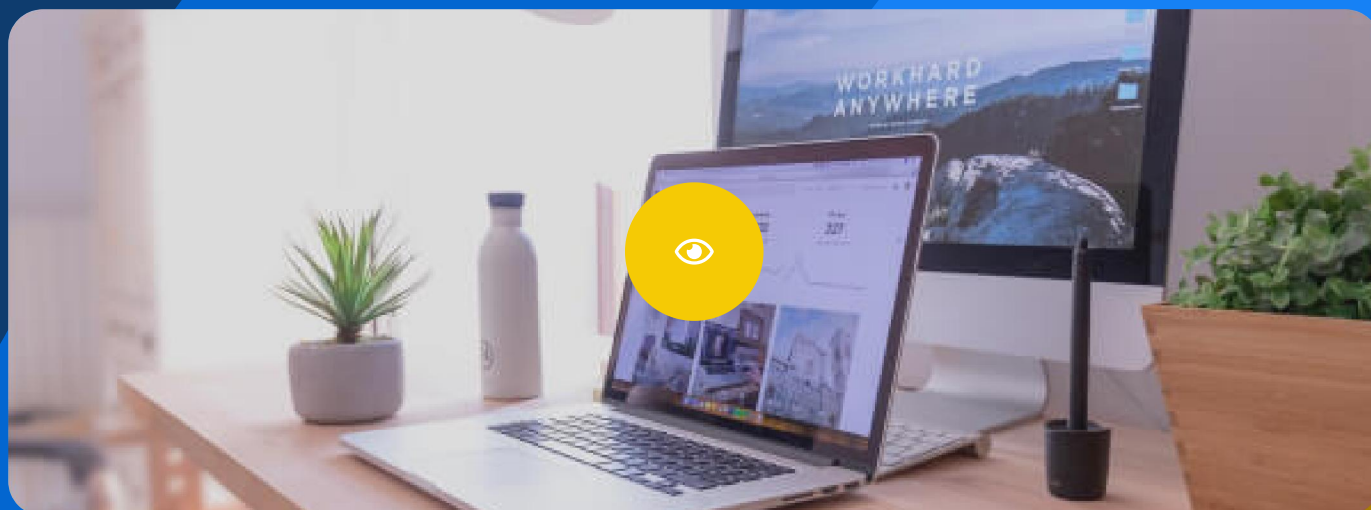


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## PARTY IN-DEPTH ANALYSIS OF PERSONAL LAWS THAT CONTRADICT GENDER EQUALITY IN INDIA

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Ayush Anand\*

### ABSTRACT

*Personal laws have always been a serious conflict to protect fundamental rights and into achieving gender equality. Personal laws, which are religious and cultural laws that govern personal matters such as marriage, divorce, inheritance, and adoption, have often been criticized for contradicting gender equality. In many societies, personal laws have been used to perpetuate discrimination against women by enforcing patriarchal norms and practices. Personal laws have been known to sanction practices such as child marriage, polygamy, and the denial of inheritance rights to women, among others. Despite the efforts of women's rights activists, legal scholars, and human rights organizations, personal laws that contradict gender equality continue to exist in many parts of the world. These laws often have deep roots in cultural and religious traditions, making it difficult to bring about legal and social change. However, the movement for gender equality has gained momentum in recent years, with many countries reforming their laws to align with international human rights standards. There has been a growing recognition that personal laws must reflect the principles of gender equality, non-discrimination, and human rights. This abstract highlights the need to reform personal laws that contradict gender equality and the challenges faced in doing so. It emphasizes the importance of promoting legal and social change that reflects the values of gender equality, non-discrimination, and human rights. It also underscores the need for continued advocacy and awareness-raising efforts to address the underlying cultural and social norms that perpetuate discrimination against women.*

**Keywords:** Gender Justice, Uniformity, Equality, Woman Rights.

### INTRODUCTION

Personal Laws are a set of laws that applies to a certain group or a class of peoples or between based on religion, faith, or culture. In India, we have various codified or uncoded personal laws which are always conflicting between them. India is a diverse culture and multiculturalism

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\*BA LLB, SARDAR PATEL SUBHARTI INSTITUTE OF LAW.

that's the reason we respect all the religious customs and rituals. In the current scenario Hindus, Muslims, Christians, Sikhs and, Parsis all the religions are governed and regulated by personal laws. It deals with the matter of Marriage, Divorce, Succession, Inheritance, Adoption, Guardianship, joint family and partition, etc. Personal Laws are civil laws that deal with the matter between two individuals. It provides basic norms to connect and maintain in a family setup. The requirement of norms from time to time gives statutory recognition through various enactment. Personal laws sources are coming from a divine entity or creation of an intellectual person. For a long time, they are criticized for perpetuating gender inequality in achieving uniformity. These personal laws we are following since the colonial period. Despite from this in current times India needs to codify all personal laws in the ambit of respecting religious freedom. Laws that restrict women's inheritance rights. In some cultures, personal laws restrict women's inheritance right, giving priority to male heirs, or denying women the right to inherit at all. This can lead to a cycle of poverty and exclusion, and perpetuate gender inequality by denying women the right to own and control their property. Laws that discriminate against women in divorce. Some personal laws give more rights to women in divorce cases, such as granting men the right to unilaterally divorce without their consent or denying women the right to property or maintenance after divorce. This can leave women economically vulnerable and dependent on men.

As per the Global Gender Gap Report 2021 published by the World Economic Forum, India is ranked 140 out of 156 countries with a score of 0.625 (out of 1).<sup>1</sup> The Global Gender Gap Report provides scores on Global Gender Gap Index (GGGI) which examines the gap between men and women in four dimensions, namely, Economic Participation and Opportunity, Educational Attainment, Health, and Survival, and Political Empowerment.

Efforts are being made in many countries to reform or abolish discriminatory personal laws and promote gender equality. These efforts involve advocacy, legal reform, and awareness-raising campaigns, which seek to change cultural attitudes and promote the equal rights and opportunities of women.

**Indian Young Lawyers Association and others Vs, The State of Kerala and Others<sup>2</sup> also known as Sabarimala Case** was the most debated and burning issue due to its old customary

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<sup>1</sup> Ministry of Women and Child Development, PIB Report  
<https://pib.gov.in/PressReleaseframePage.aspx?PRID=1782628> accessed on 21 February 2023.

<sup>2</sup> (2019) eleven SCC 1; 2018 (8) SCJ 609

practices. The temple of Sabarimala is situated in Kerala well known temple famous for Hindus. This ancient temple is worshiped by the god Lord Ayappan who is coming from Dharmashastha and beliefs in the son and shiva. The priest of their temple believes in old traditional customs and a conservative mindset that 10-50 years of women due to admittance of menstrual cycle questionable for her purity. Women had fought and struggled so much to achieve the position equally as men on various platforms. Sabarimala is a remarkable example of a woman not entering the temple. These kinds of old religious custom is a huge discrimination against woman. Article 17 of the Indian Constitution is a clear violation of the abolition of untouchability.

## **PERSONAL LAWS IN BRITISH INDIA**

The Mughal rule came to an end with the entry of Britishers into India. Personal Laws came into existence after coming the Charter of 1753 with religious freedom. After that Hindus and Muslims can practice their laws without any intervention from the Britishers but the ultimate myth is they are leading and colonizing. In 1772 Governor General of India Warren Hastings had laid down that Qurans are to regulate Muslim Personal Law and Shastras are to Hindu Personal Law. They came to India like an innocent trader

In 1834 Lord Macaulay was appointed as the chairman of the First Law Commission to codify the penal code and again they didn't touch religious personal law. Lord Macaulay in his famous speech, stated: "Our Principle is simply this-uniformity where you must have it but in all cases certainty."<sup>3</sup> General Lord William Bentinck with help of activists like Raja Ram Mohan Rai banned the Bengal Sati Regulation Act in all jurisdictions of British India on December 4, 1829. This type of sati practices feeling of the human nature. At that time protests happened against Hindu and Muslim personal laws but due to huge protests from a Muslim extremists, they failed to make reforms to Muslim law.

## **MARRIAGE**

Under Hindu, law marriage is a sacrament. Manusmriti is an ancient source of Hindu personal law. It is biased toward the female gender and the divorce concept doesn't mark the Hindu regime. This smriti not mentioned dissolution of marriage, divorce, and remarriage.

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<sup>3</sup> XIX Hansard's Debates, 3<sup>rd</sup> series, p.531-533 <[Conflicting Fundamental Rights: Why do we need to codify Personal Laws In India? - Academikey \(lawetopus.com\)](#)> accessed on 21 February 2023.

In the case of **Khursheed Ahmad Khan vs State of UP & Ors**<sup>4</sup> Supreme Court decided that polygamy is not an essential part of Islam personal law needs reform. We should also clarify the actual age for males and females. It is uniformly applicable to all religions. In India, we came up with Child Marriage Prohibition Act but it is not too apply to all religions and classes of society. In child marriage, a woman's body is not capable to born a child. Most of the poor class women do even not give themselves and their children proper nutrition and are not mentally mature. Muslim Personal Law completely gives freedom to child marriage. The State should regulate and control these kinds of practices.

In Muslim Personal Law, marriage is like a contract to legalize sexual intercourse and reproduce children. Man can have multiple wives at the same time i.e. Polygamy. This type of custom always promote discrimination and violates the rights of woman. Marriage is a pious act for Muslims. In these act marriageable age is not classified. The age of marriage considers after attaining puberty which is generally 15 years which may also vary by 12 years age for a boy and 9 years for a female. The consent of a female is also not necessary for marriage when she is under the majority and in puberty. She can marry with her Guardian's consent. It is uncodified and based on Shariah, which follows the religious texts of the holy Quran.

## DIVORCE

When we talk about divorce in Muslim personal law recognized two types of divorce judicial and extra-judicial divorce. Extra-judicial divorces consist of Ila, zihar, and Talaq-i-tafweez. Under these kinds of divorce, a Muslim husband can unreasonably give irrevocable divorce to his wife. Both spouses have to stay without physical intercourse till the period of divorce after that they can live separately. The extra-judicial divorce is toxic in the environment it simply spoils the relationship of husband-wife in one pronouncement. In case of **Shayara Bano vs. UOI & Ors.**<sup>5</sup> Supreme Court banned one form of extra-judicial divorce talaq-i-biddat i.e. triple talaq in a single pronouncement of talaq three times marriage will be dissolved. In talaq-i-biddat didn't give time to think about their relationship in form of oral and written form. Under inheritance male heirs inherit double the property as female heirs. Females only receive Mehr and the husbands maintain their expenses. If his husband died in the consummation of marriage she didn't get any kind of property inheritance right on the husband's property.

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<sup>4</sup> 2015 Latest Caselaw 94 SC

<sup>5</sup> AIR 2017 9 SCC 1(SC)

In Christianity, Law women have to prove the ground for Adultery for divorce additionally one ground Adultery as well as cruelty or domestic violence but in case they have no such kind of burden to prove. **Pragati Varghese vs. Cyril George Varghese**<sup>6</sup> the matter relating to adultery Pragati Varghese filed a petition for divorce under section 10 of the Indian Divorce Act, 1869 woman have to prove one other ground with adultery. The Bombay High Court said that it's an unnecessary burden on women. It held that section 10 of this act is ultra vires for Articles 14,15,21 of the Indian Constitution this is completely unreasonable so this case favors Christian wives. Similarly in the case **Ammini E.J. v. Union of India**<sup>7</sup> a Christian woman has to prove the other offense. It is a violation of Article 15 no discrimination based on caste, sex, religion, race, or place of birth, and also a violative of Article 21 of the Indian Constitution.

## INHERITANCE AND SUCCESSION

We have mainly two systems of inheritance Mitakshara and Dayabhaga. In Mitakshara the property rights go to the deceased Karta. It lays down the principle of the doctrine of representation which states that the shares of the property go after the death of the Father or Grandfather or both. It clearly shows the characteristics of the male dominant society. In Dayabhaga, the principle of religious efficacy prevails that the deceased head member of the family is competent to share the property. Again in terms of Hindu Law, only a male heir can transfer religious offerings. Then the Succession Act of 1956 broadened the concept of succession where women's rights were also recognized.

In the case of **Danammna vs. Amar**<sup>8</sup>, it was held that the daughter has an equal right to successorship and inherited property same as the son. The Court had interpreted the objective behind the Amendment Act of 2005, which is to eliminate gender biases and differences between the genders. The Hon'ble Supreme Court with due respect to the facts opined that Mitakshara Law needs a tremendous amount of change have been brought forward to address the equal treatment of the nearest female. Furthermore bench also opinions that section 6<sup>9</sup> of the Hindu Succession (Amendment) Act 2005, without doubt, favors the appellant but due to

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<sup>6</sup> AIR 1997 Bom 349, 1997 (4) BomCR 551

<sup>7</sup> AIR 1995 Ker 252

<sup>8</sup> (2018) 3 SCC 343

<sup>9</sup> Devolution of interest in coparcenary property.-(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right the same manner as the son;  
(b) have the same rights in the coparcenary property as she would have had if she had been a son;  
(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.

amendment in 2005, the act now endows the daughter to have a coparcener right same as her son. The status of the coparcener is the same as the propositus to the same rights and liabilities to the daughter.

Under Hindu personal law, a child who comes from an illegitimate relation they have the right to inheritance in the parent's property under section 16(3) of the Hindu Marriage Act, 1955 right over parents. This kind of drastic change by considering the rights of illegitimate children **Revansidappa vs Malikarjun**<sup>10</sup> in this case, the supreme court held that illegitimate children have the right over their parents in self-acquired property and ancestral property. Even children born out of void or voidable marriage they considered rights under section 16(3) of HMA.

Maintenance can be provided to the deserted wife. It can be provided in the form of all needful commodities. A Karta has to maintain and fulfill the family and the wife could only get her maintenance during her lifetime. Maintenance is not easy in Hindu we have to go through a long way. The only way to get maintenance to the deserted husband is to go to the court and then the court will decide the matter. In our Indian Court, it takes so much time and burden of several cases to deal with and impart just so it takes longer sometimes.

In **John Vallamattom v. Union of India**,<sup>11</sup> a three-judge bench once expressed regret enactment of the Common Civil Code. In this case, petitioner challenged the section 118 of the Indian Succession Act on the ground that it was discriminatory under Article 14 as well as violative of Article 25 and a nephew or a niece or any other relative as regards his right to consign his property for religious or charitable purposes. The definition in the Act did not include the wife of a 26 of the Constitution. Section 118 of the Act imposed restrictions on a Christian having a testator as a near relative while an adopted son was included as a relative. So, a Christian death and deposit it within 6 months otherwise the bequest for religious or charitable use testator having a nephew or niece must execute the will at least 12 months before he would be void. This restriction did not apply to a person having a wife. The court held Section 118 of the Succession Act is unconstitutional being violative of Article of the Constitution. Articles 25 and 26 have no application in this case as the disposition of property for religious and charitable uses is not an integral part of Christian religion Articles 25 and 26 of the Indian Constitution only protect those rituals and ceremonies that are an integral part of religion. The Chief Justice of India forcefully reiterated the view that the Common Civil Code

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<sup>10</sup> (2011) 11 SCC 1

<sup>11</sup> AIR 2003 SC 2902



be enacted as it would solve such problems. Here is not gender discrimination rights and customs also.

## WIDOW'S RIGHT IN PROPERTY

Before the Hindu Women's Right to Property Act of 1937, was enacted women were not entitled to their husband's property. According to the Hindu Succession Amendment Act 2005, the Widow of a deceased person has the same right as her living husband would have. The Husband's interest confers into the widow. But if the husband gives his property to a third person, that case, the wife cannot oppose them.

## ADOPTION

In Adoption, women have no right to adopt a child even with the consent of their husband under Hindu Law. Only the father has the right to adopt a child without the consent of his wife. A widow also adopts a child but the condition is the prior consent of the husband. Here the male dominance is only males can adopt the child. Even an unmarried person also wants to adopt a child with some conditions fulfilled like major, sound mind, not married if married condition marriage must be dissolved.

**Shabnam Hashmi vs. UOI**<sup>12</sup> is a landmark case matter related to adoption that highlights the issue of gender inequality within the personal laws of India. The case was filed in 2014 by Shabnam Hashmi, a social activist and founder of the NGO ANHAD (Act Now for Harmony and Democracy), who would challenge the constitutionality of certain provisions of Muslim Personal Law that discriminated against women. The case generated significant public debate and scrutiny of personal laws in India, with many arguing that discriminatory provisions within personal laws violate women's fundamental rights and perpetuate gender inequality. In 2017, the Supreme Court of India declared the practice of triple talaq to be unconstitutional and struck it down, marking a significant victory for gender equality in India. The Shabnam Hashmi case highlights the need for continued legal reforms to address gender inequality within personal laws in India and to ensure that all citizens, regardless of their religious affiliation, are afforded equal rights and protections under the law.

In the case of adoption, neither Muslim nor Christian personal law recognizes the concept of adoption if they want to adopt a child under the Guardians and Wards Act, of 1890. They can

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<sup>12</sup> AIR 2014 SC 1281



adopt a child through this act after the court's permission. **Mohammad Allahabad Khan vs. Mohammed Ismail Khan**, the court held that does not recognize adoption like Hindu law because the adopted child has no right of inheritance under Muslim and Christian law strictly prohibited but under Hindu personal law adopted child is similar to that of a biological child. For instance, a single male parent cannot adopt a female child but a single female parent can adopt a male child.

## CONSTITUTIONAL PERSPECTIVE

According to Article 13 of the Constitution of India, all pre-constitutional laws which abridge or disrespect fundamental rights are unconstitutional and also restrict the state to make any law that is violative of fundamental rights. In interpreting the word law under Article 13 (1). In **Narasu Appa Mali vs. the State of Bombay**<sup>13</sup>, the Supreme Court contended that personal laws are not under the meaning of Art. 13 (1) that's why does not come under the purview of fundamental rights. But at the same time court gave a judgment that contended that personal law comes under the purview of Art. 13 (1) in case **C. Masilamani Mudalia vs Idol of Sri Swaminathaswami, Thirukoli and Githa Hariharan vs RBI**<sup>14</sup> tested the validity of personal laws that it's violating the other provisions and rights.

Article 25 and 26 gives religious freedom to practice, profess, and propagate any religion. It's not mean anybody can disturb his liberty like sleeping, living peacefully, etc. In the case of **Moulana Mufti Syed Mohammed Noorur Rehman Barkati v. State of West Bengal**,<sup>15</sup> they pronounce their Azaan i.e. religious prayers through a speaker in the morning at 6 o'clock. The Calcutta High Court the applicants to use a microphone in the early hours of pronouncing the Azzans in the Mosque. Azzan is an integral part of the Muslim religion but the use of the microphone is not an integral part of Islam. The SC said that the use of a microphone is not an integral part of Islam according to Article 21 Right to Sleep is a fundamental right nobody can violate their liberty of peaceful sleep. According to Articles 25(2) and 26 of the Indian, Constitution State has the right to restrict religious freedom subject to morality, health, and public order. If it violates the other provisions of fundamental rights.

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<sup>13</sup> AIR 1952 BOM 84

<sup>14</sup> 1996 AIR 1697, JT 1996 (3) 98

<sup>15</sup> AIR 1999 Cal 15

## WHAT IS THE NEED FOR THE CODIFICATION OF PERSONAL LAWS

Personal laws in many countries, including India, are currently not codified or consolidated into a single comprehensive law. Instead, they are based on various religious texts and customs and are subject to interpretation by religious authorities and the judiciary. This can lack uniformity, consistency, and transparency in the application of personal laws and can create disparities in legal rights and protections for individuals belonging to different religious communities. Codification of personal laws would also help to eliminate discriminatory provisions and practices that favor one religion over another, and would help to promote gender equality and human rights for all individuals. Additionally, it would simplify the legal system and make it more accessible to the general public, reducing confusion and uncertainty regarding personal matters such as marriage, divorce, inheritance, and guardianship.

88% of the women feel that their family disputes can be resolved if the law is codified while 89% want the government to intervene in helping codify Muslim Personal Law<sup>16</sup>. Over 86% want religious leaders to take responsibility for enabling Muslim women to get justice in the family and they want these leaders to support the bringing about of a gender-just law.

UCC (Uniform Civil Code) means a single code that governs all the personal laws of Hindu, Muslim, Sikh, Christian, and Parse in a matter related to Marriage, divorce, succession, adoption, etc. for the citizens irrespective of their religion, caste, tribe, etc. While framing the Constitution, most members wanted to keep personal law in the purview of fundamental rights. This is the most controversial and debated matter that personal laws is to legislate under the state extent. UCC has come under DPSP (Directive Principle of State Policy) which is not enforceable in the court. It is not in the purview of fundamental rights which we can enforce in courts. Its purpose is to replace all the personal laws and regulate them through a single code.

H.M. Seervai opined that personal laws could be considered existing laws and laws in force because of their applicability in court proceedings. His assertion was based on Entry-5 (List-III)<sup>17</sup>

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<sup>16</sup> The Wire <[Muslim Women Want Reforms in Personal Laws, Study Reveals \(thewire.in\)](https://www.thewire.in/news/india/muslim-women-want-reforms-in-personal-laws-study-reveals/)> accessed on 21 February, 2023

<sup>17</sup> *In Re, Smt. Amina vs Unknown*, AIR 1992 Bom 214 <[Conflicting Fundamental Rights: Why do we need to codify Personal Laws In India? - Academike \(lawctopus.com\)](https://www.lawctopus.com/academike/conflicting-fundamental-rights-why-do-we-need-to-codify-personal-laws-in-india/)> accessed on 21 February 2023

BJP committed to bringing UCC into the country after full of debates and discussions with due respect to personal law. The main objective of UCC is gender equality. When we see the case of **Mohd. Ahmed Khan vs. Shah Bano Begum**<sup>18</sup> in this matter related to maintenance in Muslim personal law maintenance is only given up to the iddat period. The five judges bench contended that section 125 of Cr.P.C. applies to all the citizens of India and if in case of a clash between personal laws and the provisions of Cr.P.C. 125, Cr.P.C. would be superior law. After this case government came up with the Muslim Women (Protection of Rights on Divorce) Act, 1986 to protect divorced women's rights and survive a dignified life. For smoothening to deal with the cases easily the courts need Uniform Civil Code. UCC simply makes a person's life. Likewise, various courts said Indian Judicial System needs Uniform Civil Code. On May 27<sup>th</sup> Uttarakhand constituted a committee to form a draft proposal for UCC. Other states also started to draft a proposal for UCC to refine the flaws in personal laws for the betterment of healthy lifestyles. These initiatives increase social harmony, promote gender equality and empower women. Recently in the Rajya Sabha BJP M.P. Kirori Lal Meena introduced a private member bill on UCC and it was passed with the voting 63 votes in favor and 23 against. BJP committed with the slogan One Nation-One Code to unite integrity and fraternity among people.

## CONCLUSION

In some cases, Personal Laws may contradict achieving gender justice and limit the rights and opportunities of women. It's contradictory until Parliament will not come with a major reform like UCC. Marriage should be registered under the eye of the law in the patriarchal dominant Indian society women can't make their own decision to live a dignified life just because of non-uniformity in personal laws. Many cases don't register under the eye of the law just because they are not aware and court proceedings take a long time in making justice. Many of us don't register cases due to societal pressure and their religious personal laws don't give liberty to live in terms of our choice. When we talk about Polygamy how a man lives under the same roof? with four wives. Is he capable to maintain the personal expenses of multiple? What are the property rights of children coming from? Polygamy practices should be eliminated from the personal laws domain. It is sensitive to health hazards issues and promotes the sexually transmitted disease AIDS, HIV, etc. When we talk about inheritance in Hindu personal law everyone has equal rights in the ancestral property after that codification women's got rights of inheritance but Muslim women have maintenance right if their husband dies in the

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<sup>18</sup> 1985 AIR 945 1985 SCR (3) 844 1985 SCC (2) 556 1985

consummation of marriage she didn't get any property rights in inheritance. Jewish Personal Law may restrict women's access to religious leadership positions and limit their ability to initiate divorce. Christian personal laws may prohibit women from holding certain religious positions or limit their participation in church activities. Hindu Women had limited inheritance rights, they are not allowed to divorce their husbands without their consent. Overall, personal laws that discriminate against women are seen as a barrier to gender equality and are often the subject of ongoing debate and reform efforts.

The issue of personal laws in India is complex and multifaceted and requires a delicate balance between respecting religious and cultural traditions and promoting gender equality and women's rights. It will require sustained efforts from the government, women are protected and empowered in all aspects of their lives. Personal laws that contradict gender equality can have a detrimental impact on society and individuals, perpetuating discrimination and reinforcing harmful stereotypes. Such laws can undermine women's rights and limit their ability to exercise autonomy and make decisions about their lives.

To promote gender equality, it's essential to ensure that personal laws align with constitutional provisions and international human rights standards. There is a need for legal reform to remove discriminatory provisions and create a more inclusive legal framework that respects the rights and dignity of all individuals, regardless of gender.

Additionally, education and awareness campaigns can help to challenge harmful gender stereotypes and promote a more inclusive and equitable society. It's essential to engage with various stakeholders, including policymakers, civil society, and communities, to ensure that gender equality is mainstreamed across all aspects of society. Ultimately, achieving gender equality requires a sustained effort and commitment from all members of society, and it's crucial to work towards this goal for a more just and equitable world.