CHAPTER – IV
MYTH REGARDING PERSONAL LAWS

(4.1) Myth regarding Religions and Religious Verses

Difference between religions are basically very little when we look to their deeper philosophical terrains, which emphasise on moral perfection either in individual or social behavior. The ancient India vision that truth is one but the learned ones speak variously, points out the possibility of strengthening the policy of tolerance eschewing communal violence. Emphasis on truth and non-violence constitute fundamental virtues common to all religions. Koran asks us not to revile those whom others worship besides Allah. The socially valuable qualities—pursuit of truth, justice, love and charity—are repeatedly enjoined as will of the God in Koran. Jesus, by pronouncing that the kingdom of God is dwelling in each human being, appealed to moral perfection and tolerance. Buddhism propounded code of morality for perfect life by emphasising need for simplicity, equality, and compassion and joy of renunciation and charity. The Jaina vows of non-violence, of non-injury to living beings, of truth, chastity and renunciation of external pleasure and the emphasis in Adi Granth of Sikhs on the concept of universal man that frees the mind from bigotry and superstition reflect the common threads of tolerance and harmonious social life.119

As noted above, Hindu Personal Law has gone through drastic changes in pre and post Constitutional era but other personal laws have remained near about untouched. Not only the Muslims but minority communities such as, Parsis and Christians have also raises objection to bring changes in their personal laws. But the major objection is filed by the Muslims.

119P. Ishwara Bhat, Law and Social Transformation In India 229. (Eastern Book Co., Lucknow, 1st edn., 2009)
The most uncodified and unchanged law is, "Muslim law" so far. Because, whenever any efforts were made to bring change in this law, this community has opposed that by citing misinterpreted and twisted verses of Quranic law. Being the major minority, under the shelter of minority rights, they have never allowed the legislature to modify Muslim Personal Law. The Holy Quran, also contains verses regarding criminal acts, which were in practice till the Britishers repealed it and enacted an "uniform criminal law." At that time none of the Muslims objected it. Because, it was in their favour and because the punishments provided in Quran were very harsh than provided in Criminal law, enacted by the Britishers. When they adopted uniformed criminal law, then they could not be allowed to create hurdles for a UCC.

(4.2) Misconception Regarding Quranic Verses for Civil Rights

The Shari'ah, as the law of Islam, is a complete legal system. Regrettably, a pretty large number of Muslims naively practice an awfully distorted version of it. The Personal Law (ahwal al shaksiya), one of its important disciplines, is the worst sufferer at the hands of the ignorant. As a result, there are many wrong notions of the Muslim personal Law prevailing around us.¹²⁰

(4.2.1) Polygamy

As regards polygamy by men, there is a lot of confusion and misconception regarding its place and recognition under Muslim law. This practice was certainly not a creation of Islam- unlimited and unconditional polygamy was rampant in the Arab society at the time of the rise of Islam and was not unknown or non-existent in any other part of the world either. Islam tried to restrict it by limiting the permissible number of wives and subjecting that restricted permission to the pre-condition of man's capacity to treat the co-
wives absolutely equally. It is very unfortunate that while the Quranic permission for polygamy is conventionally regarded as law, its conditions and restrictions in this regard are seen merely as unenforceable Quranic morality or advisory.121

The Quran [IV :3,129] dissuades men from indulging in polygamy by enjoining that if they cannot do justice they should remain content with one wife only and warning them that it may not even be possible for them to do full justice to more than one wife. The message of the Quran in this respect is quite clear and can be so paraphrased: "Marry more than one woman only if you can treat them absolutely equally in all matters. If you cannot do so, have only one woman as wife. This will prevent you from injustice. Beware! You may not be able to do equal justice to two or wives even you want." To this Quranic injunction the Prophet had added a highly deterrent warning that "a person having more than one wife but denying them equal justice will be torn apart when he appears before God on the Day of Judgment."122

(4.2.2) Talaq

Unequivocally declaring divorce to be the Abghad-ul-Mubahat (worst of all permitted things), the Prophet warned his people in these words to keep away from it:

"Enter into marriage and do not dissolve it. God curses those who change their life partners for the sake of pleasure."Muslim law in fact stands for what is now known as the Breakdown Theory of divorce. The Quran did not specify any matrimonial offences; and the Prophet laid down no bars to matrimonial relief. The modern breakdown theory of divorce does not want the court to go into the causes of the breakdown of marriage; the law-giver of Islam did not want the matter to be taken to the court at all unless it became

121 Supra 47 at p.157
122 Ibid at p.157
wholly unavoidable. And where this worst was to happen unavoidably, he wanted people to act quietly and privately; only for exceptional cases did he think of judicial intervention.\textsuperscript{123}

The Quranic injunction [XLV:1-2] directing men how they should have resort to divorce is so unequivocal that one really wonders how it can be given a meaning other than what it so clearly says:

\begin{quote}
When you divorce women
Divorce them for the period of Iddat
Count the days of Iddat and fear God
Do not turn them out of home
Nor shall they go out
These are the laws of God
Those who violate them wrong themselves
You do not know that after all this
God may create a new situation

And when they are nearing completion of Iddat
Resume cohabitation in an equitable way
Or part company in an equitable way
And take as witness two just persons
To establish evidence before God
This is enjoined for believers in God
And in the Day of Judgment
And those who fear God
For them He finds a way out.\textsuperscript{124}
\end{quote}

\textsuperscript{123}Supra 47 at p.176
\textsuperscript{124}Ibid at p.181
Traditional interpreters of Sunni law give effect to a Talaq pronounced by a man even in sheer violation of the law and procedure for divorce explained above, calling it Talaq-ul-Bidat (innovative divorce) - opposite of Talaq-us-Sunnat, a term they use for a divorce pronounced in accordance with the prescribed law and procedure. According to them a Talaq-ul-Bidat is 'sinful but effective' - a strange proposition rendered into English as "bad in theology but good in law." Some instances of how the so-called Talaq-ul-Bidat is practised are given below.\textsuperscript{125}

The law says that a divorce pronounced for the first or the second time in life will be necessarily revocable within the permissible time. Yet, if a man declares an "irrevocable divorce" it is supposed to be a Talaq-ul-Bidat having the effect of dissolving the marriage straight away.\textsuperscript{126}

If a man adds the word 'triple' or its equivalent to his divorce declaration, or repeats the word Talaq thrice, this is supposed to be a Talaq-ul-Bidat having the legal effect of a third-time divorce and hence instantly dissolving the marriage leaving no room either for revocation of divorce during Iddat or for renewal of marriage ever after that.\textsuperscript{127}

In Shia law there is no concept of Talaq-ul-Bidat; nor is it recognized by the Salafi Ahl-e-Hadith section of the Sunni Muslims - in both these traditions every Talaq must be in strict compliance with the legal conditions and procedure.\textsuperscript{128}

\textsuperscript{125} Supra 47 at p. 181
\textsuperscript{126} Ibid at p. 181
\textsuperscript{127} Ibid at pp. 181-182
\textsuperscript{128} Ibid at p. 182
(4.2.3) Remarriage and Halala

If after pronouncing a Talaq-ul-Bidat a husband wants to reunite with his divorced wife a wholly unlawful practice based on a very distorted view of the concept of 'Halala' is followed as the so-called device to legalize remarriage of the parties which is otherwise not permissible. Halala is in fact a concept very different from what it is erroneously believed to be. As a dissuasive measure under divorce rules the law provides that a man cannot remarry a wife whom he has divorced thrice on different occasions in life. If in such a case the woman marries another person but, by a sheer coincidence, her second marriages too ends [by reason of the second husband's death or divorce] and she wants to try her luck at marriage once again- instead of finding a third person she may now marry her first husband if he so desires [since her second marriage cancelled her status of being thrice-divorced wife of the first husband]. The rule of Halala, clearly, takes care of remote possibilities and cannot be employed as scheming to override the law. Jurists agree that it is sinful to arrange marriage of a thrice-divorced woman to another man with an underhand agreement that he will divorce her without consummating it; and yet they give effect to this 'sinful' act. The concept of Halala as understood and practiced in India is, in our opinion, repugnant to the Fundamental Duty of citizens to "renounce practices derogatory to the dignity of women" contained in Article 51-A(e) of the Constitution and hence cannot be given effect by the courts.129

129 Supra 47 at p.182
(4.2.4) Marital Disputes

For all cases of marital disputes, the Quran [IV : 35] enjoins that efforts must first be made for an amicable settlement for which two arbitrators should be named- one from the wife's and the other from the husband's side- and "if they do their best to reconcile them God will do good." The Quran further enjoins men not to act in haste and to coolly think before deciding on Talaq since "you may dislike something about your wife but, may be, God has put in her some good for you." This injunction clearly means that a man can think of pronouncing a divorce only for a reason and not at whim. In several verses - all clear in their meaning- the Quran prescribes conditions and procedure for divorce. [See, e.g., Verses II:266-231 & LXV: 1-7]. The man pronouncing divorce must be (a) major, (b) sane, and (c) in his senses. Jurists of the past decided that a divorce pronounced in a state of anger, jest, intoxication or duress, or by way of threat or inducement, could be given effect. This was a pro-women move to help disgruntled wives who wished to get rid of their cruel husbands- the idea was not to compulsorily give effect to divorce in every such case even against the wishes of the wife (or of both parties). Now a divorce pronounced by a man in such circumstances has been proclaimed to be wholly ineffective by legislation in several Muslim countries. A divorce cannot be pronounced when the wife is in menses, since this is a period of physical distance between the spouses not fit for taking a decision on separation. A man thinking of divorce must therefore wait till the wife is in a Tuhr (menses-free time), as getting emotionally closer to the wife he might change his mind. A divorce given in violation of this rule, which by no means is merely recommendatory, would be ineffective.130

A Muslim husband may, under all schools of Muslim law, effect an out-of-court divorce by his own declaration. This is called Talaq (although the word is generic and means just divorce). It was certainly not something

130 Supra 47 at p.178
introduced by Islam but in fact a pre-Islamic practice which Islam reformed in an appreciable way. There is nothing in the law of Islam suggesting that the husband is free to exercise the power of Talaq in an arbitrary, irrational or unreasonable manner. It allows Talaq subject to several conditions that are of a dissuasive nature, their purpose being to discourage the husband from exercising his right without a careful and cool consideration.\textsuperscript{131}

The provision for an out-of-court divorce in Muslim law is based on a firm expectation that the aggrieved spouse would behave in a God-fearing, responsible and rational way and in strict compliance with the rules and procedures laid down by the law. The permission for such a divorce is not aimed at giving unbridled, arbitrary or unilateral powers to either the husband or the wife in the matter of divorce.\textsuperscript{132}

The Quran expressly sanctions dissolution of a woman's marriage in case of necessity by ordaining: "If a woman be prejudiced by a marriage, let it be broken off." Based on this Quranic injunction as applied and interpreted by the Prophet, Muslim jurists of the past developed a very liberal law of divorce at the behest of women. Among the forms of divorce by women recognized by various schools of Muslim law are Khula (divorce by women out of court) and Talaq-e-Tafweez (divorce by women under the terms of her marriage contract) - for effecting either of which the woman need not approach the court. In addition to these private divorces by women, Muslim law also contains rules of Faskh, i.e., dissolution of a woman's marriage by the Kazi on a legally specified ground. On this aspect of women's divorce law various schools of Muslim law provide different rules, and the Maliki school among them is most favourable to women.\textsuperscript{133}

\textsuperscript{131} Supra 47 at pp.176 - 177
\textsuperscript{132} Ibid at p.176
\textsuperscript{133} Ibid at p. 68.
(4.2.5) Maintenance

There is a general misconception that under the Muslim law after the expiry of Iddat no divorced wife is entitled to any maintenance from her former husband. It is wholly wrong. The true legal position is that the Iddat-period maintenance is made payable unconditionally since the wife cannot legally remarry during this period. However, if she continues to remain unmarried even after the Iddat, she has to be paid further maintenance by her former husband including:

(a) Nafqa-e-raza' at [maintenance during child fosterage], and  
(b) Nafqa-e-walayet [maintenance during child custody].

(4.2.6) Burqua

Whatever picture is shown by Muslim religious leader regarding Burqua system for Muslim women, does not exist in Holy Quran. And, Mohammad Prophet never recognized Burqua system for any woman. Many developed and several developing countries have banned Burqua system.

(4.2.7) Castes

According to Quran, all the human beings are same, but in fact, there are also castes and sub-castes among Muslims. If Allah is one, how can his follower be of different class.

The situation in Muslim society should be different if Muslims adhere to all the dos and don'ts. Muslims have brought shame to themselves by creating and sustaining divisions and sub-divisions. Broadly speaking, Muslims have the Sunnis and the Shias. Then among Sunnis, a number of sub-division have

\[ Supra 47 \text{ at p. 193.} \]
surfaced. Nadaf, Ahle Hadis, Pinjares, Quraishs, Mehdis, Cuchi Memons, Saits, and so on. These are not castes, but have caste like features. Intergroup marriages are exceptionally permitted. Shias culture and customs are quite different. These different features do not bring credit to Muslim society. No efforts are made to put an end to this type of divine culture in total violation of Islam.135

(4.2.8) Justice and human Rights

Islam, like other great religions, is primarily concerned with human relations. In ordinary life, people do not live primarily in terms of rights against others but in terms of mutual relationships involving love, compassion, self-preservation and self-sacrifice in pursuit of happiness and peace for themselves and their loved ones. The great religious traditions teach people, with good reason, that such things are not a matter of course nor are they always a question of rights. This would partially explain why most religions tend to emphasize moral virtue, obligation, love and sacrifice even more than the individual’s rights and claims.136

Islam stresses the practical implications of this relationship and applies the moral criteria of excellence to the practical work-a-day life of ordinary human beings. Islam is the only philosophical system that tackles the problem directly: it handles the correlation between moral issues and their human repercussions without the least sense of evasion. This shows the aggressive posture of Islam as compared to other moral and ethical disciplines. The aggression is backed by an unshakable confidence in the viability of its own

moral system, a system that achieves an ideal synthesis between man's theoretical tendencies and his practical compulsions.137

The Qur'anic standards of justice are objective in that they are not tainted by considerations of racial, tribal, national or religious sentiments. The Qur'an addresses justice as one of its major themes, which is referred to in at least fifty-three instances where the people are urged to be just to others at all levels, whether personal or public, in words and in conduct, in dealing with friends or foes, Muslim or non-Muslim, all must be treated with justice.138

It is often said that Islamic law is immutable as it is divinely ordained and therefore closed to the notion of adaptability and change. It is submitted on the contrary that the immutability view of Shari'ah is only partially accurate, as the divine law itself integrates adaptability and change in its objectives and it is therefore an inalienable part of its philosophy and outlook. The leading jurists and 'ulama' have consistently maintained the view that Shari'ah is resourceful and well-equipped with the necessary tools with which to accommodate social change. The shari'ah thus recognizes independent reasoning (ijtihad) and its sub-categories, such as considerations of public interest (istislah), juristic preference (istihsan), analogical reasoning (qiyas) and so forth for the very purpose of adapting the law abreast of the changing needs of society. Textual interpretation (tafsir, ta'wil) may also be used for the same purpose. Since the greater part of the Qur'an, including its legal verses (ayat al-ahkam) consist of general ('amm) and unqualified (mutlaq) expressions, they are on the whole open to interpretation and ijtihad.139

As a binding source of law, the collective will and consensus (ijma') of the people and their scholars ensure continuity as well as adaptation to change

138 Supra 136 at p. 30
139 Ibid at p. 49
through the introduction of new laws that reflect the legitimate needs of the community and the vision of its scholars. Ijma' is a vehicle, in theory at least, for evolution of ideas and for integrating the educational and cultural achievements of the community into the fabric of Shari'ah.\footnote{Supra 136 at p. 53}

Islamic law requires that government affairs are conducted through consultation with the community and the government strives to secure the public interest (maslahah). This is the subject of a legal maxim which declares that 'the affairs of Imam are determined by reference to public interest' (amr al-imam manut bi'l maslahah). According to another legal maxim, instances of conflict between public and private interests must be determined in favour of the former. Public interest is thus the criterion by which the success and failure of government is measured from the perspective of Shari'ah.\footnote{Ibid at pp. 60-61}

Islam does not permit a male to sit before women and talk. But this is allowed by the society today. Shaikhs of Saudi Arabia do have dialogue with women Ambassadors and High Commissioners. How to react to these fundamental changes which are totally un-Islamic? In Iran, Kuwait and other Muslim countries we find women lawyers, judges, ministers and so on. Kuwait has gone far ahead in modernization. There is more western culture than Islamic culture.\footnote{Supra 135 at pp. 94-95}

While the purity of Islam has to be maintained, wrong perception of Islam has to be removed. While the religious leaders have their own role in society, it should be admitted that they too have to change their mindset in a changing society. Muslim society is a part of the larger society and, therefore, Muslim society cannot remain unchanged at all. Change is a sign of a progressive society. As Karl Marx has said, "Force is the midwife of every society pregnant with old ideas." Islam is quite progressive. It provides for

\footnote{Supra 135 at pp. 94-95}
changes. But changes should be healthy. It should maintain moral principles and at the same time adopt progressive and healthy ways of life.¹⁴³

(4.3) Muslims Law in Several Muslim Countries

All Arab countries except Saudi Arabia now have codified and reformed Muslim family law. Although in some countries piecemeal reform had begun much earlier, since 1951 one Arab country after another has adopted comprehensive codes of family, succession and personal status laws. While Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Somalia, Sudan, Syria, and Yemen had adopted such codes before the end of the century; Bahrain, Djibuti, Mauritania, Qatar and the United Arab Emirates followed suit in the first decade of the new millennium. All these codified laws have brought uniformity in the application of Muslim law and effected reforms to varying extent, mainly in the areas of bigamy, divorce and women's rights.¹⁴⁴ Outside the Arab world, similar reforms have been introduced by sporadic limited-scope laws enacted in the Muslim-dominated Indonesia, Malaysia, Pakistan and Bangladesh; while the non-Muslim Philippines has adopted a massive code of Muslim law.¹⁴⁵

Many Muslim countries have outlawed polygamy. In fact, polygamy is not binding under the Quran on the faithful. Even Ottoman Turkey had outlawed polygamy in 1917 followed by Egypt (1920), Sudan (1929), Jordan (1951), Syria (1953), Tunisia (1956), Morocco (1958), Iraq (1959), Pakistan (1961) and several others. In Saudi Arabia, even triple talaq is banned. The Convention on the Elimination of all Forms of Discrimination Against Women, adopted by the U.N. General Assembly in 1979 laid down the standards and provisions for reforming the Personal Laws. Consequently, a number of Muslim countries have reformed their laws accordingly. Courts of law of these

¹⁴³ Supra 135 at p. 11
¹⁴⁴ Supra 47 at p.10.
¹⁴⁵ Ibid at p.10.
countries have given judgments affirming gender equality. Their governments have enacted reformist legislation relating to Muslim family laws. The Egyptian Government is contemplating to enact a law which will give the right to a woman to divorce her husband if he takes a second wife.¹⁴⁶

Almost all Muslim countries today have modernised their laws relating to maintenance of women, children, old parents and deprived relations, and have switched over to Shariat based yet progressive philosophy oriented legislation. To begin with, Pakistan and Bangladesh have established 'Arbitration Councils' for the neglected wife; she can appeal there against her husband to seek an order by the court to provide her maintenance for her livelihood. In Brunei and Malaysia the Shariat Courts have been armed with sufficient powers to reach relief to such wives. The religious councils, state customs and 'Kathi's Courts Enactement, 1955 have been empowered to apply the classical Islamic Law based on Shariat principles to such effect that the neglected married woman can obtain an order from the Court of 'Kathi' (as called there) compelling the husband to make payment of maintenance from time to time. The wilful failure of husband to comply with such order can put him behind bars for a small period.¹⁴⁷

In Iraq, this jurisdiction is vested in Kazi. There, the wife's right to receive maintenance is not adversely affected by her richness, illness or by the fact of belonging to another religion. She can validly refuse to live with him if he withholds her mahr or neglects to maintain her; in such conditions she can live with her parents and still claim the maintenance allowance. Obedient wife's maintenance is a debt on the husband. Membership of another religion is no bar in Jorden also. In Egypt, Iraq, Morocco and Yemen maintenance includes food, clothing, residence, medical treatment and some other expenses recognised by laws. If the wife was Muslim and converts to another religion

¹⁴⁶Supra 15 at p.25
¹⁴⁷Supra 50 at p. 220.
after marriage, she loses her right to maintenance. Right to accommodation includes separate accommodation if the husband brings a co-wife without her consent. Even if the accommodation provided by him is not suitable to her standard or is situated too far from her place of work to enable her to simultaneously look after her household duties and official duties, she can refuse to accept it, it will not amount to disobedience. But the criterion of obedience is not left to unilateral decision; the court is precluded from passing an order of 'disobedience' as long as the wife justifies her disobedience. Similarly, no obedience against the rules of Shariat can be demanded. In such cases maintenance will be intact. The Iraqi statute also provides that where the husband leaves his wife without support and hides himself or disappears, or has gone missing, the quadi can order maintenance for her from his property. Under Tunisian statute the husband who absconds leaving his wife unattended is ordered by the court to return within one month, failing which, the wife is given option to dissolve the marriage.  

The Islamic countries provide for some additional benefits to the divorced wife having small children. Mother's right to the custody of children is normally not affected by divorce. The classical principle is that when deprived of matrimonial home, she should be provided with shelter for her and her children. In Algeria if the Qadi is of the opinion that the husband has misused the power of Talak, he can order payment of compensation to the wife. She can demand accommodation from the husband for herself and her children. In Malaysia this right to residence can extend to expiry of *iddat* period, or children's guardianship period, or her entering in another marital relationship. Egyptian law also requires the husband to provide independent accommodation to the minor children and the divorced wife both, otherwise she can retain possession of the matrimonial home till they remain under her guardianship. Indeed in Iraq, there is special law, entitled the Law of Divorced Wife's Right to Residence, 1983'. During the hearing of the matter for the

148 *Supra* 50 at pp.220 - 221.
dissolution of their marriage, the Court can pass an order for her independent residence and in execution order eviction of the husband to make it available to her. (The Qadi in Egypt can also offer her an option for rental from her husband for a suitable residence at other than the matrimonial home.) The Iraqi law however does not allow her these facilities if she independently owns a house or a flat. The Tunisian Code of Personal Status goes one step further: first of all, the Court must be satisfied that reconciliation is no more possible, then only the divorce decree can be passed; and while passing the decree the court, even at its own provide for all important matters relation to the residence of the divorce, her maintenance, custody of the children and schedule for meeting them. Of course, any of the parties are free to forgo any of these rights. The husband is also bound to pay her remuneration for suckling and keeping custody.\textsuperscript{149}

Maintenance of Children.- This is the responsibility of the father in generally all the Islamic countries. No doubt it extends to that period also during which the child is in the custody of mother. This period ranges from 7 to 12 years, in some countries (Somalia, South Yemen) 15 years, in Algeria and Morocco till puberty or marriage of the female child. During this period the divorced mother can demand \textit{recompensation} for the amount spent on the child. In a divorce by mutual agreement the talaknama may mention the amount agreed by both for spending on the child. In Algeria the maintenance of the daughter is father's liability till she joins her husband after marriage; in the case of son it extends to his age of majority (Algerian Family Code, 1984). Physically or mentally handicapped children and the school going ones are to be supported further till they recover or finish their education and start earning on their own. In Iraq if the boy is unable to earn, the father's liability continues further. In Jordan the expenses on son and daughter's education is to be wholly born by father. In Egypt also the son can demand expenses from father for his education upto the level of his other peers. According to the Moroccan Code

\textsuperscript{149}Supra 50 at p. 222
the father's liability to maintain his son runs up to the completion of the latter's education or attaining 21 years of age. This liability does shift from father to mother if the former is indigent; and an affluent son has to fend for himself. In South Yemen both have to share in proportion to their capacity.\textsuperscript{150}

The Holy Prophet advocated that all Muslims are one. They are totally integrated. One has to share the pain of another. He should never wish another Muslim what he does not want for himself. No Muslim should keep away from another Muslim for more than three days. Allah is one, Quran is one, Prophet is one. How can the Muslims be divided?\textsuperscript{151}

Mumtaz Ali Khan, in her book, "Tall Islam And Short Muslims, has analysed various mandates from Quran, i.e., "Brutal behavior", "Bigotry", "Slander and Backbiting", "Hypocrisy", "Arrogance", "Giving false evidence", "Hoarding", "Bribe", "Haram Money", Zina", "Prostitution", "Alcoholism", etc. and has strongly opined that they cannot be justified as per Quran, but at present these evils do exists and practiced by the Muslims too.

Last decade has witnessed so many such “Fatwas”, which have not only caused injustice and awkward circumstances, but have also caused grave injustice to Quranic concepts. A true follower of Islam would never appreciate such system in any manner.

Most of the Muslim Countries have modified their personal laws and amended them as per the social need of the time. It can not be said that, they have acted against the theme and objects of the Holy Quran. In fact, they have shown the respect towards the true spirit of Islam. These Countries could reform their Personal law easily, and no material objection was raised to regulate the law successfully. But in India, because the Muslims are in

\textsuperscript{150}Supra 50 at pp. 222-223
\textsuperscript{151}Supra 135 at p.214.
minority, they are provided shelter for the practices which are even contrary to Quranic principles.

(4.4) Misconception in Christian Community

Christians too, claim their personal law of being "divine" origin but the history of development of Christian law reveals that, nothing in these laws is divine. Before and after independence, several amendments are made in personal laws, relating to Christians and they have accepted it too. Amendments in divorce grounds is a very important reform in this regard. But yet too, there are several provisions in this area which need drastic changes.

"The Bible" the only main religious book for Christians, which gives code of conduct for Christians, no where restricts its people to go against the law of land. Some verses of "Bible" do definitely provide that how should Christians behave and regulate their lives, but the true theme of "The Bible" is also to maintain good conscience, justice, equity, respect towards other etc.

In his book "Christian Law in India : Revision of Law of Matrimonial Causes", Dr. Kande Prasada Rao, has given several areas and reasons why, law relating to Christian badly needs change, and should be changed. He has also advocated and given the list of the names of the Christians, who are very much willing to bring change in Christian law and they have also approached the home ministry for doing so. In this book he has also advocated for Common Civil Code.
(4.5) Misconception in Parsi Community

As mentioned in history, when Parsis reached to India, they abided themselves with the conditions of the king. One of the conditions was that, they will follow the legal system of India. And after observing the laws for Parsis, no provision seems to be of divine origin.


Present personal law system of India, is not only suffering from several infirmities but also consists of many outdated provisions. In fact, such provisions are not in practice at all, and it is also not practicable to follow them in present time. Existing personal law system should be replaced with a modern approach towards law.

(4.6.1) Hindu Personal Law

It is well admitted that different branches of Hindu Law has gone through several fundamental changes and are well modernized with changes and demand of the time. Then too, there are few provisions which need to be changed as per modern social needs. Such provisions are as under;

(4.6.1.1.) Hindu Marriage Act, 1955 (HMA)

S. 13(b), which is for "Divorce by mutual consent" is partly inconsistent with the time.

At present, the social scenario is drastically changed. Present generation takes decision very fast and generally there do not exist any occasion that they
rethink on their decisions. And also, before coming to the court, the parties try their level best to settle the matter and on failing, they approach the court. As per this provision, court generally takes not less than six months to pass a decree of "Divorce by mutual consent." Hence, the "period of six months" needs to be modified and inspite of six months, "as early as possible" such kind of petitions should be decided. On technical ground only, parties should not be harassed.

S. 14, provides "No petition for divorce to be presented within one year of marriage."

But western culture has greatly affected the mindset of Indian society. Now the person who wants to be released immediately from the tie of marriage, and when Indian personal law system has already adopted "the Break Down Theory" of marriage, there seems no any logic to let this provision remain. In India, for institution of marriage, it is always tried to keep the couple together forever, but when the situation is such that the parties can not reside with each other at all, and also are residing separately, they should not be made to wait one year to file a divorce petition. Now-a-days it is observed that even the marriage of one day or few days results in decision of taking divorce, due to the gravity of the circumstances arose from the act of any of the party. In such circumstances, to make such people wait, makes no sense. No doubt this provision provides scope for the discretion of the court to allow to admit such petition even before one year, but this is not practiced in general. Hence, this provision is outdated and needs to be omitted.

S. 24, which is for "maintenance pendante lite and expenses of proceedings" is partly inconsistent with the present era.

In any petition or suit filed under this legislation, one party is definitely at the fault to harass the other. One clause is required to be added to this
section, that is, while passing any order under this section, court should 
primafacy ensure itself, that any order passed positively in this regard should 
not benefit any culprit and should not cause injustice to sufferer.

(4.6.1.2) The Hindu Minority And Guardianship Act, 1956 (HMGA)

Proviso (a) of s.6 of the said Act, mandates that "no person shall be 
entitled to act as the natural guardian of a minor under the provisions of this 
section- (a) if he has ceased to be a Hindu, or...." This can not be treated as 
valid provision in a Secular country like India. Just conversion to another 
religion can not be a valid ground to snatch any legal right from a person. This 
proviso is required to be omitted from this section.

(4.6.1.3) The Hindu Adoption And Maintenance Act, 1956 (HDMA)

Proviso of s.7 of the said Act, mandates that, "...if he has a wife living, 
he shall not adopt except with the consent of his wife unless the wife... has 
ceased to be a Hindu...." Apart from this, two other conditions are also 
imposed, when there is no need for the husband to take the consent of the wife 
for adoption. But the condition quoted above can not be valid in a secular 
country. If wife has converted to any other religion then too, she cannot be 
made to suffer any such inability in her legal right. Same as proviso of s.8 of 
this Act, mandates for husband, on the above ground only this unjustifiable and 
illogical part of the proviso requires to be omitted. More over any infirmity 
which is caused due to being or not being "Hindu" can not be sustained.

S.11 (iii) of the said Act, mandates, "...if the adoption is by a male and 
the person to be adopted is a female, the adoptive father is at least twenty one
years older than the person to be adopted..." and s.11(iv) mandates, "...if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty one years older than the person to be adopted....." A person who is above the age of 18 years can adopt a child under this Act. In such circumstances, such mandatory provision can not be imposed, because looking to the adoption ratio and percentage of abandoned and orphaned children, it is required to enhance and improve the conditions for adoption to match the standard of social need. For instance, if a woman of thirty years, wishes to adopt a male child of eleven years, why to impose restriction on that, It is very much established now, that no child is given in adoption without following the various guidelines formed to follow while giving any child in adoption. Agencies authorized to give child in adoption, has to follow them. On the part of the government the basic parameter of adoption should be the interest and welfare of the child. Hence above two conditions are required to be deleted from the legislation.

S.11(i) mandates, "if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, Son's son or Son's Son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption." And s.11 (ii) mandates, "if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made, must not have a Hindu daughter or Son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption."

These provisions are not up to the need of the society because if a person has the monetary and social capacity to brought up ten children healthily, and he or she wishes to provide shelter and family to orphan and abandoned children, why he or she should be prevented from such act which is in the interest of the orphan and abandoned children and at last in the interest of the development of the society and country. Such kind of technical incapacity, not only prohibits such persons to adopt but also bans the future of the child to
be adopted. If the legal system of India really wants to secure the future of orphan and abandoned children, it should remove such infirmities from the legislation.

S.41(6)(b) of the Juvenile Justice (Care and Protection of children) Act, 2000 (JJAct) provides, "the court may allow a child to be given in adoption-... ...(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters;...." This is a contrary provision than S.11(i) and S.11(ii) of the HAMA.

S.10(i) mandates, "No person shall be capable of being taken in adoption unless... (i) he or she is a Hindu;..." This literally means, only Hindu child can be adopted. But when an abandoned or orphan child is in question, how to determine his or her caste or religion? In such circumstances the basic concept of adoption fails on the part of law because it is observed that, when people adopt from orphanage, they do not even bother to know the caste or religion of the child. Hence, this provision is not up to the need of the society.

(4.6.2) Muslim Personal Law

(4.6.2.1) The Muslim Women (Protection of Rights on Divorce) Act, 1986 (MWPRDA)

It is well-known that to come out from the hues and cries started after Shah Bano's case, among Muslim community, the then government enacted this legislation. Provisions of this Act, are quite contrary to the basic principles of justice. Some of such provisions are;

S.3(1)(a) of this Act provides for "a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former
husband;... " and s.3(1)(b) provides, "where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;...." Both the provisions can not be sustained logically in present time. These provisions are not only illogical but also are bias towards rights of Muslim women. Though the basic object of this Act was, "to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto", but when these provisions are studied deeply, it literally reveals that, this Act was not enacted to protect the rights of women, but it was enacted to benefit the male group of the Muslim community. It is well settled concept of Holy Quran that, no person should escape from his liabilities. It is totally illogical to allow maintenance to a divorcee women only for iddat period.

As per s. 3(b), responsibility cast upon husband to pay maintenance to the children where the divorced woman maintains her children, is limited to two years only. A husband or a father can not be allowed to enjoy such kind of illogical liberty or right. Divorcee women can not be left to the sympathy of the other people. This is neither logical nor acceptable. Not only in present era, but also it was illogical and unacceptable at the time of enactment of this legislation. The rights provided under above two clauses are contrary to the concept of social justice to women.

S.4 of this Act provides for "order for payment of maintenance" is totally inconsistent with the object of this legislation itself, because as per this provision; after iddat period, the magistrate may make an order for maintenance to be obtained from her relatives who would be entitled to inherit her property on her death according to Muslim law. Moreover one of the factors which are to be considered before granting such order, is "the standard of life enjoyed by her during her marriage...." This is an illogical provision,
because a woman who would have any property, she would not need to approach any relative for her maintenance, and when the husband is not made responsible to pay the maintenance to his divorced wife after iddat period, the status she enjoyed during her marriage cannot be considered. The first proviso of this section provides that, such women can get maintenance from her children and if children are unable to maintain her, the parents of such woman would pay maintenance to her. And on their inability, the order for maintenance can be passed against such "Other relatives as may appear to the Magistrate to have the means of paying the same...."

S.4(2) states that, if there is no such relative or such relatives are unable to maintain her, "... the Magistrate may, by order, direct the State Wakf Board established under s. 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance...." These provisions themselves prove themself quite contrary to the concept of providing dignified and healthy atmosphere for development of women. This provision puts a woman in the category of a beggar. There is no any substantive reason, why husband should not be made responsible for the maintenance of wife and children? This practice can not be allowed to be adopted and carried out in a cultured society. No Sura or Aayat of Holy Quran permits this. Such kind of biased and unjustifiable provisions needs to be omitted from the legislation.

S.5 of this Act, provides option to the parties, and states as, "if on the first date of the first hearing of the application under sub-section 2 of s. 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of ss.125 to 128 of the Code of Criminal Procedure, 1973 (Cr.PC); and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly...". This means, it is upto the mercy of the
husband who will never opt to do any such act which can help his wife. Because the provisions under this legislation are in favour of husband rather than the provisions under Ss. 125 to 128 of Cr.PC. Hence, this provision is impracticable and unjustifiable. After the enactment of this Act too, the Muslim women have approached courts u/ss.125 to 128 of Cr.PC, for the protection of their rights. This Act was enacted to protect the rights of divorced women, but it has totally failed to fulfill the objects, because the basic intention of the legislature was malafide behind this legislation.

No provision of this Act seems to have been based on any ancient source of Muslim law then too, Muslims accepted it and in fact demanded it. This proves that people welcomed the law of their choice and not of the choice of religion because, it is well accepted that Prophet Mohammad was the first to recognize rights of women but, this legislation, in fact, curtails the rights of women.

(4.6.2.2)The Dissolution of Muslim Marriages Act, 1939 (DMMA)

This is, "an act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie;...". Though this legislation was enacted in the period of Britishers and, it was not opposed. None of the provisions of this Act has any consistency with Holy Quran or with any other ancient source of Muslim Law, but then too, it was brought in practice.

There are total nine grounds provided to women for decree for dissolution of marriage under this legislation but none of them has any

152Muslim Laws 14, Bare Act with short Notes (Universal Law Publishing Co., New Delhi, 2015).
religious background. But the grounds provided for divorce, needs to be amended as per present social need.

(4.6.2.3) The Muslim Personal Law (Shariat) Application Act, 1937 (MPLAA)

S.2 provides the description of the particulars, regarding which the Muslim Personal Law (Shariat) can be applied. But, whether a Muslim will be benefited with the provisions of this section or not would depend upon the conditions prescribed under s.3 of this Act. As per the provision of s. 3, when the prescribed authority is satisfied that a person who is a Muslim, and who is competent to contract within the meaning of s.11 of the Indian Contract Act, 1872, and who is a resident of the territories to which this Act extends, has made declaration in a prescribed form that he wishes to be benefited with the provisions of this section, can allow him to be governed by s. 2. And there after "...the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified..."

But, if the prescribed authority refuses to accept such declaration, the declarant can file appeal against such order and on allowing such appeal, the declarant or his minor children and their descendants shall be governed by the s.2 of this Act.

This Act provides lot of variations. The choice to be governed or not to be governed by a law, can not be left to any person. This legislation has also caused several irregularities in application.
(4.6.3) Christian Personal Law

(4.6.3.1) The Indian Christian Marriage Act, 1872 (ICMA)

Most of the Britishers were Christians. This legislation was enacted to manage the affairs relating to marriages among Christians. Hence, the provisions of this Act, are greatly influenced by the practices followed by the Britishers in their period. Even prima facie it is not based on religion. And many of the provisions are not of use at all in present time, in context of Indian society.

S.3 of this Act, provides "interpretation clause". It includes interpretation of "Church of England", "Anglican", "Church of Scotland", and "Church of Rome". In present time, these terms have no use in India.

S.5(2) prescribes that, marriage of a Christian may be solemnized by any Clergyman of the Church of Scotland and such marriage should be solemnized as per the rules, rites ceremonies and customs of the Church of Scotland. At present, this provision do not have any logic because it is totally impracticable that any Clergyman of Scotland would perform marriage ceremony of Indian Christian, and if it happens so, then too, why the rules, rites, ceremonies and customs of the Church of Scotland, should be imposed on any Indian Christian? Moreover, word "may" itself clears that any other person other than mentioned in this section, can solemnized the marriage. Who are those other persons, is not cleared anywhere in this Act. This gives space for the other ways of solemnizing marriages. Hence, it is open for interpretation.

S.10 of this Act is for marriages to be solemnized between the hours of six in the morning and seven in the evening, can be said to be logical for convenience of the different people or authorities associated with marriage ceremony, but then the exceptions given under this section are not logical in
present context of Christians residing in India, because in any general term a Clergyman of the Church of England or Rome or Scotland, do not have any existence in India in present time. On the same ground the terms used regarding the Clergyman of Churches of England, Scotland and Rome also do not have any practical applicability in present Indian society context.

Other provisions of this legislation, are on factual and procedural aspects and do not show or refer to any religious base or validity. Part V of this legislation provides for the "marriages solemnised by, or in the presence of, a Marriage Registrar", this itself indicates that the marriages can be solemnised even without going to the Churches and also in the absence of the Priest of a Church. Moreover, This literally means, no any religious ceremony is mandatory for solemnising marriages among Christians in India.

(4.6.3.2) The Indian Divorce Act, 1869 (IDA)

S.3 of this Act, provides interpretation clause. S.3(5) provides interpretation of term "Minor Children". According to this provision, "in the case of sons of native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of native fathers, girls who have not completed the age of thirteen years; in other cases, it means unmarried children who have not completed the age of eighteen years." This interpretation clause is contrary to the provisions of Indian Majority Act, 1875 and Indian Penal Code, 1860 (IPC). Hence, this creates ambiguity. If any question relating to "minor children" appears in context of two legislations, one this Act and another, any other legislations, there would be serious ambiguity.

S.10 provides "grounds for dissolution of marriage". There are ten grounds for divorce under this section. Looking to the social changes and needs of the society, these grounds need to be devided in three parts i.e., (i) Void marriages, (ii) Voidable marriages and (iii) grounds for divorce. Under
S.10(ii), conversion to other religion, is a ground for divorce but looking to the present social changes, this grounds, requires to be omitted. Other clauses under this section, are near about same as prescribed under other personal laws.

(4.6.4) Parsi Personal Law

(4.6.4.1) The Parsi Marriage and Divorce Act, 1936 (PMDA)

Though enacted in the period of Britishers, this legislation is near about in tune with the present social need. But then too, there are few unnecessary and illogical provisions in this Act also.

Different definitions are given under section 2 of this Act. S.2(1) states, "Chief Justice" includes senior Judge," this can not be accepted practically and logically because in India, the top most post in judiciary is the Chief Justice of Supreme Court of India and after that, is the Chief Justice of a High Court. The term "Senior Judge" of any other category cannot be called as Chief Justice.

S.2(4) provides for the definition of "grievous hurt", but this definition in fact has a wider scope as mentioned under s.326 of IPC. Comparing the both, the present definition is not only has a very narrow scope but it is unnecessary placed here.

S.3 provides, requisite to validity of Parsi marriage. Sub-section (a) and (c) have a common concept as mentioned under S.4 of Special Marriage Act, 1954. Only clause(b) mandates, "a marriage under this legislation or a marriage of Parsis is valid if, it is solemnized according to ceremony called "Ashirvad" by a priest and this has to be carried out in the presence of two Parsi witnesses." The ceremony of "Ashirvad" is performed before "the Holy Fire". But this is a customary practice and not of "religious nature".
Chapter III is regarding "Parsi Matrimonial Courts". In present time, there is no need to have such separate system, exclusively for Parsis. Suits or petitions can be brought to the family court or district court, as the case may be. Hence, this part is totally unnecessary.

S.32 provides for "grounds for divorce". The grounds provided under this provision, need to be divided under the heads of, (i) Void Marriages, (ii) Voidable Marriages and; (iii) Grounds of divorce. It is also required to add other grounds of divorce as mentioned under Special Marriage Act, 1954 (SMA). Moreover, S.32(j) of this Act provides "conversions" as one of the grounds of divorce, which is totally unconstitutional and unjustifiable in present era.

S.34 provides for "judicial separation" but in present time only judicial separation has lost its utility because the present generation believes in quick decision. Hence, this provision needs to be omitted.

(4.7) Common observation regarding Personal Laws

General and even specific study of all the personal laws, proves that all the personal laws have gone through changes, as per the changes of the social circumstances and needs of the Society. However, some personal laws have retained somehow rigid and their provisions have lost their utility with the passage of time. The National Law Commission of India has frequently given several suggestions to bring basic changes in personal laws, and on its reports several changes are brought by amending the different personal laws, but no efforts are made to uniform all. The basic reason behind this is, the people of different community have never tried to understand the reality of their personal laws. They are intentionally made to live with several misconceptions regarding their personal laws.
Ceremonies regarding marriage are the only issue which can be seen as a quasi-religious and quasi-customary practices. There would be no exaggeration if they are identified as customary practices only, because no religion or religious book has given or provided, exact form of marriage required to be followed by the people of that particular community. One fact is common regarding all kind of marriages is that, generally the marriages are followed in the presence of a religious priest or the marriage ceremonies are presumed to be carried out in the presence of "God". But civil marriages do not require any such ceremony. This practice has given space for the interpretation that "the law has to be changed as per the changing time and social need."

No religion allows separation between husband and wife but then too, the ratio of divorced couples is growing up. No person of present time, except the person who has in fact, renounced the world permanently, has remained purely religious. All are very much cautious regarding their rights, that may be of any nature. But when its about obligations and duties, it is a general tendency that people wishes to escape.

No religion prohibits adoption except Islam. But the concept of adoption under Islam too, can be interpreted as per the changes and needs of the society. Because Islam clearly mandates that, following the law of the land is a pious duty of every Muslim. For Parsis and Christians, there is no any written proof which prohibits adoption.

Looking to the above mentioned facts and reasons, it is clear that, the present personal law system of India is neither of religious nature and nor have any divine origin and, has been changing as per the needs of the society. Though the legislature touched little to the personal laws relating to Muslims, Christians and Parsis, but it brought huge and drastic changes in Hindu Personal Law. Wherever, the legislature found it necessary to provide common rights and impose common obligation, it passed many secular laws which
applied to all, irrespective of the religion of the people. S.125 of Cr.PC, and Protection of women from Domestic Violence Act, 2005 are the best examples in this regard. Whatever crisis went on in society among Muslims, after Shah Bano's Case and even after the enactment of the Muslim Women (protection of Rights on Divorce) Act, 1986, the judiciary of this country has passed necessary orders under s.125 of the Code of Criminal Procedure, 1973.

(4.8) Family Laws of Goa, Daman and Diu: A Critical Analysis

Prior to becoming a part of India, Goa, Daman and Diu had been for more than 450 years under the Portuguese rule and in pursuance of their policy of assimilation, the Portuguese introduced their laws in this Territory, amongst others the Civil Code, although they made some concession to the usages and customs of the Hindu and Muslims communities. Enacted in the year 1867, the Portuguese Civil Code, is based on the French Civil Code, commonly known as the Code of Nepolean, being however also strongly influenced by the teachings of the contemporaneous French, German and Italian jurists. It constitutes the basic substantive Civil Law and it regulates, *inter alia*, matters relating to family, contracts, succession and property.\(^{153}\)

It is a very common misconception that Goa, Daman and Diu is regulated by one Civil Code, that is Portuguese Civil Code, 1867. But it is also a proved fact that, there also runs different branches of civil laws for different religion people. Not only this but also, it is very clear from studies that Portuguese Civil Code or Goan Code suffers from several illogical and unscientific infirmities. This code do not have any religious base but it exists due to practice only. For long years, people residing in Goa, Daman and Diu have authenticated this law, through practices. Different Decrees are followed here. When it was tried to bring some changes in this code, people of goa

objected it. That itself reveals that people want to practice what they have followed from years and they object changes of any nature.

The Portuguese Civil Code, 1867 suffers from several infirmities and inequalities. Some of them are as under;

First of all, the whole Portuguese Civil Code is not translated till yet and what people of these regions follow are just piecemeals. The whole code is in French only. It literally means that Portuguese Civil Code is purely a foreign law to India, which do not consists the essentials required for the Indian society.

Goa, Daman and Diu became part of India in 1961 and on 19-12-1961, the Parliament of India passed the Goa, Daman and Diu, Administration Act, 1962. S.5(1) of this Act, reads as, "All Laws in force immediately before the appointed date in Goa, Daman and Diu or any part thereof, shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority."

In Portugal, the civil code of 1867 was replaced by the new code of 1966, but civil code of 1867 continued to be practiced in Goa, Daman and Diu till today.

(4.8.1) Civil Code-Contracts in Particulars of Marriage

As per Art. 1073(4), "...males below the age of fourteen years and females below the age of twelve years shall not contract marriage..." This means, males who are above the age of fourteen years and females who are

above the age of twelve, can contract the marriage. It clearly violates the basic principle of Prohibition of Child Marriages Act, 1929.

Art. 1187 mandates, "The wife shall not publish her writings without the consent of her husband; but she may approach the Court in case of his unfounded opposition."\textsuperscript{155} This cannot be taken as a logical provision at all. All the citizens of India has the fundamental right to freedom of speech and expression under Art. 19(1)(a) of the Constitution of India. Both the husband and the wife are treated as separate entity and personality. On the other hand, there is no any such provision regarding taking consent of the wife, before publishing writing of the husband. This provision is neither logical nor gender just and nor Constitutional.

Art. 1204 provides the grounds of separation of persons and properties. Under this Art., four grounds are mentioned. They are;

"(1) Adultery committed by the wife;
(2) Adultery of the husband with public scandal, or complete abandonment of the wife or keeping a mistress in the conjugal domicile;
(3) The conviction of the spouse to life- imprisonment;"\textsuperscript{156}

Arts. 1204(1) and 1204(2) are quite gender unjust, because adultery committed by wife provides ground to the husband for separation, but only "adultery" committed by husband, do not provide ground to the wife to seek for separation. If the adultery committed by husband is with public scandal or husband completely abandons the wife or the husband keeps a mistress in the conjugal domicile, then only the wife can get separation. This provision dominates the rights of women, and compels them to tolerate injustice to the

\textsuperscript{155} See, Supra 154 at p.27.
\textsuperscript{156} See, Ibid at p.31.
last extent. This is neither legal nor Constitutional. Then too, it is legal in Goa, Daman and Diu.

(4.8.2) Family Laws No.1, Laws of Marriage As a Civil Contract

Art. 4(3), prohibits the marriage between a male who is below the age of eighteen years and a female below the age of sixteen years. And, as per Art. 5, "A male above the age of eighteen years and a female above the age of sixteen years, but below twenty one years of age, and not emancipated, is equally prohibited to marry as long as the consent of the parents or of those who represent them is not secured or the lack of such consent is made good by legal process." 

The crux of these sections is that, male who is above the age of eighteen years and female who is above the age of sixteen years, but below the twenty one years of age, can get marry with the consent of their parents or whoever represent them. Any practice which is against the due process of law can not be legalise, just because it is practiced by the people.

Arts. 11 to 29 provide the grounds regarding void and voidable marriages. Looking to their divisions, they are required to be modified with the demand of the present changing time and main stream of law of this country.

• Law of Divorce

As per Art. 122 of law of divorce, "All the illegitimate children may be legitimated, except:

(1) The adulterine children;
(2) The incestuous children.

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157 See, Supra 154 at pp.39-40.
158 Ibid at p.40.
159 See, Ibid at pp. 41-45.
Paragraph 1. Adulterine children are those born to any person, married at the time of conception, from another who is not his/her spouse.

Paragraph 2. Incestuous children for the aforesaid purpose means:

1. The children of relatives by consanguinity or affinity in any degree in direct line;

2. The children of relatives by consanguinity up to the second degree inclusive in the collateral line. There sounds no logic in this provision because all the children have the right to lead life with dignity for which they need to be legitimate, if accepted by the persons who wants to provide them status of legitimacy.

Issues like, "Incestus children", "the parental control during subsistence of marriage", "the parental control, after the dissolution of Marriage", "parental control in relation to illegitimate children", "the suspension and termination of parental control", "Maintenance", "guardianship" and family council" are covered under Arts. from 97 to 313. Law of protection of children is covered under Arts. from 1 to 59. But these terms completely differs from the meaning incorporated in main legal system of India.

(4.8.3) Usages and customs of Gentile Hindus of Goa are governed by the decreesigned on 16-12-1880. Some of its illogical and unscientific illustration are as under;

Art. 2 reads as, "The marriage, solemnized between Gentile Hindus, according to their religious rite, produces all the civil effects which the laws of the country acknowledge to the catholic and civil marriages." Whereas;

160 Supra 154 at p.100.
161 See, Ibid at pp. 95-141.
162 See, Ibid at pp. 141-154.
163 Ibid at p.156.
Art. 3 reads as, "However the marriage contracted by a male Gentile Hindu by simultaneous polygamy shall not produce civil effects; except in the following cases only:

(1) Absolute absence of issues by the wife of the previous marriage until she attains the age of 25 years;
(2) Absolute absence of male issue, the previous wife having completed 30 years of age; and being of lower age, ten years having elapsed from the last pregnancy;
(3) Separation on any legal grounds when proceeding from the wife, and there being no male issue;
(4) Dissolution of the previous marriage as provided for in Art. 5, ...\(^{164}\)

Both the above sections do not provide any clarity and in fact they are contrary to each other. Because Art. 2 provides that, the marriage, solemnized between Gentile Hindus, produces all the civil effects "which the laws to the country acknowledge to the catholic and civil marriages", but Art. 3 allows polygamy in some circumstances. Arts. 3(1) and 3(2) produces very illogical and unscientific issues, according to which a male Gentile Hindu can contract another marriage. As per Art. 3(1), if till the wife attains the age of 25 years, she does not give birth to an issue and, as per Art. 3(2) "Absolute absence of male issue, the previous wife having completed 30 years of age, and being of lower age, ten years having elapsed from the last pregnancy." This clause is also totally illogical, because it is well-settled by the science that the determination of the sex of the foetus or the child, depends upon the male chromosome and not upon the female chromosome. Art. 3(3) is also very unjustifiable due to these reasons.

\(^{164}\)Supra 154 at p. 158.
As per Art. 4, for simultaneous marriage, there should be a proof of the circumstances as mentioned in Art. 3, and there should be expressed consent of the previous wife, in a public deed, in the case which are referred under clause 3(1) and 3(2). It has to be admitted that, no wife would give such consent willfully, hence to get the consent, she might be tortured and if not so, then too, husband's second marriage, itself is the highest degree torture for a wife who is still a wife, legally and socially.

As per Art. 5, if wife commits adultery, the marriage between Gentile Hindus may be dissolved, by justifying the cause of dissolution in the Court; and by performing subsequently the ceremony known as "gothacria" with the solemnities of gentile rite. But such facility is not provided to wife. These provisions are not only illogical, but also illegal, gender unjust and unconstitutional.

As per Art. 9, "Legitimation of illegitimate issues of any type is not permitted.", But "the illegitimate issues of dancing girls and of other unmarried women may be recognized and legitimated by their mother." But such facility is not provided to wife. These provisions are not only illogical, but also illegal, gender unjust and unconstitutional.

As per Art. 10, "In the absence of legitimate male issues, Gentile Hindus of any caste are permitted to adopt a male in accordance with the ceremonies prescribed by his/her religious rite." But such facility is not provided to wife. These provisions are not only illogical, but also illegal, gender unjust and unconstitutional.

As per Art. 11, "The adoptee shall be chosen from amongst the relatives likely to succeed the adopter, preference being given to the second issue of his brothers and among the Brahmins and Kshatriyas from amongst those not yet initiated into the thread ceremony." And "...the adoption of another is prohibited, where one adoptee already exists...." Why one should not be

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165 See, Supra 154 at p.157.
166 See, Ibid at pp. 157-158.
167 Ibid at p.158.
168 See, Ibid at p.158.
allowed to adopt from out of the family or from orphanage? is not explained anywhere. Such kind of legal practice definitely defeats the values and principles of the standards of justice for the children.

As per Art. 13 "The dancing girls and the "Bhavinas" are permitted to adopt a relative belonging to their own caste only in the absolute absence of issues."\(^{169}\) This should not be allowed in present time, because banning adoption from outside the family is completely illogical and unjustifiable, and is also completely against the welfare of the children who are orphan, abandoned and separated. Such provisions are against the standards of international safe-guards produced and accepted for the welfare of the children.

As per Art. 29, "The non-Catholic inhabitants of Goa who are not Hindu Gentiles may observe the provisions of the present law which shall be applicable to them in so far as it is not contrary to their religious rites; and in the same manner, their private usages are safeguarded in so far as they are not contrary to morality and public order.\(^{170}\) This provision provides very wide scope for the different kind of usages in practice, which may differ even family to family, village to village, district to district, community to community. Such practice can cause many ambiguities in practical life of the people and for the law regulating machinery also.

As per Art. 30, "In cases where the parties who are benefited by the exceptions of the present law opt by common agreement for the application of the provisions of the Civil Code and other legislations of the country, the same shall be made applicable to them.\(^{171}\) This provision also gives space for a wide scope of choice to the parties. They may choose whatever they wish to. Such kind of situation is neither logical nor justifiable. Law can not be and should not be optional.

\(^{169}\) Supra 154 at p.158
\(^{170}\) Ibid at p.162.
\(^{171}\) Ibid.
(4.8.4) Usages And Customs of Non-Christian Inhabitants of Diu

Provisions of Arts. 3 and 4 of this part, are same as discussed above.

As per Art. 5, "the provisions of Arts. 3 and 4 do not apply to any sect of the Muslims who may contract a simultaneous marriage with prior consent of the wife of the previous marriage, expressed in a public deed."

Sale paragraph. When the wife or any of the wives refuses such consent the husband may make good the lack of it through the Court provided he proves the sufficient cause."\textsuperscript{172} This provision can be observed in context of the existing practice among the Muslims in other parts of India. It is not a general practice among all the Muslims but apart from Goa, Daman And Diu, it is not necessary for a Muslim man to take the permission of the wife before getting another marriage. But courts of India, has started to take, second marriage of the Muslim husband, as a ground of divorce for Muslim women.

As per Art. 6, "The marriage contracted with all the legal formalities may be dissolved by a suit instituted for such purpose in any of the following case:

1. Impotency of the spouses duly proved;
2. Adultery by the wife;
3. Ill treatment and serious injuries;
4. Change of religion....."\textsuperscript{173}

These ground for dissolution of marriage are neither adequate and nor totally justifiable because as per Art. 6(2) adultery by the wife, is a ground for divorce but, if the same is committed by the husband, is not a ground for divorce for wife. Change of religion, Art. 6(4)) cannot be a ground for divorce

\textsuperscript{172} Supra at p.164.
\textsuperscript{173} Ibid at p.165.
for anyone in present era, because religion is a matter of faith only. Hence, there is no logic in this ground. Moreover, there needs to be added more grounds for divorce as exist in the main stream of legal system of India.

Art. 11 reads as, "In the absence of a legitimate male issue, non-christians are permitted to adopt a male child, after performing the ceremonies prescribed by their religious rite." This provides that, only non-Christians are permitted to adopt a child and that too in the absence of a legitimate male child.

As per Art. 12, widows are permitted to adopt a male child, only if they have not done so during the subsistence of their marriage but adoptee should be chosen from amongst the relatives of the husband and if there is no any such relative, then she can choose from amongst her relatives or any stranger.

Art. 14 reads as, "The adoptee and the adopter should be of the same caste." Such kind of provision can not be justified in a secular country where the ratio of orphan or abandoned children is at very high level.

Art. 31 reads as, "In case an unmarried non-Christian person dies intestate, its succession is governed in terms of the law of the country." This means, that in such circumstances, the provisions of Indian succession Act, 1925 would apply.

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174 Supra 154 at p.166.  
175 See, Ibid at p.166.  
176 Ibid.  
177 Ibid at p.169.
(4.8.5) Usages And customs of Non-Christian Inhabitants of Daman (Decree No.77)

(4.8.5.1) Usages And Customs of Banian

In respect of marriage, rights and duties between the spouses, legitimation, provisions, majority, guardianship joint family and its management, maintenance, gifts, succession, partition of the properties of the joint family, acquisition of the inheritance and its renunciation, oaths, excommunication etc. are different for the Banians of Daman than other groups of people. These issues are discussed under Arts. from 1 to 93.178

(4.8.5.2) Usages And Customs of Other Castes

Under this title, it is specified that other castes, which comes under this title, shall follow the same usage and customs as followed by Banians but some other specialities (differences) are provided for them. Such provisions are in respect of marriage, legitimation, succession, adoption, ex-communication. These special provisions are mentioned under Arts. from 2 to 33.179

Art. 2 of this title reads as, "the males are permitted simultaneous polygamy, and they may have any number of wives except the Oars, or Lotias and Cojas or Barbunjas, who shall not have more than four wives; and the Brames of the Modd caste, who shall not have more than two.

Sole paragraph. However, simultaneous polygamy shall not take place amongst Mainatos, Noria-Machins, Burures, Capris, Salvis, Batelas, Porobias and Brames with the exceptions of those of the caste of Toloquia and Modd."180

This provision, itself is unconstitutional and against the basic principles and

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178 See, Supra 154 at pp. 174-188.
179 See, Ibid at pp. 182-192.
180 Ibid at p.188.
standards of present age justice system. Such illegal liberties should not be
granted to anyone on the ground of religion or community, usages and customs,
which are against the basic legal system and against the morality.

As per Art. 3 of this part, it is made compulsory that, for second or
subsequent marriage during the life time of the previous wife or wives, her or
their prior consent is indispensable.\footnote{\textit{Supra} 154.} But it can not be accepted totally that
such consent or consents can be "free". Such consent can be obtained by force
of any nature. And with no option left, wife or wives are bound to give consent.
If it is accepted that wife or wives have given free consent for subsequent
marriage, then too, when any provision is in contradiction with public policy
and basic principles of Constitution of India, it should be eradicated or omitted
from the legal system.

Four grounds for the annulment of marriages are provided under Art. 12.
Two of them are, adultery by the wife and conversion to another sect or
religion.\footnote{Ibid at p.190.} These grounds can not be justified in present era, because adultery
by the husband should also be a ground. Such kind of gender unjust provision
can not be allowed to exist in any part of India. Religion is a matter of faith and
choice, that should not be a weapon for either purpose to cut-off the relation. In
a secular country, such kind of ground for annulment of marriage is neither
logical nor Constitutional.

As per Arts. 19 and 20, adoption of a male child of the same caste is
allowed but from the relatives only, and when it is not possible from the
relatives, than only allowed from strangers.\footnote{Ibid at p.191.} The provision prohibits the
adoption from the children who are orphan or abandoned because generally
their caste is unknown. And unknown caste child can not be adopted in

\footnote{\textit{Supra} 154.}
\footnote{Ibid at p.190.}
\footnote{Ibid at p.191.}
circumstances mentioned under this Art. In addition, this provision also precludes from adopting a girl child.

(4.8.6) Marriage in the Portuguese Colonies (Decree No.35461)

The marriage in Portuguese colonies are regulated as per the provisions of this decree and also as per the provisions in force for others but are not inconsistent with this decree. This part consists of issues like method of performing Catholic marriages between the natives and natives, and natives and non-natives, marriage of minors, canonical certificate, civil registration, duties of the civil Registrar, supplementary and transitory provisions. These provisions are given under Arts. from 1 to 48 of this part.

Law of Divorce is given in part II, under Arts. 1 to 79, which includes the issues, such as grounds and procedure of contested Divorce, procedure for entrusting children, properties, permanent maintenance on divorce, effect of refusal of divorce, divorce by mutual consent and separation of persons and properties etc.

Part III of this decree, is regarding the incapacity due to minority and the manner of making it good.

(4.8.7) Succession

Arts. from 1735 to 2166 are in reference of succession and Arts. from 1369 to 1505 are in reference of the administration of property.
Whatever is mentioned above is relied upon the translation work of Mr. M.S. Usgaocar. In his work also, only some part of the original code is translated and not the whole.

**(4.9) General Observation**

Whatever is discussed above, discloses that Goa Civil Code does not provide an UCC for all the citizens, staying in the territory of Goa, Daman and Diu. In fact it differs drastically from community to community, caste to caste and people to people. Though, only few provisions are discussed above, but they do reflect the reality of the family Laws of Goa, Daman and Diu. The existing code of family law in Goa, Daman and Diu, is basically gender unjust on many aspects. It also suffers from several other loopholes and infirmities, which are of very serious nature. Hence, Civil Code of Goa also requires to be replaced by a justifiable code.