

INVALIDATING INSTANT TRIPLE TALAQ: IS THE TOP-DOWN APPROACH OF REFORMING PERSONAL LAWS PRUDENT?

Niraj Kumar & Akhilendra Pratap Singh***

In Shayara Bano v. Union of India, the Indian Supreme Court pronounced a split, though bold and progressive verdict setting aside the practice of instant triple talaq or talaq-e-biddat. Against the backdrop of this judgment, this paper traces the jurisprudence evolved by Indian courts vis-à-vis personal laws and the right to religious freedom. Two central arguments are presented in the course of this paper. First, the courts have not adopted a consistent approach when dealing with issues connected to personal laws. Second, the courts by means of the doctrine of essential religious practices have, besides interfering in the domain of personal laws, attempted to fashion the religion specific personal laws as per the understanding of the respective judges. In relation to this, the paper briefly considers the efficacy of the top-down approach of personal law reform which has been practised in India in the post-independence period. While showing that the top-down approach of personal law reform has not fared well in the Indian context, the paper suggests a different and more inclusive approach which can be adopted in the endeavour to reform personal laws.

I. INTRODUCTION

In *Shayara Bano v. Union of India* ('Shayara Bano'),¹ the Supreme Court of India ('SC') pronounced a verdict which set aside the practice of instant triple *talaq* or *talaq-e-biddat* which had been oft exploited by Muslim husbands to sever marital ties with their wives instantaneously and irrevocably. The verdict received huge applause, particularly from women's rights groups, on account of it being perceived as a decisive step towards attaining a gender just society.² Another notable point, though only of symbolic value, is that the bench that pronounced the judgment was constituted of judges of varied religious faiths.³

* Assistant Professor, National Law University Delhi.

** Ph.D. candidate at the Department of Political Science 'Jean Monnet', University of Campania 'Luigi Vanvitelli', Naples, Italy.

¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

² See The Wire, *Supreme Court's Triple Talaq Order Welcomed By Activists, Muslim Personal Board*, August 22, 2017, available at <https://thewire.in/170027/supreme-court-triple-talaq-verdict-2/> (Last visited on March 28, 2018).

³ The Bench comprised of J.S. Khehar (at that time Chief Justice of India), Kurian Joseph, Rohinton Nariman, U.U. Lalit, and S. Abdul Nazeer, JJ. belonging to Sikh, Christian, Parsi, Hindu and Muslim faiths respectively. Despite this plurality representing Bench, the absence of a female justice is clearly evident.

Although, the Court's limited concern in the case was whether triple *talaq* was constitutional and protected under the ambit of personal laws, its order has equally serious implications on other issues, such as the reformation of personal laws, and more importantly, the manner in which such reform must be brought about. These issues, which are incidentally or directly affected by the triple *talaq* judgment, become increasingly pressing and sensitive when used politically. For example, in this case, drawing legitimacy from the SC's verdict, the present day Central Government, which is blamed by some commentators to have an anti-Muslim stance, has introduced a Bill which criminalises the said practice and seeks to make it punishable by imprisonment extending up to three years and fine.⁴ On one hand, this act of government has been perceived by some as an unjust case of regulation of private affairs of a group of its citizens by the government, in this case being the *Sunni* Muslims belonging to the *Hanafi* sect.⁵ On the other hand, others have suggested that if the government was truly concerned of the well-being of Muslim women, then it would have made some provision in the said Bill for arbitration or reconciliation giving the Muslim women, who are the real victims of this practice, greater say in the matter.⁶

Against the backdrop of the triple *talaq* verdict, this paper discusses the prudence of the top-down model of reforming personal laws. To do so, it first provides a brief summary of the judgment so as to highlight the approaches of different judgments forming part of the verdict. It then traces the jurisprudence developed by the Indian courts with respect to personal laws and right to religious freedom. The paper primarily focuses on two aspects – firstly, that Indian courts have been inconsistent in their approach while dealing with personal laws and secondly, that the courts via the doctrine of essential religious practices have not only interfered in the domain of personal laws but also attempted to fashion the religion specific personal laws according to the understanding of the adjudicating judges. In light of the later discussion, the paper considers the broader issue of reformation of personal laws and the manner in which it must be carried out in a multi-religious country like India.

II. REVISITING THE VERDICT: GAMES OF INTERPRETATION

The five-judge bench in *Shayara Bano* pronounced three separate orders setting aside the practice of triple *talaq* by a majority of 3:2. The majority

⁴ See The Muslim Women (Protection of Rights on Marriage) Bill, 2017, 247 of 2017, §4. (The Bill was successfully passed in the Lower House of the Parliament, Lok Sabha but was defeated in the Upper House, Rajya Sabha).

⁵ This observation becomes more important because at the same time a nine-judge bench of the Supreme Court was hearing the case on whether right to privacy is a Fundamental Right under the Indian Constitution. Interestingly, the question was answered in the affirmative by the Supreme Court bench, declaring right to privacy to be a fundamental right. See Justice Puttaswamy v. Union of India, (2017) 10 SCC 641.

⁶ See Flavia Agnes, *The Politics behind Criminalising Triple Talaq*, 53 (1) ECONOMIC AND POLITICAL WEEKLY (January 6, 2018).

was constituted by two separate orders, one authored by Justice Rohinton Nariman for himself and Justice U.U. Lalit, and the other written by Justice Kurian Joseph. As per Justices Nariman and Lalit, the question to be decided by the Court was whether the Muslim Personal Law (*Shariat*) Application Act, 1937 ('1937 Act') could be said to recognise and enforce triple *talaq* as a rule of law to be followed by the courts in India and if not, whether the precedent that personal laws are outside the scope of Article 13(1) of the Indian Constitution is correct in law.⁷

In reaching the conclusion with regard to the first part of their question, that is whether the 1937 Act recognises and enforces triple *talaq*, Justices Nariman and Lalit, adopted a straight-forward approach. They rejected the line of argument forwarded by the Muslim Personal Board that the 1937 Act was only aimed at doing away with the customs and usages that were contrary to Muslim personal law.⁸ In their view, such reading of the 1937 Act was a constricted one and therefore, impermissible in law. Thus, the 1937 Act not only aimed at doing away with the customs and usages which were contrary to Muslim personal law but also to enforce Muslim personal law.⁹ Such reading of the Act led them to conclude that all forms of *talaq*, including triple *talaq*, were not only recognised but also enforced by the 1937 Act.¹⁰

At this juncture, it becomes imperative to mention the relevant section of the 1937 Act so as to clear the air in this regard. The relevant section, Section 2 of the 1937 Act reads as follows:

“2. Application of Personal Law to Muslims— Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).”

A plain reading of the section clarifies that it only attempts at doing away with any customs or usages which are contrary to the Muslim Personal Law, the *Shariat*. The section further makes Muslim Personal Law, the applicable rule of law in cases concerning matters such as intestate succession, property of

⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶331. (Although, Justices Nariman and Lalit felt that there was a need to relook at the law that personal laws do not fall within the scope of Art. 13(1) of the Indian Constitution, but they refrained from going into this question.)

⁸ *Id.*, ¶343-44.

⁹ *Id.*

¹⁰ *Id.*, ¶347.

females, marriage, and its dissolution between two Muslims. These facts can be culled out more clearly by reading the section in light of the statement of objects and reasons of the Act.¹¹ However, ignoring such interpretation of the section, the Judges opted for a different and contrary interpretation.

As regards the second part of their question, which is whether the precedent that personal law is outside the scope of Article 13(1) of the Indian Constitution is correct in law, they refrained from providing a decision on it.¹² However, treating the 1937 Act as a pre-constitutional legislative enactment, they concluded that the Act was well within the purview of the Article 13(1) of the Indian Constitution and therefore, can be declared to be void to the extent to which it is inconsistent with Part III of the Constitution.¹³ Having reached this conclusion, and thereafter applying the test of manifest arbitrariness to it, they held that the 1937 Act insofar as it seeks to recognise and enforce triple *talaq* is violative of Article 14 and therefore void to that extent.¹⁴

Considering the same set of questions, the minority judgment authored by Chief Justice Khehar for himself and Justice Nazeer came to a different conclusion. As per their viewpoint, triple *talaq* though considered to be a sinful practice, was considered to be valid in law by the *Sunni* Muslims of the *Hanafi* sect. Moreover, since it had been in practice for more than 1400 years, in their view it had become an essential part of the faith of the *Sunni* Muslims of the *Hanafi* sect and thereby an essential constituent of their personal law enjoying protection under Article 25 of the Indian Constitution. They further concluded that the practice in question did not violate the express parameters of public order, morality, health and other fundamental rights set forth by the Indian Constitution which permitted subjecting the right to religious freedom under Article 25 to restrictions. Continuing on a similar note, they concluded that since triple *talaq* was protected under the ambit of personal laws, the practice has protection equal to that of a Fundamental Right under the Indian Constitution.¹⁵ Therefore, the minority concluded that it would be out of place for the Court to set the practice aside on the ground of being violative of constitutional morality.

The balance that had crept into the verdict by the two judgments was finally disturbed and tilted in the favour of majority by the separate order of Justice Kurian Joseph. For him, the only question that required to be adjudicated was whether the practice of triple *talaq* has any legal sanctity. Relying on *Quranic*

¹¹ *Id.*, ¶40. (The Statement of Objects and Reasons of the said Act are reproduced by the Court.)

¹² The question whether triple *talaq* is an essential religious practice of the Islamic faith and resultantly protected under Art. 25 of the Indian Constitution, was answered in negative by Nariman and Lalit, JJ. *See id.*, ¶353-56.

¹³ *Id.*, ¶342, 348 & 396.

¹⁴ *Id.*, ¶392, 395 & 396.

¹⁵ *Id.*, ¶288.

verses and the two-judge bench decision of the SC in *Shamim Ara v. State of U.P.* ('Shamim Ara'),¹⁶ Justice Joseph concluded that triple *talaq* lacks legal sanctity.

Undoubtedly, the SC in *Shamim Ara* engaged with the issue of *talaq*, but the discussion was of a different nature and cannot be treated as forming the part of *ratio decidendi* of that case. In *Shamim Ara*, the singular issue that was decided was whether a plea of previous divorce taken in the written statement even if not communicated to the wife can be treated as pronouncement of *talaq* by the Muslim husband to his wife and whether the same has the effect of dissolving the marriage.¹⁷ While dealing with the issue, the Court held that in order for a pronouncement of divorce to become effective, it is necessary that communication of such pronouncement of divorce is made to the wife without ambiguity.¹⁸ Since, this criterion remained unfulfilled in the case, therefore, the marriage was found to not have been dissolved.¹⁹ In holding so, the Court observed:

“None of the ancient holy books or scriptures of Muslims mentions in text such form of divorce...No such text has been brought to our notice which provides that a recital in any document, whether a pleading or an affidavit, incorporating a statement by the husband that he has already divorced his wife on a specified or unspecified date even if not communicated to the wife would become an effective divorce on the date in which the wife happens to learn of such statement contained in the copy of the affidavit or pleading served on her”.²⁰

The decision of the Court, therefore, in the *Shamim Ara* case was limited to the issue of whether a divorce pronounced by a Muslim man to his wife but not communicated to her would be an effective divorce and result in dissolution of marriage. Thus, the Court only dealt with the way in which a Muslim divorce would become effective, and nowhere in the entire judgment did the Court make an attempt to decide whether any form of Muslim divorce was valid or not. However, despite the clarity of adjudicated issue in the *Shamim Ara* case, Justice Kurian Joseph was of the opinion that the SC had in the said case held that triple *talaq* had no legal sanctity.²¹ Further, as per his view, despite continuing for long, the practice was not integral to *Sunni* Muslims belonging to the *Hanafi* sect.²² Moreover, as the practice of triple *talaq* was against *Quranic* injunctions, it could not be held to be valid or good in *Shariat* and therefore, was bad in law.²³ He, however, agreed with the minority on the point that the 1937 Act was not legislation

¹⁶ *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518.

¹⁷ *Id.*, ¶6.

¹⁸ *Id.*, ¶16.

¹⁹ *Id.*, ¶17.

²⁰ *Id.*, ¶7.

²¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶301.

²² *Id.*, ¶324.

²³ *Id.*, ¶315,316, 327.

regulating *talaq*, rather it was aimed at curbing customs and usages prevalent amongst Indian Muslims that were contrary to *Shariat*.²⁴

Undoubtedly, the decision of the constitution bench in this case invalidated the practice of instant triple *talaq*. However, if one goes by the reasoning adopted by the three judges, whose judgements constitute the Shayara Bano verdict, in reaching their respective conclusions, it appears that the approaches adopted were extremely incoherent, rather oppositional. For instance, let us consider the approach of the bench vis-à-vis the issue of statutory status of the subjects regulated by the 1937 Act. Grappling with this issue, Justices Khehar, Nazeer, and Joseph took the view that the said Act did not confer any statutory status or aim at regulating the issues mentioned therein. Rather, as per the judges, the only aim of the 1937 Act was to do away with the customary practices and usages that had crept into Muslim personal laws and were contrary to *Shariat*.²⁵ By contrast, in the opinion of Justices Nariman and Lalit, the Act in addition to doing away with the customary practices and usages which were contrary to Muslim Personal law, also aimed at regulating the subjects mentioned in the Act.²⁶ Therefore, with respect to this issue, the predominant opinion²⁷ was that the 1937 Act did not aim at regulating the subjects mentioned therein, and therefore, did not attain the status of statutory law and rather remained within the ambit of Muslim personal law. Now, if we consider this view with regard to the 1937 Act as correct, then the primary basis of the judgment of Justices Nariman and Lalit becomes shaky. It is because Justices Nariman and Lalit treated the 1937 Act as pre-constitutional legislative act that enforced triple *talaq*, and therefore, set aside the said practice by striking the relevant section of the Act on the ground that it violated the Fundamental Right of equality under Article 14 of the Constitution. Such interpretational incoherence with respect to an issue of grave importance in the highest court of the country seems unusual and problematic. However, if we trace the Indian jurisprudence with regard to personal laws, it appears that over the years Indian courts have repeatedly failed to maintain a consistent approach.

III. PERSONAL LAW AND RELIGIOUS FREEDOM IN INDIA: SHIFTING APPROACHES, CONTINUOUS INTERVENTION

Commencing from the constitution-making process, the issue of personal laws in the country has been a major site of strife.²⁸ In the Constituent Assembly, furious debates took place about whether independent India should

²⁴ *Id.*, ¶304, 305.

²⁵ *Id.*, ¶233, 304, 305.

²⁶ *Id.*

²⁷ The predominant opinion here refers to the orders of Justices J.S. Khehar, Nazeer and Kurian Joseph.

²⁸ See Subrata Mitra & Alexander Fischer, *Sacred Laws and the Secular State: An Analytical Narrative of the Controversy over Personal Laws in India*, 1(3) INDIA REVIEW (2002).

continue with the practice of religion specific personal laws for different religious groups devised by the colonial masters or whether this system should be done away with and replaced by a Uniform Civil Code.²⁹

Caught in a deadlock, the constitutional architects devised a pragmatic strategy. On one hand, they accepted the practice of governing different religious groups in accordance with their personal laws. As a result, one can find in the Indian Constitution, provisions which accord group rights equal legitimacy as individual rights.³⁰ On the other hand, the constitution makers not only provided for strong individual rights but also placed the ideal of uniformity as a directive principle to be pursued by the future generations. Such an arrangement was made in order to ensure balance between individual rights and group rights, with an aim to foster a strong national identity.³¹ Although such an arrangement is appreciable as it truly reflects India's unique pluralistic tradition and multicultural ethos, at times it has led to serious contestations, particularly between individual claims to equality and the right to religious freedom of different religious groups.³² In particular, it has rendered the task of judges daunting since such disputes are brought forth in courts for final settlement in accordance with constitutional principles. Therefore, in order to deal with them, the courts in India have been compelled to adopt varied approaches.

A. *SHIFTING APPROACHES OF THE COURTS VIS-À-VIS PERSONAL LAWS*

Insofar as the question of constitutionality of laws is concerned, the Constitution of India prescribes certain requirements which must be met by laws in order to be constitutionally valid.³³ For laws that pre-date the constitution, such as personal laws the relevant constitutional provision is Article 13(1) which reads as

“13(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”.³⁴

²⁹ See CONSTITUENT ASSEMBLY DEBATES, Vol. VII, November 28, 1948 *speech* by LOKANATH MISRA 175; Constituent Assembly Debates, Vol. VII, December 1, 1948 *speech* by C. SUBRAMANIAM 87; Constituent Assembly Debates, Vol. XI, November 21, 1949 *speech* by JASPAT ROY KAPOOR 194.

³⁰ See The Constitution of India, 1950, Art. 25–30.

³¹ See Peter Ronald deSouza, *Politics of the Uniform Civil Code in India*, 50(48) ECONOMIC AND POLITICAL WEEKLY (November 28, 2015); see also Shefali Jha, *Secularism in the Constituent Assembly Debates, 1946-1950*, 37(30) ECONOMIC AND POLITICAL WEEKLY (July 27, 2002).

³² See Archana Parashar, *Gender Inequality and Religious Personal Laws in India*, 14(2) BROWN JOURNAL OF WORLD AFFAIRS 2 (2008).

³³ The Constitution of India, 1950, Art. 13.

³⁴ *Id.*, Art. 13(1).

Another provision under the same Article, i.e. Article 13(3)(a) clarifies what is meant by the term ‘law’ for this purpose. According to it, “‘law’ includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.”³⁵ These two provisions are to be read in light of Article 372 which reads as follows

“372(1) ...all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority”.³⁶

Further, according to Explanation 1 of Article 372, the expression ‘laws in force’ means

“...a law 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 it or parts of it may not be then in operation either at all or in particular areas.”

Reading the above provisions harmoniously, it becomes clear that any law to be constitutionally valid must not infringe upon the fundamental rights guaranteed by the Constitution of India.

However, as stated at the outset, the Constitution of India provides for certain group rights, and since personal laws fall within the ambit of such group rights, courts have been cautious while adjudicating their constitutionality. In doing so, the courts have deviated from the above formula and adopted two distinct approaches, which we term as the ‘Play Safe’ approach and the ‘Activist’ approach.

1. The ‘Play Safe’ Approach

In their early years, the Indian courts were wary of interfering in the domain of personal laws and adopted a play safe approach holding that personal laws cannot be tested against the touchstone of fundamental rights.³⁷ In doing so, they followed the reasoning that the personal laws are not ‘laws’ under Article 13(3)(a) of the Indian Constitution. This view of the court is explicit in the *State of Bombay v. Narasu Appa Mali* (‘Narasu’)³⁸ judgment. In this case, the petitioner

³⁵ *Id.*, Art. 13(3)(a).

³⁶ *Id.*, Art. 372(1).

³⁷ See, Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel* in RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 273 (1st ed., 2002); see also Mihir Desai, *A ‘Safe’ Judgment*, 52(36)ECONOMIC AND POLITICAL WEEKLY (September 9, 2017).

³⁸ *State of Bombay v. Narasu Appa Mali*, 1951 SCC OnLine Bom 72 : AIR 1952 Bom 84.

challenged the Bombay Prohibition of Bigamous Marriages Act, 1946, which prohibited bigamy for Hindus while allowing the same for Muslims, on the ground that it was violative of the fundamental right of equality guaranteed under the Indian Constitution. The Bombay High Court rejected this view and upheld the legislation.³⁹ The Court's judicial premise in reaching this conclusion was that personal laws are not 'laws' under Article 13(3)(a) of the Indian Constitution. In doing so, the Court did not make any distinction between statutory and non-statutory personal laws.⁴⁰

Although, the *Narasu* judgment was delivered by one of the High Courts in the country prior to the enactment of post-independence Hindu personal law reforms, its reasoning had a huge impact on the personal law jurisprudence in the High Courts as well as the SC in the post-reform era. An early depiction of this is visible in the judgment of the Madras High Court in *Dwaraka Bai v. Nainan Mathews*.⁴¹ In this case, the petitioner challenged Section 10 of the Indian Divorce Act, 1869 which allowed a husband to obtain divorce only on the ground of adultery, while the wife had to prove cruelty or desertion in addition to adultery. The court while upholding the said provision held that such discrimination was justified as it considered the differing consequences which the act of adultery could have when done by a man and woman.⁴² On similar lines, in *Harvender Kaur v. Harmander Singh Choudhry*,⁴³ the Delhi High Court upheld Section 9 of the Hindu Marriage Act, 1955. In doing so, the Court observed that

“Introduction of constitutional law in the home is most inappropriate... [and] will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have any place.”⁴⁴

In *S. Mahendran v. Travancore Devaswom Board*,⁴⁵ the division bench of Kerala High Court upheld the practice of banning the entry of women who fall within the age group of 10-50 years from trekking the holy hills of Sabrimala in connection with the pilgrimage to the Sabrimala temple and from worshipping Sabrimala shrine during any period of the year. While upholding this practice, the Kerala High Court made several observations that hint towards the potential influence which the *Narasu* reasoning may have had on the final decision in the case. These observations were that

³⁹ *Id.*

⁴⁰ Flavia Agnes, *Personal Laws* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 909 (1st ed., 2016).

⁴¹ *Dwaraka Bai v. Nainan Mathews*, 1953 SCC OnLine Mad 31 : AIR 1953 Mad 792.

⁴² *Id.*, ¶35.

⁴³ *Harvender Kaur v. Harmander Singh Choudhry*, 1983 SCC OnLine Del 322 : AIR 1984 Del 66.

⁴⁴ *Id.*, ¶34.

⁴⁵ *S. Mahendran v. Travancore Devaswom Board*, 1991 SCC OnLine Ker 43 : AIR 1993 Ker 42.

“(1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.

(2) Such restriction imposed by the Devaswom Board is not violative of Arts. 15, 25 and 26 of the Constitution of India.”⁴⁶

Another instance when the hegemony of *Narasu* reasoning comes out starkly in the SC in respect of personal laws is in the case of *Shri Krishna Singh v. Mathura Ahir*.⁴⁷ In this case, the question that came up for adjudication before the court was whether a *shudra* would be eligible to become a *sanyasi*. Overruling the High Courts’ view that any impediment faced by a *shudra* owing to personal laws would be violative of Articles 14 and 15 of the Constitution and therefore discriminatory, the SC held that a *shudra* could only become a *sanyasi* if the customs and usages permitted for it. While holding so, the SC observed that

“...Part III of the [Indian] Constitution does not touch upon the personal laws of the parties. In applying personal laws of the parties, [it is important to] enforce the laws derived from recognised and authoritative sources of Hindu Law...except, where such law is altered by any usage or custom or abrogated by a statute.”⁴⁸

The above survey of cases provides an overview of the ‘Play Safe’ approach which the Courts adopted during the early half of the post-independence period while dealing with personal laws. Undoubtedly, such an approach of the Indian courts depict their constricted attitude while dealing with personal law issues, but as Flavia Agnes argues, the primary reason for this approach was that the judicial verdict in such cases could potentially encroach upon a task that is bestowed upon the legislature or overshadow what is essentially a legislative prerogative.⁴⁹ The latter argument made by Agnes as to the approach of Indian courts *vis-à-vis* personal laws is not without substance. Rather this attitude of the Court has received due recognition by the SC in *Ahmedabad Women Action Group v. Union of India*.⁵⁰ In this case, the petitioners had challenged various provisions of Muslim personal law, such as polygamy and triple *talaq*. The SC declined from examining the merits of the petition, and held that making laws for social change was the prerogative of the legislature and not of the courts.⁵¹

⁴⁶ *Id.*, ¶44.

⁴⁷ *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689.

⁴⁸ *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689, ¶17.

⁴⁹ See Agnes, *supra* note 40, 909.

⁵⁰ *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573.

⁵¹ *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573, ¶14, 21.

2. The ‘Activist’ Approach

Although, the Narasu reasoning played a major role in fashioning the personal law jurisprudence in the country, but as every idea is subject to change, adaptation, reformulation, and abrogation, it gradually started to lose its stronghold and the approach of Indian courts in matters pertaining to personal laws also shifted. Consequently, the courts adopted a more activist stance and began to test personal laws on the touchstone of Fundamental Rights. This approach enabled the courts to either strike down any particular statutory provision in any law or to reinterpret them harmoniously with Part III of the Indian Constitution.⁵²

An early depiction of this approach is visible in the judgment of Andhra Pradesh High Court in *T. Sareetha v. T. Venkata Subbaiah*.⁵³ In this case, the petitioner challenged the constitutionality of Section 9 of the Hindu Marriage Act, 1955 dealing with restitution of conjugal rights on the ground of being violative of Articles 14, 19, and 21.⁵⁴ The Court struck down the relevant provision, finding it to be violative of Article 21 and observed that

“...[the remedy of] restitution of conjugal rights constitutes the starkest form of governmental invasion of personal identity and individual’s zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being.”⁵⁵

However, later, the SC in *Saroj Rani v. Sudarshan Kumar Chadha*⁵⁶ expressly overruled the view taken by the Andhra Pradesh High Court.

On similar notes, in *Ammini E.J. v. Union of India*,⁵⁷ the Kerala High Court quashed the words ‘incestuous’ and ‘adultery coupled with’ from Section 10 of the Indian Divorce Act, 1869 on the grounds of being arbitrary and violative of Articles 14, 15, and 21 of the Constitution.⁵⁸ Following this verdict, several other High Courts held this provision to be discriminatory. Resonating with these verdicts, the Indian Parliament amended the said Act in 2001 bringing it in consonance with personal laws of other religious groups.⁵⁹ In *C. Masilamani Mudaliar v.*

⁵² See Agnes, *supra* note 40, 909.

⁵³ *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90 : AIR 1983 AP 356.

⁵⁴ *Id.*, ¶17.

⁵⁵ *Id.*, ¶29.

⁵⁶ *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90.

⁵⁷ *Ammini E.J. v. Union of India*, 1995 SCC OnLine Ker 47 : AIR 1995 Ker 252; see also *Mary Sonia Zachariah v. Union of India*, 1995 SCC OnLine Ker 288 : (1995) 1 KLT 644.

⁵⁸ *Ammini E.J. v. Union of India*, 1995 SCC OnLine Ker 47 : AIR 1995 Ker 252, ¶¶40,41, 47.

⁵⁹ See Werner Menski, *The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, 9(3) GERMAN LAW JOURNAL 3(2008).

Idol of Sri Swaminathaswami Swaminathaswami Thirukoil,⁶⁰ the SC held that the right of a Hindu woman to execute a will in relation to the property possessed by her under Section 14 of the Hindu Succession Act, 1956 is protected under Articles 14, 15, and 21 of the Constitution.⁶¹ Similarly, in *John Vallamattom v. Union of India*,⁶² the SC struck down Section 18 of the Indian Succession Act, 1925 as being violative of Article 14.⁶³

Another important judicial pronouncement depicting SC's liberal, rights-based and activist approach is *Danial Latifi v. Union of India*.⁶⁴ In this case, the petitioners challenged the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 ('1986 Act'), under which Section 125 of the Criminal Procedure Code, providing for maintenance for wives, including divorced women, by their former husbands, was made inapplicable to divorced Muslim women. It was brought to the attention of the Court that at the same time, under Section 3(1)(a) of the 1986 Act, a divorcing Muslim husband had become liable to potentially much higher maintenance payments to his ex-wife than under Section 125 of the Criminal Procedure Code.⁶⁵ The constitution bench of the SC while upholding the Act made following important conclusions for the benefit of divorced Muslim women:

"1. A Muslim husband is liable to fair and reasonable provision for the future of the divorced wife including her maintenance and should be made within the iddat period.

2. Such Liability of Muslim husband is not confined to the *iddat* period."⁶⁶

These cases, among others,⁶⁷ point towards the shift in the attitude of Indian courts when dealing with issues concerning personal laws. Indian courts, which in the beginning were not inclined towards interpreting personal laws in light of the Fundamental Rights guaranteed by the Constitution, have gradually adopted a more liberal as well as rights-based stance.

⁶⁰ C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil, (1996) 8 SCC 525.

⁶¹ C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil (1996) 8 SCC 525, ¶¶15, 27, 29.

⁶² John Vallamattom v. Union of India, (2003) 6 SCC 611.

⁶³ *Id.*, ¶¶66, 70.

⁶⁴ Danial Latifi v. Union of India, (2001) 7 SCC 740.

⁶⁵ See The Muslim Women (Protection of Rights on Divorce) Act, 1986, §3; see also Menski, *supra* note 59, 219.

⁶⁶ See Danial Latifi v. Union of India, (2001) 7 SCC 740, ¶36.

⁶⁷ The activist approach of the Indian courts is visible in several other cases, see generally Pragati Varghese v. Cyril George Verghese, 1997 SCC OnLine Bom 184 : AIR 1997 Bom 349; Debra Clare Seymour v. Pradeep Arnold Seymour, 2002 SCC OnLine Del 343 : (2002) 98 DLT 34; Shamim Ara v. State of U.P., (2002) 7 SCC 518.

Although the above-discussed approaches provide an insight into the trajectory of courts' engagement with personal laws, they do not offer a holistic picture. It is because, in addition to the mentioned approaches, the Indian courts, particularly the SC, have devised another way to secularise the religious domain. This other mode devised by the courts to bring religion in tandem with the secular constitutional values is the doctrine of essential religious practices. It is important to mention here that although through the use of doctrine of essential religious practices, the Court has not directly dealt with personal laws, but at the same time, its impact has been such that it has given Indian courts the authority to decide which practice of a particular religion is protected by the Constitution as being part and parcel of its personal laws. Employing this doctrine in a range of cases concerning the right to religious freedom, the SC has continuously intervened within the religious circle and has taken upon itself to decide what practice constitutes the core of any religion.

B. DOCTRINE OF ESSENTIAL RELIGIOUS PRACTICE: CONTINUOUS INTERVENTIONS IN THE RELIGIOUS DOMAIN

Writing about the role of courts in regulating religion in a secular constitutional setup, Pratap Bhanu Mehta makes an important observation. He remarks,

“...[courts] have to determine whether or not a policy places a substantial burden on the free exercise of religion. This might require the court to have not just a clear definition of religion but also to determine whether a particular practice counts as falling under that definition.”⁶⁸

This remark is as much applicable to Indian courts, particularly the SC, as to courts in other legal systems, such as US and Germany.⁶⁹ However, what is unusual about Indian SC is its activism in shaping religion as per the understanding of judges or the State, rather than accepting it as practised by the believers.⁷⁰ This has, at times, led to serious rather controversial outcomes primarily because of two reasons. First, Indian religions, particularly Hinduism and Islam, do not in *sensu stricto* fit into the Western meaning of religion, and thus, defining

⁶⁸ Pratap Bhanu Mehta, *Passion and Constraints: Courts and the Regulation of Religious Meaning* in *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION* 319 (1st ed., 2008).

⁶⁹ For the role of courts in examining religious beliefs and practices in United States, see Jared A Goldstein, *Is There a Religious Question Doctrine-Judicial Authority to Examine Religious Practices and Beliefs*, 54 (2) *CATHOLIC UNIVERSITY LAW REVIEW* 497 (2005); for the German perspective, see Dieter Grimm, *Conflicts Between General Laws and Religious Norms* in *CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL* 3-14 (1st ed., 2014); Gerhard Robbers, *Religious Freedom in Germany*, 2001(2) *BRIGHAM YOUNG UNIVERSITY LAW REVIEW* 643 (2001).

⁷⁰ Ronjoy Sen, *Secularism and Religious Freedom* in *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 886 (1st ed., 2016).

their meanings a task next to impossible. This is so because these religions have numerous schools of thoughts and interpretations. Second, such judicial activism has denied self-identification to certain religious sects and groups.⁷¹ Although, the Court has used this practice to decide various category of cases falling within the domain of right to religious freedom,⁷² but as our purpose here is to highlight the courts' influence in shaping religion, we concentrate on cases that specifically deal with this very aspect.

The first case wherein the SC made use of this doctrine was *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* ('Shirur Mutt').⁷³ The Shirur Mutt case is also important because of the fact that it became the ideal reference point of constitutional discourse on religious freedom in the subsequent decisions of the Court. In this case, the *mathadhipati* or the head of Shirur Mutt challenged the Madras Hindu Religious and Charitable Endowments Act, 1951 on the ground it infringed Articles 25 and 26 of the Constitution. Although the Court upheld the major portion of the impugned Act in this case,⁷⁴ but what is of interest for the purposes of this paper is the way in which the Court decided to interpret the term 'religion'. In defining the term, Justice Mukherjea rejected what Rajeev Dhavan calls the assertion test, whereby a petitioner could simply assert that a particular practice was a religious practice.⁷⁵ Instead, drawing from the Australian High Court's decision in *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth*,⁷⁶ the Court favoured the term being defined as

"A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worships which are regarded as integral parts of religion..."⁷⁷

⁷¹ *Id.*; see also FARRAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM 111(2016).

⁷² See Sen, *supra* note 70, 887. (Ronojoy Sen classifies these cases into three categories; first, to decide which religious practice is constitutionally protected; second, to adjudicate the legitimacy of legislations for managing religious institutions; and third, to decide the extent of independence that can be enjoyed by religious denominations.).

⁷³ *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282 ('Shirur Mutt').

⁷⁴ For a critical review of the Court's order in the *Shirur Mutt* case and some other important case laws on constitutional limits on religious freedom in India, see P.K. Tripathi, *Secularism: Constitutional Provision and Judicial Review*, 8(1) JOURNAL OF THE INDIAN LAW INSTITUTE 10-16 (1966).

⁷⁵ Rajeev Dhavan, *Religious Freedom in India*, 35(1) THE AMERICAN JOURNAL OF COMPARATIVE LAW 220 (1987).

⁷⁶ *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth*, (1943) 67 CLR 116.

⁷⁷ *C.f.* Sen, *supra* note 70, 888.

At this juncture, it is necessary to mention that such a broad definition of the term 'religion' thereby including rituals and ceremonies as integral components to reach a holistic understanding of religion given by the SC was different from that given by the Bombay High Court in a prior case, wherein the High Court narrowly interpreted the term as "whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the [Indian] Constitution."⁷⁸

By using this definition in the Shirur Mutt case, the SC did several things. First, it clarified that the protection under Articles 25 and 26 was not confined to matters of doctrine or belief only but extended to acts done in pursuance of religion. Therefore, it contained guarantees for rituals, observances, ceremonies, and modes of worship. Second, it cleared the air in relation to the limits of autonomy which was granted to religious denominations to decide which religious practice was essential for them.⁷⁹ Third, although the judgment gave a wide definition of religion so as to include rituals and practices, and at the same time it sanctioned an elaborate regulatory regime for religious institutions. In doing so, it paved the path for the SC to decide which practice was essential to the religion in question, thereby leading judges to enter into a less familiar territory.⁸⁰

In the later decisions of the SC, this led to substantial reformulation of the doctrine of essential religious practices. For instance, in *Durgah Committee v. Syed Hussain Ali*,⁸¹ wherein the petitioners, the *khadims* of the shrine of Moinuddin Chisti in Ajmer, challenged the Durgah Khwaja Saheb Act, 1955 on the grounds that it violated their fundamental rights guaranteed by Articles 25 and 26 of the Constitution. Authoring the judgment in this case, Justice Gajendragadkar did not make any reference to the relevant scriptures. Rather, skilfully constructing a secular history of the shrine, he concluded that the shrine "had always been in the hands of the official appointed by the State."⁸² Although, the Court conceded that *Chistia* sect were a religious denomination, nonetheless, it upheld the validity of the impugned Act. In doing so, Justice Gajendragadkar introduced a 'rational' element in the doctrine of essential religious practices. He observed that

"...in order that practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for

⁷⁸ Ratilal Panachand Gandhi v. State of Bombay, 1952 SCC OnLine Bom 86 : ILR 1953 Bom 1187. (A similar definition of 'religion' was provided by Chagla, J. in the same judgment. It should also be mentioned that since this definition was not preferred by the Supreme Court, therefore, when the High Court's decision in Ratilal's case came before the Supreme Court, it was overturned.)

⁷⁹ Sen, *supra* note 70, 889.

⁸⁰ Dhavan, *supra* note 75, 220.

⁸¹ Durgah Committee v. Syed Hussain Ali, AIR 1961 SC 1402.

⁸² *Id.*, ¶22.

being treated as religious practice...Similarly, even practices which may have sprung from merely superstitious beliefs and [therefore] extraneous and unessential accretion to religion itself. Unless such practices are found to constitute an essential and integral part of religion their claim for the protection under Art. 26 may have to be carefully scrutinized. In other words, the protection must be confined to religious practices as are essential and integral part of it and no other.⁸³

By adding a ‘rational’ element to the essential religious practices doctrine, the Supreme Court not only took upon itself the authority to decide what practice qualified as religion, but it also brought within its purview the authority to decide whether a particular practice was ‘real’ or ‘mere superstition’.

Similarly, in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*,⁸⁴ where the spiritual head of the Nathdwara temple in Rajasthan challenged the constitutionality of the Nathdwara Temple Act, 1959 on the grounds that it infringed Articles 25, 26(b), and 26(c). The Court, while reconstructing the doctrine of the *Vallabha* school and the history of the temple, upheld the Act.⁸⁵ In doing so, the Court moved to a State-centric view and observed that

“In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion because the community may speak with more than one voice and the formula would therefore break down. The question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and whether it can be regarded as integral or essential part of the religion...”⁸⁶

The later cases on right to religious freedom⁸⁷ blindly followed the doctrine of essential religious practices without ever reconsidering it. At times, the use of this doctrine by the Court has backfired and created enormous religious tensions in the country, like in the *Mohd. Ahmed Khan v. Shah Bano Begum*⁸⁸ case.⁸⁹

⁸³ *Id.*, ¶33.

⁸⁴ *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, AIR 1963 SC 1638.

⁸⁵ Sen, *supra* note 70, 891.

⁸⁶ *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, AIR 1963 SC 1638, ¶57.

⁸⁷ See *Acharya Jagdishwaranand Avadhuta v. Commr. of Police*, (1983) 4 SCC 522; *Mohd. Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731; *S.P. Mittal v. Union of India*, (1983) 1 SCC 51 : AIR 1983 SC 1.

⁸⁸ *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 : AIR 1985 SC 945.

⁸⁹ ARUN K. THIRUVENGADAM, *THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS* 201 (2017).

In following the doctrine of essential religious practices, the Court has made an attempt to discipline the religious domain by striking down the religious practices that in its understanding were irrational and backward in character. A similar trend is explicit in the triple *talaq* verdict also, wherein the majority rejected this practice as being non-essential to the Muslims of *Hanafi* sect.⁹⁰ This has not only shrunk the space for personal faith, but at times, also marginalised popular religion.⁹¹

However, if we view this pattern in the light of discussion done under the ‘Shifting Approaches vis-à-vis Personal Laws’⁹² section of this paper, it appears that the Court has rather than shifting its approach followed a set pattern; although what is common in both these discussions is that the Court has taken upon itself to either reform the personal laws or secularise the religious domain.

IV. INVALIDATING INSTANT TRIPLE TALAQ: SURRENDERING TO POPULAR DEMAND OR DEMOSPRUDENCE?

At this juncture, if we view the approach adopted by the Supreme Court in the Shayara Bano case in light of the discussion in the preceding sections, two observations are clearly discernible. First, the minority judgment adheres to the ‘Play Safe’ approach adopted by Indian courts when dealing with personal laws.⁹³ This can be safely argued because despite recognising that instant triple *talaq* is a sinful practice, the minority did not invalidate the practice, instead holding it as being a part and parcel of personal laws as well as an essential religious practice of the Muslims belonging to *Hanafi* sect. Second, the majority adopted the ‘Activist’ approach by invalidating the said practice on the grounds that it not only was arbitrary and violated the fundamental rights of individuals guaranteed under Part III of the Constitution, but was also against the *Quranic* injunctions.⁹⁴ Therefore, on the basis of these latter observations, it would not be wrong to say that both the majority and the minority judgments in this case had much to borrow from the past jurisprudence developed by the Indian courts with regard to the issues of personal laws and religious freedom.

Although the scale of balance in this case shifted towards striking down the practice of instant triple *talaq*, as discussed in the beginning, the reasoning of the Court in doing so was extremely incoherent.⁹⁵ Therefore, it compels one to think about whether in addition to the legal issues involved, if there was any extra-legal factor which compelled the Supreme Court to adjudicate this case in

⁹⁰ See *Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶353-56.

⁹¹ Sen, *supra* note 70, 902.

⁹² Part III (A) of this paper.

⁹³ See Part III (A)(1) of this paper.

⁹⁴ *Id.*

⁹⁵ See Part II of this paper.

the manner that it did. More specifically, there arises a question as to whether the Court felt obliged on account of popular pressure to invalidate the said practice. This question is not out of place as it appears from the Court's observations that its verdict was very much influenced by popular pressure, and it had made its mind that it was the right time that it took this issue in its own hands and decide it finally. Some of the concluding observations from the minority judgment strengthen this claim.

“The whole nation seems to be up in arms against [instant *triple talaq*]. There is seemingly an overwhelming majority of Muslim women, demanding that the practice of *talaq-e-biddat* which is bad in theology, be declared as impermissible in law. The Union of India has also participated in the debate. It has adopted an aggressive posture, seeking the invalidation of the practice by canvassing, that it violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting that it even violates Constitutional morality... Most of the views expressed on the subject, hugely affirmed that the practice was demeaning... Even during the course of the hearing, learned counsels appearing for rival parties, were in agreement, and described the practice as unpleasant, distasteful, and unsavoury... Some even described it as debased, abhorrent, and wretched.”⁹⁶

Such observations coming from the highest court of the country cannot be taken lightly, more so when it comes in the context of sensitive matters, such as those of religious freedom and personal laws. Another reason why this possibility cannot be done away with is that the Supreme Court, at times, has passed orders solely based on popular demands.⁹⁷

In spite of such observations which hint at the influence of popular pressure on Court's verdict in this case, it would not be correct to argue that the SC's verdict in this case was propelled solely by popular pressure. Had that been the case, the Court would have easily invalidated the practice by calling it anti-Islamic, and therefore, beyond the mandates of *Shariat*.⁹⁸ However, the Court did

⁹⁶ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶289. (In this regard, *see also* the observations made by Justices Nariman and Lalit in ¶338.)

⁹⁷ *See Shyam Narayan Chouksey v. Union of India*, (2017) 1 SCC 421. (In this case, the Supreme Court made it mandatory for all cinema halls to play the National Anthem before a feature film is displayed, and stated all people watching the film are obliged to stand up to show their respect to the National Anthem. It further stated that during the period when the National Anthem is being played, the entry and exit doors of the cinema halls shall remain closed. In the Court's view, such a measure would instill the feeling of patriotism and nationalism within the citizens. Although the Court made the fundamental duties, mentioned in the Indian Constitution, the basis of their order, the political context in which the order came depicts the role played by popular pressure.); *see NUJS Law Review, Editorial Note*, 10 NUJS L. Rev. 1 (2017).

⁹⁸ *See Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶310. (Interestingly, only one of the orders in this case authored by Justice Kurian Joseph mentions that the practice was against the basic tenets

not do so rather what it did comes closer to what may be classified as ‘demosprudence’. In the words of Lani Guiner,

“...demosprudence is a lawmaking or legal practice that builds on the collective wisdom of the people. It focusses on the relationship between the lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law.”⁹⁹

In simple terms, demosprudence is defined as legal practices that specifically target social movements and attempt to catalyse legal change through such movements.¹⁰⁰ If we view the triple *talaq* verdict in light of these definitions, it can be safely argued that the Court’s decision comes closer to demosprudence. It is because the Court, being mindful of the mass movement against the said practice, invalidated it despite acknowledging that the same was recognised as a lawful form of divorce under the *Hanafi* school of Muslim personal law. In this context, therefore, the Court’s effort must be appreciated.

On a different note, the Court’s role in shaping and reshaping the *demos* is an all-important question.¹⁰¹ But, at the same time, it should also be borne in mind that the issue of personal laws and religion are as much an issue of democratic deliberation as of judicial adjudication.¹⁰² This is because personal laws and religion are intimately imbibed in the daily lives of citizens, particularly in the Indian subcontinent, and also have political implications. Moreover, since both personal laws and religious freedom enjoy constitutional protection, any non-serious engagement with them is destined to be problematic. In this context, therefore, it becomes necessary to discuss the issue of reformation of personal laws. The next section aims to briefly discuss this aspect.

V. REFORMING PERSONAL LAWS: HOW PRUDENT IS THE TOP-DOWN APPROACH?

Personal law reforms in India have been and continue to be a sensitive issue because they may potentially impinge on the right to religious freedom of various religious groups in the country. In contrast to this, several practices continued through the personal law system pose serious threats to constitutional values of equality and dignity of individuals as well as groups of individuals falling within

of *Quran* and *Shariat*.)

⁹⁹ Lani Guiner, *Demosprudence through Dissent*, 122 (4) HARVARD LAW REVIEW 4 (2008).

¹⁰⁰ Brian Ray, *Demosprudence in Comparative Perspective*, 47 STAN. J. INT’L L. 111 (2011).

¹⁰¹ Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 MACQUAIRE LAW JOURNAL 3-23 (2014).

¹⁰² Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999(3) UTAH L. REV. 639 (1999).

the broader category of a religion, such as women. While dealing with the question as to the status of personal laws in independent India, the Constituent Assembly considered it prudent to continue the personal law system.¹⁰³ Nonetheless, the idea that personal laws needed to be reformed so as to meet the constitutional goals was not lost in the post-independence period.

In the early years, the thrust to reform the personal laws came from the executive and the Parliament. This is exemplified by the various attempts to enact what came to be known as the Hindu Code. The first Prime Minister, J.L. Nehru, was of the opinion that task of reforming personal laws must begin from the majority as it would demonstrate that the reforms were not political tools to suppress the minorities.¹⁰⁴ However, legislative attempts to reform personal laws of other religious communities came much later.¹⁰⁵ In the meantime, judicial attempts to bring the personal laws in consonance with the constitutional mandate had already begun, and it created huge social and political divisiveness in the country. Analysing closely the developments in the personal law system in India, Menski comments that

“India... has quite consciously over decades - and thus not by accident - developed a fascinating reflection of the original ideal of the Uniform Civil Code, in the form of a sophisticated, harmonised system of legal regulation that maintains and skilfully uses the input of personal status laws and yet achieves a measure of legal uniformity....Indian family laws have been skilfully reformed and harmonised in such a way that the newly configured Indian legal system of the post 9/11 era has extremely sensitively built the various traditional legal systems and new social welfare concerns into a gradually consolidated form of post-modern social welfare law.”¹⁰⁶

Although, we may agree with Menski’s observation, the real question which is yet to be answered relates to the effect of these reforms. It belies the question as to whether the social reality of the Indian society changed merely by bringing about changes in the personal law system. Flavia Agnes provides a pertinent answer to this question. She writes that

“The lessons learnt in the last 60 years are that uniformity has not worked. It has also had a disastrous impact on the rights of Hindu womenRather than uniformity, what women need are an accessible and affordable justice delivery system and

¹⁰³ See Galanter & Krishnan, *supra* note 37.

¹⁰⁴ THIRUVENGADAM, *supra* note 89, 195.

¹⁰⁵ *Id.*, 197.

¹⁰⁶ MENSKI, *supra* note 59, 213.

inclusive models of development that will help to eliminate their poverty and destitution and help to build an egalitarian world.”¹⁰⁷

Although her comment is specifically directed at the plight of Hindu women and is in the context of Hindu personal law reform, it is equally true of reforms in the personal laws of other religious groups. This chasm between the social and legal reality reveals that the top-down approach of reforming personal laws has not worked well in India. This is clearly exemplified by the *Sarla Mudgal v. Union of India*,¹⁰⁸ wherein the issue of polygamy within Hindu religion was raised despite the fact that not only the Narasu judgment but also The Hindu Marriage Act, 1955 prohibits it and the Indian Penal Code, 1860 makes engaging in it a criminal offence.¹⁰⁹ Evidently, in order that the personal law system is reformed, a more comprehensive and co-operative attempt is required to be made. Therefore, in the rest of this section, we discuss briefly an approach for personal law reform which we believe is more inclusive as it demands cooperation and strengthens the bond between State and religious groups.

Personal laws are usually implemented independent of the structures and mechanisms of the State, but the State can very well regulate them through its legislative powers. However, as Abdullahi An-Na'im rightly argues, such attempts

“...can neither immediately eradicate the practice of these laws altogether, nor transform their nature and content, at least not without engaging in massive oppression and intimidation of the particular population over a long period of time.”¹¹⁰

He further argues that even if any State was willing to take such harsh measures so as to bring the religious and customary laws in harmony with the human rights paradigm, such a policy itself would be against human rights.¹¹¹ Therefore, he suggests that “any effort to change religious and customary laws in accordance with human rights law should seek to persuade people of the validity and utility of the change.”¹¹² This seems to be the most practical solution to the problem of personal law reforms. The only impediment here, which is generally prevalent in the Indian context, is the presence of fundamentalist factions within different religious groups who view these discriminatory and illiberal practices as being part and parcel of their religion, and thus defend them under the garb

¹⁰⁷ Flavia Agnes, *Liberating Hindu Women*, 50(10) ECONOMIC AND POLITICAL WEEKLY (March 07, 2015).

¹⁰⁸ *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635 : AIR 1995 SC 1531.

¹⁰⁹ See The Hindu Marriage Act, 1955, §5; The Indian Penal Code, 1860, §494.

¹¹⁰ Abdullahi Ahmed An-Na'im, *State Responsibility under International Human Rights Law to Change Religious and Customary Laws* in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 176 (1st ed., 1994).

¹¹¹ *Id.*

¹¹² *Id.*, 177.

of religious freedom of groups. To this problem, Anthony Appiah suggests a viable solution. He argues that “the most effective way of ending these practices involves making allies with the more orthodox”.¹¹³ He claims that it is these orthodox groups who can effectively convince these fundamentalist groups,¹¹⁴ with both falling within the same broader religious group, that they are deviant to the true goals which religions in general propose.¹¹⁵ Doing so would aid the members of fundamentalist groups to realise the truth of their religions and thus give up illiberal practices that have crept into the same.¹¹⁶

The role of the State in this approach of reforming personal laws would be no less than that of the members of religious groups. The State cannot effectively lead this process pursuing a positivistic frame of mind and imposing its standards of human rights upon the religious communities. Therefore, it will be necessary for the State to appreciate the centrality of religious laws in order to support the process of internal reformation because personal laws are directly related to and are important aspects of distinct identities of religious group.¹¹⁷ Moreover, since religious laws operate independently of State structures and mechanisms, if the State engages with them in a hard-fashioned way, it will be able to transform the content of these laws only superficially without bringing about a social change.

Therefore, if this road to reforming personal laws is to reach the desired end, then it is crucial that the State in spite of acting in a hostile and intrusive way towards religious personal laws act in a supportive capacity. One way to do this is to encourage the religious groups to engage in internal consultations about reforming their practices by developing programs and incentives that inspire the process of reformation.¹¹⁸ Moreover, as this process would require cautious progress, therefore, classifying religious laws as being discriminatory, patriarchal and oppressive must be done by the members of the groups themselves in order to avoid rift amongst different religious groups.¹¹⁹

In our view, this approach to reform personal laws will have an additional benefit of strengthening the bond of citizenship because the State while performing a supportive role will interact with members of religious groups irrespective of their religious affiliation and status.

¹¹³ AKEEL BILGRAMI, *SECULARISM, IDENTITY, AND ENCHANTMENT* 18 (2014).

¹¹⁴ For the difference between religious fundamentalism and religious orthodoxy, see EDWARD J. CARNELL, *THE CASE FOR ORTHODOX THEOLOGY* 113-14 (1959).

¹¹⁵ BILGRAMI, *supra* note 113.

¹¹⁶ See Akhilendra Pratap Singh, *Religious Freedom under the Personal Law System*, Farrah Ahmed, *Oxford University Press*, 2016, 10(2) NUJS L. REV. 245 (2017).

¹¹⁷ See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 325-36 (2002).

¹¹⁸ Andra Nahal Behrouz, *Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative*, 103(5) COLUMBIA LAW REVIEW 1156-61(2003).

¹¹⁹ AN-NA'IM, *supra* note 110, 179.

VI. CONCLUSION

To sum up, law making in a multicultural society like India, ought to take into consideration factors that are intrinsic to the distinct identities of the people constituting it. At the same time, it is also important that the larger principles of equality, liberty, and dignity are not ignored. Therefore, there can only be certain in-built principled exceptions applicable to the interpretation and application of personal laws. Although, when legislators devise laws they confront a vast decision problem, but it is important that they proceed with what is often called ‘the total evidence requirement’.¹²⁰ It is also necessary that they tread cautiously in the realm of criminalisation. This is more so when the legislature appears to have a tendency of criminalising a human conduct which essentially arises out of a civil obligation, in the present case instant triple *talaq*. This reasoning applies with similar intensity to Indian courts as well.

¹²⁰ BILGRAMI, *supra* note 113, 64.