criminal Procedure Code upon Muslim women would be unreasonable classification making the impugned section violate of equality enshrined under Article 14 of the Constitution.
2. Whether the period up to which maintenance is payable to Muslim women is up to remarriage or only up to Iddat to which the Supreme Court replied that being a secular provision, Section 125 of the Criminal Procedure Code will apply in its full force upon Muslim women also and just like the wives of other religion, a Muslim wife will get maintenance up to the time of her remarriage and not only Iddat. As regards the conflict between the statutory and personal law vis a vis period of maintenance, the Court held that there is no conflict and the harmony is already established. While Section 125 Criminal Procedure Code allows maintenance up to remarriage, Muslim law does not prohibit maintenance after Iddat. Section 125 of the Criminal Procedure Code being enabling provision will prevail over personal law which is not prohibited.
3. Whether there is any difference between Mehr and Nafaqa (maintenance) in reply of which the Supreme Court said that Dower (Mehr) and maintenance are two distinct concepts having fundamental difference as regards the origin, nature and purpose. Therefore, Dower and Maintenance are two separate duties of a Muslim husband to be fulfilled at two different times. Payment of Dower does not tantamount to payment of maintenance.

The Muslim Women (Protection of Rights on Divorce) Act, 1986

The Act of 1986 was enacted on the pretense of being a welfare legislation for Muslim women while in reality it was a cloak with ulterior motive to undo the effect of Shah Bano judgment. The Legislature recognized the distinction between Dower and maintenance by placing it under two different clauses of the Act namely Section 3(1)(a) and Section 3(1)(b) of the Act. As regards the applicability of Section 125 of the Criminal Procedure Code for Muslim women, the Act declared in Section 5 that Criminal Procedure Code is applicable subject to the joint petition by the husband. With respect to the period of maintenance, the Act intended to provide maintenance, the Act intended to provide maintenance only uptoIddat i.e. three months. This was on basis of interpretation of the word "within" as used in Section 3(1)(a) of the Act.

Daniel Latifi&Ors. Vs. Union of India (2001) 7 SCC 740

In this case the constitutional validity of The Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged. The Constitutional bench by its judicial wisdom and creative interpretation saved the validity of the law and brought it within the constitutional ambit. The Court held that the word "within" as used in Section 3(1)(a) of the impugned Act cannot be interpreted to mean that maintenance is to be paid "only for", "only during" or "not beyond Iddat"; rather it means that the provision for maintenance must start within Iddat but liability does not end there but it continues up to marriage. Such wide interpretation would serve the purpose of gender justice and would also keep the Act within the confines of the Constitution. As regards the rider in Section 5 in the journey of Muslim women under Section 125 of the Criminal Procedure Code, the Court held that now there is no distinction between Section 3 of the impugned Act and Section 125 of the Criminal Procedure Code because under both the provisions, maintenance is payable up to remarriage and proceedings would be conducted by the judicial magistrate of first class. The *Daniel Latifi* judgment restored the decision in *Shah Bano*'s case and reiterated the resolve of the Supreme Court to do justice whenever there occurs gross miscarriage of justice.

Triple Talaq Case

Shamim Ara Vs. State of Uttar Pradesh AIR 2002 SC 3551

In this case, the Supreme Court was made aware of the plight of Muslim women vis a vis triple Talaq which is pronounced by husband, many a times without the knowledge of his wife. The

Court held that Talaq brings along with it certain rights and duties such as duty to observe Iddat, right to obtain Mehr, maintenance etc. These rights and duties can be effectively fulfilled only when the Muslim wife is aware of Talaq. Hence, the husband must pronounce Talaq only after informing his wife about the same. The Court did not stop here and furthered the cause of justice for Muslim women to a greater extent by declaring that the husband must also prove that the divorce was necessitated by a justified cause i.e. Talaq can no longer be pronounced at the whims and fancies of the Muslim husband, rather he must prove some matrimonial guilt on part of the wife. The husband's burden of proof would also include his burden to prove his efforts at reconciliation i.e. divorce cannot be a decision of momentary passion. Hence, the Court did justice with the policy of preservation of marriages.

ShayaraBano v. Union of India 2017 SCC OnLine SC 963

The landmark triple talaq judgment sparked opinions, mostly of appreciation across nation. However, in the light of the aforementioned *Shamim Ara's* decision, it has to be noticed that the Supreme Court had already taken some measures vis a vis triple talaq. Although, some strong intervention was needed and the Supreme Court delivered on this front on 22nd August 2017. The court declared triple talaq unconstitutional by 3:2 majority on the ground that triple talaq is irrevocable and does not provide any ground for reconciliation between the parties; it vests arbitrary power in the hands of Muslim husbands who can at any time exercise their power and change the lives of their wives for worse on weakest of weak grounds. This practice was found violative of the Muslim women's fundamental right to equality and to a dignified life. Marriage is a sacred union which should be preserved to withstand storms and not break down owing to capricious logic. The Court also pointed out how personal laws are misinterpreted sometimes to the comfort of patriarchal authorities ruling the realm of personal laws to the extent that their misinformed interpretations diverge from the very ancient texts which are considered the sources of personal laws. Herein, the Court observed that talaq is described as sinful attracting wrath of God in the Hanafi school of Shariat law. The landmark judgment has given birth to the **Muslim Women (Protection of Rights on Marriage) Bill, 2017** which aims at prohibiting divorce by pronouncing triple talaq by criminalizing such act, but once again it remains ineffective till date owing to party politics, which is restraining the Bill from being passed by the Rajya Sabha. However, recently **Muslim Women(Protection of Rights on Marriage) Ordinance 2018** also

known as the *Triple TalaqOrdinance* was promulgated by the President of India and since then has been under lime light. Some critiques question the veracity of Centre's dedication towards the empowerment of Muslim Women; according to them when the Supreme Court has itself invalidated the practice of triple talaq it becomes inconsequential and therefore there is no need for penalty upon the same. Moreover, the ordinance entails three years imprisonment for any Muslim man who abandons his wife and renders her destitute by pronouncing triple talaq; three years imprisonment is also prescribed for offences under Section 304-A (Death by rash or negligent act), Section 148 (Rioting armed with deadly weapon) of the Indian Penal Code, 1860 which often makes many question if triple talaq can be placed on the same pedestal as these IPC offences. Every coin has two sides to it and even though Supreme Court had invalidated the practice of triple talaq it was still happening. A right without remedy is like a medicine without cure and therefore punishment carries with it deterring quotient preventing any Muslim man to pronounce triple talaq. Another societal evil that was brought forth by numerous newspaper articles was "kidney marriages", a practice undertaken by many Middle Eastern Sheikhs who would come to India for medical tourism; since Indian laws allow only relatives to donate kidney/ other organs, they would marry poor Muslim women, extract her kidney and disclaim her merely by uttering "talaq" three times. With criminal sanction provided by the *Triple Talaq Ordinance*, there can be a start to uproot these barbaric practices from our social fabric.

Hindu Marriage Act, 1951

Section 13(2) of the Hindu Marriage Act, 1951 provides for special ground of divorce to Hindu wife. The Section states that any bigamous marriage after 1955 is void ab initio if both the marriages are performed before 1955 and both the wives are alive at the time of petition i.e. right of divorce is given to both the wives. This clause is said to be a mastery of law in as far as it extends some relief against bigamy even to those women who suffered it before 1955 when there was no legal prohibition against it. However, this ground has lost its practical utility and has merely become a matter of academic discussion.

Conclusion

"... But ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fiber... While a unified code is imperative ... the first step should be to rationalize the personal law of the minorities to develop religious and cultural amity."

- *Sahai J.*

In the case of SarlaMudgal Vs. Union of India[17]

Article 44 of the Constitution of India which provides for Uniform Civil Code is commonly referred to as the community welfare charter. In a historic judgment of *SarlaMudgal (supra)*, the Supreme Court of India had directed the then Prime Minister Narsimha Rao to take fresh look at Article 44 of the Constitution which enjoins the State to secure a uniform civil code which accordingly to the Court was imperative for both protection of the oppressed and promotion of national unity and integrity[18]. However, there has not been much deliberation upon uniform civil laws specially in the context of matrimonial norms prevalent in varied forms in different religions. One of the main reason for such stagnant position of uniform matrimonial laws is the non-enforceable character of the Directive Principles of State Policy. I suggest even though rituals and traditions of every religion should be practiced as has been mandated in their respective personal laws, a line should be drawn between religious norms and inequality. Personal laws that oppress a particular sect of the community it regulates should be amended and immediate steps shall be taken in this respect. Leila Seth at the Smt. Renuka Ray Centenary Memorial Lecture on 4thJanuary, 2005 very rightly said,*"Now is the time to redeem the pledge of equality given to women of India and enshrined in the Constitution. I submit that the personal laws should conform to the fundamental rights of equality and if there is any conflict, equality should prevail."*

[17] (1995) 3 SCC 635

[18]Shukla V.N., THE CONSTITUTIONAL LAW OF INDIA 416, (Central Law Agency 49th ed. 2012).