

Gender Equality vis- a`-vis Personal Laws

Half of the Indian population are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.

Madhu Kishwar v State of Bihar¹

Contemporary India is a multicultural society that is pluralistic with regards to religious law. Different groups in India have separate religious personal laws which have generated gender inequality in India, since all religious personal laws, to various extents, give women fewer rights than men.²

While one's religion determines which law will apply to him or her regarding marriage, divorce, maintenance, guardianship, adoption, inheritance, and succession, a common thread woven through all of India's personal law systems is the patriarchal dominance of men.

Certain personal laws, especially of the Hindus, have been codified accompanied by certain amendments in light of the compulsions of modern times, while others continue to apply to the respective religious groups in their long-established, traditional forms.

Given the seemingly strong protections of gender equality in India's Constitution, it is puzzling that the Indian government can uphold facially discriminatory laws against women, especially when such laws affect women's lives so intimately.

¹ (1996) 5 SCC 145.

² Archana Parashar , 'Gender Inequality and Religious Personal laws in India' ,volume xiv, The Brown Journal of World Affairs, issue 2, Spring/Summer 2008, 103.

Colonial Regimes and Personal Laws

The British colonial government thought it fit to not interfere in the 'religious' matters of the 'natives' fearing antagonism³.

Colonial regimes generally did not attempt to abrogate personal status law or to introduce reforms aimed at promoting gender equality, as their interests lay in maintaining economic and social stability. The codification of personal laws undertaken by them often shaped the substantive content of the law in a manner that furthered colonial interests, reflected the gender ideologies of the colonial state itself, and formalized gender discrimination in religious practice.⁴

Successive Indian governments due to lack of political arising from the fear of offending electoral vote bank groups and backlash from religious communities have done the same so that in the present day, India has a complex system of personal laws despite a Constitutional directive to the Legislature to enact a uniform civil code⁵. The prevalence of personal laws in the country has had far-reaching ramifications in terms of its implications on the fundamental and human rights discourse of women.

Religious Laws and the Status of Women

Religious laws governing personal status do not merely affect women's standing within their religious communities; they also directly and indirectly condition their ability to exercise civil, political, economic, social and cultural rights guaranteed by international and national law in both public and private life.⁶

³Madhushala, 'Need for Uniform Civil Code in India: A human rights perspective' (13 Oct 2013)

<http://centreright.in/2011/10/need-for-uniform-civil-code-in-india-a-human-rights-perspective/> accessed 16 Feb 2016

⁴ Donna. J. Sullivan, 'Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution', 23 New York University Journal of International Law and Politics 795.

⁵ Art. 44 of the Indian Constitution.

For example, the maintenance laws for Muslim women as incorporated in the Muslim Women (Protection of Rights on Divorce) Act, 1986 have a provision according to which, if the husband cannot provide for the maintenance of the divorced wife, the relatives of the husband's wife have to pay her and if they cannot, then the woman should approach the wakf board. This helps the husband to desert his responsibilities while the woman wanders helplessly so as to access the other options available to her to make ends meet. No other religion has a provision similar to this one. Not only does a provision like the one mentioned above make a woman undergo hardships, it is also violative of Art.14 of the Constitution because divorced women of other religions have a right to get direct maintenance from their husbands. The husbands cannot escape the legal obligation to pay maintenance to their divorced wives. If we revisit history, we will realise how the Rajeev Gandhi government 'allegedly' enacted the Act for electoral 'vote bank politics'(so that the Muslim community is not displeased) thus compromising the rights of the Muslim women.

Gender Disparities

*SIGI*⁷ statistics for India⁸-

India stands at the **114th place out of 142** countries in the **Global Gender Gap Report**⁹ by the **World Economic Forum** with a score of 0.6455 (the lowest being 0 and the highest being 1). It includes parameters like discriminatory family code, son bias, restricted resources and assets, restricted civil liberties etc.

The systemic effects that gender discrimination in personal status law may have on women's equality, need to be examined, given the substantive breadth of the law, as well as its impact on women's ability to exercise specific rights as well as her basic fundamental and human rights.

Religion and the Scope of its Freedom

⁷ The SIGI captures and quantifies discriminatory social institutions like early marriage, inheritance, restricted access to productive resources.

⁸ Social Institutions And Gender Index< :<http://genderindex.org/rankinz>>accessed 16 Feb 2016

⁹World Economic Forum'Rankings< <http://reports.weforum.org/global-gender-gap-report-2014/rankings/>>accessed 16 Feb 2016

Religion functions, often simultaneously, on different levels: as faith, as a vehicle for social custom, as a mobilizing force in national and international political arenas, and as a medium of individual and collective identity. In order to assess the significance of a religious law or practice within a particular belief system, and its effects on women's equality, the religious law or practice must be viewed in the context of prevailing political, social and economic structures.

The genius of the Indian Constitution is its secular ambiguity-its unique feature of honouring religious sensitivities in a diverse religious scenario.

Article 25 of the Indian Constitution provides that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Article 29 provides for the protection of interests of minorities and their right to conservation of a distinct language, script or culture.

Religious Laws and Interpretation

The extent to which a particular interpretation of religious law is considered to be authoritative or aberrant, or a particular practice is deemed to have a legitimate foundation in religious law, does not determine whether constitutional guarantees of religious freedom are applicable. Those guarantees recognize all such interpretations (with the exception of spurious or fraudulent claims) as manifestations of religion.

The question of authenticity does, of course, have both strategic and substantive importance for those seeking to reform religious law or practice or to promote alternative interpretations.¹⁰

In states where religious law remains uncodified, regional and local custom may affect interpretations of the law.¹¹

¹⁰*Supra note 4.*

¹¹*Supra note 4*

Considering Muslim Law for instance, women's groups claim that Qur'an promotes gender equality and historically, Islam was a reformist movement that gave women the right to divorce, remarry and work. Muslim personal law is largely uncodified, and legal decisions are made by courts on the basis of the Qur'an and hadith. Organisations like the *All India Muslim Personal Law Board* and *Jamiat Ulema-e-Hind* have largely been criticized by women's groups for their retrograde views regarding women's rights who argue that since personal laws are uncodified, customary practices have superseded Qur'anic law.¹² Thus, it is claimed that it is not the Qur'an itself but the misinterpretation (deliberate or negligent), over the years of the Qur'an that has led to the discrimination against women.

e.g. 1. Islam strongly condemns talaq. The word biddat in talak-ul-biddat or triple talaq itself means disapproval, something the prophet never recommended. The measure was legitimized by Caliph Umer as an emergency measure.¹³

e.g. 2. According to the Dissolution of Muslim Marriages Act, 1939, a Muslim husband does not have to give any reason while divorcing his wife but a Muslim woman would have to give one of the limited number of available grounds while divorcing her husband. The Qur'an on the other hand, when interpreted correctly, restricts the power of the husband to divorce his wife arbitrarily. This has been discussed in detail later in this article when trying to recognise discriminatory provisions in various personal laws.

Gender equality and the Indian constitution

The principle of gender equality is enshrined in the Indian Constitution through various domains-

PREAMBLE

¹²Nayantara, 'Inside Islam: Dialogues and Debates, Challenging Misconceptions, Illuminating Diversity' A Collaboration of the UW-Madison's National Resource Centers and WPR's Here on Earth: Radio without Borders(12 June 2012)< <http://insideislam.wisc.edu/2012/06/muslim-women-in-india-seek-equal-rights-under-personal-law/>>accessed 16 Feb 2016

¹³ Lal Mohd 'Marriage and Divorce in Islam', Religious Tolerance.org, Ontario Consultants on Religious tolerance' (30 Jul 2007) <www.religius tolerance.org/mohd.htm>accessed 17 May 2016

The preamble which contains the quintessence of the constitution reflects clearly its aim to achieve equality between all its citizens irrespective of sex.

FUNDAMENTAL RIGHTS

Part III of the constitution deals with fundamental rights. They are human rights i.e. the inherent entitlement of every man, woman and child by the virtue of being human beings and have been made enforceable as constitutional or fundamental rights in India.

Article 14 provides for equality.

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”

Article 15 specifically prohibits discrimination on the ground of sex.

Art. 15 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Art. 15(3): Nothing in this Article shall prevent the state from making any special provision for women and children.

Article 16 provides for equality

Art. 16 (1) provides there shall be equality of opportunity for all citizens in matters relating to employment and Art.16(2) provides there shall be no discrimination on the basis of sex in respect of any employment or office under the state.

Article 21 provides for right to life which includes right to live with dignity.¹⁴

DIRECTIVE PRINCIPLES OF STATE POLICY:

Contained in Part IV of the Constitution, though these principles are not enforceable in any court of law, they are fundamental in the governance of the country and provide for the welfare of the people, including women¹⁵. They impose on the state a constitutional mandate to legislate according to these directives.

¹⁴ Maneka Gandhi v. Union of India(1987) 1SCC 248:AIR 1978 SC 597

¹⁵ Mamta Rao ,Law Relating To Women And Children, ,Second Edition, Eastern Book Company[2008]

Article 44 directs the State to secure for citizens a Uniform Civil Code applicable throughout the territory of India so as to have uniformity in the civil laws relating to family life.

FUNDAMENTAL DUTIES

Article 51(A) (e): To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of **women**.

According to **Articles 13 and 372**, any law in force at the time of coming into force of the Constitution of India or enacted after that which is in conflict with the chapter on fundamental rights will be void to that extent.

Freedom of Religion vs. Fundamental rights barring gender discrimination and ensuring equality

It is argued by Muslim organisations like the Muslim League that personal laws do not come within the purview of Article 13 of the Constitution. Moreover, personal laws cannot be tested in the light of the provisions of Part 3 of the Constitution, which guarantees fundamental rights.¹⁶ Further, the Constitution provides protection to personal laws under Article 29 (1), which guarantees protection of interests of minorities, including culture. Thus, their religion-based law relating to family matters is part of their culture and therefore the entire system of the family laws based on Islam is fully and completely protected under Articles 29(1) and 26(b) of the Constitution of India.¹⁷

Recognizing Discriminatory Provisions

Following are some of the various gender-discriminatory personal laws in different religions of India-

I. Discrimination in marriage laws

¹⁶ *Krishna Singh v. Mathura Ahir* (AIR 1980 SC 707) was relied upon.

¹⁷ 'Personal laws exempt from fundamental rights: Indian Union Muslim League' *The Times of India* (Kochi, 21 Feb 2014)
<<http://timesofindia.indiatimes.com/city/kochi/Personal-laws-exempt-from-fundamental-rights-Indian-Union-Muslim-League/articleshow/30761616.cms>>

A Muslim woman cannot marry any man who is not a Muslim. As to a man marrying a non-Muslim woman, while a Sunni Mohammedan may marry a non-Mohammedan if she is a Kitabia, a Shia Mohammedan cannot marry even a Kitabia.¹⁸

Polygamy

Muslim personal law permits polygamy. This is violative of Article 14 of the Constitution since the option of polygamy is available only to the men and not women.

This raises new questions such as whether it is formal or substantive equality that we are seeking. Formal equality would mean allowing Muslim women to marry four husbands as well whereas substantive equality would mean giving Muslim men the right to marry only once thus leading to equality between both Muslim men and women and Muslim women and the Indian women belonging to other religions.

Bigamy in Goa

A man in Goa may marry for the second time if the first wife does not bear a child till the age of 25 or if a male child is not born to her till the age of 30.¹⁹

Articles 3 and 4 of the section concerning the Hindus in the Portuguese Civil Code as made effective under the Family Laws of Goa, Daman and Diu can be referred to.

Unilateral talaq

Any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he desires, without assigning any cause. A man can divorce his wife by saying the word talaq three times (triple talaq). He may take the wife back after the first two times for reconciliation but once he says the word 'talaq' three times, they cannot get back together until the woman marries someone else. The woman is divorced on the pronouncement of the word 'talaq'

¹⁸ Professor Kusum, Family Law Lectures, Family Law I, (Third Edition, Lexis Nexis, Butterworths Wadhwa, Nagpur 2011)349

¹⁹ FPJ (Free Press Journal) Bureau 'Bigamy allowed in Goa, says a UN study' (Nov 17m2013) <<http://www.freepressjournal.in/bigamy-allowed-in-go-a-says-a-un-study/254150>> accessed 14 Feb 2016

thrice. There could be a waiting period involved between the three talaqs if Quran (65:1) is referred. Shias practice a compulsory iddat waiting period where the couple tries to reconcile their differences with the help of mediators from each family.

A talaq pronounced under compulsion or intoxication or fraud is also effective under Sunni law but void under Shia law²⁰. Talaq can be given without recourse to the court and even in the absence of the wife, by simply pronouncing the formula of repudiation.

Muslim law also entitles the woman to ask for a divorce under certain restricted circumstances. The Dissolution of Muslim Marriages Act, 1939 allows a wife to obtain a divorce through the intervention of a judge, before whom she must establish one of a limited number of acceptable bases for divorce. This again is violative of Article 14 as the man does not have to assign any reason for divorce as against a woman who has only a limited number of grounds. The very fact that the men have arbitrary power for talaq is gravely unfair to women.

However, on reinterpreting the Quran,

"The Mohammed restrained the power of divorce possessed by the husbands and practically forbid its exercise by the men without the intervention of arbiters or a judge²¹. Thus, it is claimed that problem of discrimination lies with the misinterpretation of the Quran.

Muslim women too have the right to seek dissolution of marriage under the system of *khula*, but this right is very rarely invoked for the simple reason that her seeking divorce would completely deprive her of whatever she may get from her husband, most importantly, a place to live. This in itself is a great disincentive.²² Also, in *khula*, the husband has to accept the offer for divorce.²³

²⁰ Professor Kusum, Family Law Lectures, Family Law I, (Third Edition, Lexis Nexis, Butterworths Wadhwa, Nagpur 2011)356

²¹ Syed Ameer Ali, member of the Judicial Committee of the Privy Council "Mahommedan Law" (5th edition) 572

²² A.S.Parveen Akthar vs. The Union Of India (MANU/TN/2472/2002)

²³ "Personal laws exempt from fundamental rights: Indian Union Muslim League" *The Times of India* (Kochi, 21 Feb 2014)

In *A.S.Parveen Akthar vs. The Union Of India*²⁴, a writ petition was filed, asking for a declaration of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 in so far as it seeks to recognise and validate Talaq-ul-Biddat form of divorce as void and unconstitutional as it was grossly injurious to the human rights of the married Muslim women and offends Articles 14, 15 and 21 of the Constitution.

After considering a number of cases²⁵, it was held in the case of *Jiauddin Ahmed vs. Anwara Begum*, (1981) 1 GLR 358, that the divorce must be for a reasonable cause, and must be preceded by an attempt for reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his side.

Referring to S.2, it was held that it, in whole or in part, cannot, having regard to the decisions of the apex Court²⁶, be declared as void or unconstitutional by reason of any inconsistency with Part III of the Constitution.

In other case laws, however, it has also been held that a mere pronouncement of talaq by the husband was not sufficient for a divorce. The preconditions of arbitration for reconciliation and reasons for talaq needed to be satisfied by the husband²⁷ The factum of divorce is required to be proved, including the conditions precedent therefore by evidence both oral and documentary, when the same is disputed by the wife before a competent Court of law.²⁸

²⁴MANU/TN/2472/2002

²⁵ *Zeenat Fatema Rashid vs. Md. Iqbal Anwar*, 1993 (2) Crimes 853; *Sarabai vs. Rabiabai*, ILR 30 Bom. 537; [Asha Bibi vs. Kadi Ibrahim](#), ILR 33 Madras 22;

²⁶ AWAG(1997-3 SCC 573);*Krishna Singh vs. Mathura Ahira*(AIR 1980 SC 707)

²⁷ *Dagdu S/O Chotu Pathan, Latur vs. Rahimbi Dagdu Pathan, Ashabi* (2003 (1) Bom CR 740), the verdict will be binding on the State of Maharashtra and have persuasive value for other States as well.

²⁸ *ibid.*

Many nations such as Tunisia, Algeria, Iraq, Iran, Turkey have banned triple talaq. India still permits it.²⁹

II. Inheritance and succession

In societies where land is the principal economic resource, disabilities in inheritance and succession deeply impact women.

Bina Agarwal in *“Who Sow? Who Reaps? Women and Land Rights in India,* “explains how studies suggest that in India access to even marginal landholdings can significantly reduce the risk of absolute poverty and land access provides not only direct production resources, but also indirect benefits, such as enhanced access to credit from institutions or private moneylenders and reduced risk of unemployment.

The level of poverty among women has been linked to their degree of direct access to land and other economic resources, as well as to their indirect access to those resources through male family members.

The Hindu Succession (Amendment) Act, 2005

Right to Partition of Dwelling House by a Female Heir: S. 23, HSA, was omitted by the 2005 amendment. With the amendment daughters, married or unmarried, will have equal rights along with sons to reside in and claim partition in the dwelling house.

Existing Discriminatory Provisions:

Ss. 8 to 13 deal with rules regarding Hindu males whereas Ss.14 to 16 lay down rules regarding Hindu females .Following is the gender discrimination that follows:

1. The presence of different rules for succession is in itself a contradiction to equality under Art.14.

²⁹ Lal Mohd ‘Marriage and Divorce in Islam’, Religious Tolerance.org, Ontario Consultants on Religious tolerance’ (30 Jul 2007) <www.religius tolerance.org/mohd.htm>accessed 17 May 2016

2. According to **S.15 (1)** of the Act, property of a Hindu female intestate devolves firstly upon sons, daughters and husband.

In case of males, mother of the intestate categorised as Class I heir, inherits equally with the children and wife of the deceased son. Presence of children and husband excludes mother from inheriting property of her daughter.

3. According to **S.15 (2)**, in the absence of children or children of predeceased child, the property would devolve upon her father's heirs or husband's heirs based on the source of acquisition i.e. if the property is acquired from her parents then the father's heirs possess the right to inherit the property and if the property is acquired from her husband or her father-in-law, the property would devolve upon the heirs of the husband.

The **source of acquisition** is '**not relevant**' for **males**.

4. The property of a Hindu woman dying intestate will devolve first upon her children and husband. And after that, upon the heirs of her husband, before her own family.

In case of self acquired property, **S.15(1)(b)** puts heirs of the husband ahead of her father's heirs as in **(1)(d)** and mother's heirs as in **(1)(e)**.

Thus, there is a possibility that her in-laws might inherit over her own parents.

When the wife was thrown out of the matrimonial home after unfortunate death of her husband by her in-laws, she acquired considerable wealth through her job and lived along with her parents. Later she died intestate. Her mother and her in-laws filed for grant of a succession certificate under **S.372, Indian Succession Act**. The Supreme Court held that in case the intestate woman dies issueless, the heirs of her husband would be given preference over her parents.³⁰

Discrimination against Men:

1. **Father is a Class II heir, his wife a Class I heir**: Son of predeceased son of a predeceased daughter and son of a predeceased daughter of a predeceased son are in Class II whereas by

³⁰ Om Prakash v. Radha Charanthe (1 (2009)15 SCC 66)

virtue of the 2005 amendment daughter of a predeceased son of a predeceased daughter and daughter of a predeceased daughter of a predeceased son are elevated to Class I.

According to a recommendation by the **204th Law Commission** report, the father should be elevated to Class I heir as he should be given the right of inheritance like a mother.³¹

Discrimination v. Injustice

Professor S. P. Sathe in his "*Gender, Constitution and the Courts-in Engineering Law-Essays in Honour of Lotika Sarkar*" emphasized on how gender equality has always eluded the constitutional provisions of equality before the law or the equal protection of law as equality is supposed to be amongst equals and since men and women cannot be conceded at an equal platform, looking at the present scenario, gender equality does not seem to be a legally forbidden inequality. Thus, there might be positive discrimination with the object of achieving justice. However, this discrimination has to have a **rational basis**.

Section 10, Rule 4, HSA, 1956

(i) It allows widow of predeceased son of the Karta to inherit but excludes widower of predeceased daughter.

(ii) Wives have been given property share from their matrimonial side whereas this is not the case with husband.

If or not there is a '**rational basis**' for this discrimination would be **debatable**.

III. MAINTENANCE

In *Mohd Ahmed Khan v. Shah Bano Begum*³², it was held that divorced Muslim women had the right to maintenance even after the *iddat* period was over.

³² AIR 1985 SC 945(1985) 2 SCC 556

The Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted to nullify the *Shah Bano* judgement. It provided that u/s. 3(1) (a) a divorced woman is entitled to reasonable and fair provision and maintenance within the iddat period.

Later, it was held in **Daniel Latifi v. Union of India**³³ that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only.

Critical Analysis:

1. **S.125 of the CrPC** is a provision for women belonging to all religions and exclusion of Muslim women (when husband does not consent) violates Arts.14, 15 and 21 as according to S.5 of the Act a Muslim woman has remedy under S.125 CrPC only with the consent of the husband. Which Muslim husband would like to go through the rigours of the CrPC (Ss.125-128) when he can be governed by a much easier Muslim law? Hindu women have the right to maintenance under the **Hindu Adoptions and Maintenance Act, 1956** and the **Hindu Marriage Act,1955** which in no way bars her right under S.125, CrPC.

2. The Act does not apply to the **deserted and separated** Muslim wives.

3. **S.4** makes the relatives of the divorced women or the state Wakf Board responsible for maintenance in case of failure to pay by the husband. It is quite improbable she would get sustenance from a third party to the marriage. Also, the waqf board themselves are usually perennially starved.

IV. Guardianship

S.6 (a) of the Hindu Minority and Guardianship Act, 1956 clearly states that the mother, after the father would be the minor's guardian. Though it was established in *Githa Hariharan v. Reserve Bank of India* (1999 2 SCC 228) that it would be interpreted as the mother being the guardian in the absence of the father, the discrimination still remains as the mother and the father don't have equal status as guardians and the provision should be amended deleting the very use of the word 'after'.

³³ (2001 7 SCC 740).

STATE RESPONSIBILITY, JUDICIAL RESPONSE, THE ROAD AHEAD

The Supreme Court has taken differing views while dealing with personal laws. In a number of cases it has held that personal laws of parties are not susceptible to Part III of the Constitution dealing with fundamental rights. Therefore they cannot be challenged as being in violation of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India³⁴.

There also have been cases where the Supreme Court has considered fundamental rights while determining the validity of personal laws and has either struck them down or interpreted them in a way as to maintain their consistency with fundamental rights³⁵.

There is however, no uniformity of decisions as to whether personal laws can be challenged on the touchstone of fundamental rights i.e. whether they are "laws" or "laws in force" under Article 13 of the Constitution of India.

However, a three-Judge Bench of the Supreme Court has taken a contrary view and has held that personal laws to the extent that they are in violation of the fundamental rights are void³⁶.

The Bombay High Court in the case of Narsu Appa Mali held that personal laws are not susceptible to the Chapter on fundamental rights for the following reasons:

- Personal laws are not 'laws' under Articles 13 and 372 of the Constitution
- Personal laws are not 'laws in force' under Articles 13 and 372 of the Constitution

Personal Laws are Laws

(a) Article 13(3) as well as Article 372 of the Constitution defines "law" to include "any Ordinance, order, by law, rule, regulation, notification, custom or usage having in the territory of India the force of law".

³⁴ *Krishna Singh v. Mathura Ahir* (AIR 1980 SC 707) ; *Maharshi Avdresh v. Union of India* (1994 Supp (1) SCC 713) ;
Ahmedabad Women Action Group & Ors. v. Union of India (1997 3 SCC 573)

³⁵ (a) *Anil Kumar Mhasi v. Union of India* (1994 5 SCC 704) ; *Madhu Kishwar V. State of Bihar* (1996 5 SCC 125);

³⁶ *Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* (1996 8 SCC 525)

(i). "Personal laws" include both codified and uncodified laws. To the extent that personal laws include codified laws there cannot be any dispute that such laws are "laws" under Articles 13 and 372. Whether before or after the Constitution, such laws have been enacted by the then existing sovereign and they continue to be in force even on the change of the sovereign unless they are repealed or treated as void under Article 13 of the Constitution.

(ii) The SC has observed that "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."³⁷

(iii) In the case of *Sant Ram v. Labh Singh* (AIR 1965 SC 314) a Constitutional Bench of this Court observed: "The reasons given by the Supreme Court to hold statute law void apply equally to a custom. Custom as such is affected by Part III of the Constitution dealing with fundamental rights..."

(iv) In the same case the court further observed: "Custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force."

Personal Laws as Laws in Force

Once personal laws are recognised as "laws" under Article 13 of the Constitution of India at least those codified laws which have come into existence after 1950 would in any way be subject to fundamental rights like any other law. The only other question would be regarding those personal laws which have existed prior to the coming into force of the Constitution. If personal laws are 'laws' as commonly defined there is no justification for treating them as not "laws in force" merely because they were in existence at the time of coming into force of the Constitution.

Thus for all practical purposes these laws were laws in force in the territory of India immediately before the commencement of this constitution. Consequently to the extent that they were inconsistent with the provisions of Part III of the Constitution they were to be treated as void.

³⁷ *Narsingh Pratap Deo v. State of Orissa* (AIR 1964 SC 1793)

International Law

The general prohibition of gender discrimination, and the companion principle of gender equality, are grounded in the United Nations Charter, the Universal Declaration of Human Rights and in the International Covenants on Human Rights and are elaborated in the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).

It requires states parties to ensure the equality of men and women in all matters relating to marriage and family relations, including rights and responsibilities during marriage and at its dissolution and also in matters of social and cultural life.

While India ratified the CEDAW, it has acceded to the covenants. The state has an obligation to inculcate and implement in the domestic jurisprudence gender neutral laws so as to prohibit discrimination against women.

Conclusion

Some antiquated provisions are discriminatory towards women as they do not test personal laws for their conformity with principles of egalitarianism that are the touchstones of our Constitution as well as international declarations/agreements to which India is a party³⁸.

Most of them are not sanctified by any religion. Even if they are, they would still not be protected by the fundamental right of religion guaranteed under Part III. Article 25 itself provides that the fundamental right of religion is subject to other provisions of Part III.

Thus looked at from any angle the discriminatory measures have to be struck down as being unconstitutional. As regards the demand for a Uniform Civil Code to tackle the

³⁸*Supra note 3*

discriminatory provisions in personal laws, the author is not in favour of the same as the beauty of culture and religion is in its intricacies, originality and uniqueness. A common code might make the laws get rid of their very reason for existence, their essence and the religious origin that they have. Discriminatory provisions can be tackled by striking them down or making suitable modifications. Nevertheless, we need to revisit freedom of religion and personal laws from the perspective of equality and liberty.