UNIT 3 PERSONAL LAWS

Structure
3.1 Introduction
3.2 Objectives
3.3 Feminist Discourse on Law and the State
3.4 Defining Personal Law
3.5 The Colonial Discussion on Legislative Reform
3.6 Debates on Personal Law
   3.6.1 Hindu Laws
   3.6.2 Islamic Laws
   3.6.3 Christian Laws
   3.6.4 Parsi Laws
3.7 Let Us Sum Up
3.8 Unit End Questions
3.9 Glossary
3.10 References
3.11 Suggested Readings

3.1 INTRODUCTION

This Unit explores the debates on personal laws in India. It analyzes the historical construction of personal laws and their changing facets in relation to the institution of marriage and divorce. It attempts to map the nature and context of the Hindu, Islamic, Christian and Parsi personal laws. It engages with the aspect of personal laws and feminist interventions on those laws. Thus, it examines how Indian feminists are challenging these laws by claiming equality, justice and liberty. In turn, it deploys the intersections of customary laws and their impact upon women. You will introduced to various aspects and debates related to Hindu, Islamic, Christian and Parsi laws in this unit. The major arguments that you will read here have been drawn from the work of, Flavia Agnes (2011), Family Law: Family Laws and Constitutional Claims, Vol. I.

3.2 OBJECTIVES

After completing this Unit you will be able to:

- Know the feminist discourse on law and the state;
• Explore information about personal laws such as Hindu, Muslim, Christian and Parsi laws; and
• Discuss the relationship of personal laws with customary laws such as marriage and divorce.

3.3 FEMINIST DISCOURSE ON LAW AND THE STATE

In post-independent India, the women’s movements have constantly and consistently engaged with the state and raised the question of women’s equality and rights. They demanded employment, wages and reservation for women in parliament and also launched campaigns against sexual violence, rape, dowry, sex selective abortion, property rights and various issues which you have read about in your first year courses, MWG 001, MWG 002 and MWG 004. The women’s movement has posed the fundamental question of women’s rights in connection to citizenship and the Indian state. For instance, the Shah Bano case (see previous unit of this Block) in 1986 brought the discourse of Criminal Procedure Code and maintenance of Muslim women. It became controversial by promoters of Muslim personal law and challenged the Indian polity. It also postulated the problem of Indian feminists and their political positions by engaging with the Uniform Civil Code (UCC) debates about whether women from all communities require the UCC or not which you have also read in unit 3, block II of this course. Reference to UCC was also discussed in the previous unit of this block. As you read in the unit: Gender and Law, Block 4 of MWG 002, the law as an institution and machinery of the state is supposed to be gender neutral but in reality it is gender blind. The earlier unit had already introduced personal law in the areas of marriage, divorce, adoption and succession and here in this unit we are going to study the interface between feminism and personal law.

One of the significant legal interventions feminists are struggling and seriously questioning the State is on the rape laws. For example, the 1979, ‘Mathura rape case’ in which four teachers who are Indian citizens wrote an open letter to Chief Justice of India and raised the fundamental premises that links ‘women’s rights are human rights’. They stated that the judiciary itself is biased while delivering justice to the most marginal sections. In the case of Tukaram Vs State of Maharashtra the position of the tribal girl became vulnerable due to her social identity. Since then the Ramja Bi, Bhavri Devi, Maya Tyagi cases have addressed the questions which are crucial to the legal system in India. The most recent ‘Nirbhaya case’ of 16th December, 2012 brought in the new discourse about rape laws with the recommendation of the Justice Verma Committee. The committee also recognized the category of marital rape which can be viewed as a landmark intervention for the feminist movement. These interventions at the formal level reflected the nature of social change which has been brought by the
institution of law and its impact on gender equality. Let us now study about personal laws and their emergence in India.

### 3.4 DEFINING PERSONAL LAWS

The personal laws have to be explicated in order to begin a debate on family laws. The historical context which determined the nuances of personal law is vital in any of such ventures. It is misconstrued that personal laws are created on the basis of religious texts. Human relationships within the institution of family are embedded within diverse customary practices. These can be interpreted in the light of divine laws by scholars. These interpretations later underwent modifications during the colonial and post-colonial periods (Agnes, 2011, p. 2). According to Flavia Agnes, “the term ‘personal law’ was first introduced in the Presidency of Calcutta, Bombay, and Madras in the late eighteenth century, when the pre-colonial, non-state arbitration were transformed into state-regulated and state-controlled adjudicative system” The transformation was at two levels: (i) through the introduction of a legal structure modelled on English courts which were adversarial in nature (that is, Anglo-Saxon Jurisprudence); and (ii) through principles of substantive law which were evolved and administered in these courts (that is, Anglo-Hindu and Anglo-Mohammedan laws” (Agnes, 2011, P. 5). Hence, the initial genealogical moments of personal laws are the product of colonial interests that were subsequently codified.

### 3.5 THE COLONIAL DISCUSSION ON LEGISLATIVE REFORM

The British entered India and critiqued Hindu religion by pointing out the deplorable status of Indian women. It has become the major soteriological (dealing with religion) challenge and many Hindu reformers responded to this dialogue between domain of Hinduism and Christianity. As a result, protests against the practice of Sati, child marriage, and age of consent and so on took place. This resulted in judicial and legislative procedure such as The Sati Regulation Act, 1829, Widow Remarriage Act, 1856, Age of Consent Act, 1860 and 1891. Intellectuals who believed in the revival of Hindu religion opposed the raising of age of consent to twelve. According to them, such a legal move hindered essential cohabitation between husband and wife which has to be started immediately when the wife reaches puberty. Forty four women doctors demonstrated that rape is the cause for death of child-wives. Consequently, the Age of Consent Act was amended and age of consent for sexual intercourse was increased to twelve years in 1891 (Agnes, 2011, p. 17). It is opined that the act protected married/unmarried girls from ‘premature prostitution’ and ‘premature marital cohabitation’. You have read about some of these Acts in the courses MWG
Religion 001 and MWG 002. Let us quickly revisit some Acts to contextualize the process of institutionalization of law specific to women in India. Child marriage remained as an ignominy in the Indian conscience till the social reformer Rai Saheb Harbilas Gour Sarda initiated ‘Child Marriage Restraint Bill’ in 1927. It was argued that marriage of the girls below the age of twelve should be restrained. However, the first ‘All India Women’s Conference’ held in Pune argued that marriage should take place only after the age of fourteen years and there must be a ban on child marriage. It demanded that marriage below fourteen years should be outlawed. The Sarda Act was passed in the year 1929. The Prevention of Child Marriage Act (2006) also was ratified to challenge the menace of child marriage (Agnes, 2011, p. 18). One of the significant features of this new Act was to incorporate the specific offence for an adult male to marry a minor. The famous Rakhmabai Case was path breaking and testified the assertion of her individual rights in the domain of family.

Box No. 3.1: Ramkambai Case

Rakhmabai was married at the age of 11 years to an elderly person called Dadaji Bhikaji. She refused to cohabit with him. The case was filed in Bombay High court in the year 1884 for restitution of conjugal rights. According to historian Sudhir Chandra, this case is a “unique event in colonial India” (Chandra, 1998, p. 1). It was argued that Dadaji Bhikaji did not take this case to the Caste Panchayat where the women had the right to decide whether to stay with the husband at his home or not. Hence, he brought the case to the British court. The colonial court gave a judgment in favor of the husband by granting conjugal restitution rights. Rakhmabai said she would prefer to go to the prison rather than staying with Dadaji Bhikaji. Interestingly, the case was dissolved with payments of money to her husband since she refused to stay with him.

Sati Regulation Act, 1829

The missionaries and reformers like Raja Rammohan Roy criticized the practice of Sati which was steeped in scriptural doctrines. The authenticity of the practice of Sati drew upon Brahmanic Scriptures which became central to ongoing debates (see previous unit). However, the British government decided to ban the Sati system in 1813. When the British Empire reached its peak of imperial power in 1829, the Act on Sati Regulation came into existence (Agnes, 2011, p. 16).

The Age of Consent Act, 1861 fixed ten years as the minimum age for the consent to sexual intercourse. In other words, if a male initiates sexual intercourse with a girl who is below the age of consent, this act was considered as rape according to Indian Penal Code of 1861. The following section deals with the colonial debates on legislative reforms.
Check Your Progress:

Write in your own words the definition of personal law.

3.6 DEBATES ON PERSONAL LAWS

3.6.1 Hindu Laws

Diversity of laws, customs and a non-state legal edifice are the characteristics of ancient India. “The original texts were of Aryan origin but the assimilation between Aryan and non-Aryan tribes led to an amalgamation of customs and practices” (Agnes, 2011, p. 11). In the early period, the scriptural law was the earliest legal system and there was an association with religion, morality and law which was believed to have divine sanction. It is known collectively as Dharma. Dharma has three main sources, Shruti, Smriti and Sadachara. Shruti evolved with the divine revelations or utterances, primarily the Vedas, Smriti with ‘the memorized word-the dharmasutras and dharmashastras’ and Sadachara with ‘good custom’ (Agnes, 2004, p, 12). However, the Hindu marriage and family laws are rules through the medium of Smritis and nibandhas (commentaries and digests). As many scholars pointed out, Hindu laws are codified by the Vedas resulting in the foregrounding of Hindu laws. During the 8th century BC to 5th century AD, extensive guidelines were recommended on how the social relation can be
drawn on the basis of Smriti. The Smritikars were the teachers, thinkers and philosophers who endorsed idea of particular context to govern the religious as well as day to day life in society. In a similar way, the dharmaashastras teach the ethics, law and morality. “While some fifty-five rules were mandatory, others were directory and hence were not binding and could be treated as mere guidelines” (Agnes, 2011, p. 11). These texts were not in written forms and followed with an oral tradition via Brahminal priesthood from one generation to another as guru-shishya parampara. Every generation has interpreted the texts according to societal contexts. It can also be confronted again by Smritikars. Thus, Smritis are always interpreted based on old formulations with contemporary forms and every time the interpreters considered this model of nibandhas whenever smritis were interpreted (Agnes, 2011, p. 11).

The two prominent schools of thought under the Anglo-Hindu law were ‘Mitakshara’ of Vijnaneshwar (Eleventh century) and Dayabhaga of Jimmutavahan (Twelfth century). But, there were variations at the local level. For instance, the Dayabhaga was followed in West Bengal and on the other hand, Mitakshara was followed in Mithila, Benaras, Bombay and Dravida schools.

Marriage is conceptualized as an important obligation in Smritis. It is central to pious and religious life and considers one’s debt to ancestors by giving birth to children. The ‘wife’ was conceived as an amalgam of identities such as that of wife (grihapati) and on the basis of divine union (dharmaapatni). Wife is also constructed as a part or half of the husband and called Ardhagnini. Marriage is linked to the idea of rebirth. Smritis provided space to notions of chastity and virginity of women. The advent of the ‘Hindu Marriage Act’ in 1955 questioned the application of the notion of purity to women and monogamous nature of marriage. Two bills radically changed the lives of women in India. G.V. Deshmukh was instrumental in designing and initiating the Hindu women’s Right to Divorce Bill in the year 1938. Hindu women’s ‘Property Bill’ was introduced in the year 1937. These are significant legal interventions in the spheres of family and marriage.

Hindu women achieved the right to divorce in a similar way to that of men due to the introduction of The Hindu Marriage Act, 1955. It added a contractual and dissoluble dimension while maintaining the sacred and ritual character of the institution of marriage. It relied on ‘the capacity to marry’ (section 5) and ‘ceremonies of marriage’ (section 7) It was criticized for introducing ‘western model of family law’ and ruining the character of Hindu law (Agnes, 2011, p. 23). Concurrently, the western idea of formal equality that is enshrined in the ‘Hindu Marriage Act’ justified the legal duty of the Hindu women to carry out the relation with her husband. It was pivotal in converting the nature of marriage as ‘status’ to ‘dissolvable
contract’. Nevertheless, it failed to neutralize the brahmanical and scriptural implications of the contract.

The law of property was embedded in a feudal, agrarian, patriarchal ethos. Ownership of property was confined to males and practiced according to birth under the ‘Mitakshara law’. It is emphasised that ‘Smritikars’ such as Manu and Gautama and sages such as Narada, Yagnavalkya and others debated and provided alternative opinions on ‘Stridharma property’ or women’s property which is affiliated to descent (Agnes, 2011, p. 31).

3.6.2 Islamic Laws

The Sharia is central to Islam and exists as a main reliable medium of ethics. The notion of law is contested according to modern sensibilities. Fiqh is known as Islamic jurisprudential law. The knowledge of jurisprudence is taken from the Quran, Sunna, Ijma and Qiyas (Fyzee, 1974, pp. 16-18). However, unlike Hindu personal laws, Mohammedan laws underwent significant changes with time and these changes have been accepted by the respective schools of law and society.

According to Agnes (2011), the Quran or the word of God, is recognized as the prime realm of law. It is described as ‘revealed law’ and connotes ‘recital’ or ‘reading’. The Quran stands for the will of God send to the Prophet via Angel Gabriel. It abounds with six thousand verses in which two hundred verses engage with law, and eighty verses explicate contours of the institution of family. The Caliphs or the successors of the Prophet played a vital role in dealing with the disputes of the people. They deployed Quran and practiced old Arab system of arbitration and customary law. It is contended that “Quran cannot be construed as ‘law’; it is the source of law. Divine law cannot become a legal system in its own right. It requires human intervention by way of interpretation or application” (Agnes, 2011, p. 41).

Interpretation or practice is considered as the ‘human intervention’ that is essential for the structuring of a law. This understanding generated debates to accommodate different sources of law. ‘Sunna’ (means ‘compacted path’) or tradition is the secondary realm of Islamic law. The etymological shifts of the word ‘sunna’ has to be understood in this context. The changes in the meaning of the word introduce us to the use of that particular word. It was earlier applied to refer to the cultural ream of the pre-Islamic tribes and Muslims of the seventeenth century. Later, it was used to signify the ‘practices or precedents’ of the prophet called ‘the Hadis’. It is also considered as pivotal as principles of Quran. It, thus, transformed into core doctrine of the traditional schools of eighth century. It is perceived as the existing culture of the schools as well as the institutions of the Prophet in the contemporary context. The tertiary realm of law ‘Ijma’ stands for the
consensus among the scholars of the law of any particular period. It was based on the ‘Hanafi doctrine’ which argued that law should alter according to different periods. It was also determined by ‘Maliki dogma’ which premises on the relations between newness of facts and decisions. The principle of ‘Itijihad’ stands for the essential conditions which rest on reason to generate the Shariat law.

It emerged as a part of the agreement which was used to construct Islamic law and also witnessed limits related to employ reason. Afterwards, it relegated to the sole field of renowned scholars. The fourth and final arena of Islamic law is ‘Qiyas’ which espouses ‘reasoning by analogy’. Qiyas is the ways that condition the interpretation. The application of the principle is conceptualized in a different fashion. Through using logic and reasoning, it can be practiced in other situation. The rule that is part of the law dominates if there are contradictions exist between the situation and language of the text. Qiyas became the type of law through particular agreement between schools of Shafii and Malikki. The diverse arenas of law called ‘talfiq ( patching)’ is discussed in relation to aforementioned debates. It stands for the ‘blending of desirable rules’ from plural areas of law, for Derret and Mensky, which comes under the rubric of Islamic school of legal thought. The legal stand points of scholars and judges, for Hidayatullah, called ‘The Fatwas’ also contributed to principles of law (Agnes, 2011, pp. 41-42).

The Shia and Sunni are two major sects within Islam. The Hanafi, Maliki, Shafii and Hanbali are four known laws under Sunni laws. The Hanafi School is established by Abu Hanifa (AD 699-767). It is called as Kufa school. It has its roots in Iraq and extended to Afghanistan, Syria and other parts of the world. Shia school was founded by Imam Jafar. The Ithna Ashari, Jaffariya and Ismaili are Shia schools of law. The Bohras and Khojas are Ismaili groups (Agnes, 2011, p. 42).

**Islam: Rights of Women**

The premise of Shariat laws has to be understood in the background of tribal Arabia. The law of contract was mastered by Arabian traders in private and public life and was applicable to social relation and marriage. In Islam, ‘marriage is civil and dissoluble contract’. During the time of polygamy the Prophet limited the number of wives to four in which he clearly said that every wife needs to be treated equal with respect and love. There was a system of bride price of tribal Arabia which was known as mehr. Mehr is provided at the time of marriage and is considered as a protection to the women. The woman has the right to half of the share of her male counterpart (Agnes, 2011, p. 43).
“The right to enter into a pre-marriage (pre-nuptial) agreement (qurar-nama or kabin-nama): These agreements relate mainly to two aspects: (i) regulation of matrimonial life, and (ii) stipulations regarding dissolution of marriage. This can be an effective way of controlling polygamy” (Agnes, 2011, p. 44). Women can demand individual residence if the husband decides to undergo a second marriage and they can seek divorce if the husband does not act according to the agreement.

The right to individual allowances or maintenance also plays an important role. The perspectives related to the share of Muslim men and women is based on the one third rule related to ‘testamentary succession’. Making of wills is impossible on the basis of ‘legal heirs’. It states that a person who practices Islam can not ‘will away more than one third of the property’. It should be according to the rules of succession related to Shariat and inheritance should be premised on those rules. Nevertheless, it is analysed that share of women is not tantamount to men on the basis of Islamic law and women has the right to possess half of the property of the male. Thus, it reflected the idea of equity. Thus, Mehr had to be given to the wife and unmarried daughter as per his “share of inheritance” (Agnes, 2011, pp. 41-42).

The origins of Indo-Islamic rule can be understood through engaging with historical perspectives on the advent of Islam to India. It is argued that Islam became a part of India through the Arabs who came to India via Arabian sea for trade. In eighteenth century, they resided in Malabar coast. They espoused ethos of the natives. It is observed that ‘Moppillahs’ of Kerala and Lakshadeep were not practicing their religious life as per Shariat. On the other hand, ingrained ‘matrilineal systems’ existed in that particular region (Agnes, 2011, p. 45).

The emergence of Shariat was in the Sultanates of Afgan and Turk. In India, it was observed in the twelfth or thirteenth century. Hanifs, the Muslim Sultans who entered India depended upon Ullama which acted as the higher body of legal and religious negotiations. Sharia, the fundamental law was followed by them according to the Ullama’s delineations in the royal courts. Muslims in India were classified as groups of nobility, peasantry and the artisans. It was observed that artisans imbibed the mélange of Hindu and Muslim traditions. Practices such as property systems based on joint family and caste segregation were followed by those who converted to Islam. In this context, the personal law was constructed in reference to other social categories including caste. Thus, it developed in the mixture of local as well as cultural values.
Religion

<table>
<thead>
<tr>
<th>Box No. 3.2</th>
</tr>
</thead>
</table>

East Indian Company diwani rights during Mughal era in Bengal, Orissa and Bihar, resulted in new legal dynamics. It provided the East India Company the power to mediate disputes related to ‘natives’. Native personal law thus got translated into English. For instance, Sir William Jones translated Muslim law of inheritance called Al Sirajiyyah. The Hedaya, the Arabic work was translated into English by Charles Hamilton. Drawing on Fatwa-e-Alamgiri that was codified during the rule of Aurangzeb, Neil Baillie developed the Digest of Mohammudan Law. These translations were happening under the guidance of Hastings in the year 1791.

In order to develop Anglo-Mohammedan Law, colonial courts deployed these translated works. Islamic Jurisprudential law or Islamic Fiqh was enriched by the contributions of Islamic jurists such as Ameer Ali, Asif Ali Fyzee and so on. Currently, it is called as ‘Indo-Muslim law’ or ‘Indo-Islamic law’ which is a part of higher level legal discourses in India. It is also formed through engaging with legal expertise of muftis, quazis and ullamas (Agnes, 2011, p. 46).

The perception of marriage in Islam is that of ‘civil contract’ which ordains procreation through sexual relations. ‘Nikah’ represents ‘contractual union’. The notion of qubul stands for ‘free consent’. The consent of the parties is considered as vital in this particular process. ‘Ijab’ stands for recommendation for marriage. ‘Witness’ is an integral part of marriage. The guardians are called ‘Walis’ who act as protectors for the minors who wish contractual marriage. ‘Nikhanama’ is the document that captures the contract related to marriage. Islamic law also prescribes certain conditions for marriage called ‘aqd-e-nikah’ which guarantees circumstances of marriage. It connotes ‘conditional stipulates’ which happen during marriage and govern the husband.

In order to understand the conceptualization of Marriage in Islam, one has to unravel certain categories. For instance, ‘Mehr’ is an ‘economic safeguard’ for women. It shows reverence for wife and the problems which wife undergoes through the law of inheritance. Islamic law of marriage also provides rules related to dissolution. It can occur by ‘judicial verdict’, ‘act of the parties’ and demise of a partner. The death of wife or husband death can cause dissolution. After the death of wife, husband can marry earliest and wife has to finish four or ten months of Iddat.

As per Islamic law, husband and wife have to follow equal rules of ‘dissolution of marriage’. Divorce by the husband involves rules such as Talaq. When the husband decides to dissolve the marriage it is known as talaq. While Talaq includes various modes of marriage dissolution, there are two major
ways of talaq such as talaq-al-sunna and talaq-al-bida’a. “The major difference between the two modes is that the first mode provides for repentance, retraction and reconciliation, while in the other form talaq becomes irrevocable when it is uttered and does not allow for a period of retraction and reconciliation” (Agnes, 2011, p. 55). The first form is considered as legitimate based upon the principles of Prophet Mohammed. The second form is not approved and talaq is declared three times in one sitting. Zehar is a form in which pledge is taken by the husband on the premise that he considers his wife equivalent to his sister, mother and any female in his family. Another form of marriage, Mubaraa happens through the agreement between husband and wife. Marriage is also dissolved through certain judicial processes. These are called as Lian and faskh. In lian, wife can proceed for divorce if there is disprovable accusation by the husband such as blaming the wife for infidelity. Faskh stands for the ways of seeking divorce through ‘Muslim marriages Act’ (1939) in India.

3.6.3 Christian Laws

The nature of Christian law has to be analysed to understand the way in which it determines the deep questions related to law in India. According to Flavia Agnes, certain paradoxes and non linear developments are embedded within the field of Christian law. Path breaking statutes that radically influenced Indian personal laws have also structured the levels of reforms within diverse religious groups and also remained ‘static’ in comparison to groups who had to face multiple drifts related to matrimonial laws. Foregrounding of ‘Anglo-Saxon jurisprudence’ by the British and French and Portuguese’s practices of ‘Continental systems’ in their geographical regions have structured the laws that are applied to Christians. Christians comprise 2.3 percent of the Indian population according to the 2001 census. The groups among Christians in India do follow plural mores. Three of the major ones are as follows: one is based on the orthodox churches which are rooted in West Asian cultural practices that comprise Syro-Malabar, Mar Thoma Church, Syro-Malankara and so on. Another is the Roman Catholic Church ground in Latin Rites. The third tradition is that of reformist churches founded on Protestant tradition. They are integrated into the Church of North India (CNI) and Church of South India (CSI).

The question of liberated identity of women under the period in which pre-Christian Roman law was practiced is contested. It is argued that they enjoyed certain independence related to ending of their state of being married. It coexisted with the evolution of marriage to that of ‘private contracts’. However, the Church gained some power with regard to marriage during the emergence of Christianity in Europe. Church was also instrumental in converting marriage in to the category of holy unions. It is asserted that Roman Church gained control over the marriages in the twelfth century. The Church of Rome also achieved prime priestly power in the issues related
to marriage. The impact of church law on marriage has to be mapped in this context. Canon law or Church law of marriage has its foundation in Roman and Jewish law.

Marriage, for Church, connotes “the husband and wife were made of one flesh by the act of God, marriage being a holy tie, a sacrament” (Diwan and Diwan, 1997, p. 21, cited in Agnes, 2011, p. 67). In turn, the notion of divine wedlock attributed a sacramental tinge to the institution of marriage. The institution of Church legitimized the ‘solemnization of marriage’. Permission from the church to get married and public ceremony linked to marriage were considered as essential requirements of the solemnization of marriage. For instance, marriage which was arranged without elders, bishop and priest was prohibited in AD 802. The Church, which intervened in marriage, tried to prevent licentious and extramarital relations. It resulted in the deification of church as an essential part of the marriage (Agnes, 2011, p. 67).

The circumstances that lead to the formation of Christian personal law help us to understand the transformation of local mores that existed before and after the conversion. Converted Christians indulged in native cultural mores in property related acts and marriage up to nineteenth century. The British and Portuguese administrators started legal interventions and Christian personal law came into existence during the later half of the nineteenth century. The Christian sects in India were situated in a cultural mélange of Eurocentric thoughts as well as the native cultural approaches. It is argued that converted Christians maintained caste ideology of pre-conversion social life (Grafe, 1982; Thekkedath, 1982; cited in Agnes, 2011, p. 66).

The manner in which the category of divorce has been conceptualized in the legal domain raises major questions for the communitarian perceptions of divorce. Divorce on the basis of mutual agreement is very much part of Indian matrimonial statutes. However, the couples need not establish the fact of ‘matrimonial fault’. It is argued that Christian couples had to face problems in availing this particular right unlike other communities in India. They had to re-register their marriage as per Special Marriage Act (Agnes, 2011, p. 71). It persuades us to enquire about the role of Christian women related to reform of laws. The debates that arose in context of ‘Christian Marriage and Matrimonial Causes Bill’ by the Law Commission in 1960 were intended to reform the archaic laws pertaining to Christians in India. Based on the letters of Christian women about their oppressed conditions, the Law Commission was forced to advise the government to amend the section 10 of the Indian Divorce Act. After prolonged and vibrant legal interventions in India, a bill was passed by parliament that demands the amendment of archaic nature of Indian divorce act. It helped Christian women and men to seek divorce on the grounds of cruelty, adultery and desertion. Divorce
Personal Laws

became easier by consent than the divorce doctored on untrue grounds (Agnes, 2011, pp. 72-75).

3.6.4 Parsi Laws

The Parsi (Parsee) community in India is numerically very small. The 2001 Census shows that India has a Parsi population of 76,000. The community has its genesis in Iran. “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 their sacred fire” (Agnes, 2011, p. 75). In the same year Arab Caliph Omar conquered Persia. The Parsi king Yezdezind lost his kingdom and left the country in search of a new land through the sea route and landed at the south of Daman. According Flavia Agnes, they sought refuge from the local king, Jadao Rane. They assured the local king that they would enhance the land (Agnes: 2011, p.75). The king gave refuge to them under five conditions; they should accept the vernacular language and they render their holy text into vernacular language. The Parsi women changed their dressing style and wore local saree. The marriage ritual included the tying of sacrosanct knot and retreat from the activities related to the arms (Agnes, p.75). The local king permitted the Parsi community to build the fire temples near Diu which is named as Navsari. Gradually, the Parsis adopted local customs. The community has two sects, Shensoys (or Shuhursaees) and Kudmis. During the British regime, the Parsis got exposed to education, trading, business and so on.

The Parsi legal discourse has to be reflected within the colonial context. In case of civil laws, all the British laws were applicable to Parsis. However, Parsi communities still maintain their distinct identity in terms of marriage and bigamy. In 1778, they filed the petition to William Hornby that Parsi Panchayat should be recognized legally. Eventually, they got permission to exercise the customary practices. The Parsis were keen to protect the two doctrines which were different from British laws, namely, “The English Statute of Distribution in case of intestacy” and “The English common law relating to husband and wife denied married women independent control over property during converters” (Agnes, 2011, p. 78).

In 1850, a Parsi lady litigated against her husband for a decree of restitution of conjugal rights in the Court of Bombay. There were no clear guidelines for the matrimonial suit of the Parsi. So the court applied the Ecclesiastical jurisprudence or the English Christian laws. But, the jurisprudence was challenged by the Privy Council. And the Supreme Court also says that Ecclesiastical jurisprudence cannot be implied to Parsis. In light of this case, the Parsi community in Bombay demanded a separate legislative act to regulate Parsi marriage and divorce.
On 20th August, 1855 in the central hall, a call was given by Parsi community to discuss about the fire temple in which independent laws of Parsis were also demanded. A committee was nominated to draft the Code of Laws. December 5th 1859, the Managing Committee of the Parsi Law Association set up and approved the name ‘A Draft Code of Inheritance, Succession and Other Matters’ (Agnes, 2011, p.79). On March 31st 1860, Draft Code was handed over to the Select Committee and on 10th August, 1861, the Select Committee of legislative council presented their report and recommended to Bombay Government may appoint a commission to look into primary examination in the context of standard laws by the Parsis of India.

Thus, in 26th December 1861, the Bombay Government appointed the commission in which evidence was recorded both written and oral by the Parsi community. As a result, inheritance, succession and property between husband and wife were addressed. The mofussil Parsis yet refused to have a right of females to inherit family property after the death of husbands and also in the terms of rights of married women throughout ‘couverte’ to grasp or ‘dispose to their separate property’. There were diverse opinion about the inheritance, succession and property by the Bombay Parsi and mofussil Parsis. The mofussil Parsis argued for two separate inheritance laws and it was rejected by the Commission on 13th October, 1862. In 1864, the Parsi Law Commission based on its report in 1865; introduced two bills, Parsee Marriage and Divorce Bill, and the Parsee Succession and Inheritance Bill (Agnes, 2011, p. 79).

The Parsi Marriage and Divorce Act is significant because it is the first codified matrimonial law in India. It has safeguarded the customary Panchayat, along with jury and seven members of the community. Thus, it holds the Anglo-Saxon courts framework. However, in the 1930s, Parsis also began to bring changes and in 1933, Parsee Law of Succession was passed with the aim to improve the conditions of daughters and widows under the statute and share in the parent’s property. The changes were integrated into the Indian Succession Act of 1939 where the chapter about Parsi Act of Succession has been mentioned (Agnes, 2011, pp. 80-81).

Inevitably, the British were in process of modifications of law in Britain for women .The Parsi community was impacted by it. In 1936, the joint select committee passed the bill to reform the scope of dissolving marriage considering various grounds such as insanity, pre-marriage pregnancy, grievous hurt and desertion. The women’s movement in India experienced a new phase in the 1980s. The Bombay Parsi Panchayat had taken a lead on two bills which were recommended by 110th Law Commission Report. It recommended amendment of the reforms in the personal laws of Parsis. The Parsi Marriage and Divorce Act was introduced in 1986 in both houses and amended finally in 1988 after the President’s sanction. Now the major changes in Marriage and Divorce Act were almost like Hindu marriage act.
Divorce with mutual consent, the division of the right of legitimate and illegitimate children were eliminated. Also in the Succession laws, in 1991, the male-female discrimination on descendants was also resolved (Agnes, 2011, p. 82). On the other hand, women from the Parsi community were missing in the entire discourse and procedures while negotiating the laws for women. It is contended that the absence of women in such crucial moments of law making signify the prevalent patriarchal tensions that existed in the community.

**Check Your Progress:**

*Write in your own words the interpretation of Christian and Parsi personal law.*

---

### 3.7 LET US SUM UP

In this Unit, you studied about the colonial construction of personal laws and further evolution of legal debates that intersect with the issues of Muslim, Parsi, Hindu and Christian women. In the post independent period, Indian women’s movements are also confronting with laws and state to bring out the equality and justice for women through various legal interpretations.
3.8 UNIT END QUESTIONS

1) Do you agree that the Indian feminist movement has contributed to bring the gender-just laws for Indian society? Explain it.

2) Discuss the Hindu personal laws in India.

3) Discuss the Muslim personal laws in India.

4) Discuss personal laws in relation to Christian and Parsai communities of India.

3.9 GLOSSARY

Anglo-Saxon Law : It is a body of written rules and customs that were placed in the Anglo-Saxon period in England before the normal conquest. This body of law descewed form Scandinarian and Germanic law.

3.10 REFERENCES


Anagol, Padma. (2005). The Emergence of Feminism in India, Ashgate.


### 3.11 SUGGESTED READINGS


Anagol, Padma. (2005). *The Emergence of Feminism in India.* Ashgate.
