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Personal Laws of Religious Communities in India

The first Prime Minister of India late Pandit Jawaharlal Nehru had a vision of a united nation of India. With the background of the present land-mass of the subcontinent of India carved up between the Royal Princely States, and the Imperial Powers of Europe, his vision of a National Unified State of India was indeed a bold dream. The complexities of the legal variations existing in India were formidable. The majority of the population followed various beliefs of the Hindu faith. These variations included the Sikhs, Jains, Sindhis as well as Orthodox Hindus who were themselves sub-divided into various sects such as the Krishnaites, Vaishnavites, Shivites as well as many castes and sub-castes each having their own customs, having the force of Personal Law. In addition there was the large minority community of Muslims also divided into various groups such as the followers of H. H. the Aga-Khan, the Vada Mulla of the Dawoodi Vohras, and the Shias and Sunnis amongst others. Then came the three minority communities of the Christians, Parsis and Jews. Amongst the Christians there was the sharp division between the Roman Catholics who according to Church Law did not accept the concept of a Civil-Law-Divorce and the numerous sects of Protestants ; of which the Church of England predominated as it received the official support of the British Raj. Upto the time of the independence of India, it was extremely difficult for two persons belonging to different religious communities and governed by different Personal Laws to get married in India. The old Special Marriage Act provided that where two persons did not believe in any religion and made a declaration to that effect, so that the Personal Law of no religious community would be applicable to them, then they could avail of the special provisions of this Act and contract a Civil Marriage. The other method open to such persons was for one of the two persons to be converted to the religion of the other and so the same Personal Law would become applicable to both of them and the marriage would then be solemnised under the Common

personal Law. Late Pandit Nehru's own daughter our late beloved Prime Minister Indira Gandhi was faced with this problem directly when she desired to be married to late Mr. Firoze Gandhi. Since conversion is not permitted in the Zoroastrian religion and neither party wanted to declare themselves atheists, the only recourse was for Mr. Gandhi to convert to the Hindu Faith and then have the marriage ceremony solemnised according to Hindu religious customs.

Such sharp dilemmas confronted late Pandit Nehru and drove home the realisation that for an unified nation of India it was essential to provide some laws concerning the area of Personal Laws which would govern all people of the new nation-state of India. With this background in mind the Constitution of India was framed. Part IV of the Constitution of India does not contain mandatory laws. Part III of the Constitution contains mandatory laws which are supreme and which prevail over all other Central or State Government Laws which may have been previously enacted or which would be enacted after 1951. Part III contains the Fundamental Rights applicable to persons who are Citizens of India or who are non-Citizens living in India. In contrast Part IV of the Constitution contains a number of articles which give directives for the future enactment of legislation by Union, State and Local Government authorities. These principles are not enforceable in any Court of Law. However they give direction to policy making. After 1951 Parliament and Legislatures as well as Local authorities when passing new laws would have to enact such laws in keeping with the spirit and directives contained in this part of the Constitution.

Article 44 provides a directive as follows: "the State shall endeavour to secure for the Citizens a Uniform Civil Code throughout the territory of India."

This article has its main directive and purpose as unification of laws governing personal matters of not all people in India but only those persons who are Citizens of India. Considering the situation which existed before the independence of India and also before 1951, and treating this article simply as a statement of directive policy making, the article was useful for inclusion in the Constitution. However nearly four decades have passed since the independence of India. Many laws have been enacted in the field of Personal Laws during these four decades. A new generation of people most of whom are Citizens of India have been born and have grown up to adulthood in social con-

ditions which are considerably different from those prevailing before 1947 or 1951. The question thus is whether in the present situation in India there is any need at all to abolish all the existing Personal Laws and replace them with a new enactment entitled "Uniform Civil Code." This matter is further discussed in detail below. It is my humble opinion and submission that there is no necessity at all at present to replace the existing Personal Laws of the various "Uniform religious communities in India by a completely new enactment entitled Uniform Civil Code."

1. Nexus

The term "Personal Law" includes all those laws which relate to the personal life of human beings. These include the three major areas of Matrimonial laws, Inheritance Laws and other "Family Laws". It is necessary to be clear in one's conceptual thinking at this point. In Europe by and large in the past over thousand years, the main religious faith followed by practically all persons living in all the countries in Europe is and was the Christian religion. There existed also the minority community of people following the Jewish religion. In the Middle Ages in Europe the Catholic Church controlled all the laws concerning the personal life of Christian people including the Monarchs of the various countries. The motto proclaimed loudly at Melk Abbey in Austria of the supremacy of the Church over the State says "No one can become Emperor unless his legitimacy is certified by the Church." By controlling the soul of the human being through "Canon Law" the Church retained its supremacy and became the unifying factor for Family Law throughout Europe, for all Christians. From about the 16th century onwards, from the time of the Protestant Reformation the uniformity in Canon Law previously maintained by Catholic Church broke down as one country after another became Protestant. The Monarchs of the Protestant countries constituted their own Churches. For Example in England Henry VIII made himself the secular Head of the country of England as well as the religious head of the Church of England. The Church Synod thus became the equivalent of Parliament for enactment of Laws concerning Church Law i.e., Ecclesiastical law. This law was administered through Church Courts over which priests presided as Judges. Contempt of such Church Courts was punishable by excommunication — a most fearsome and awesome

punishment for the soul of any God fearing Christian. Thus variations came into existence in Personal Laws of the various countries in Europe. In course of time and history people through Parliaments took power to pass laws concerning Personal matters into their own hands. Thus by the middle of the 20th century even in Europe the area of Personal Law to a large extent passed out of the domain of the Church and into that of secular law making. Since the various countries considered themselves as independent Nation States of Europe the question of *Nexus* became important. *Nexus* is the connection between a person and a Court dispensing a system of Law. In most of the countries of Europe, the *Nexus* selected is that of "*Citizen*" status. If a person is a citizen of a country then he/she is within the jurisdiction of the Court of that country which dispenses and administers the Personal Laws enacted by the Parliament or law making authority of that country. In England until recently the *Nexus* was always and only "*Domicile*"—the Court of a country where a person had his/her permanent home had jurisdiction over the person to administer the Personal Law applicable in that Court to that person. Recently after the Hague Conventions on Private International Law differences in *Nexus* between England and the Continental countries have been ironed out so that at present the *Nexus* used are citizen or one year's residence within the jurisdiction of the Court of a country. The Court will apply the Personal Laws enacted by Parliament to such persons as are within its jurisdiction.

In contrast in India the *Nexus* connecting a person with a Court administering a system of Personal Law has always been the "*Religious Nexus*". In India there are five major religious communities for legal purposes. These are (1) Hindu ; (2) Muslim ; (3) Christian ; (4) Parsi — Zoroastrian and (5) Jewish.

2. History of the Evolution of Personal Law of Religious Communities in India

In this part the historical development of Personal Laws in India during the 19th/20th centuries will be considered chronologically.

(a) Parsi Personal Law

The policy of the British rulers in India was not to be involved with the Personal matters of the people living in India who had such a

great variety of customs, creeds, beliefs and ceremonies. During the 19th century the policy of British rulers and law makers was that personal law matters should not be decided by Civil Courts presided over by British Judges but rather should be left to be administered by local Panchayats or Akabars or Heads of communities. This was known as "Delegated Rule". It was only if a community demanded from the British Rulers that a special Act be promulgated by the Governor General in Council for the members of that particular religious community that a Special Act was promulgated for such purpose.

In India the position concerning Personal Laws was as follows in the 19th century: In the territorial area of the Princely States of India the various Laws applicable in each separate Princely State were applicable to the subjects of each Prince or Ruler of the State. For Example, Parsi Zoroastrians living in Navsari was subjects of the Gaekwad of Baroda and as such were governed by the Laws of the State of Baroda. In the territorial area of British India British laws applicable in India governed British subjects of Her Majesty Queen Victoria as well as persons who were not British Subjects but who had their permanent home/residence in the territory of British India. For Example Parsi—Zoroastrians residing in Surat or Bombay which were within British Indian territory had a different set of Personal Laws applicable to them upto 1865.

In British India there were three Supreme Courts later called Charter High Courts, at Bombay, Madras and Fort William, Calcutta. The jurisdiction of these three Charter High Courts was derived from their grants of Letters Patent by Her Majesty Queen Victoria. The jurisdiction of the Judges of the Original Side of these three High Courts was co-equal to that of the Judges of the Supreme Court in London, England. So far as Matrimonial Jurisdiction was concerned prior to 1857 the Judges of the High Court in England had no power to grant any matrimonial relief. This power was vested in the Priest Judges of the Church Courts in England who administered Ecclesiastical Law. In 1857 Parliament at Westminster enacted the major Statute—the Matrimonial Causes Act 1857. For the first time in the history of England Civil Judges appointed by Her Majesty sitting in the Divorce Division of the High Court in London, England could dispense matrimonial reliefs to persons who had undergone a "Christian" marriage i.e., a monogamous marriage. From 1857 onwards the Supreme Courts/

High Courts in India at Bombay, Madras and Fort William, Calcutta could thus also dispense the same matrimonial jurisdiction as the Judges in England. By interpretation of the Letters Patent in India it was decided that even Jewish persons whose marriage was monogamous could apply to the High Court for matrimonial reliefs.

In India the first religious community to demand a separate enactment of Personal Law was the Parsi Zoroastrians. In the 19th century around the 1840s to 1860s a famous case was bitterly fought through the Bombay Courts to the Privy Council — Ardeshir Cursetjee Vs. Pherozebai. The facts in this case were as follows : at a tender young age Pherozebai, a daughter of a rich merchant family, the Banarji family, was married to a young boy Ardeshir Cursetjee. After puberty she was sent to stay with the husband's family. The young husband ill treated the wife. She complained of cruelty and returned to her parents' house. Her family members were Barristers and Lawyers and her family was most influential in Society. She filed a historic case for restitution of Conjugal rights and alimony in the Supreme Court Original Side in Bombay. The Trial Court Judge held in her favour and treated her in the same way as a Christian woman. The husband appealed. The Appellate Side Judges were divided in their opinion. The husband raised the plea that his was not a Christian soul and since the Judges of the Supreme/High Court in Bombay only had similar jurisdiction as the Ecclesiastical Court Judges in England who only had jurisdiction over Christians, the Bombay Court had no jurisdiction over the parties to the suit and so the Order of restitution of conjugal rights could not be made against him. The Chief Justice of Bombay held in favour of the wife, and awarded her a decree of restitution plus a large monthly alimony. The husband appealed to the Privy Council. The Privy Council upheld the husband's plea. The disappointed wife returned to India and at her instance the Governor General at Fort William, Calcutta appointed a Parsi Law Reform Commission. Her influential family members pointed out that in the meantime between the date of the Privy Council deciding her case and the appointment of Law Reform Commission, in England itself the Matrimonial Causes Act 1857 had been passed. This Act applied to Christians and Jews whose marriage was monogamous. The Parsis demanded that a separate Act be promulgated in India by the Governor General in Council creating a separate special court for Parsi Zoroast-

rians for matrimonial matters along similar lines to the Matrimonial Causes Act 1857 in England.

In response to this demand the Parsi Marriage & Divorce Act 1865 was promulgated. Broadly under this Act the following salient legal provisions were made regulating Matrimonial Personal Laws for the Parsi Zoroastrians in British India.

i) Marriage amongst Parsi Zoroastrians was made monogamous. Provisions were made concerning capacity, essential validity and formalities of marriage. The marriage ceremony would be legally valid only if performed by Zoroastrian priests according to Zoroastrian religious *Ashirvad* ceremony and customs.

ii) Special Courts called "Parsi Chief Matrimonial Courts" were constituted in Bombay, Madras and Calcutta; and in other mofussil places in the districts, Parsi Matrimonial Courts were constituted. In the three Presidency towns the status of the three Parsi Chief matrimonial Courts was co-eval with the Original Side of the High Court in dignity ; and the Chief Justice or other Judge presided in these Court assisted by "Delegates" who were all Parsi Zoroastrians. These Delegates were final Judges of facts and had the power to grant matrimonial reliefs.

iii) These Matrimonial Courts had power to grant the following matrimonial reliefs: divorce ; nullity ; judicial separation ; restitution of conjugal rights ; and also award alimony to the wife and maintenance for the children as well as provide for custody of the children.

Between 1857 and 1937 the Matrimonial Causes Act in England was amended several times. Parsis were not lagging behind. *The Parsi Marriage & Divorce Act 1936* was promulgated by the Governor General in Council. The old Act of 1865 was repealed. Under the present Act, marriages solemnised in *Ashirvad* form between two persons who are boht Parsi Zoroastrians can be terminated only in the special Parsi Chief Matrimonial Courts or Parsi Matrimonial Courts in India. No other Courts in India have any jurisdiction to grant Decrees of Divorce or nullity to Parsi Zoroastrians whose marriage is solemnised in the religious *Ashirvad* form under the provisions of this Act.

The 1936 Act maintained the status of the Special Parsi Courts but reduced the number of Delegates to seven. The grounds for divorce were increased to ten grounds of which the main grounds are desertion, adultery, grievous bodily hurt, etc. One ground which is special is that the defendant (guilty-party) has ceased to be a Parsi Zoroastrian. The term Parsi Zoroastrian is double barrelled. The word Parsi refers to ethnic origin and means and includes all those persons in India who are descended from the people who came from Iran to India who were Zoroastrians. This includes descendants of the original group who came to India over a thousand years ago as well as descendants of Irani Zoroastrians who came to India at any time during the past about one thousand years. The word Zoroastrian refers to religion and means a person whose religious initiation, *Navjote* ceremony, has been performed in the Mazdayasnie Zarathushtrian Daena. A person who is born a Parsi can never cease to be a Parsi. So this divorce ground only refers to a person who is ethnically a Parsi but who has ceased to be a Zoroastrian.

b) Christian Personal Law

After the Parsis the Christians were the next to follow suit with a demand for a special law. In 1869 the Indian Divorce Act was promulgated. During the British Raj many Europeans especially persons from Great Britain were residing in British India. Many of them were of the Church of England or Church of Scotland or other Protestant Churches. After the Matrimonial Cause Act of 1857 it was possible for Christians domiciled in England to apply for matrimonial relief in the High Court in London. However the ship voyage from India to England took a long time in sailing boats and steamers. In order to make it easier for Christians living in India to obtain a legal valid divorce, the Indian Divorce Act IV of 1869 was promulgated.

Under this Act the Charter Jurisdiction of the three Presidency High Courts was supplemented. Christian divorce cases have to be instituted in the High Court of the place where the parties reside. The High Court has the power to transfer any case concerning Christians to a District Judge within the territorial jurisdiction of the High Court. The Grounds for divorce under the Christian Act are rather unfair to the wife. There is a double standard. It is easier for a husband to get a divorce. The grounds for divorce are basically only two:

(i) change of religion to some other religion than Christianity by the defendant/respondent. (ii) adultery. The wife in addition to adultery must prove that the husband has been guilty of incestuous adultery, bigamy with adultery, marriage with another woman with adultery, or adultery coupled with cruelty or adultery coupled with two years desertion or rape, sodomy or bestiality. The name of the co-respondent has to be cited and the co-respondent has to be made party to the petition. If the Court finds the respondent guilty then decree of divorce is passed which is made decree absolute after six months.

The Court also has jurisdiction to grant decree of nullity on the grounds of impotence or the parties are within prohibited degrees of relationship or either party was lunatic or idiot at the time of marriage or the former spouse of either party was alive at the time of marriage ceremony between the parties (bigamous marriage). The legitimacy status of children of annulled marriages is saved by section 21 of this Act. The Court also has power to grant decrees of judicial separation and restitution of conjugal rights; and also make orders for alimony for the wife, maintenance for the children and custody of the children. Unlike the Parsi Act, under the Christian Law, the Court has power to order a settlement of the wife's property for the benefit of husband and children. After this Act the Christian community also pressed for a law governing marriages amongst Christians.

The Indian Christian Marriage Act XV of 1872 was promulgated. This Act applies to parties if one of whom atleast is a Christian. Any person professing the Christian religion is a Christian and this includes Roman Catholics, Anglicans, Church of Scotland and other Christian sects. The priests/ministers/clergymen who are authorised by the Act can perform the ceremony of marriage. The Act provides for capacity/essential validity and formalities of marriage. Banns must be published. Both Parsi and Christian marriages require to be registered. Persons can get married under the Christian Act by the Marriage Registrar instead of by a Priest in Church.

The post independence Government of India has taken the view following the example of the British law makers that unless the community concerned demands a change of Personal Law and the community is united in its demand the Government will not interfere to change the laws of minority communities. Although the Minorities

Commission has recommended amendment for both Parsi Law and Christian Law, since the communities are not united in their demand for change, the matter has not progressed further.

It is necessary at this stage to make a few practical observations regarding the reality of the state of affairs concerning Christian Law in the Courts in India. Because the grounds of divorce are limited and many times the real reason for divorce is not adultery at all, lawyers practising in the High Court for Christian divorces have in practice resorted to the use of fiction rather than fact in the presentation of cases in the High Court. The presiding Judge as well as the lawyers and the parties know fully well that the allegations contained in the petition usually contain a cooked up fictitious story with an imaginary correspondent; but the farce has to continue with a straight face in Court in order to enable the parties to obtain a legally valid divorce so long as the present statute is not amended. There is great need to amend the Indian Divorce Act 1869.

c) *Muslim Personal Law*

Muslim Law remains in the realm of customary Personal Law to a large extent. The religious law is contained in the Koran. The Koran has been interpreted by learned Muslim Jurists whose opinions form the Shariat Law. Muslims are divided into numerous groups, the two main groups being Shia and Sunni. In addition there are many smaller groups living in India who go according to their Qazi. Marriage in Muslim Law is considered a Civil contract between a man and a woman. Under the Koranic Law the man can have upto four legal wives simultaneously; but the woman can only have one legal husband at a time. She can take a divorce and remarry; or she may become a widow and remarry.

In Muslim Law dissolution of marriage is permitted without the necessity of going to Court. The husband has the right to pronounce *talak*. There are three different methods of pronouncing *talak*. The second method is by mutual consent of husband and wife; this is called "Khula divorce or 'mubara' at divorce"; the third method is divorce by the wife according to the marriage contract agreement called *talak-i-tafweez*.

Muslim ladies protested about the unfairness of these Personal Law methods of divorce. The Dissolution of Muslim Marriages Act VIII of 1939 was enacted to enable a woman married under Muslim Law to obtain a decree of divorce from a Court. The grounds for divorce are the following : husband's whereabouts not known for four years ; husband has neglected or failed to maintain wife for two years ; husband is sentenced to seven years jail ; husband has failed to perform marital obligations for three years without reasonable cause ; husband is impotent ; husband is insane for two years or is a leper or suffers from B. D. ; wife was under age of fifteen years on marriage and she repudiated the marriage before age 18 ; cruelty by the husband which is defined in various ways. An unusual provision of this Act is that if a woman converts from Islam to another religion she can still apply for divorce under this Act. There is much need for enacting a Family Law statute for Muslims to govern their Personal Law matters.

d) *Hindu Personal Law*

Prior to 1955 Hindu Law was largely a matter of customs and there was a very great variety of customs of the numerous different castes, sub-castes and groups within the broad term "Hindus". The variations of customs were bewildering so in the British Raj days the English Judges took the easy recourse under the General Causes Act 1897 of recognising all customs as valid under Hindu Personal Law. Hindu men had the right to take more than one wife prior to 1955. It was one of the most cherished aims of late Pandit Jawaharlal Nehru to bring about unification of Hindu Personal Laws. After independence of India a series of statutes were enacted which collectively form a sort of Hindu Personal Law Code.

The Hindu Marriage Act 1955 applies to any person who is Hindu by religion including Brhmo, Prarthana, and Arya Samaj persons and Buddhists, Jains and Sikhs. It also includes any other person who is domiciled in India and who is not a Muslim, Christian, Parsi or Jew by religion. So the term Hindu is a broad catch all term.

After 1955 Hindu marriages have become legally monogamous. The statute provides for capacity of marriage, and formalities. The formalities prescribed by the Act include all customary rites and ceremonies of either party to the marriage including the *saptapadi* ceremony.

This Act provided for the first time registration of Hindu marriages ; an attempt to prevent bigamous marriages.

The Act provides for matrimonial reliefs of divorce, nullity, judicial separation and restitution of conjugal rights. The grounds for divorce are : divorce by consent of both parties ; or divorce on the ground of the respondent having committed one of several matrimonial offences which include living in adultery ; conversion to another religion ; incurably of unsound mind ; incurable leprosy ; suffering from communicable B. D. ; renouncing the world by entering any religious order ; or not having been heard of as being alive for seven years. The Hindu Act provides for maintenance claim to be made by both husband and wife against each other ; and also maintenance of children by both parents. This Act in effect provides a kind of Uniform Civil Code for the millions of Hindus living in India with their great varieties of customs.

e) *Jewish Personal Law*

There are no statutes specifically providing for Personal Laws of Jews in India. The Jewish persons are governed by their religious "Rabbinical Laws" which are administered by their religious priest, the Rabbi in their Synagogue. According to their Personal Laws Jewish persons can obtain a divorce, called "a Bill of Gett" from the Rabbi. This enables a Jewish person to remarry another Jewish person. However in view of there being no statute in India enabling inter-religious marriages of persons professing different religions in India before 1954, in order that the Jewish divorce obtained by Bill of Gett should be doubly reinforced, it was also possible for a Jewish person to apply for a divorce in the High Courts of Bombay, Madras and Calcutta only. These Charter High Courts had inherent matrimonial jurisdiction over Jewish persons whose marriages were monogamous. A decree of divorce pronounced by a High Court was legally valid throughout the world and would enable a divorced Jew to marry in any country of the world again under the Laws governing Civil marriage in other countries.

After independence of India late Pandit Jawaharlal Nehru tried to make it easier for persons belonging to different religious communities and governed by different Personal Laws in India to marry. Also persons whose Personal Laws were not satisfactory could have an option

to get married and have their legal rights governed by a Civil Statute. For this purpose the Special Marriage Act 1954 was enacted. This Act is optional. Nobody can be forced to get married under this Act. However everyone is free to exercise a voluntary choice or option to get married under this Act by the method of a Civil Registry Marriage or to have their marriage solemnised under any Personal Law registered under this statute and so avail of the protection of this statute.

3. Feasibility of the Concept of Uniform Civil Code in India

i) *Positive Elements* : The intention of the Constitution framers was to provide some Statute Law which would govern all persons who are Citizens of India in Personal Law matters. If a common Uniform Civil Code were enacted which would be mandatory on all citizens, wiping out differences between all religious communities so that every citizen was equally treated as every other citizen in law, it may perhaps promote national integration.

ii) *Negative Aspects* : However there are so many things militating against the concept and feasibility of a Uniform Civil Code in India that in my view it is not at all desirable or even possible to enact such a Code. Some of the factors against such a Uniform Civil Code (U. C. C.) are the following : It would only apply to citizens of India. There are millions of persons living in India who are not Citizens of India and who are at present governed by their own Personal Laws respectively. Why should such persons who enjoy the benefit and protection of the Laws in India already be bereft of such protection through a U. C. C. Another serious aspect is that persons whose Personal Laws are based on religion would never accept or obey a U. C. C. which is contrary to their religious beliefs because they would rather obey Allah and their conscience than some man made Statue. What is the sense of enacting a Law which would not be obeyed or accepted by the people ? Thirdly, those people in India who do not want to be governed by their Personal Laws already have the option open to them of availing of the benefit of the Special Marriage Act or the Foreign Marriage Act. These Statutes in a sense are a kind of Uniform Civil Code in practice. In a country like India it is wiser to have an optional law such as the Special Marriage Act than a mandatory U. C. C. which would not be obeyed by everybody.

4. The Possibility/Need for Change from within the Religious Traditions

The policy of law making in the field of Personal Law followed by the Rulers in the time of the British Raj which is also continued to some extent by the present Government of India is to leave them alone. Government will not and should not enact Statutes concerning Personal Law of any religious community unless and until there is a demand for such law made by and coming from within the community concerned. For example, the Parsis had demanded a Matrimonial Act over a hundred years ago in 1865. There is need for amendment of the present Act. But unless the Parsi community unitedly makes the demand for amendment and puts pressure through the Minorities Commission and other channels, Government should not take it into its own hands to forcibly thrust some Statute like an U.C.C. down their throats. Similarly unless the demand for law reform comes from within the religious traditions of the various religious communities in India it would be inadvisable and unwise jurisprudentially for the Government of India to enact an U. C. C. which would wipe out all the Personal Laws existing in India.