International Journal of Research
Available at https://edupediapublications.org/journals
p-ISSN: 2348-6848
e-ISSN: 2348-795X
Volume 04 Issue 02
February 2017

Judicial Activism in Personal Laws

Dr. Kamljit Kaur & Ms. Mahima Sikka

INTRODUCTION

Personal Laws[1] are set of laws which govern and regulate relations arising out of certain factors connecting two persons or more than two persons. Those factors are: Marriage, Blood, and Affinity[2]. Moreover, personal law governs and regulates subjects or areas of personal sphere such as: Marriage, Divorce, Maintenance, Succession, Minority & Guardianship etc. Barring few[3], most of the personal laws in India are based on scriptural laws which are divided and based on religions.

They provide norms of governing personal relations in the family set up. With the passage of time, these norms were given statutory recognition with several enactments in the area of Marriage, Divorce, Maintenance, Inheritance & Succession, Guardianship and Custody matters. Importance of personal laws can be seen by its very nature, composition and personas and relations to which it is being applied. Personal laws occupy a unique position in today's age and it plays a vital role in keeping the society in the civil bounds.

There are few areas in some communities, which are yet to be given a legislative shape. It is actually the political environment hampering the reform in few personal laws of the country.[4]

As referred above, Personal laws can be of following types:

1) Religious practices[5];
2) Customs and Usages[6]

[1] Hereinafter kindly read "Personal laws" as laws governing or regulating 'marriage', 'maintenance', 'succession', and other family relations and subjects.

[2] Adoption, Surrogacy and also Live-in relationship

[3] For example: Special Marriage Act, 1954 and Code of Criminal Procedure, 1973, s.125

[4] S.P. Sathe, *Judicial Activism in India*, (2nd ed., Oxford University Press 2002) 193

[5] Religious practices can be recognized and protected under Article 25 of the Indian Constitution if those are found to be essential to a religion. It mostly covers un-codified part of personal law.

[6] Apart from having religious practices dealing with the personal laws or governing personal law affairs, customs or usages which are being practiced by a particular sect of the community, those customs and usages can be a part of personal laws governing family relationships. But "Customs" and "Usages" so part of, must have legal backing. In the sense it must not have been specifically prohibited by law. In cases where personal law is codified, usually there is less scope for the custom or usage.

3) Statutes[7] in the nature of:

   1. Codification of customary or religious practices as a part of personal laws and
   2. Repealing of or alternation of existing (arbitrary, discriminatory or unreasonable laws) personal laws[8]
   3. Secular laws or secular provision of laws dealing with marriage, maintenance or succession etc., which is otherwise dealt with the branch of personal laws. Such Statutes or laws[9]are being branded as 'Secular family laws'[10]and

4) Judicial interpretations in case of ambiguities.

Though the origin of personal laws or family laws in India can be traced to the time immemorial, current personal laws which are in functioning or in force,[11] may also find its foundation or basis in the recognition of very "right to practice" religion under Article 25 of the Indian Constitution where a citizen has been given "freedom of conscience and free profession, practice and propagation of religion". This is evident from the pertinent observations made by the Supreme Court of India in ***Commissioner Hindu Religious Endowments (HRE), Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*** [12]where Supreme Court of India had an occasion to deal with two questions:

- What is essential part of a religion?
- What is protected under Article 25?
- What rituals & ceremonies can be protected as an essential practice under Article 25? Supreme Court of India, in this, in relation to above mentioned aspects and questions, has observed:

> 'The guarantee under the Constitution of India not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Art. 25'

[7] For example: Hindu Marriage Act, 1954, Parsi Marriage and Divorce Act, 1936, Indian Christian Marriages Act, 1872, un-codified Muslim personal law, etc.

[8] It happens mostly in case of reformation of personal laws. For E.g. Hindu Succession (Amendment) Act, 2005

[9] Special Marriage Act, 1954, Foreign Marriage Act, 1969, Indian Succession Act, 1925 and Code of Criminal Procedure, 1973, s.125

[10]Flavia Agnes, *Family Law, Volume I: Family Laws and Constitutional Claims*, (1st ed., Oxford University Press 2011) 153

[11] Whether statutory or un-codified

[12] [1954] AIR SC 282

Post-constitution period/development of law has ushered a new era of "Codification" & "Reformation" of personal laws by the State by exercising its legislative power.[13] When the legal system of India was on the verge of its development and when a culture of constitutionalism which being developed in relation to legal system of India, the third major organ of India Constitution, Judiciary of India in general & Supreme Court of India in particular, started assuming greater role and responsibility. This is because of the very reason that Supreme Court of India is considered to be the guardian of Indian Constitution[14] and the same is reflected from some of the provisions of Indian Constitution.[15]

As such during the initial period of acceptance of Indian Constitution, number of legislations or laws had either get amended or repealed, owing to their contradiction with that of the provisions of Indian Constitution.[16] Personal laws, whether codified or un-codified, customary or in the form of religious practices, or whether existing or laws already in force,[17] were no exception for this very process getting either repealed or amended. Unlike other statutes or legislations, which were repealed in early period of acceptance of Indian constitution, repealing of personal law was not the easy task, either for the Legislature or for the Indian judiciary.

This is for the simple reason that one may, by interpreting the expression "practice" under Article 25 of Indian Constitution, provide a secured cover to"Personal laws" from being repealed or amended. Since, Article 25 falls in the domain of Part III[18] of the Indian constitution i.e. "Fundamental Rights." As a principle of Constitutionalism[19], and as an interpretation,[20]'Part III of the Indian Constitution constitutes the core and basic structure of Indian Constitution'.

[13] Hindu Code Bill, through which the major chunk of Hindu personal law got codified by bringing uniformity throughout the community with respect to laws governing: Marriage, Divorce, Maintenance, Succession and Minority and Guardianship. Dr. B.R. Ambedkar, was the man behind bringing a Hindu Code Bill for Hindu religion with the sole intention of providing justice and equal opportunity to female gender and also to bring rationality in relation to the set of laws governing above mentioned subjects. Those Acts are: Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoption and Maintenance Act, 1956, and Hindu Minority and Guardianship Act, 1956.

[14] *Kesavananda Bharati v. State of Kerala* [1973] AIR SC

[15] For example: Constitution of India, a. 32

[16] Kesavananda Bharati (n 14)

[17] *See*: Constitution of India, a. 372: "Laws in force"

[18] Herein after kindly read "Part III" as or for "Fundamental rights"

[19] Constitution of India, 1950, a.13

[20] Kesavananda Bharati (n 14)

This has ushered a new era a Constitutional[21] debate and a Constitutional discussion of: 'inter- play or inter-relation of personal laws with the Part III (Fundamental rights) of Indian constitution'.

This research paper is an attempt to delve into the *extent* and *scope* of judicial power to review highly sensitive areas like personal laws dealing with family affairs and also to investigate the question as to whether personal laws, which are majorly based on religious dictates codified in the statutes, are saved from Constitutional prohibitions in part III.

INTERFACE OF 'PERSONAL LAWS' AND 'PART III' OF THE CONSTITUTION OF INDIA:

There are two scenarios in which personal laws and Part III of Constitution of India can be discussed together. Those are:

1. Personal laws[22] coming in contradiction with the provisions of Part III of Constitution of India[23] and
2. Personal laws[24] which takes away or repeals the 'existing' personal laws and thereby clashes with that of Article 25 of Indian Constitution.

Ever since the inception of Indian Constitution to till date, higher judiciary of India, including Supreme Court of India, is facing the dilemma of finding out satisfactory compromise between two extremes: 'personal laws' which are based on religious practices and 'Part III' of the Indian Constitution i.e. chapter on Fundamental Rights[25].

In this connection, it is worthy of mentioning two important judicial decisions which will throw some light on the dilemma of Inter-relation of Personal law & Part III. The first such case is of judgment delivered by Bombay High court in ***State of Bombay Vs. Narsu Appa Mali***[26]. This case

[21] Hereinafter kindly read "Constitutional" in relation to the Constitution of India, 1950 and its provisions
[22] Codified, existing, already in force and customary
[23] Provisions other than Article 25 of the Indian Constitution
[24] Which aims at reforming existing personal laws (which are found to be arbitrary, unconstitutional or against the Part III) by way either of amendment or by repealing the same or by enacting a new Act/Law altogether.
[25] *State of Bombay Vs. NarsuAppa Mali* [1951] ILR Bom 775, *SrinivasaIyer v. SaraswathiAmmal* [1953] Mad. 78,
(52) A.M. 193, *Ahmedabad Women Action Group Vs. Union of India* [1997] AIR SC 3614 etc.
[26] [1951] ILR Bom 775

is pertaining to the 'Bombay Prohibition of Bigamous Marriage, Act, 1946,'[27] the constitutional validity of which was challenged on the basis of Article 14, 15 & 25 of the Constitution of India. Two major issues were involved in this case:

- Whether the Personal laws of Hindus, or of any other community, is "Law" within the meaning of Article 13 (3) (b) and Article 372 (3), Explanation 1
- Whether an alteration of the personal law of one community, without a similar alteration in that of others, violates equality?

Bombay High Court in considering the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, said that personal law was not included in the "law" referred to in Article 13 (3) and was not the "law in force" saved by Art. 372 (3).It was also declared that Bombay Prevention of Hindu Bigamous Marriage Act, 1946 is not violative of Article 14 as the State was free to embark on social reforms in stages.

Bombay High Court in this case ruled that:

1. Personal laws are not 'laws in force' under Article 13 of the Constitution as they are based on religious precepts and customary practices; and
2. The principles enshrined in the Part III of the Constitution cannot be applied to the persona laws.

It is pertinent that the Bombay High court has said sharp distinction must be drawn between *religious faith and belief* and *religious practices*. According to the Court, what State protects is religious faith and belief. If religious practices run counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.[28]

A similar question arose in ***Srinivasa Iyer v. Saraswathi Ammal*** [29]In holding that Madras Hindu Bigamous (Prevention and Divorce) Act, 1949 did not violate Article 15 and Article 25, the court said that it did not discriminate between Hindus and Muslims on the ground of religion, as State was empowered by virtue of Constitution of India to either enact (legislate) or to repeal or alter personal laws.

[27] As per Article 372 it was in the category of "All laws in force"
[28]Ibid
[29] [1953] Mad. 78, (52) A.M. 193

Apart from what has been debated in aforementioned judgments, there is one more concern in relation to the *interface of personal laws and Part III*, i.e. Uniform Civil Code. UCC[30] aims to provide a common code for all the citizens, irrespective of their religion. It aims to codify (primarily) 'Marriage' & 'Divorce' related affairs. It is pertinent to note in this context, that the issue of UCC is highly being politicized by the political parties in the national politics.[31] There is one more school of thought[32] on the parallel lines to UCC which advocates for 'rationalization' & 'reformation' of existing personal laws (which are un-codified & discriminatory),without having recourse to UCC.

CONSTITUTIONAL VALIDITY OF 'PERSONAL LAWS'- SCOPE &EXTENT OF JUDICIAL REVIEW:

What is Judicial Review?

The doctrine of 'Judicial review' is reflected in Article 13 of the Constitution of India explicitly. Any laws passed by the State which is inconsistent with that of provisions of Part III of the Constitution of India would be declared by the Supreme Court of India as unconstitutional and ultra vires the Constitution. The terms of Article 13 are very clear and wider. It has broadened the definition of "Law"[33] [as] including all forms of regulations from the side of 'State.'[34] unlike,

The U.S.A., the Constitution of India explicitly establishes the doctrine of judicial review.[35] the

Courts in India are under Constitutional duty to interpret the Constitution and declare the law as

[30]Constitution of India, a. 44: Especially in the context of personal laws or Family laws

[31]Ramachandra Guha, 'Towards a Gender sensitive Code'http://ramachandraguha.in/archives/towards-a-gender- sensitive-civil-code-2.htmlaccessed04 September, 2014

[32]*See*: Ajit Prakash Shah J., Foreword to A book by Flavia Agnes (n 10)

[33]**Article.13 Laws inconsistent with or in derogation of the fundamental rights:**
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this Article , unless the context otherwise requires,-
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

[34] The expression for the purpose of Part III, the expression "State" is defined under Article 12 of the Indian Constitution.

[35] M.P. Singh, *Indian Constitutional Law*, (5th ed., Wadhwa Publications 2006), page 1563

unconstitutional if found to be contrary to any constitutional provision, including the provisions of Part III. Though at times Courts in India are being accused of usurping the function of constitutional adjudication, it is a function which has been imposed on them by the Constitution itself. It is a delicate task and they cannot evade their constitutional responsibility.[36] In expanding the horizon of certain provisions of Part III, Supreme Court of India has displayed judicial creativity of a very high order and expanded the scope of certain provisions of Part III.[37] At the same time it has also put limitations on the exercise of legislative power by the State.[38] In ***Kesavananda Bharati v. State of Kerala***[39] Khanna J. emphasized upon the importance of judicial review in following words:

> **'As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these rights are not contravened… Judicial review has thus become an integral part of our Constitutional system.'**[40]

Chandrachud C.J. in ***Minerva Mills Ltd. v. Union of India***[41] observed:

> **'It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled.'**

In the context of Personal laws, the doctrine of judicial review was always surrounded by one of the constitutional objectives i.e. UCC.[42] Courts, while dealing with the constitutional validity of personal laws, could not refrain themselves from being discussed, concern for Uniform Civil Code (UCC). Moreover, in this context, there are some other areas where the either constitutionality or reasonableness and rationality of some laws are being questioned. Those issues are always a challenge for the judiciary to strike a balance between religious based personal laws and concerns of gender justice and fairness of law. Issues such as:

[36] Ibid
[37] For example Article 21
[38] KesavanandaBharati(n 14)
[39] [1973] AIR SC 1461
[40] Ibid
[41] [1980] AIR SC 1789
[42] Constitution of India, 1950, a. 44

1. Monogamy;[43]
2. Restitution of Conjugal rights (RCR)[44]
3. Discriminatory grounds of divorce[45]
4. Discriminatory inheritance norms[46]
5. Right of maintenance upon divorce[47]
6. Discrimination in guardianship laws[48]
7. Discriminatory nature of personal laws[49]
8. Live- In Relationships

The focal point of this project would be to deal with above mentioned issues which shall further throw light upon:

1. Interface of Part III of Constitution of India and Personal laws and
2. Constitutional validity of personal laws

Before discussing the issues mentioned above it is pertinent to mentioned Shah Bano's case[50] which has ushered a new era of judicial activism in Personal laws which were, till the Apex Court has pronounced its judgment in that case, considered as sensitive area of laws.

SHAH BANO EPISODE-WATERSHED OF JUDICIAL REVIEW IN PERSONAL LAW:

This is perhaps the beginning of dawn of the judicial review in personal laws where Apex court of India had to go against existing personal laws and had to take into consideration certain temporal and secular aspects. This is the landmark in the journey of development of personal laws. Supreme Court of India in ***Md. Ahmed Khan v. Shah Bano Begum***[51] ruled against the tenets of Muslim persona law by providing maintenance claim to a Muslim divorced lady under Section 125 of Cr.P.C., despite prohibition under Muslim personal law. Shah Bano, a Muslim woman, had been divorced by her husband. She filed suit for maintenance under Section 125 of Cr.P.C.When the case was

[43] *SarlaMudgal v. Union of India*[1995] 2 SCC 635
[44] Constitutionality of which was challenged in *T. Sareetha Vs. VenkataSubbaiah* [1983] AIR AP 356 and in *Saroj Rani Vs. Sudershan Kumar*[1984] AIR SC 1562
[45] *Ammini E. J. V/s. Union of India*[1995] AIR Ker 252 FB
[46] *Mary Roy v. State of Kerala* [1986] AIR SC 1011
[47] *Md. Ahmed Khan v. Shah Bano Begum* [1985] AIR SC 945 and *Daniel Latifi V/s. Union of India* [2001] 7 SCC 740
[48] *GithaHariharan v. Reserve Bank of India* [1999] 2 SCC 228
[49] *Ahmedabad Women's Action Group (AWAG) v. Union of India* [1997] AIR SC 3614
[50] *Md. Ahmed Khan v. Shah Bano Begum* [1985] AIR SC 945
[51] [1985] AIR SC 945

before Magistrate Court, the issue was regarding right of divorced Muslim woman to claim maintenance from her husband under secular legal provision, Section 125 of Cr.P.C, which the Magistrate's Court the granted an order of maintenance of a sum not exceeding Rs. 500/-. But when the matter reached Supreme Court of India, case involved a substantial question of law. **By upholding the claim Shah Bano under section 125 of Cr. P.C. despite prohibition for the same under Muslim Personal law, Supreme Court expressed hope that Parliament would take steps to enact UCC as enjoined under by Article 44 of the Constitution. The Muslim fundamentalists were agitated by that decision. The then Rajiv Gandhi government keeping in mind political considerations, changed his mind[53], despite agreeing with the judgment and thereby enacted the Muslim Women (Protection of Rights on Divorce) Act, 1985, whereby a Muslim women was taken out of the purview of section 125 of CrPC**

There are number of such cases where personal laws or legislation or legal provisions pertaining to personal laws were challenged in relation to the above mentioned issues. In some cases, Courts, without indulging into the question of constitutionality of personal laws, made it point to recommend to the Union of India to bring UCC as a part of the legal system.

1. MONOGAMY: *Sarla Mudgal v. Union of India*:[54]

This is another significant judgment in relation to the personal laws, their constitutionality and UCC. This case is concerning polygamy of Hindu men after conversion to Islam. While the issue before the Court was that of bigamy of Hindu men and the validity of their marriage contracted prior to conversion, it primarily addressed the issue of the UCC. The approach of court, according to the famous authority on Family Law, Flavia Agnes[55], was in the context of the nation, national integration and minority identity.

2. RESTITUTION OF CONJUGAL RIGHTS: *T. Sareetha V/s. T. Venkataubbiah*[56]:

Where the contentious matrimonial remedy, 'restitution of conjugal rights' was challenged. Not merely the reasonability even the constitutionality of this provision was challenged by the petitioner in this case. The Andhra Pradesh High Court struck down Section 9 of Hindu Marriage Act, 1955 as unconstitutional. The Section 5 is concerning restitution of conjugal rights which allows petitioner to *compel* the defendant to cohabit and perform the conjugality as one of the matrimonial obligations. The court held that this provision violates the right to

[53] S.P. Sathe, (n 4) 266
[54] [1995] 2 SCC 635
[55] Flavia Agnes (n 10) 163
[56] [1983] AIR 5 AP 356

privacy and human dignity guaranteed by Article 21 of the Constitution of India. But in a similar case before the Delhi High Court, ***Harvinder Kaur v. Harminder Singh***[57] it upheld the constitutionality of the provision.[58]

Finally Supreme Court of India, in ***Saroj Rani v. Sudarshan Chaddha***[59] uphold the decision given by Delhi High Court and ruled that Section 9 is constitutional, by indirectly overruling the *T. Sareetha* judgement of Andhra Pradesh High Court.

In my personal opinion, *Harvinder Kaur* and *Saroj Rani's approach* of Delhi High Court and Supreme court of India is correct and legal one. Marriage is the union of two opposite sex and law expects[60] parties to be major and sane enough to understand the nature & consequences of the marriage. Once a party enters into legal wedlock, they are bound by the matrimonial obligations,[61] failure to perform would provide a cause of action to the other party and thereby it would entail matrimonial suit like restitution of conjugal right (RCR).

3. **DISCRIMINATORY GROUND OF DIVORCE- *Ammini E. J. v. India*[62]:**

Constitutional validity of Section 10 of Indian Divorce Act was challenged on the ground of dual burden on the part of wife to prove two grounds at the same time in a petition for divorce. This was found to be arbitrary and discriminatory by Kerala High Court and as such struck down as unconstitutional. As a result of it, Legislature has amended the Section 10 by substituting it with the new one by virtue of Indian Divorce (Amendment) Act, 2001 and removed the discrimination. The amended Section 10 provides common grounds to both the parties to the marries, husband and wife, making it similar with Section 13 of Hindu Marriage Act, 1955 and Section 27 of Special Marriage Act, 1954. It also provides few additional grounds to wife, like Hindu Marriage Act and Special Marriage Act.

4. **DISCRIMINATORY PROPERTY INHERITANCE NORMS- *Mary Roy v. State of Kerala*[63]:**

It **involves the question of constitutional validity of personal law on the basis of Article 14** and 15 of the Constitution of India. The provisions of two statutes- Travancore Christian Succession Act, 1910 and Cochin Christian Succession Act, 1922 which discriminated

[57] [1984] AIR Del 66
[58] Hindu Marriage Act, 1955, s. 9
[59] [1984] AIR SC 1562
[60] Qualifications for the marriage
[61] Consummation, Conjugality and Cohabitation
[62] [1995] AIR Ker. 252
[63] [1986] AIR SC 1011

against daughters, were challenged. Supreme Court of India struck down the discriminatory provisions on the basis of Article 14 & 15 of the Constitution of India.

Sanjay Purshottam Patankar v. Prajakta Pramnod Patil, 2015 : The Bombay High Court in this case held that a widow who remarries does not lose her right over the late husband's property.

5. RIGHT OF MAINTENANCE UPON DIVORCE-

***Danial Latifi v. Union of India*:**

There is no point of discussing this case without giving reference to the *Shah Bano case* as discussed above. In fact this case is the resultant of Shah Bano case, since the decision given therein had created lot of chaos amongst the Muslim community. So to shun the chaos and feeling of insecurity amongst the Muslim community especially Muslim men,the Government had enacted Muslim Women (Protection of Rights on Divorce) Act, 1986. It is in this case the constitutional validity of the Act was challenged. Supreme Court upheld the constitutional validity of the Act but provided a more egalitarian and gender-just interpretation of the Act. The new Act has substituted the earlier right of recurrent maintenance under section 125 of Code Criminal Procedure, 1973 with a new right to claim a lump sum amount as a divorce settlement. If the husband fails to make such a settlement, a divorced Muslim woman has the right to approach the court for enforcement of the right under section 3 of the Act.

In the case of ***Vaishali A. Waghmare v. Anil P. Waghmare , 2015*- The Bombay High Court**, While deciding the appeal preferred against the judgement of the Sessions Court, which denied the maintenance granted by the Judicial Magistrate First Class, Karad, M.S. Sonak J. modified the order of the Judicial Magistrate First Class and directed the respondent to pay maintenance on monthly basis to the applicant with effect from 1 January 2015 thereby setting aside the order of the Sessions Court and also held that **a wife sitting is only entitled to maintenance when there is sufficient cause to stay away from her husband.**

Firdos Mohd. Shoeb Khan v. Mohd. Shoeb Mohd. Salim Khan, 2015

Looking at the burden on the husband to provide maintenance to his wife even in cases where the wife is well educated and capable enough to earn for her living, a bench of S.A. Morey J gave a landmark judgment in favor of husband to curb the misuse of the provision of maintenance, and held that a wife who is well qualified and is capable to earn cannot sit idle and claim maintenance from her husband.

6. DISCRIMINATION IN GUARDIANSHIP LAWS-

Githa Hariharan v. Reserve Bank of India, SC 1999

This is extremely differently facet of judicial review in personal law where court has instead of giving a finding of unconstitutionality, the Supreme Court of India used the interpretative tool of 'reading down' the law to include the mother was also the 'natural' guardian of a child.

7. EXERCISE OF JUDICIAL RESTRAINT-

Ahmedabad Women's Action Group (AWAG) v. Union of India, SC 1995

Well, this case is the classic example of exercise of judicial restraint when it comes to dealing with or deciding a question in relation to personal, law and Part III of Indian Constitution. In this case Muslim personal law regarding polygamy and oral divorce by uttering the word '*talaq*' thrice, which is popularly known as triple talaq, were challenged on the ground that they violated the fundamental right to equality. The Court held that the since the petition raised questions of social policy, this fell outside the scope of its power. Although the Court had held in an earlier case that personal laws also had to be consistent with the fundamental rights, it has thought fit not to make such sweeping reforms in personal law through judicial process. So this judgment shows that the court wanted to convey that in such cases remedy lies before Parliament. It is for the Parliament to take the steps to reform the personal law.

In this connection, it is pertinent to note that Shaha Bano case and Ahmedabad Women's
Action Group case are two different corners of the same thread. They represent two different approaches of the judicial attitude towards personal law. Shah Bano case, where Court has taken extremist approach and look at the case of Ahmedabad women's Action Group, where court did not undertake to reform personal laws through judicial process. Court

has thought it prudent to leave major reforms causing social change to be brought about through legislative process.

8. LIVE - IN RELATIONSHIPS:

The first case in which the Supreme Court of India first recognized the live in relationship as a valid marriage was that of **Badri Prasad vs. Dy. Director of Consolidation**, in which the Court gave legal validity to the a 50 year live in relationship of a couple. The Allahabad High Court again recognized the concept of live in relationship in the case of **Payal Katara vs. Superintendent, Nari Niketan** [3] and others, wherein it held that live in relationship is not illegal. The Court said that a man and a woman can live together as per their wish even without getting married. It further said that it may be immoral for the society but is not illegal.

In 2003, the Supreme Court set up the **Malimath Commission for reforms in the Criminal Justice System.** The report submitted by this Commission mentioned that-

"The definition of the word 'wife 'in Section 125 should be amended so as to include a woman who was living with the man as his wife for a reasonably long period, during the subsistence of the first marriage."

The Fundamental right **under Article 21 of the Constitution of India guarantees all its citizens "right to life and personal liberty" .In the case of S. Khushboo vs. Kanniammal & Anr., the Supreme Court held that living together is a right to life. Live in relationship may be immoral in the eyes of the conservative Indian society but it is not "illegal" in the eyes of law.**

The Supreme Court in the case of D. Velusamy v. D. Patchaiammal has held that, a 'relationship in the nature of marriage' under the 2005 Act must also fulfill some basic criteria. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. It also held that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'.

- **Rights of a female in live in relationship**

In a case in Delhi, the Delhi High Court awarded Rs. 3000/- per month as maintenance

to a maid who was in a live in relationship with her widower employer. **In Varsha Kapoor vs. UOI & Ors., the Delhi High Court has held that female living in a relationship in the nature of marriage has right to file complaint not only against husband or male partner, but also against his relatives.**

- **Status of children of couples in live- in relationship**

Uday Gupta vs. Aysha SLP-3390 Of 2014 decided on 21st April 2014: The SC in the present case called upon a bench comprising Dr. B.S. Chauhan and J. Chelameswar, JJ to determine whether a man and a woman living together for a long period of time be assumed to be married and their children considered legitimate, to which it answered in the affirmative.

The Court took reliance on two of its previous judgments in ruling that unless an unimpeachable evidence could be produced, **a long-term relationship of a couple without marriage per se would in the eyes of law assumed to be a marriage and children born thereof, legitimate, as was brought about by Section 16 of the Hindu Marriage Act intending to bring a social reform by conferring legitimacy on some otherwise illegitimate-considered group of children.**

In the case of *Bharata Matha & Ors. vs. R. Vijaya Renganathan & Ors.*, the Supreme Court of India has held that child born out of a live-in relationship may be allowed to succeed inheritance in the property of the parents, if any, but doesn't have any claim as against Hindu ancestral coparcenary property.

CONCLUSION & SUGGESTIONS

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'. This is evident from the kind of outlook taken by Apex court of India in Ahmadabad Women's Group case.

Well, keeping in mind the Constitutional limitations on the court not to exceed its function under the garb of 'Judicial activism' or 'judicial review', one would definitely appreciate the role performed by the Judiciary in India especially the Supreme Court of India. Whenever necessary courts have adopted an activist approach and also declined to deal

with the area which is completely the province of the State. One thing is clear after analyzing the provisions of law, judgments delivered by the Courts in India and the situation in which Part III and Personal laws a coexists, that it is only for the State/Legislature to take some appropriate steps either in the form of:

1. Enacting a uniform civil code or
2. Rationalizing or improving or removing the discriminations from the existing personal laws.

Fact of the matter is, not all the personal laws are discriminatory. Codification of personal law, especially amongst Hindus, has brought a sea change in the nature and application of law. There are some set of personal laws which are neither codified nor got amended. There is ongoing demand among academicians, judiciary and other stakeholders, to improve those set of personal laws, especially Muslim personal law, owing to their clash with the provisions of Part III.

In this connection, a question arises after learning state of affair in which personal laws are, that in such a modern, contemporary and civilized era, is it still viable to be governed by Religion or community based Laws? Religion, as far as my understanding goes, should only be allowed to govern inner conscience of an individual and not the external conduct. It is high time that, it is 'reason' and not the 'religion' which should dictate the legislation. Uniform civil code, perhaps seems to be the *golden mean* in such controversial state of affairs