CHAPTER - II
PERSONAL LAW SYSTEM OF INDIA

(2.1) Historical background of Personal Laws in India

(2.1.1) History of Hindu Law

Hindu system of law has the most ancient pedigree of the known systems of law. If the Vedic period is accepted to be 4000 to 1000 B.C., Hindu law is about 6000 years old. In this span of 6000 years, it has passed through various phases. At times it has developed and grown remarkably well, at times it has sagged, at times it has reached such heights that even the most modern system may envy it, at times it has degraded so low that it has earned contempt, and at times it has just dragged on. Yet, it has existed with remarkable durability.\(^{35}\)

In 185 BC, the last of the Mauryas was assassinated by his Brahmin commander-in-chief Pushyamitra, who founded the Sunga dynasty. The *Arthashastra*, in substance, embodies the imperial code of law of the Maurya kings (who reigned from 325-185 BC); the Dharmashastras, on the other hand, were based on the psyche of a Hindu nation established with the Brahmin empire of the Sunga dynasty (founded in 185 BC). The difference between the *Arthashastra* and Dharmashastras has been explained on the theory that the *Arthashastra* was dealing with secular law and approached the consideration of relevant questions from a purely secular point of view, whereas the Dharmashastras considered the same problems from an ethical, religious, or moral point of view, and gave effect to the notions on which the Hindu social structure was based. It was widely believed that the *Arthashastra* had progressed independently of the Dharmashastras until the Manusmriti was composed, and that subsequent to the Manusmriti, the Arthashastra ceased to

It is believed that, some of the Sages of ancient time, were in direct communication with God and the sacred law was revealed to them by Almighty himself. Such revelations were incorporated in Shrutis or Vedas. After research, it is well accepted now, that the period of the Vedas was near about 4000-1000 B.C.. Shruti or Vedas describe the way of life, way of thinking, way of following custom, way of their behavior etc. of our early ancestors. Rules of

36 Fali S. Nariman, India's Legal System: can it be saved? 8 - 9 (Penguin Group, Gurgaon, 2nd edn.,2014)
37 Supra 35 at p. 21.
laws were mainly framed from four Vedas. After that, till the evolution of Smritis, customs continued to prevail as law. The Sutras and Gathas, came into existence after the Vedas.

A long period of transition existed from Vedas to Smrutis. The most systematic exposition of rules and basic principles of laws, came into existence from the time of Smrutis. Early Smrutis are called the Dharmasutras and the later are called Dharmashastras. There were many Dharmasutras but very few are known. They are mainly Gautama, Baudhayan, Apastamba, Harita, Vasistha and Vishnu. Dharmashastras are also divided mainly in three parts. They are; (i) Achara (ii) Vyavahara and (iii) Prayaschitta.

The \textit{Yajnavalkya Smriti} gives a list of twenty sages as law-givers, viz., Manu, Atri, Vishnu, Harita, Yajnavalkya, Usanas, Angaris, Yama, Apastamba, Samvarta, Katayana, Brihaspati, Parasara, Vyasa, Sankh, Likhita, Daksha, Gautama, Satatapa and Vasistha.\textsuperscript{38} Manusmruti, Yajnavalkya Smruti and Narada Smruti are the most important Smruties out of all. The compilation of Manu Smruti is placed at about 200 B.C.

The \textit{Smriti} texts do not make any clear-cut distinction between rules of law and rules of morality or religion. The philosophical theories that the Hindus propounded and the theological belief that they held, made it but natural that there was blending, inter-linking and sometimes interlocking of religious and ethical and legal principles and concepts. In most of the rules and institutions, ethical and legal principles have been woven into one fabric.\textsuperscript{39}

The code of Yajnavalkya was founded on the \textit{Manusmriti}, but the treatment was more logical and synthesized-particularly on the question of women-their right to inheritance, their right to hold property and the like.

\textsuperscript{38} Supra 35 at p.32.
\textsuperscript{39} Ibid at p.20.
Yajnavalkya, though a follower of conventional conservatism, was decidedly more liberal than Manu: possibly because of the then-pervading influence of the teachings of the Buddha. There are a number of verses in the code of Yajnavalkya that bear testimony to the fact that the law of procedure and the law of evidence to be followed in civil disputes had made considerable progress. According to Yajnavalkya, the cause of a judicial proceeding arose when any right of a person was infringed, or any wrong was done to him by another in contravention of the smritis or customary law.  

The Code of Narada (a compilation) has come down to us in its original pristine form—it begins with an introduction, and the treatment of the subject is in two parts: the first part deals with the judicature, and the second enumerates and discusses with clarity the eighteen titles of legal subjects contained in the Manusmriti. The merit of this smriti is that it states the law in a straightforward manner, in a logical sequence which is readily assimilated, and in a style which is both clear and attractive. Some of the topics of law dealt with by Narada are inheritance, ownership, property, gifts, and partnership. The Narada-smriti lays down a series of rules relating to pleading, evidence of witnesses and procedure. One of its most striking features is that it is the first of the Dharmashastras to accept and record the principle that king-made laws (legislation) override the rules of law laid down in the smritis. Several commentaries with different authorities are also available on all these Smritis. One after another and sometimes in co-relation with each other, they formed laws, which were followed in the early society. They were not only basic principles of law, but they also formed a complete code of conduct of our ancestors.

It is also an admitted fact that, prevailing customs were the main source of legal development. In fact, most of the customs of that period were incorporated in Vedas and Smritis. Till Smritikars reduced law in writing, the

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40 Supra 36 at pp. 4 - 5.
41 Ibid at p. 5.
process was carried on by the Digests and Commentaries. Several of the customs were incorporated into the rules. Such customary rules were modified to meet the need and changes of the society. Valid custom should be ancient, continuous, certain, reasonable, moral in favour of public policy and in consistence with law. Custom can be local, family custom or, caste or community custom.

In this background, it is but natural for Hindus to consider their law as of divine origin. Hindus consider their law as a revealed law. The theory is that some one among us, our great rishis, had attained such spiritual heights that they could be in direct communion with God. At some such time, Hindu law was revealed to them and through them we got our divine law. The revealed law has come to us in the form of four Vedas. The assumption is that the later developments, the Smritis, the Digest and Commentaries are nothing but the expositions of the sacred law contained in the Vedas which are considered to be the source of all knowledge. On that premise emerges the concept that Hindu law is divine law. And being divine law, it is sacrosanct, inviolable and immutable. The word 'sacrosanct' implies that Hindu law is not merely sacred or holy law but also hallowed law, a law to be looked at with reverence, the validity of which cannot be questioned. The word 'inviolable' implies that it is a law which cannot be violated, which cannot be changed. In short, it is a permanent law. The word 'immutable' signifies that it is an unchangeable law which is valid for all times to come; it is eternal law. Though equity, justice and good conscience are included in modern sources of Hindu Law, but they exist from the time of Vedas and Smritis. Different Smritikars like Gautama, Brihaspati, Yajnavalkya etc. have made reference in their Smritis regarding equity, justice and good conscience. precedents and legislations became sources of law, mainly from the evolution of British administration of justice in India.

42 Supra 35 at p.19.
Schools of Hindu law emerged with the emergence of the era of Commentaries and Digests. The commentator put his own gloss on the ancient texts, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose.

There are two main schools of Hindu law:
1. The Mitakshara school, and
2. The Dayabhaga school or Bengal school.

The Mitakshara school has the following sub-schools:
(i) Benares school,
(ii) Mithila school,
(iii) Maharashra or Bombay school, and
(iv) Dravida or Madras school.\footnote{Supra 35 at p.55.}

The Mitakshara school owes its name to Vijnaneshwara's commentary on the \textit{Yajnavalkya Smriti} by the name of "Mitakshara." The Dayabhaga school owes its origin to Jimutavahana's digest on leading \textit{Smritis} by the name of "Dayabhaga". The Mitakshara school prevails in the whole of Indian except Bengal and Assam. The Dayabhaga school prevails in Bengal and Assam. But such is the paramountcy of the authority of the \textit{Mitakshara} that it prevails even in Bengal and Assam on all those matters on which the \textit{Dayabhaga} is silent. The \textit{Mitakshara} is not merely a running commentary on the \textit{Yajnavalkya Smriti} but it is also a digest of practically all the leading Smritis, and deals with all titles of Hindu law. The \textit{Dayabhaga} is a digest on leading Smritis and deals only with partition and inheritance.\footnote{Ibid} The concept of Hindu law is deeply rooted in Hindu philosophy and Hindu religion. The ancient Hindu social structure and its continuance in modern times is, to a great extent, the outcome of Hindu philosophy and religion. Whatever difficulties there may be of defining
precisely Hindu religion and philosophy, it may be difficult to spell out their basic postulates, which have prevailed during the thousands of years of the existence of Hindu society. The codified Hindu Law lays down uniform law for all Hindus. In the codified areas of Hindu Law, there is no scope for existence of schools. The schools of Hindu law have relevance only in respect of the uncodified areas of Hindu Law.

(2.1.2) History of Muslim Law

Islam as a new religion had appeared on the globe in the early years of 7th century AD in the historic Arab city of Makkah now situated in Saudi Arabia. It was proclaimed by Prophet Muhammad [570-632 AD], Posthumous child of Abdullah son of Abdul Muttalib, hailing from the noblest Arab family of the time-the Quraish-which claimed descent from patriarch Abraham through his younger son Ismail. On facing severe persecution in the city of his birth for thirteen long years on account of his revolutionary ideas, in his 53rd year he migrated to the friendly city of Madinah over two hundred miles away. He breathed his last there ten years later and is buried in a mausoleum called the Green Dome in a corner of the palatial Madinah mosque which was initially built by him.

Since the demise of the prophet in 632 AD there have been two broad divisions among the follower of Islam, known as the Sunnis and the Shias. The origin of these twin divisions is embedded in the difference of opinion that had then cropped up among his followers as to who should be his temporal successor. The majority favoured an open election among his Companions and Disciples, while a minority insisted that the only rightful successor to the Prophet would be Ali bin Abi Talib- his paternal cousin married to his

45 Supra 35 at p.11.
46 Ibid at p.55.
youngest daughter Fatima (notably, all male issues of the Prophet had died during infancy). The majority had prevailed and Abu Bakr al-Siddiq (Prophet's closest Companion and father-in-law) was elected as the first Caliph.\textsuperscript{48}

In the course of time that majority and minority of the heyday of Islam came to be known as the Sunnis and the Shias respectively. Though sharing all essential religious beliefs and practices, the two factions gradually developed their own theology and law. The Shia minority recognized Ismat (infallibility) of the successive Imams and rested both their theology and law exclusively on their interpretation of the Quran and Hadith. On the Contrary, the majority Sunnis based their theology and law on the interpretation and narration of those basic texts by the Prophet's Companions (many among whom were his near or distant relatives) and their disciples and descendants.\textsuperscript{49}

There have been, and still there are, four different schools of theology and law, among Sunni Muslims. They are: (i) Hanafi school, (ii) Maliki school, (iii) Hanbali school, and (iv) Shafei school. There were also some other Sunni schools which came to an end with the passing of time. The most important three of them are: (i) The Awzai school, (ii) The Zahiri school, and (iii) The Tabari School.

Shias are divided mainly in three Schools. They are, (i) The ithna Ashari Jafari School, (ii) The Zaidi Shia School and (iii) The Ismailiya School. All these schools exist in different parts of India. The dispute over Imamat (leadership of Muslims), gave birth to both Shia and Sunni Schools. Shia and Sunni, too have several different theological groups, sub-sects and castes among them.

\textsuperscript{48} Supra 47 at p.7.
\textsuperscript{49} Ibid at p.8.
As per the view of Sobhi Rajab Muhmassani, as noted in his book, Falsafat Al-Tashri Fi Al-Islam (The philosophy of Jurisprudence in Islam), the sources of Muslim Law can be classified as under;

(A) Shariah Sources:-

(i) Quran
(ii) Hadith or Sunnah (Tradition)
(iii) Ijma (consensus of opinions)
(iv) Qiyas (Analogy)
(v) Equity and the absolute good
   (a) Istihsan, (preference)
   (b) Al-masalih al mursalah (public interest)
   (c) Istidlah and Istishab (Deduction)
(vi) Ijtihad and Taqlid

(B) Extraneous sources:-

(i) Legal fiction
(ii) Positive Legislation
(iii) Custom.

Every word of Koran is that of God, communicated to the Prophet Muhammad through Gabriel (the angel). The Koran is not and does not profess to be a code of law or even a law book, nevertheless, it would be a mistake to overlook its influence in shaping the Islamic legal principles.\(^5^0\) As Islam grew with the pace of time, so did Muslim Law, eventually culminating into a magnificent system of jurisprudence encompassing all branches of law, both public and private, and covering all legal subject including Huqooq-ul-Ibad (human rights), Siyasa Shariya (governance), Qaza (administration of justice), Muamalat (transactions), Jinayat (criminal law) and Athwal-us-Shakhsiya (personal status). The origin of this comprehensive and all-embracing legal

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\(^{50}\) Syed Khalid Rashid, Revised by V. P. Bhartiya, *Muslim Law* 6 (Eastern Book co., Lucknow, 2009)
system is professedly divine but its later development and systemization is certainly attributable to human beings.\footnote{Supra 47 at p. 6.}

In the Muslim faith tradition the Holy Quran is the last Book of God revealed to Prophet Muhammad who was the last Prophet of God on earth—figuratively the Khatam-un-Nabiyyin (Seal of Prophets)—after whom no other Prophet has been, or will ever be, sent by God. The Quran is a book of divine injunctions in Arabic believed to have been gradually revealed by God to Prophet Muhammad through archangel Jibreel (Gabriel) in a period of about twenty-three years, which he used to memorize and convey to his followers. These injunctions used to be recorded on his instructions by some of his close disciples on materials then available for writing and were collected, in a single 114-chapter volume, during the reign of his third successor about fifteen years after his demise.\footnote{Ibid at p. 4.}

For over a thousand years the great majority of Muslim jurists agreed that out of over six thousand verses in the Quran there were only five hundred verses with legal content. Most of the "legal" verses concern 'ibadat, approximately "acts of devotion", such as prayer and the pilgrimage. Out of these five hundred verses, there are about one hundred and ninety that deal with non-ritual aspect of the law; only matters of inheritance are laid out in any detail.\footnote{Muhammad Baqir As-SADR, and translated by Roy Parviz Mottahedeh, Lessons in Islamic Jurisprudence 1 (Oneworld publication, Oxford, England, 2007)}

**Istihasan** or preference literally means setting aside, the analogy, when there is the presence of a strong source. Shariah was provided with an elasticity and adaptability by Istihasan. Al-masalih al-mursalah or public interest is a new source of Shariah. Istidlal or Istishab, is a special source of law which can be derived from reasons and logic. Ijtihad and Taqlid serve as a medium of
deducing rules from the Shariah sources, i.e., Holy Quran, Sunnah, Ijma, Qiyas, Istihsan etc.

Legal fiction, positive legislation and custom come under extraneous sources. Opinions of jurists and precedents of English courts, come under legal fiction. Whenever public interest called for such need, the Caliphs and Sultans enacted laws either directly or indirectly. Such legislations were based on Shariah sources. Though after the evolution of Islam, Holy Quran and tradition took the place of customs and usages, but at many instances customs and usages formed a part of source of Muslim law.

Abdur Rahim divides the course of Muslim Law into four distinct periods. This classification has generally been approved by the writers on Muslim Law. These periods can be classified as:

(i) Period I - A. H. 1 to 10: Legislative period
(ii) Period II - A. H. 11 to Ummayads: The Period of Collection and Interpretation
(iii) Period III - From Abbasids to A. H. 200: The Period of the Development of law and four Sunni Schools.
(iv) Period IV - A. H. 200 to The Present Day: Period of "Taqlid".

The school of Islamic jurisprudence to travel to India first was that of Daud al-Zahiri. While this school had soon become extinct, later Muslim travellers, preachers and rulers brought to India the Hanafi and Shafei school of Sunni law and the Ithna Ashari Jafari and Ismaili schools of Shia law—and among these the Hanafi school had become dominant in the country. In the course of time India made a rich contribution to all these schools of Islamic religio-legal thought.

54 Supra 50 at p.25.
55 Supra 47 at p.19.
Islamic law was gradually codified in India under the authority of Muslim monarchs of the past. The first State code of Muslim law prepared in India was the Fatwa-e-Ghiyasiya promulgated under the authority of Ghiasuddin Balban who ruled India during 1266-1288 AD. Later in history it was replaced by the Fatwa-e-Qarakhania of the Tughlaq rulers. The Mughals began with their first code, Fatawa-i-Babari, and ended with the celebrated 30-volume Fatawa-e-Hindiya [Code of India] better known as Fatawa-e-Alamgiri. The latter was prepared towards the end of the 17th century AD by a commission comprising numerous native and foreign scholars and headed by a great Indian jurist of the time, Shaikh Nizam Burhanpuri. All these codes were based on Sunni Hanafi law. During the British rule in India Muslim law, like its name, suffered awful distortions.

The Muslim law in India is not a uniform body of legal rules. By tradition two broad versions of non-statutory Muslim law have been, and remain, in force in the country. Generally described as 'Sunni law' and 'Shia law', these are in fact the laws of the Sunni Hanafi and the Shia Ithna Ashari Jafari schools of Muslim law.

People following them are divided in several castes, creeds, sects and sub-sects and are spread all over India. In different part of this country too, they have different cultures and rules of law, customs and usages among them.

(2.1.3) History of Christian Law

The law governing the Christian community in India are ridden with contradictions and their progression has not been linear. At one level, Christians are governed by pioneering statutes which revolutionized the
scheme of personal laws in India and set the parameters of reform for all communities. These laws were based on the then prevailing English laws. On the other, these statutes remained static for well over a century and had become archaic and redundant, while other communities strived to keep abreast with the changing trends in matrimonial laws in the western world. Two other factors of historical significance have also contributed to the complexity.\(^{59}\)

The laws governing Christians are shaped by two distinct colonial influences - the Anglo-Saxon jurisprudence introduced by the British and the Continental system introduced by the French and the Portuguese within their respective territories.\(^{60}\)

(2.1.4) History of Parsi law

The Parsis originate from Iran (abode of Aryans) in AD 636, when the Arabs invaded Persia and Caliph Omar defeated the Parsi king Yezdezind, they sailed off in boats in search of a new land to escape persecution, carrying with them sacred fire. After a great ordeal at sea, the boat landed twenty-five miles south of Daman (Framjee 1858:10). The head of the group implored the local king, Jadao Rane, to give them refuge, with a promise that they would enrich his land.\(^{61}\) The king laid down five conditions.

(1) The Parsis should adopt the local language,
(2) They should translate their holy texts into the local language,
(3) Their women must change their dress and wear the local saree,
(4) Their marriage ceremony should include the local rite of tying of the sacred knot, and
(5) They should surrender their arms.\(^{(Cabinetmaker 1991:2-3)}\)

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\(^{60}\) Ibid.

\(^{61}\) Ibid at p. 75
They consented to all the five terms and in return the King granted them permission to build their fire temples and allotted to them a stretch of undeveloped country near Diu. They renamed the place as Navsari.\textsuperscript{62} Within this integrated community there are two sects- Shensoys (or Shuhursaees) and kudmis.\textsuperscript{63} The Parsis adopted the local language and customs, while maintaining a distinct and separate identity.

The Britishers also enacted few secular laws, such as the Special Marriage Act, 1872, the Married Women's Property Act, 1874, the Indian Minority Act 1875, the Guardianship and Wards Act, 1890, Indian Succession Act, 1925, Child Marriage Restraint Act, 1929 and S.112 of Indian Evidence Act, 1872.

**(2.2) Development of Personal Laws**

Constitution of India, is adopted on 26\textsuperscript{th} January, 1950. Development and recognition of different personal laws can be classified mainly in two parts. They are;

(1) The development of Personal laws in pre-Constitutional era; and
(2) The development of personal laws in post-Constitutional era.

**(2.2.1) The Development of Personal Laws in Pre-Constitutional Era**

In the days of Mughals, the establishment of the East India Company (c.1600) had been exclusively commercial, and the Company was chiefly concerned with the management of its own factory at Calcutta, exercising jurisdiction and power over Englishmen residing in what were known as the

\textsuperscript{62}Supra 59 at pp. 75-76.
\textsuperscript{63}Ibid at p. 76.
'East Indies.' After the battles of Plassey (in 1757) and of Buxar (in 1764), Lord Clive acquired from the Mughal emperor the diwani of Bengal, Bihar and Orissa, and thereafter, the Company assumed far greater territorial responsibilities. Originally, the civil and judicial administration of these territories was managed through Indian diwans, but shortly after the arrival of Warren Hastings in 1772, the civil and judicial administration of territories outside the town of Calcutta was undertaken by the East India Company itself.64

The earliest power emanating from the British Crown for the administration of justice in India dates as far back as the reign of James I, who by a charter granted in 1622, authorized the East India Company 'to chastise and correct all English persons residing in the East Indies and committing any misdemeanour either with martial law or otherwise'. By a later charter dated 3 April 1661, issued in the reign of Charles II, power was given to the Governor and councils of the several places in India then belonging to the Company 'to judge all persons belonging to the said Governor and council, or that live under them, in all causes, whether Civil or Criminal, according to the laws of Kingdom and to execute judgment accordingly.' The words 'all persons' used in that charter were wide enough to also include non-Europeans who lived within the factories of the Company, and the expression 'according to the laws of the Kingdom' meant English law.65

As the East India Company shifted its interest from a trading power to a political power, establishment of courts modeled on Anglo-Saxon jurisprudence became a political expendiency. Gradually, hegemonic imperial claims influenced every aspect of Indian life—economic, political, and legal. This clear marker of modernity was welcomed by the newly evolving English-

64 Supra 36 at pp. 11-12.
educated middle class of Bengal and provided the British a moral justification for ruling India as harbingers of enlightenment.\(^66\)

It has long been accepted that colonialism brought about a large scale transplants in legal systems within the colonised countries. The displacement of earlier legal systems took place to varying extents within colonies. Speaking of South Asia generally, the English legal system as modified by the principles of justice, equity and good conscience were "received" into the territories controlled by the British, and British and Roman-Dutch legal systems (the latter in relatively small areas) were introduced in the wake of colonial conquest. Yet, the British chose, for a variety of reasons, not to impose the English law upon the matters governed by the personal laws of the various groups present in India. These groups continued to be governed by their religious personal laws, which were specific for every religious group and religious denomination. Over a period of time, while the source of such religious personal law was acknowledged as the "revealed" law and derived from a religious source, the law itself was subject to interpretation by the secular courts set up by the British and a modified Anglo-Hindu and Anglo-Muslim law emerged in South Asia. This form of autonomy in personal law matters has led to this sphere being frequently cited as an arena for legal pluralism in erstwhile colonies.\(^67\)

\((2.2.1.1)\) Development in Hindu Law

The British period played a great role in development of Hindu law in pre-Constitutional era.

Through their interventions, the Hindu Society Could rid itself of its 'barbarism' and enter an era of 'civilization'. An image of the cruel and

\(^66\) Supra 59 at p.12.

\(^67\) P. Ishwara Bhat, Constitutionalism and Constitutional Pluralism 293 (LexisNexis, Gurgaon, 2013)
superstitious natives who needed Christian salvation was deliberately constructed by the Evangelists. The entry of Hindu social reformers into the campaign against Sati at the advent of nineteenth century strengthened the process of interventions not only by judicial decisions but also by legislative reforms.\textsuperscript{68}

19\textsuperscript{th} century is viewed as revolutionary era for modernizing personal laws. The Sati Regulation Act, 1829, was the first law in this direction. To abolish the practice of "Sati" which was perceived to be bured on Scripture dictates, in 1813, the British government partly banned it by banning the Sati practice in which the women were forced to commit Sati. Thereafter, with the success of their efforts in this direction, they banned it totally by regulating the Sati Regulation Act, 1829.

The social ill-practices had very deep root in the mindset of people of that time but the Britishers did not stop and in 1856, they made a successful effort by allowing remarriage to the Hindu widows through the Hindu Widow Remarriage Act, 1856. After that, The Age of Consent Acts of 1861 and 1891 were passed. Both these laws were highly opposed by many Hindu intelligentsia but it could not make any difference. Despite of the ban on child marriages, this ill-practice continued in the society, hence, the Child Marriage Restraint Act, 1929 was enacted.

The Caste Disability Removal Act, 1850 was enacted with a view to eradicate the practice of disqualifying any Hindu's right to property in the joint family property, if he converts to any other religion. The Hindu Disposition of Property Act, 1916 was enacted to remove certain disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the time of such disposition. This Act was amended twice in British period. Firstly by the Transfer of Property (Amendment)
(Supplementary) Act, 1929 and thereafter the Government of India (Adaptation of Indian Laws) order, 1937. The Hindu Inheritance (Removal of Disabilities) Act, 1928 was enforced to prohibit the exclusion from inheritance of certain disqualified heirs. The object of the Hindu Gain of Learning Act, 1930, was to stipulate that all the income earned through self-professional qualifications would be separate property of the Hindu male, who has acquired it. Acquiring the professional qualification, from the sources and funds of the joint family, also could not bring any change in his separate right to property. To set the right to property of Hindu women, the Hindu women's Right to Property Act, 1937 was enacted. Previous to this, Hindu women never had any right relating to property. Thereafter, Arya Marriage Validation Act, 1937, Hindu Women's Right to separate Maintenance and Residence Act, 1946, and Hindu Marriage (Removal of Disabilities) Act, 1946, were enacted.

Although Hindu society has advanced much beyond what it was during the period of Commentaries and Digests, yet the development of laws was thwarted. Hindu Law became static and did not conform to the changed context of Hindu Society. The progressive section of Hindu society always clamoured for reforms. In 1941, a Hindu Law Committee was constituted which in its Report recommended that Hindu Law should be codified in gradual stages, beginning with the law of intestate succession and marriage. The Committee was again revived in 1944 under the chairmanship of Sir Benegal Narsing Rau. The Rau Committee evolved a uniform code of Hindu law which would apply to all Hindus by blending the progressive elements of laws of the various schools of Hindu Law. The draft code was meant to be an integrated whole.69

69Supra 35 at p.54.
(2.2.1.2) Development in Muslim Law

Except the legislations which were of regulative, procedural and administrative nature, no substantive law was passed in the area of Muslim personal law.

The Muslim Law, though successively replaced, remained the basis of criminal law, applicable to all inhabitants in Bengal and other Muslim parts of British India until 1862. The Islamic law of evidence was not entirely abolished until 1872. As regard the law of family and inheritance and matters relating to Wakf, gift, pre-emption etc., continued validity of the Shariah for Muslims was guaranteed by section 7 of the famous Regulation of 1780.70

There are certain enactments like the Mussulman Wakf Validating Act, 1913 which reaffirm the continued applicability of Muslim Law to Muslims, yet others like the Dissolution of Muslim Marriages Act, 1939 and the Shariat Act, 1937, which though professing to apply Muslim Law to Muslims, yet make certain innovation in the law.71

The Muslim Personal Law (Shariat) Application Act, 1937 abolished several ill-practices from the Muslim Society. It also provided scope for a little modern approach in Muslim Personal Law.

There is no provision in the classical Hanafi Law, which applies to a majority of Muslims in India, to enable a married Muslim woman to obtain a decree from the court dissolving her marriage if the husband neglects to maintain her, makes her life miserable, and under certain other circumstances. Since the Hanafi jurists clearly laid down that if Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafii or Hanbali Law,

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70 Supra 50 at p.34.
71 Ibid at p.34.
acting on this principle, the Ulema have issued Fatawa to the effect that in certain cases, as enumerated in Section 2 of the above Act, a married Hanafi Muslim woman may obtain from court a decree dissolving her marriage. 72

In this period mainly, Kazis Act, 1880, Mussalman Wakf Act, 1923, Mussalman Wakf Validating Act, 1930 and at state level Bengal, Mohammedan Marriages and Divorces Registration Act, 1886, Jammu Kashmir Muslim dower Act, 1920, Mapilla Wills Act, 1928, Mapilla Manumakkattayam Act, 1939, Jammu-Kashmir Dissolution of Muslim Marriage Act, 1942, Assam Moslem Marriages and Divorces Registration Act, 1935, were enacted.

(2.2.1.3) Development in Christian Law

Until the nineteenth century, converted Christians generally followed pre-conversion local customary practices in respect of property inheritance and marriage rituals. The concept of a distinct Christian personal law evolved much later, during the later half of the nineteenth century, with the statutory enactments introduced by the British and the Portuguese. 73 Thus, while being shaped by the European philosophies of the conservative and highly institutionalized Roman Catholic Church and the liberal and loosely structured Protestant theology, the indigenous Christian community also incorporated local customs, traditions, and languages, resulting in wide regional diversities. The converted Christians also retained their pre-conversion caste hierarchies (Grafe 1982:98 and Thekkedath 1982:23) 74

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72 Supra 50 at pp. 37-38.
73 Supra 59 at p. 66
74 Ibid at p. 66.
The Laws governing the Christian Communities have three distinct sources:
(1) The statutes enacted by the British in the nineteenth century;
(2) The Civil Code introduced by the Portuguese and the French within their colonies.
(3) The local customary laws.\footnote{Supra \textit{59} at p.66.}

In addition, Roman Catholics are governed by a dual system of civil law- the (Indian) Divorce Act, 1869 and Cannon law (Church law).\footnote{\textit{Ibid} at p.66.} The Indian Divorce Act, 1869 and the Indian Christian Marriage Act, 1872 were the two main legislations enacted by the Britishers, in the area of Christian personal law.

It is said in general that, in Goa, Daman and Diu, there exist a Common Civil Code but its a myth, because, there too, the rules and regulations differs decree to decree. There too, the practice on basis of caste, creed and community is followed.

The Goa Civil Code is, therefore, not strictly a uniform code. In any case everyone does not agree with the view for the following reasons. In the first place, there are three types of marriages-one, Catholic Church marriages; two, marriages of Catholics outside the fold of the Catholic Church; and three, marriages for non-Catholics. Marriages conducted by the Catholic Church are supposed to be sacramental. Catholics can have civil marriages without the involvement of the Church but this is generally not so simple because of societal pressure. The Catholic Church does not recognize such marriages. Catholics marrying in church need not register their marriages, for that job is supposed to be done by the Church itself. But in the process Catholics are treated separately compared to other communities as if they have their personal law which others do not have. Similarly, divorce is also governed separately
depending upon under which law the marriage has taken place. According to the agreement of 1946 between the Catholic Church and the Portuguese State, Catholics marrying under the Canon Law (church marriages) are excluded from the divorce provisions under the civil law. Canon Law 1141 stipulates that a marriage which is ratified and consummated is absolutely indissoluble. What the Church allows is judicial separation certifying as if the marriage has not taken place or has not been consummated. The Ecclesiastical Court of the Church, and not the civil court, can take such decisions.77

(2.2.1.4) Development in Parsi Law

The early British legal system differentiated between the personal law of Parsis living in the Presidency towns of Bombay, Calcutta and Madras and that of those living in other towns. As Hindu and Muslim personal laws became increasingly identifiable in the legal system, Parsis came to be governed by the English civil law. This was true so far as the Parsis of Presidency towns were concerned. In other places Parsis were to be governed by their customary laws; if there was no clear guidance in that regard, then by the rules of 'justice, equity and good conscience', which were supposed to mean 'the rules of English law if found applicable to Indian society and circumstances'. The application of English law, however, proved problematic.78

The first legislation enacted for the Parsis was, Succession to Parsee Immovable Property Act, 1837. Thereafter, in 1864, the Parsi Law Commission was appointed and on the report on this Commission, the Parsi Intestate Succession Act, 1865 and the Parsi Marriage and Divorce Act, 1865 were enacted. In this later legislation, the provisions of Matrimonial Causes Act, 1857 were incorporated and Parsi marriages were made monogamous. In 1936, the Parsi Marriage and Divorce Act, was again amended and with some

77 Supra 8 at pp. 20-21.
78 Ibid at p. 17
modifications, several new grounds for divorce, were incorporated in this legislation. The Parsi intestate Succession Act, 1865 was incorporated in Part III of the Indian Succession Act, 1925.

The History of personal laws in India tells that the process of codification started during the British period and it was the appropriate occasion to reform the personal laws. As study revealed that the British rulers were more interested to maintain their political authority over India. That is why they adopted non-interference policy with regend to personal laws. However, the British rule was forced to adopt progressive approach to abolish certain ill effects of personal laws/religion. Consequently, the Britishers passed few secular laws such as the Special Marriage Act, 1872, Married Women's Property Act, 1874, Indian Majority Act, 1875, The Guardians and Wards Act, 1890, Indian Succession Act, 1925 and the Child Marriage Restraint Act, 1929, Sec.112 of Indian Evidence Act, 1872.79

(2.2.2) Development of Personal Laws in post-Constitutional era

After the adaptation of Constitution, there occurred many changes in different personal laws. But except Hindu Personal Law, no notable change is brought or tried to be brought in other personal laws. Developments and changes occurred in post-Constitutional era, in different personal laws are as under;

(2.2.2.1) Development in Hindu Law

The decade of the 1950s was a decade of a forward march towards replacement of the traditional Hindu personal law by a modern and standardised code, which would have little to do with the Hindu dharmashastras. In this march, three elements were noticeable. First, the

79 Supra 33 at p.95
approach was modernist and highly influenced by professional lawyers and 
other members of the intelligentsia who had scant regard for the traditional 
institutions which the Gandhians were advocating. Second, while reforming 
and standardising Hindu law, *shastric* tradition was not considered sacrosanct. 
Within the Hindu fold it was a secular move. Third, for those who did not want 
to use any personal law of any community in contracting a marriage, a secular 
option was to be made available to them.\textsuperscript{80}

After independence, in spite of enacting Hindu code Bill, the four major 
enactments i.e., the Hindu Marriage Act, 1955, the Hindu Succession Act, 
1956, the Hindu Adoption and Maintenance Act, 1956 and the Hindu Minority 
and Guardianship Act, 1956, were made in the area of Hindu Personal law. 
Through these enactments major changes were brought in laws relating to 
Hindus.

Hindu Marriage Act, 1955, is frequently amended to meet the Social 
needs and changes. The changes are made mainly through the Repealing and 
Amending Act, 1960, the Hindu Marriage (Amendment) Act, 1964, the 
Marriage Laws (Amendment) Act, 1976, the Child Marriage (Amendment) 
Act, 1978, the Marriage Laws (Amendment) Act, 1999, the Marriage Laws 
(Amendment) Act, 2001, the Marriage Laws (Amendment) Act, 2003 and the 

In the Hindu Succession Act, 1956, changes were brought, through the 
Hindu Adoption and Maintenance Act, 1956, the Adoption of Laws (No.3) 
order, 1956, the Repealing and Amending Act, 1960, the Repealing and 

\textsuperscript{80}Supra 8 at p.85.
In reference of the Hindu Minority and Guardianship Act, 1956, there is no any major change at Central level but several States have definitely made some amendments, as per their needs.

The Hindu Adoptions and Maintenance Act, 1956 is so far amended by four legislations, they are; the Repealing and Amending Act, 1960, the Hindu Adoptions and Maintenance (Amendment) Act, 1962, the Pondicherry (Extension of Laws) Act, 1968 and the Personal Laws (Amendment) Act, 2010. Several efforts were made to uniform law regarding adoption but none of them proved to be fruitful due to several reasons.


The formal future of Hindu law, as the majority system of personal laws in India, was safeguarded in 1950, despite a Constitution that appears to speak the language of modern Western Constitutionalism and guarantees equality before the law for all citizens. Not just Hindu personal law, therefore, but the entire legal system of post-colonial India was subjected to an intricate compromise from the 1950s onwards, which would constantly need to be fine-tuned.81

Since 2001, the contours of India's new welfare-conscious legal structures have become particularly clearly manifested in India's radical post-1985 regime of post-marital maintenance entitlement for all ex-wives until death or remarriage, building on the world-famous Shah Bano case of 1985. This was followed by the Hindu Succession (Amendment) Act of 2005, the Prohibition of Child Marriage Act of 2006 and most recently the remarkable

Maintenance and Welfare of Parents and Senior Citizens Act of 2007. Taken together, these purposeful innovations constitute to a large extent deliberately silent dramatic readjustment of social welfare laws in India, which may be an economically booming country today, but also remains a place teeming with hundreds of millions of people living below the poverty line. There are powerful constitutional agendas here requiring the Indian state to intervene in gendered imbalances and to construct a more effective social welfare net that does not require monetary input from the state, but relies on social and moral normative orders to provide remedies.\textsuperscript{82}

\textbf{(2.2.2.2) Development in Muslim Law}

As mentioned in historical background of Muslim Personal Law, except Muslim Personal Law (Shariat) Application Act, 1937 and Dissolution of Muslim Marriages Act, 1939, no any major legislation was enacted by the Britishers to regulate Muslim Personal Law functions. After independence too, no Central or State government tried rather dared to bring any major change in Muslim Personal Laws. Orissa Mohammadan Marriages and Divorces Registration Act, 1949, Muslim Personal Law (Shariat) (Madras Amendment) Act, 1949, Muslim Personal Law (Shariat) (Kerala Amendment) Act, 1963, Meghalaya Muslim Marriages and Divorces Registration Act, 1974, Jammu Kashmir Muslim Personal Law (Shariat) Application Act, 2007, are definitely enacted but they do not consist any substantial or material change.

Muslim Women (Protection of Rights on Divorce) Act, 1986, was enacted by the then government, to resolve the hues and cries occurred in Muslim society due to the verdict given by the Apex Court, in \textit{Mohd. Ahmed Khan v. Shah Bano Begum}\textsuperscript{83} This Act could not give any specific solution of the problem.

\textsuperscript{82}Supra 33 at p. 126
\textsuperscript{83}AIR 1985 SC 945.
(2.2.2.3) Development in Christian Law


For intestate succession law, whatever was incorporated in the Indian Succession Act, 1925 is continued till today.

The second largest community in Goa, Daman and Diu are the Christians and in respect of marriage law they are governed by either the Portuguese law of civil marriages or the 1946 Imperial Decree on Canonical marriages. The matrimonial laws applicable to the Christians in rest of India are the Indian Divorce Act, 1869 and the Christian Marriage Act, 1872, which are very different from that applicable to the Goan Christians. In respect of
succession, all Goan Christians are governed by the local Portuguese law, the Indian succession Act of 1925 being wholly inapplicable in the territory.  

(2.2.2.4) Development in Parsi Law

The Parsi Marriage And Divorce Act, 1936 is in practice among Parsis till yet. Few changes were brought to this Act, through amendments and adaptations, they are; the Parsi Marriage and Divorce (Amendment) Act, 1957, the Pondicherry (Extension of Laws) Act, 1968, the Parsi Marriage and Divorce (Amendment) Act, 1988 and the Marriage Laws (Amendment) Act, 2001.

(2.3) Jewish Personal Law

There is no any codified law for Jews for marriage and divorce in India, but provisions regarding intestate succession of this community are incorporated in the Indian Succession Act, 1925.

A standard text book on Jewish law relied upon by courts in India, is written by the renowned Jewish Scholar and professor of Talmudic Literature at the Hebrew Union College, Rev. M. Mieliziner, titled, Jewish law of Marriage and Divorce in Ancient and Modern Times, the Second edition of which, was published in 1901, and Jewish code of Jurisprudence by Rabbi Kadushin, published in 1921.  

\[84 \text{ Supra 29 at p. 246.} \]
\[85 \text{ Supra 59 at pp. 87-88} \]
(2.4) General Observation

This analysis contains only brief introduction of the different legislations which were and are in force, but their enactment, in different parts of India, differ on very wide scale. Their application depends upon local customs, usages and practices by the religious leaders, dominating people, socio-political background of the area etc. Different States have also amended personal laws, as per the convenience of their areas. Such differences make the Indian personal law system, complex and ambiguous which has caused several hardships in reference of civil issues of the citizens of this country.