

# Constitutional Challenges, Communal Hues and Reforms within Personal Laws\*

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## **i. The Political Location of Personal Laws**

The debate around the diverse ‘personal laws’ and the enactment of a uniform family code (more commonly referred to as the Uniform Civil Code or ‘UCC’) reflects the tension between two Constitutional guarantees, that of equality and non-discrimination (Articles 14-15) and of religious freedom and cultural plurality (Articles 25-28). While the mandate for enacting a UCC (Article 44 of the Constitution) is a directive principle of state policy, equality and protection of minority culture are justiciable fundamental rights. It is within this scheme of seemingly conflicting Constitutional claims that one needs to examine the challenges to discriminatory personal laws. This essay aims to explore the complex terrain of gender justice and legal pluralism within a communally vitiated political climate.

Though the term ‘personal laws’ is popularly applied to the regime of family laws, its sphere is wider and includes management and administration of religious institutions, trusts and shrines. Governing family relationships and religious practices in accordance with the culture and religious beliefs of the people is a tradition the Indian state inherited from the colonial regime and which they, in turn, had inherited from the Moghul rulers. Both the Moghuls and the British believed that it is easier to govern people if the realm of the ‘sacred and the private’ are left to self regulating groups.

The term ‘personal laws’ encompasses within it, the scriptural mandates, customary practices and state enactments. Although the British rulers presumed that all personal laws are religiously ordained, this presumption is not valid. Contrary to popular belief, this is a dynamic terrain which is shaped and moulded constantly through evolution in community practices brought about through socio-economic and political changes, court interventions and state enactments.

## **ii. Contested Terrain of Legal Pluralism versus Legal Universalism**

Though the Constitution framed at the dawn of a new sovereign state is viewed as a marker of the political break from its colonial past, it is shaped by the political concerns of the period. Framed in the aftermath of the Second World War and human rights violations by State governments, the Indian Constitution enshrined within it the principles of individual freedom and protection against state violations. At another level, the new nation emerged out of the bloodiest of communal violence and in the wake of an insecure minority who needed an assurance from the new nation. Viewed in this context, the Constitution does not signify a break with the past but a continuous

engagement with the concerns that it had inherited from the earlier regime and the wider political concerns of the period.

Hence the Constitutional Assembly Debates around the enactment of a UCC are framed within the dynamism between group identity and individual rights - multiculturalism and legal pluralism at one end and legal universalism and citizenship claims at the other. At this historical juncture of India's freedom, the overarching concern of the founding fathers was formation of the new nation state and its smooth governance. Within this paradigm, the provision of a UCC was debated primarily in the context of the authority of the state to regulate civil life and family relationships of its citizens and the right of minorities to their cultural identity.

An insecure and defensive Muslim minority had to be reassured of their right to religious and cultural freedom within the new democracy to be governed by majority dictates. What emerges here is a duality of concerns for the newly evolving Indian State. At one level, it was deemed necessary that the various sects, castes and tribes of the vast majority - from the erstwhile Princely States, territories under the control of various tribes and the British Raj - be integrated as one community by enacting a uniform set of family laws, by introducing a concept of 'legal Hinduism'. The flip side of this objective of smooth governance was an assurance to minorities (not just Muslim, but also Christian and Parsee) of their separate religious and cultural identity symbolised by the continuance of their personal laws.

### **iii. Creation of Legal Hinduism**

Gender equality and women's rights were not the focus at that point of time. The debate around women's rights within family laws was fore-grounded later, during the enactment of the Hindu Code Bill in the fifties. We need to examine the debate around the Hindu Code Bill in the Context of the mandate of equality and non-discrimination (Art.14-15) and the provision for the enactment of a UCC (Art.44). A special code for Hindus notionally violated both these principles. The process was validated on the basis that it was expedient to grant Hindu women property rights since they lagged far behind the women from other minority communities in this respect.

But while this was the stated objective, there was an underlying objective. The reforms need to be viewed within the paradigm of nation building. The overarching concern here was for homogenizing the culturally diverse Hindu community through a uniform set of state regulated enactments rather than bringing in gender equality. So though the plank on which the campaign for reforms was mounted was women's rights, gender equality was not its primary objective and several principles of gender justice which were the stumbling block for reforms were compromised to push through the state agenda of reforms in Hindu law.

One important principle that was compromised was the retention of Hindu Joint Family (HUF) property system through which a Hindu male gets rights in the ancestral family

property by birth. This was done to appease the stalwarts who vociferously opposed granting women equal inheritance rights and women's right to inheritance was limited to self acquired property of their father. But even this much trumpeted right was further subverted by surreptitiously granting Hindu men the right to will away the property. The protective restraint against bequests under the Islamic law to safeguard women's rights, did not find a place in the codified Hindu law, since the Hindu law was remoulded on the English model of exclusive and absolute rights to the individual. Hence women's rights of maintenance and inheritance were rendered transient and illusory.

To cite another example, although the Hindu Marriage Act introduced divorce, the act did not provide for any economic security of the divorced woman except the right of meagre maintenance dole with a rider of sexual purity. The large scale destitution of Hindu woman after divorce in the post reform phase seemed as though the Hindu woman had bartered her right of residence and economic security, to the right of divorce and consequent destitution. The principle of monogamy, which was modeled on the Western and Christian doctrine was not suited to the cultural conditions of a custom ridden, pluralistic Hindu society. So at one level the law was ineffective in curbing polygamy, but conversely it strengthened the patriarchal base by depriving women in informal relationships of their customary rights.

To sum up, the Hindu law reforms of the post Constitution period were neither 'secular' nor 'gender just'. In the post Constitutional era, this was the first instance, where the State moved away from its mandate enshrined within the directive principles of enacting a uniform civil code for its citizens. But the reforms have never been viewed within this paradigm of endorsing the culture of legal pluralism. Since the Hindu laws governing family relationship lagged behind the laws of all other communities, the reforms were projected as imperative to salvage women from the bondage of discriminatory religious and cultural practices.

Although the reformed Hindu law is projected as the ideal piece of legislation which liberated Hindu women, the underlying motive of the reform was consolidating the powers of the state and building an integrated nation. This crucial objective could be achieved only by diluting women's rights to arrive at a level of minimum consensus so that the agenda of reform could be effected without much opposition. Several customary rights were sacrificed to arrive at uniformity. The statutes which were finally enacted were more ornamental rather than genuine and concrete efforts of rectifying the gender discrimination written into the Hindu law.

#### **iv. The Communally Tinted Clarion Call for a UCC**

Despite this social reality and legal history, the call for a Uniform Civil Code came to be framed within the context of the personal laws of the Muslims. The shadow of partition continued to haunt the independent nation which was ravaged periodically by communal violence. The Nehruvian model of a modern, democratic and secular nation state was dented by periodic communal strife and the Hindu and Muslim communities continued

to be constructed within polarized oppositions. It is against this backdrop of rising communal tension, the Muslim law, which was until then perceived as more modern and advanced in terms of women's rights began to be viewed as obscurantist and anti-women. [The earlier view that Muslim law is more favourable to women was based on the fact the Muslim women were entitled to property inheritance and Muslim women were granted the right of a judicial dissolution of marriage nearly two decades prior to Hindu women acquiring similar rights.]

The call for a UCC and the adverse comments on Islam contained in the *Shahbano*<sup>1</sup> judgement must be viewed within this background. The demand for a UCC was endorsed not only by the Hindu right wing but also by the secular polity and women's rights groups and was governed by three distinct undertones i.e. gender equality, national integration and concepts of modernity imbedded within notions of middle class morality. The secular / women's rights groups projected UCC as a magic wand which would ameliorate the woes and sufferings of Indian women in general and Muslim women in particular. This formulation placed gender as a neutral terrain, distanced from contemporary political processes. Minority women were projected as lacking a voice and an agency either within their community structures or through litigation processes to enforce their basic human rights.

At another level, for the liberal, modern, English educated, middle classes, the demand is laden with a moral undertone of abolishing polygamy and other 'barbaric' customs of the minorities and extending to them the egalitarian code of the 'enlightened majority'. This position relies upon the western model of liberal democracy and scorns simultaneous sexual relationships in the nature of polygamous marriages in the name of modernity but at the same time, endorses sequential plurality of sexual relationships (through frequent divorces). Within a communally vitiated political climate, the demand also voices concerns of 'national integration' and 'communal harmony'.

When the controversy around the enactment of the *Muslim Women (Protection of Rights of Divorce) Act, 1986* (MWA) was raging in the post *Shahbano* phase, the media projected two insular and mutually exclusive positions i.e. those who opposed the Bill and supported the demand for a UCC as modern, secular and rational, and those opposing the UCC as fundamentalist, orthodox, male chauvinist, communal and obscurantist. To be progressive, modern and secular was also to be nationalist and conversely the opposing faction could be labeled as anti-national. As the controversy escalated, the Muslim was defined as the other, both of the nation and of the Hindus. Muslims, in turn could be mobilised to view this as yet another threat to their tenuous security. Huge mobs of Muslims, including women, walked the street to denounce the judgement and to demand the enactment of MWA. The rigid approach of the Muslim leadership provided further fuel to the Hindu right wing forces in their anti-Muslim propaganda.

It is interesting to note that no matter what the core issue litigated before the apex court, the comments regarding the enactment of a UCC are always made in reference to

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<sup>1</sup> *Mohd. Ahmad Khan v Shahbano Begum* AIR 1985 SC 945

‘national integration’, and either a veiled or direct insinuation against Muslim law, thus creating a fiction that Hindus are governed by secular, egalitarian and gender just family code and it was high time that this code was extended to Muslims to usher in modernity and gender equality among them. The duality of the apex court gets affirmed when we examine the constitutional challenges to archaic provisions under the Hindu law. For instance, when in 1984, the Delhi High Court affirmed an archaic provision of restitution of conjugal rights under Hindu Marriage Law which was challenged on the basis that it violates the provision of equality under Art.14 and freedom under Art. 21, not only was there no mention of a UCC and ‘national integration’ but the court went further and ruled:

*“Introduction of constitutional law in the home is most inappropriate.; It is like pushing a bull into a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Art. 21 nor Art. 14 have any place.”*<sup>2</sup>

Later in the same year, the Supreme Court affirmed this decision in *Saroj Rani*<sup>3</sup> and overruled the Andhra Pradesh ruling which had struck down this provision as unconstitutional.<sup>4</sup>

In the two decades since the *Shahbano* ruling the ground realities have changed substantially. The demolition of the Babri Masjid, the rise of the Hindu right-wing, the attacks on Christians, the gruesome sexual violence upon Muslim women during the Gujarat carnage etc. have all been factors that have necessitated a re-examination of the earlier call for a UCC, ostensibly to secure the rights of minority women. Many secular / human rights organisations and some women’s groups no longer support this demand.

Despite this, the polarization in the media continues. Every time the Supreme Court makes a comment, what one sees in the media are images of purdah clad Muslim women and opinions of Muslim religious leaders opposing the demand. Many times in the media reporting, the core issues litigated before the Supreme Court is blurred and the call for a UCC is projected as a pronouncement against the Muslim minority.

For instance, the judgement pronounced by Chief Justice V. N. Khare in the John Vallamattom’s case<sup>5</sup> in August, 2003 concerned a Christian priest’s personal freedom to make a bequest of religious-charitable nature. While examining the Constitutional validity of S.118 of the Indian Succession Act, the Supreme Court ruled: “A *charitable disposition of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to the mankind has specifically been acknowledged not only in different religious texts but also in different statutes. Charitable purposes are philanthropic and since a person's freedom to dispose*

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<sup>2</sup> *Harvinder Kaur v Harminder Singh* AIR 1984 Del 66

<sup>3</sup> *Saroj Rani v Sudarshan* AIR 1984 SC 1562

<sup>4</sup> *T. Sareetha v T. Venkatasubbiah* AIR 1983 AP 356

<sup>5</sup> *John Vallamattom v Union of India* AIR 2003 SC 2902

*of property for such purposes has nothing to do with religious influence, the impugned provision treating bequests for both religious and charitable purposes is discriminatory and violative of Article 14 of the Constitution. Once it is held that the underlying purpose for enacting the said provision was merely to thwart influence exercised by people professing religion resulting in death-bed disposition, having regard to the fact that such a contingency has adequately been taken care in other provisions under the Act, the purpose and object of the Act must be held to be non-existent.”*

Based on this reasoning, the Supreme Court struck down S. 118 of the Indian Succession Act as being unreasonable, arbitrary and discriminatory and, therefore, violative of Article 14 of the Constitution. While striking down the provision, the Court also relied upon the *Declaration on the Right to Development* adopted by the World Conference on Human Rights of which India is a signatory and on Article 18 of the *United Nations Covenant on Civil and Political Rights*, 1966 which provides as follows: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief or belief in worship, observance, practice and teaching. Freedom to manifest ones own religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others."

As one can observe from these discussions, the question before the court was not of gender justice or national integration, but that of personal freedom of a Christian Priest. Contrary to popular belief, through this Petition, the Petitioner-Priest sought to protect his right of religion freedom and the right to follow the dictates of one's religion. While defending cultural plurality of belief, worship and practice by invoking the *United Nations Covenant on Civil and Political Rights*, 1966, the court ruled in favour of religious minorities, by upholding their right of religious-charitable bequests. The court held that violation of this right amount to discrimination under Article 14 of the Constitution.

But a stray and uncalled for comment regarding the UCC helped the media to convert a judgement in defense of personal freedoms and cultural plurality into one in defense of UCC and hence, anti-minority. Ironically, the next day and through the weeks that followed, the news papers were flooded with reports and editorials on UCC with quotes from Muslim religious leadership and Muslim intelligentsia on one end and women's rights activists at the other, while the judgement itself was of relevant neither to the Muslim identity nor women's rights.

Similarly in the *Sarla Mudgal* of 1995<sup>6</sup>, the core issue before the court was conversion and bigamy by Hindu men. Here again, neither Muslim law nor rights of Muslim women were issues before the court. The court was examining the rights of two Hindu wives and the validity of two marriages by a bigamous Hindu husband – the prior one under the Hindu law and the subsequent one contracted after a fraudulent conversion to

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<sup>6</sup> *Sarla Mudgal v Union of India* (1995) 3 SCC 635

Islam. Despite this, the parties to the litigation were all Hindus and continued to be so. But unfortunately, the judgement and the media publicity that followed focused primarily on UCC in the context of nation, national integration and minority identity. The Court commented: "*Since Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a common civil code for the whole of India. ... Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be only one Nation, the Indian Nation and no community could claim to remain a separate entity on the basis of religion. In this view of the matter no community can oppose the introduction of common civil code for all citizens in the territory of India.*"

But the norm of monogamy of the Hindu society, which was the issue under scrutiny before the apex court, escaped all public debate. The spotlight was turned on polygamy of Muslim men and the plight of Muslim women and solution offered to liberate Muslim women was the immediate enforcement of a UCC. There was also a hint that the uniform code would render Hindu marriages more stable by curbing the bigamous tendencies of Hindu men. A reading of the judgement seemed to indicate that the only breach of monogamy among Hindus was by conversion to Islam. To quote from the judgement, "....there is an open inducement to a Hindu husband, who wants to enter into a second marriage to become a Muslim..."

#### **v. Revisiting Shahbano and the controversial Muslim Women's Act**

Of the three judgements by the apex court which advocated an UCC in recent times, *Shahbano* alone had an aggrieved Muslim woman at its core. And this controversy warrants a re-evaluation in the light of subsequent developments. The facts of the *Shahbano* judgement, Two significant decisions of the Supreme Court delivered by Justice Krishna Iyer in 1979 and 1980 in *Bai Tahira*<sup>7</sup> and *Fuzlununbi*<sup>8</sup> had placed the divorced Muslim woman's right of maintenance under this provision upon a secure footing without arousing a political controversy.

The unwarranted comments evoked a communal backlash. Relenting to the pressure exerted by the Muslim orthodoxy, the government introduced the Muslim Women's Bill which sought to exclude divorced Muslim women from the purview of S.125 Cr.PC. This move by the ruling Congress led by Rajiv Gandhi, came to be projected as the most glaring instance of the defeat of the principle of gender justice for the Indian women as well as the defeat of secular principles within the Indian polity.

Ironically, the fury which was whipped up, seemed to be divorced from the core component of the controversy, a paltry sum of Rs.179 per month, far too inadequate to save the 73 year old ex-wife of a successful Kanpur-based lawyer, from vagrancy and

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<sup>7</sup> *Bai Tahira v Ali Hussain Fidaalli Chothia and Anr.* AIR 1979 SC362

<sup>8</sup> *Fuzlunbiv V Khader Vali* AIR 1980 SC 1730

penury . The raging controversy and the communal turn of events finally led Shahbano herself to make a public declaration renouncing her claim, strengthening the popular misconception that Islam subverts economic rights of women. If this entitlement was against her religion, she declared, she would rather be a devout Muslim than claim her right of maintenance. A sad comment indeed, warranting reflection from campaigners on both sides of the divide. The statute, passed under a party whip, led to a further strengthening of the Muslim appeasement theory in judicial discourse and in popular media.

But despite its limitations, the Act was of immense historical significance, as the first attempt of independent India, to codify the Muslim Personal Law. But the positions across the divide were so rigid by then, that they left no space to contemplate upon this milestone. Since the *Muslim Women (Protection of Rights on Divorce) Act, 1986* (MWA). was enacted amidst protests from women's rights groups and progressive social organisations, it was viewed with suspicion and foreboding by these sections. Hence the first response of the protesting groups was to challenge its constitutionality, rather than examine its viability.

While the writ petitions filed by various organisations lay dormant in the Supreme Court for a decade and half, the Act gradually unfolded itself in the lower courts. The delay in fact, worked in favour of Muslim women. Appeals from the decisions of various High Courts gradually started accumulating, along with the original writ petitions. What was intriguing was that while the writ petitions were filed by groups agitating for women's rights, the appeals were from husbands aggrieved by the verdicts of various High Courts. If indeed the Act was depriving women of their rights and was enabling husbands to wriggle out of their economic liability, why were the husbands finding themselves *aggrieved* by the orders passed under a blatantly anti-women statute? Lurking beneath was a faint suspicion that perhaps the manner in which the Act was unfolding itself in the lower courts, was indicative of a different reality, defying the premonitions. This fascinating phenomenon provided the first indication that perhaps the ill-famed Act could be invoked to secure the rights of divorced Muslim women.

A seemingly innocuous clause, which had missed the attention of protesters and defenders alike, had been invoked by a section of the lower judiciary, to pronounce judgements, which provided greater scope for protection against destitution. Section 3 (1) (a) of the Act stipulated that a divorced Muslim woman is entitled to - *a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband*. This clause, along with the preamble - *An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands ....*", had been invoked by the judiciary in defense of Muslim women's rights.

Suddenly, the lump sum provisions for future security, which the courts were awarding within the framework of Islamic principles, seemed to be a better safeguard against destitution, than the meager doles which they were entitled to under S.125 Cr.PC. A reading of the judgements indicates that the Act had rid itself of the agenda of alleviating vagrancy and destitution among divorced women and had extended itself to the claims of women from a higher social strata.

A concerned and sensitive lower judiciary, carved out a space for the protection of women's rights from what appeared to be an erroneously conceived, badly formulated and blatantly discriminatory statute, without invoking a political backlash. Drawing on the Islamic concept of *mataaon bil ma'arofe* (fair and reasonable provision), the courts opened a new portal for the protection of divorced Muslim women. The ruling of the five-judge Constitutional Bench in *Danial Latifi*<sup>9</sup>, pronounced on 28<sup>th</sup> September 2001 finally put its seal of approval on these positive interpretations. While upholding the Constitutional validity the Supreme Court read into provisions of equality and non-discrimination and gender justice were read into the statute.

#### vi. Social Concerns Frame Legal Discourse

While there is a clear mandate in defence of fundamental rights, how individual judges read and interpret these provisions is rather arbitrary. The wordings of the Constitutional mandate can be read and formulated as per the need of the hour, the political exigency and social concerns of the particular judges. Rather than a broad framework of rights, what has evolved is a case by case approach. While the decision in *Danial Latifi* provides one example of this trend, *Narasu Appa Mali*<sup>10</sup> provides yet another instance of the same trend.

This was one of the first Constitutional challenges to the existence of personal laws in the post-Constitution period. It is not surprising that the challenge to the Constitutional provision of equality, came from a Hindu male who pleaded that the norm of monogamy imposed upon him by the *Bombay Prohibition of Bigamous Marriages Act, 1946*, violated the provision of equality since Muslim men could contract polygamous marriages. In their eagerness to uphold the newly introduced principle of Hindu monogamy, Chief Justice M. C. Chagla and Justice Gajendra Gadkar ruled that the personal laws are not laws in force and hence they are not void even when they come into conflict with the provision of equality under the Constitution.

In a subsequent case *Srinivasa Aiyar v Saraswati Ammal*<sup>11</sup> it was argued that prohibiting polygamy denied Hindu men equality before the law and equal protection of law and further that it discriminated against Hindu men on the grounds of religion as it restricted the right to freely profess, practice and propagate religion. The Madras High Court did not address the issue whether the term 'laws in force' includes personal laws but held that even assuming that the term laws in force includes personal laws, the Act does not offend Art.15 which stipulates non-discrimination on the basis of sex. More recently, in 1996, in *Masilamani*,<sup>12</sup> the Supreme Court, while not referring specifically to the principle laid down in *Narasu Appa Mali*, has implicitly overruled the same by holding as follows: "Personal laws are derived not from the Constitution but from the religious

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<sup>9</sup> *Danial Latifi v Union of India* 2001 (7) SCC 740 : 2001 Cri.LJ 4660

<sup>10</sup> *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84

<sup>11</sup> AIR 1952 Mad 193

<sup>12</sup> *C. Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525

scriptures. The laws thus derived must be consistent with the Constitution, lest they become void under Article 13 if they violate fundamental rights.....”

On the other hand, even when a legal provision is tested against the Constitutional mandate of equality, sexist arguments can be upheld as was the case in *Dwarakabai*<sup>13</sup> where the stipulation that the husband could get divorce only on the ground of adultery, but the wife, in addition, had to prove cruelty or desertion, was challenged. The Madras High Court, adopting an extremely anti women posture, ruled that the discrimination is based on a sensible and reasonable classification, after taking into consideration the ability of men and women and the results of their acts and hence it is not arbitrary. The court explained this logic further as follows: *Adultery by a man is different from adultery by wife. A husband cannot bear a child and make it legitimate to be maintained by the wife. But if the wife bears a child the husband is bound to maintain it.*

It took Christian women forty long years of struggle to obtain a ruling striking down the the offensive provisions as unconstitutional. Here the arguments were advanced not just on the ground of equality under Art.14 but also right to life (Art.21). Finally, two judgements delivered by the Kerala High Court in 1995, and the Bombay High Court in 1997 struck down the offensive provisions of S.10 of the IDA as arbitrary and violative of Articles 14 and 21 of Constitution.<sup>14</sup> The court held: The legal effects of the provisions of S. 10 is to compel the wife who is deserted or cruelly treated to continue a life as the wife of a man she hates. Such a life will be a sub-human life without dignity and personal liberty. It will be humiliating and oppressive without the freedom to remarry and enjoy life in the normal course. Such a life can legitimately be treated only as a life imposed by a tyrannical or authoritarian law on a helpless deserted or cruelly treated Christian wife quite against her will and will be a life without dignity and liberty ensured by the Constitution. Hence the provisions which require the Christian wives to prove adultery along with desertion and cruelty are violative of Article 21 of the Constitution of India.<sup>15</sup>

## **Conclusions:**

The courts have adopted a cautious approach and have responded more on a ‘case to case’ basis rather than advocating a universalized position regarding its authority to enter the domain of the ‘sacred and the personal’. While there have been some gains by striking down discriminatory provisions, a clear set of principles regarding the relationship between Articles 14-15 and 25 is yet to emerge. While testing the Constitutionality of state enactments has been relatively easier than questioning the validity of well established community practices. The Courts have also resisted the pressure for judicial law making.

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<sup>13</sup> *Dwarakabai v Prof. Mainam Mathews* AIR 1953 Mad 792

<sup>14</sup> *Ammini E.J. v Union of India & Ors* AIR 1995 Ker 252 FB (Also reported as *Mary Sonia Zachariah v Union of India & Ors* 2 (1995) DMC 27 FB

<sup>15</sup> *Ibid* head note (B) also para 31

If an alternate plea could be advanced courts have refrained from testing the validity on a provision on the basis of equality and non-discrimination. For instance, in *Mary Roy*<sup>16</sup>, though the equality and non-discrimination argument was advanced, while striking down the discriminatory provisions the Supreme Court relied upon a technical ground that after independence the laws enacted by the erstwhile princely states which were not expressly saved have been repealed.<sup>17</sup>

In *Madhu Kishwar*,<sup>18</sup> the constitutionality of certain provisions of the Chota Nappur Tenancy Act, 1908, disentitling tribal women from inheritance rights was examined. The Court, while upholding the discriminatory provisions, read down the impugned provisions to preserve their constitutionality. The court ruled that destitute women could assert a right of occupation against the male inheritors. The court was unwilling in this case to declare that the custom of inheritance, which disinherited the daughter, offends Article 14, 15 and 21 on the basis that customs differ from tribe to tribe and region and region.<sup>19</sup>

In *Geetha Hariharan*,<sup>20</sup> provisions of the *Hindu Minority and Guardianship Act, 1955* which stipulate that the father is the natural guardian of the child were challenged. Rather than giving a finding of unconstitutionality, the apex court used the interpretative tool of “reading down” the law to include the mother as also the “natural” guardian of a child. Under the provision of the Act, “natural guardianship” vests in the father and after him, the mother. The interpretation that the mother is the ‘natural guardian’ in the case of an absentee father had already been upheld by the Supreme Court in 1970 *Jijabai*<sup>21</sup> and hence *Geetha Hariharan* did not break any new grounds.

A public interest petition filed by an Ahmedabad-based women's organisation, the Ahmedabad Women Action Group AWAG Case would fall more in the category of urging the courts to enter the arena of judicial law making. The petition had had challenged the various discriminatory aspects of Muslim law including polygamy and triple talaq. While dismissing this petition (and other similar petitions challenging the discriminatory aspects of Hindu and Christian law) without examining the merits of the contentions, the apex court ruled that it is not within the jurisdiction of the courts to make laws for social change. The court observed that the petitions raised issues of state policy and it is the function of the legislature to lay down these policies of social change. With this ruling, the scope of reform through judicial interventions has been curtailed.<sup>22</sup>

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<sup>16</sup> *Mary Roy v State of Kerala* AIR 1986 SC 1011. Under the Travancore Christian Succession Act, the right of daughter was limited to quarter of the share of the son or Rs.5000/- whichever is less. Under the Cochin Christian Succession Act 1922, the share of daughter was one third of the son or Rs.5000/- whichever is less.

<sup>17</sup> Part B States (Laws) Act 1951

<sup>18</sup> *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125

<sup>19</sup> Though Justice K. Ramaswamy, in a dissenting judgement struck down the provision as unconstitutional.

<sup>20</sup> (1999) 2 SCC 228)

<sup>21</sup> *Jijabai Gajre v Pathan Khan* AIR 1970 SC

<sup>22</sup> *Ahmedabad Women Action Group (AWAG) & Ors v Union of India* JT 1997 (3) SC 171. But in this connection also see *C. Masilamani Mudaliar & Ors v Idol of Sri Swaminathaswami Thirukoil & Ors*

My own reading of the development in the realm of personal laws has been over the years, the courts have responded more favourably when there is a *lis* and when women who are aggrieved by the discrimination approach the courts rather than in cases of Public Interest Litigation demanding judicial intervention to usher in an era of gender justice. But increasingly, the courts have now begun to read the notions of justice, equity, non-discrimination and right to life within the 'Personal Laws' in the context of Constitutional guarantees.

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(1996) 8 SCC 525, where the Supreme Court, held that The personal laws must be consistent with the Constitution and can be struck down if they violate fundamental rights.