CHAPTER VII

CONSTITUTIONAL IMPLICIT OF POLYGAMOUS PERSONAL LAW

(a) Personal Laws and Article 372.
(b) Personal Laws and Article 13.
(c) Whether Personal Laws are violative of fundamental Rights.
(d) Personal Laws and Right to Equality (Art. 14 & 15).
(e) Basis of reasonable classification.
(f) Discrimination on the ground of sex.
(g) Article 25 and Personal Laws.
India is a country of people of different religions, languages, castes and cultures. Despite these diversities, every effort has been made to maintain the unity of the nation. We have adopted federal system with strong centre. In Indian democracy equal political rights are given to all the citizens. We have adopted one constitution, one citizenship and one system of electorate. All the citizens above the age of 21 years have right to vote. India is a secular state. All Indians enjoy equal rights in respect of freedom of their religions. Socially, economically and educationally backward sections are given special protection. Other religious, linguistic and cultural minorities are also assured that in free India their interest would not suffer any impairment at the hands of majority. Dr. Ambedkar while presenting the draft Constitution to the Assembly for discussion observed:

"The draft constitution has sought to forge means and methods whereby India..."
will have a federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country". He added that one of the means adopted by the draft constitution was "Uniformity in fundamental laws, civil and criminal".

The preamble to the constitution makes it clear that the Constitution of India resolves to secure to its citizens:

JUSTICE, Social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation. To achieve these aims provisions relating to fundamental rights and directive principles of State policy are enshrined in the constitution.

2. Ibid.
Article 14 lays down:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

Article 15 (1) lays down:

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

Article 13(1) lays down that

"All laws in force... in so far as they are inconsistent with the provisions of this part shall to the extent of such inconsistency, be void".

Notwithstanding all these provisions India has different personal laws governing Hindus, Muslims, Christians, Farsis and Jews in family matters such as marriage, divorce, adoption, inheritance etc.

Different personal laws for different religious communities give rise to a feeling that they discriminate only on ground of religion. For instance, polygamy is legal under the Muslim Personal Law in India whereas it is not so under the personal laws
of Hindus, Christians, Parsis and Jews.

Question therefore arises: Does Muslim Law (which permits polygamy to Muslims) discriminate against Hindus, Christians, Parsis or Jews on the ground of their religion alone? To answer this question first of all we shall have to see whether the personal laws are subject to the provisions of the Constitution. If so, are they inconsistent with the Fundamental Rights guaranteed under Article 14, 15, 25 of the Constitution? Answer to these questions depends on whether the terms 'Law in force' and 'law' used in Article 372(1) and 13(1) cover personal laws.

(a) PERSONAL LAWS AND ARTICLE 372

Article 372(1) enacts that all the law in force in India before the commencement of the

3. Article 372(1) lays down that "Notwithstanding the repeal by this constitution of enactments referred to in Article 395 but subject to the other provisions of this constitution, all the law in force in the territory of India immediately before the commencement of this constitution shall continue in force here in until altered or repealed or amended by a competent legislature or other competent authority. Article 372(2) entitles the president to make adaptations and modifications to the law in force by way of repeal or amendment.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the
Constitution shall continue in force subject to the other provisions of the Constitution until altered or repealed or amended by a competent legislature or other competent authority.

Provisions of this Constitution, the president may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have affect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed (a) to empower the president to make any adaptation or modification of any law after the expiration of [three years] from the commencement of this Constitution or (by other competent legislature or other competent authority from repealing or amending any law adapted or modified by the president under the said clause.

Explanation 1 - The expression "law in force" in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operations either at all or in particular areas.
The question arises: Does the laws which are to continue in force under Article 372(1) include personal laws? Bombay High Court answered this question in negative on the ground that Article 372(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment. So it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community.

It is submitted that moreover the power under article 372(2) could be exercised only for a period of two years, subsequently increased to three years by the Constitution (First Amendment) Act 1951, from the commencement of the Constitution, and it may be inferred that this power exercisable for such a short period was not intended to be exercised in respect of the vast mass of unwieldy and conflicting non-statutory personal laws of the different community. But we should not forget as pointed out by Supreme

Court in M.G. Deesa v. State of Bombay, that the continuation of 'law in force' is not conditioned by the making of adaptations or modifications by the President in these laws, then it could not also be conditioned on their being capable to adoption or modification by President.

Supreme Court in various cases held that the term 'law in force' in Article 372(1) has been used in very comprehensive sense and includes everything that is law in the sense acceptable to modern jurisprudence, whether statutory, non-statutory, written or unwritten, customary or common, state made or judgement made. In Director of Rationing v. Corporations of Calcutta, Supreme Court made it clear that the expression 'laws in force' includes not only enactments of the Indian legislative but also the common law of the land which was being administered by the Courts. This view was

5. AIR 1958 SC 468 (482).

   Sant Ram v. Labh Singh AIR 1965 SC 314.

7. AIR 1960 SC 1355 at p. 1360.
approved by the bench of nine judges of Supreme Court in Superintendent & Remembrancer of Legal Affairs v. Corporation of Calcutta.

Moreover Article 372(1) is the only provision of the constitution under which Personal laws can be claimed to have been recognised. If the expression 'all the law in force' is construed to cover only certain types of laws and thus to exclude certain other laws then the laws so excluded would run the risk of not being continued at all.

(b) PERSONAL LAWS AND ARTICLE 13

Article 372(1) enacts that 'all the law in force' in India before the commencement of the Constitution shall continue in force subject to the other provisions of the constitution until altered or repealed or amended by a competent legislature or other competent authority. Under Article 13(1) such existing laws, in so far as they are inconsistent with the fundamental right,

shall to the extent of the inconsistency, become void from the date of the commencement of the Constitution.

Question arises whether the term 'laws in force' used in Article 13(1) includes personal laws.

'laws in force' defined by Article 13(3) includes laws passed or made by legislature or other competent authority in the territories of India before the commencement of this constitution. There is no doubt that originally personal laws of

9. Article 13(1) lays down:

"All laws in force in territory of India immediately before the commencement of the Constitution in so far as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency be void.

(2) The State shall not make any law which take away or abridges the rights conferred by this clause shall to the extend of the contravention, be void.

In this article unless to context otherwise requires:-

(a) "Law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

(b) "Laws in force" includes laws passed or made by legislature or other competent authority in the territory of India before the commencement of this constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
Hindus, Muslims, Christians, Parsees, are founded on the scriptural texts of these communities. They were not made or passed by legislature or other competent authority. On this ground it has been observed by learned Jurist V.S. Deshpande, that the unenacted Hindu Law as it stood before the Hindu Law Acts of 1955-56, and the unenacted Mohammedan law as it stands till now are not the result of any state action to attract the provisions of Article 15(1) of the Constitution. Therefore, they continued to be valid in spite of Art. 15(1) because the difference between them was not due to state action. Similar views are given by J.N.D. Anderson and Dr. Derrett.

But Mr. Justice A.M. Bhattacharjee has rightly pointed out that though the making of the unenacted personal laws of these communities was not the result of any state action and they were not made by any State action, but the application


Derrett, "Introduction to Modern Hindu Law, 1963, p.17."
of Unenacted personal laws to these communities is the result of State action. It is the action of State which enforces not only 'The Hindu Marriage Act, 1955, the Christian Marriage Act, 1872, but also the Muslim Personal Law (Shariat) Application Act, 1937.

Moreover the expression 'law' as defined in Article 13(3)(a) includes custom or usage, custom and usage which formed part of the personal laws are obviously amenable to the constitution. It does not mean that the only that part of personal laws which is based on custom and usage is amenable to the constitution and the other is not.

In Krishan Singh v. Mathura Supreme Court held that though according to the orthodox Smiriti writers a Sudra cannot legitimately enter into a religious order and although the strict view does not sanction or tolerated ascetic life of the Sudras,


it cannot be denied that the existing practice all over India is quite contrary to such orthodox view. In cases, therefore, where the usage is established, according to which a Sudra can enter into a religious order in the same way as in the case of twice born classes, such usage should be given effect to. But the Supreme Court further said if the Shastric Hindu law really imposed ban against the Sudras entering the holy order, such provision does not stand abrogated by virtue of the Constitutional mandate embodied in Part III of our Constitution. According to Supreme Court Part III of the Constitution does not touch upon the personal laws of the parties. Supreme Court has not assigned any reason for it.

Derrett, a well-known authority on Hindu law has also observed without giving any reason that Hindu Law as operating immediately before

the commencement of the constitution "... are retained intact by the provisions of the Constitution:"

"(e)ven if the rules appear to interfere with religious belief, or discriminate between resident on different regions, between castes, or between the sexes,... and cannot be cut down otherwise than by legislation".

Bombay High Court has also expressed the same view on the ground that:

"Constituent Assembly in defining 'law' in Art. 13 have expressly and advisedly used only the expression 'custom or usage' and have omitted personal law. This is a very clear pointer to the intention of the constitution, making body to exclude personal law from the purview of Art. 13".

Bombay High Court further said:

"(1)f Hindu Personal law became void by reason of Article 17 and by reason of any of its provisions contravening and
fundamental right, then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravened Articles 14 and 15. This clearly shows that only in certain respects has the constitution dealt with personal law.

We can conclude that the term 'Law' and 'Law in Force' used in Article 13 and Article 372 also include personal laws. But the fact (reality) of co-existence of various personal laws applicable to different communities and constitutional mandate make it clear they did not become automatically void.

"Even though a law becomes void automatically under Art. 13, without the necessity of any declaration by a Court, a declaration that a law has become void is necessary before a court can refuse to take notice of it. The

15. Article 17 abolished untouchability and forbids its practice in any form.

16. Article 25(2) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."
voidness of law is not a tangible thing which can be noticed as soon as it comes into existence; a declaration that it is void is necessary before it can be ignored. Therefore, a declaration by the court that a law is void is necessary even though it has become void automatically under Art. 13.

It is a well recognized principle that a court does not grant a declaration in respect of the unconstitutionality of a law except of the instance of a person aggrieved by it, it does not declare laws unconstitutional at the instance of mere volunteers. 17

Court tests a law according to the provisions of constitution. (Fundamental Right). If it finds that such law is inconsistent with the provision of constitution relating to fundamental rights it can declare such law as unconstitutional.

(c) **WHETHER PERSONAL LAWS ARE VIOLATIVE OF FUNDAMENTAL RIGHTS**

Now we shall see, if personal laws comes in the definition of 'law' or 'law in force' used order Article 13, are they inconsistent with the (specially Articles 14, 15, 25 of Indian Constitution) provisions relating to 'Fundamental Rights? Supreme Court in A.K. Gopalan v. Union of India laid down that in determining whether there is an infringement of Fundamental Rights the object and form of action need to be considered, the effect on fundamental rights, in general will be ignored.

But this formula was not accepted by the Supreme Court in R.C. Cooper, v. Union of India. In this case Supreme Court held the theory that the object and form of state action determine the extent of protection which the aggrieved party may claim, was not consistent with the constitutional scheme which aims at affording the individual the fullest protection of his basic rights. The State action

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18. AIR 1950 S.C, 27,
must, therefore, be adjusted in the light of its operation upon the rights of the individual and groups of individuals in all its dimensions.  

In *Bennett Coleman Co. v. Union of India* and *Menaka Gandhi v. Union of India*, Supreme Court reiterated that the tests of pith and substance of the subject matter and of direct object and of incidental effect of the legislation were irrelevant to the question of infringement of fundamental rights, and the true test was the direct and inevitable consequence or effect of impugned state action on a particular fundamental right.

**PERSONAL LAWS AND RIGHTS TO EQUALITY (ART. 14 and 15)**

Article 14 lays down that State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Equality before the laws has been interpreted to imply that among equals the law should be equal.


In other words, like should be treated alike and not unlike should be treated alike. Equality before the law does not mean that same laws should apply to all persons. It is not necessary that every law must have universal application for all persons. Identical treatment in unequal circumstances would amount to inequality so a reasonable classification is necessary. Varying needs of different classes or sections of people require different treatment. A legislature which has to deal with diverse problems arising out of an infinite variety of human relations must have powers of reasonable

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22. Dicev; Law of the Constitution, p.49.(10th ed.).

V.N. Suckhla - Constitution of India, State of West Bengal v. Anwar Ali A.I.R. 1952,
Charanjit Lal v. Union of India, S.C. 75,
A.I.K.

Kedar Nath v. State of West Bengal, AIR 1953,
SC 404.
classification of persons and things upon which such laws are to operate. Our Supreme Court lays down following conditions for classification to be reasonable:

(1) The classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the group.

(2) The differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are two distinct things. What is necessary that there must be nexus between them.


Seervai; Constitutional Law of India, p.274-280, (3rd Ed.).
But Supreme Court has challenged this traditional concept of equality which is based on reasonable classification and has laid down a new concept of equality in *Menaka Gandhi v. Union of India*. Bhagavati, J. in this case observed that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional doctrinaire limits. Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment.

In *K.D. Shetty v. Airport Authority* Supreme Court reiterated the same principle as follows:

"The doctrine of classification which is evolved by the Court is not paraphrase of Article 14, nor is it the objective, and end of that Article. It is merely a judicial formula for determining where the legislative or executive action is arbitrary one, therefore, constituting denial of equality.


26. AIR 1979 S.C. 1628."
If the classification is not reasonable and does not satisfy the two conditions referred above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached.

Commenting on new test of arbitrariness H.M. Seervai has rightly pointed out: "(N)о doubt arbitrary actions ordinarily violate equality but it is simply not true that whatever violates equality must be arbitrary."

Even after the establishment of new doctrine Supreme Court have been declaring laws invalid on the ground of unreasonable classification without being arbitrary.

But however reasonable the classification may be Article 15, would strike it down if the same is based only one or more of the grounds mentioned under Article 15, namely, religion, race, caste, sex, place of birth.

(e) Basis of Reasonable Classification

Now question arises:
- Whether the application of different personal laws to different religious community is based on reasonable classification or only on religion.

It is an historic fact that Hindu, Muslim, Christian, Parsis, have their personal laws which are based upon their respective religious texts and which embody their own distinctive evolution and their own distinctive backgrounds. Article 44 indicate the existence of separate personal laws and Entry No. 5, in the concurrent list gives power to the legislature to pass laws affecting personal laws. Scheme of the constitution seems to be to leave personal laws unaffected except where specific
provisions is made with regard to it and leave it to the legislatures in future to modify and improve it, ultimately to put on the statute book a common and uniform code.

29. Bombay High Court and Madras High Court upheld the provision of anti bigamy law as according to them such different laws for Hindus and Muslims are not on the ground of religion only but on social and other consideration peculiar to each communities.

30. In both above mentioned Bombay and Madras High Courts decisions, the learned judges pointed out that the classification of the Hindus and Muslims into separate classes for the application of separate sets of personal laws were extra religious grounds also. Madras High Courts went to the length of observing that the essence of classification is not their religion, but that they have all along been preserving their personal law peculiar to themselves.

31. Supra note - 29 & 30.
Bhopal High Court and Mysore High Court have also while recognizing that there are fundamental differences between the personal laws of the Hindus and the Muslims, attempted to justify them on the ground of reasonable classification based upon the outlook of persons belonging to the two communities, their history, and difference in culture.

The same view was expressed by a division Bench of the Punjab Haryana High Court in Gurdial Kaur v. Mangal Singh. It was contended in this case that applying different and discriminatory custom applicable to the Jat-Hindu as part of the Hindu law and not applying to the other Hindus, is ultravires article 15 as being discriminatory on the ground of caste of race. In rejecting the contention it was observed by the Court that if the argument of discrimination, based on caste or race would be valid, it would be impossible to have different personal laws in this

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34. Alk 1968, Punjab, 396.
country and the court will have to go to the length of holding, that only one uniform code of laws relating to all matters covering all castes, creeds and communities can be constitutional and that to suggest such an argument, is to reject it.

In spite of all these decisions the fact remains that a convert to Islam, Hindu, Parsi and Christian religions would be governed by the Personal law, to which he gets converted. In such eventuality, legal fiction, it would be presumed that as if such a person (even though he does not) historically, socially, culturally belong to the community whose religion he has adopted.

(E) Discrimination on the Ground of Sex

Application of different personal laws to Hindus, Muslims, Christians may be justified on the ground of reasonable classification, but the constitutional validity of many rules of personal laws, relating to marriage, divorce, inheritance, succession, etc. which discriminate against man and
and women is open to doubt. (Are they discriminate on the ground of sex).

In Gurdial Kaur v. Mangal Singh, the Punjab High Court said: If the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go to the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds or communities can be constitutional. To suggest such an argument is to reject it. But can it be said that the existence of multifarious personal laws is a valid defence to a plea that a personal law flouts and violates fundamental rights?

Whether polygamy contravene Article 15(1) of constitution as it discriminates against women only on the ground of sex.

Dwarka Bai v. Nairan AIR illustrates the resort to reasonable classification for upholding disparity, under Personal Laws, regarding the rights

35. AIR 1953 Madras, 791.
to men and women relating to divorce. The parties in this case were Christians and it was contended that Section 10 of the Indian Divorce Act, 1869 was unconstitutional in so far as it permitted the husband to get a divorce merely on the ground of adultery on the part of the wife, but a wife was required to establish an aggravating circumstance like cruelty or desertion in addition to adultery. It was held by the court that section 10 as it stands, is not prima facie repugnant to Article 13 to 15 of the Indian Constitution. Court further said that "it appears to be based on a sensible classification and after taking into consideration the abilities of man and woman, the results of their acts and not merely based on sex, when alone it will be repugnant to the constitution".

It means court regarded this discrimination not merely based on sex which is not contemplated by the constitution.

In Kaguban Saudagar Singh v. State of Punjab

an order of the Governor of Punjab rendered women ineligible to post in men's jails other than those of clerks and matrons. The order was assailed as violative of Article 16(2). The court turned down this plea. It was held that what is forbidden under the constitution is discrimination on the ground of sex alone, but when the peculiarities of sex added to a variety of other functions and consideration from a reasonable nexus for the object of classification, then the constitutional bar under Article 15 and 16(2) cannot be attracted.

Contrary to the above view, there is a single bench pronouncement of Delhi High Court in the case of W.A. Baid v. U.O.T. where the court held, "It is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex 'alone' because it is based on 'other consideration' even though other considerations have their genesis in the sex itself.

37. Ibid.
38. AIR 1976, Delhi, 302.
Supreme Court in *C.B. Mathamma v. Union of India* held that any discrimination on the ground of any inability, disability, or incapacity of women resulting from the peculiarities of their sex would amount to discrimination on the ground of sex alone. By applying this test we can conclude that, History shows that when polygamy was recognised in any personal law it was based on considerations which were very vital. It was justified on social, economic, religious grounds not on ground of sex alone. The reasons for or the objects behind the provisions of the Muslim law permitting polygamy for the men and prescribing monogamy for the women might have had some justification in the past, but at present the actual operation and the real effect of the law were to discriminate against the women as women and therefore, on the ground of sex alone.

To punish Muslim female for bigamy under Sections 494 and 495 of the Indian Penal Code for second marriage.

during the continuance of her first marriage and allow her husband at the same time to marry with impunity three more wives is unconstitutional.

(g) **Article 25 and Personal Laws.**

Personal Laws have their origin to scriptual texts. When any provision of personal laws are questioned in the court or any reform is suggested or made in personal it is considered as an interference in freedom of religion, because some people have firm conviction that their personal laws are part of their religion. So it is necessary to discuss whether the terms 'religion' and 'the secular activity associated with religion' used under Article 25 include Personal laws.

The term religion is not defined under Article 25. Supreme Court in H.K.E. Commr. v. L.T. Swammer defined it was follow:-

Religion is certainly a matter of faith with individual or communities, and it is not necessarily
theistic, there are well known religions in India like Buddhism, and Jainism which do not believe in God or in intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being. But it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion, and these forms and observances, might extend even to matters of food and dress. In our constitution freedom of religion is not confined to religious beliefs only it extends to practices, subject to the restriction which the constitution itself had laid down. Under article 25(2) State is authorised to make laws for social welfare and social reform and under this the state can eradicate social practices associated with religious practices.
The freedom of religion under the Indian Constitution should be understood in our socio-economic background and the role that religion has played in our history. Left to itself religion could permit to burn widows alive on the pyres of their deceased husband. It would encourage social evils like child marriage or even crimes like human sacrifice, or relegate large section of humanity to sub-human status of untouchability. Religious freedom does not allow the religion to affect the social and secular rights of its citizens. Freedom of religion extend to rituals, observances, ceremonies, modes of worship regarded as integral part of a religion. If a religious practice runs counter to public order, morality, health then the religious practice must give way to the good of the people as whole.

In Mohammad Siddiquai v. State of U.P. It was argued that a Mohammadan Sect has right to recite tabora in public places as part of their religious practices.

40. AIR 1954, All. 756.
practice and restriction on taking out processions
is violative of Article 25(1), but it was rejected
by the court.  

In Masud Alam v. Commissioner of police a
request to use loudspeaker five times a day for
calling, the faithful for prayers was declined and
it was argued in the case that to call the faithful
to pray at the appropriate time is a religious
practice, and the suppression of the use of lauds
loudspeaker for that purpose is violation of the
freedom guaranteed in Article 25(1), the court drawing
a distinction between religious belief and practices
rejected the argument holding that what the state
protects is religious belief only.  

In M.H. Qurashi v. State of Bihar the
constitutional validity of three legislative
enactments banning slaughter of certain animals
passed by Bihar, Uttar Pradesh, Madhya Pradesh were
questioned on various grounds, including violation
of Article 25(1). The court rejected the argument

41. Vol. 59. C.W.N. 293

42. All 1958, SC 701.
based on Article 25(1), stating that there are no sufficient material to show that sacrifice of cow on bakr-Id day is an obligatory act for a Mohammaedan to exhibit his religious belief.

Uttar Pradesh Government servants conduct rules which provide that a Government Servant cannot marry a second wife during the presence of the first wife without the permission of the state Government does not infringe fundamental right guaranteed under Article 25, because the act of performing a second marriage in the presence of the first wife cannot be regarded as an integral part of Hindu religion nor can it be regarded as practising or professing or propagation Hindu religion which is protected under Article 25. Even if bigamy is regarded as an integral part of Hindu religion
the inquemed rule is protected under Article 25(2)(b).

In Madras and Bombay High Courts, legislation abolishing polygamy was challenged as unconstitutional.

43. Article 25(1) lays down that:
subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law:

(a) ............

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.


infringement in the freedom of religion. It was argued that Hinduism permitted a sonless Hindu to take a second wife to beget a son for performing ceremonies essential for his parents salvation. Secondly as discrimination only on the ground of religion as Muslims were allowed to practice polygamy. The Madras High Court relied on a passage in 46 Reynolds V.U.S. which distinguished religious belief from practice and held that practice of religion was subject to state regulation. The court said that the state could regulate or restrict a practice if it "thinks that in the interest of social welfare and reform it is necessary to do so". The Bombay High Court also rejected similar arguments and upheld the Bombay, Prevention of Bigamous Marriage Act 1947 which made bigamy among the Hindus a cognizable and non-compoundable offence. Court held that abolition of polygamy was a measure of social welfare and reform. The chief Justice pointed out that introduction

46. 1879 (98) U.S. 145.
or reforms by stages by applying them first to the advanced community and later to other communities, denied neither equality before law nor equal protection of the laws to a member of the advanced community.

The belief, practice, dichotomy which accords constitutional protection to freedom of conscience and subjects religious practice to regulation by state on which the Bombay and the Madras High Courts relied on, has been rejected by the Indian Supreme Court in **Commissioner Hindu Religious Endowments v. Lakshmindra** and the American Supreme Court in **Sherbett v. Verner.** This weakens the opinion of the Bombay and Madras High Courts that imposition of monogamy on the Hindus did not infringe their religious freedom. Nevertheless, their view that abolition of polygamy was a measure of social welfare and reform still stands.

The Allahabad High Court upheld abolition of polygamy by the Hindu Marriage Act 1955. The Court said that Hinduism did not sanction polygamy as an

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47. 1954 S CK 1005 at 1023, 1924.
49. **Ram Prasad v. State of U.P., AIR 1957, All. 411, also AIR 1961 All. 334.**
essential religious practice and even if it did
prohibition of polygamy among the Hindus was a
measure of social welfare and reform.

In the Case of Reynold v. United States
which also related to the validity of a statute
prohibiting polygamy it was pointed out that:

"laws were made for the government action,
and while they cannot interfere with mere religious
belief and opinions they may with practices. Suppose
one believed that human sacrifices were a necessary
part of religious worship, would it be seriously
contended that the Civil Government under which he
lived could not interfere to prevent a sacrifice?
Or if a wife religiously believed that it was her
duty to burn herself upon the funeral pile of her
dead husband. Would it be beyond the power of the
Civil Government to prevent her carrying her belief
into practice.

So here, as a law of the organization of
society under the exclusive dominion of the United

56. (1829) 98 U.S., 145 at 166-167.
States, it is provided that plural marriage shall not be allowed. Can man excuse his practice to the contrary because of his religious belief. To permit this would be to make the professed doctrines of religious belief super on to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

So we can conclude that the freedom to practice religion is not an absolute right but as Art. 25 itself states it is subject to the other provisions of this part. Article 25(2) further empowers the legislature to enact a law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The religious practices therefore may be controlled by legislation if the state thinks that in the interests of social welfare and reform.

Supreme Court of United States in Davis V. Beason has rightly stated that:

51. 1890, 133 US. 33.
"To call their advocacy (of bigamy and Polygamy) a tenent of religion is to offend the common sense of mankind .... The term 'religion' has reference to one's views of his relations to his creator, and to the obligations they impose of reverence for his being and character, and of obedience of his will. It is often confounded with the culture or form of worship of a particular sect but is distinguishable from the latter. The first Amendment to Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship he may think proper, not injurious to the equal rights of others, and to proper legislation for the support of any religious tenents, or the modes of worship of any sect."
We can't deny that Marriage is a social institution, in which the state is initially interested. Although there may not be universal recognition of the fact, still a large number of opinion in the world today admits that monogamy is a very desirable and praise worthy institution.

Waite, C.J.

In Samuel D. Davis v. H.G. Beason, while criticising the practice of bigamy, was of the view that bigamy is a crime in any civilized society. According to him bigamous marriage 'tend' to destroy the purity of the Marriage relations, to degrade women... To call their advocacy a tenent of religion is to offend the commonsence of mankind'.

We can conclude that though the basic source of the personal laws is the Scriptural text, which regulates not only the religious matters but also Social relation. Personal laws limits

52. 1896, 133, U.S. 33.
themselves to regulate only those matters which affect the personal status, such as marriage, divorce, inheritance etc. The over all legal and constitutional position that emerges and of the study of the history of our constitution and judicial precedents, is that most of the matters now regulated by personal laws are secular activities which the state can regulate by law and which may be subjected to social welfare and reform. Constituent Assembly refused to make the personal law immutable and inviolable. It allowed the State to enact laws to reform the personal laws and ultimately to provide a uniform civil code.

54. Article 44.