BETSY'S CASE RE-OPENING THE WHO IS A HINDU DEBATE*

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1. INTRODUCTION

Derrett while discussing religious affiliation and laws defines personal law as:

"*Personal law' is now the system of rules applicable by any court to an individual in respect of the topics covered by that law, determined with reference to the religion which he professes or purports to profess or is presumed to profess; for the law determines what a man's religious affiliation is for purposes of application of personal law by methods peculiar to itself.*"[1]

Thus the question of the religion professed, presumed or purported to profess is the most important when determining the applicability of personal laws. It is this dilemma, which is central to the case of *In Re Betsy and Sadanandan*.[2] In this case, the lower court refused to grant divorce by mutual consent on the ground that the marriage, which had been solemnized under the Hindu Marriage Act, was invalid since one of the parties to the marriage (originally born a Christian) had failed to show that she had converted to Hinduism. Upon appeal, the High Court had to consider what the test for conversion to Hinduism should be. Answering this question further required investigation of what being a Hindu entailed.

This paper critically examines religious conversions and the corresponding change in personal law applicable especially in the context of conversion to Hinduism. The special nature of the problem stems from the fact that the term 'Hindu' is difficult to define, thereby complicating furnishing of any proof for conversion.

The paper while dealing with the 'Who is a Hindu' question defines the same in terms of applicability of Hindu law and does not go into the theological questions of Hindu beliefs. Here it must be clarified that the line is extremely thin since personal law follows religion at all times but the paper tries to stay clear of that conundrum by

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[1] JDM Derrett, Religion, Law and The State in India (OUP 1999) 39.

[2] *In Re Betsy and Sadanandan* 2009 (4) KLT 631.

maintaining a line of separation between religion as a personal question and religion as a legal question.[3]

2. OF 'HINDUISM' AND 'HINDUS'

Hinduism as a 'religion', contrary to popular belief, has a much more recent history than the vast pantheon of cultural practices of the subcontinent with which it is often conflated with. The term 'Hindu' was conceptualized only in the nineteenth century, in the colonial context.[4] The study of western representations has informed our understanding about how certain views about religion were perpetuated as an aid to colonial domination. These representations relied upon the portrayal of the people of subcontinent as the 'other' with words such as 'mystic', 'magical' , 'fanatic' becoming common tropes of characterization.[5]

This discourse created by the likes of western scholars such as Monier Willimas and Sir William Jones, which was based on study of ancient India texts, soon crept into the self-consciousness of the people of subcontinent who came to identify themselves as Hindus. Policies such as the Indian census[6] and functioning of the courts[7] further led to the reification of identities. In fact, the social acceptability of the classification was so great that even the Nationalist movement rallied around these artificially constructed identities.[8]

The construction of the term 'Hindu' becomes especially relevant to administration of law. Hastings's plan charged the courts with administering different personal laws for Hindus and Muslims.[9] In the process, initially the aid of *Pandit's* and *Maulvis's* was taken but soon the British realized that the codified personal law which had been derived from ancient Indian scriptures was not in consonance with the variety of customary laws that were being observed. In the common law quest for uniformity, the

[3] RW Neufeldt, 'To Convert or Not to Convert: Legal and Political Dimensions of Conversion in Independent India' in R D Baird (ed), Religion and Law in Independent India (2nd edn, 2005) 381.

[4] John Stratton Hawley, 'Naming Hinduism' (1991) 15 The Wilson Quarterly <http://www.jstor.org/stable/40258117?seq=1#page_scan_tab_contents> accessed 2 May 2017.

[5] R King, 'Orientalism and the Modern Myth of "Hinduism"' 46(2) Numen (1999) 146.

[6] B S Cohn, An Anthropologist Among Historians and Other Essays (4th edn, 1996).

[7] A Shodhan, A Question of Community: Religious Groups and Colonial Law (2001).

[8] S Kaviraj, 'The Imaginary Institution of India' in P Chatterjee and G Pandey (eds), Subaltern Studies VII – Writings on South Asian History and Society (1999) 1.

[9] C Mallampalli, 'Escaping the grip of Personal law in Colonial India: Proving Custom, Negotiating Hindu-ness' (2010) Law and History Review 1043-1044.

courts thus classified people into neat legal categories based on religion and religion-based law, which led to the eventual displacement of personal laws.[10]

The works of Menski[11], Galanter[12] and Derrett[13] have all contributed towards showing how the so-called Hindu law implemented by the British was not the traditional law practised before the advent of British rule but something that was painstakingly constructed by the British in a quest for uniformity. This however meant muddying of the 'Hindu' category itself, as the definitions imposed did not match the social realities that existed on the ground.

The series of post-independence decisions and the variety of tests they suggest while defining who a Hindu is bears testimony to this confusion. Thus, the possibility of any one neat test or definition in consonance with social reality was excluded since the category being defined was at best an imaginary community.

3. OF THE PRESUMPTION OF 'HINDUISM'

A number of legislations collectively referred to as the Hindu code were introduced 1955-56, as an effort to codify the Hindu laws and provide a working definition of the term Hindu had to be created in order to identify those to whom the provisions of these laws would be applied. The legislations followed identical definitions and extended the sweep of the term 'Hindu', "*to any person who is a Buddhist, Jaina or Sikh by religion.*"[14] This was in keeping with the constitutional admission, as Baird points out,[15] that the term 'Hindu' would be treated as both a religious and legal category.[16]

Thus the Hindu code bills created an all-encompassing legal definition of Hindu distinct from its religious connotation. Further, the legislations lay down that they would apply, "*to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion.*"[17] This negative definition implied that there was

[10] W Menski, Hindu Law: Beyond Tradition and Modernity (2003) 156-163.

[11] W Menski, Hindu Law: Beyond Tradition and Modernity (2003) 156-163.

[12] M Galanter, 'The Displacement of Traditional Law in Modern India', (1968) Journal of Social Issues 65.

[13] JDM Derrett, Religion, Law and The State in India (OUP 1999) 39.

[14] Hindu Marriage Act 1955, s 2(1)(b).

[15] R D Baird, 'On Defining "Hinduism" as a Religious and Legal Category' in RD Baird (ed), Religion and Law in Independent India (2nd edn, 2005) 69.

[16] The Constitution of India 1950, art 25.

[17] Hindu Marriage Act 1955, s 2(1)(c).

general presumption as to applicability of Hindu law and any deviation from it would have to be proven otherwise.[18]

This presumption as to Hinduism or more precisely Hindu law is thus usually a given and would apply to a person even though he may be an atheist or might even abhor Hindu rituals. But if there is such an overarching presumption why does it become imperative to give a definition? The need for a definition arises whenever there is a contestation of identities. In India a major site of this contestation is in the context of religious conversion, which opens a Pandora's Box ranging from the question of eligibility for affirmative action benefits to application of a different personal law.[19]

In fact, *Betsy's* case raises the 'Who is a Hindu?' debate in the backdrop of conversion to Hinduism. The Hindu code bill allowed for its application to, "*any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.*"[20] The requirement of a settled standard to prove conversion naturally necessitates the characterization of who is a Hindu.

This question becomes even thornier when affirmative action benefits have to be ascertained that is when there is an intersection between caste identity and religious conversion.[21] In this regard it is important to note that India has followed what can loosely be termed as the constitution-religious model.[22] This involves a justice-based approach to law based on equality.[23] The more traditional and hierarchical views of religion have thus been tried to be replaced. Provisions such as abolition of untouchability,[24] removal of prohibitions from temple entry[25] are perhaps the best examples of the same. These concerns have further informed the manner and contexts in which the courts have dealt with the term 'Hindu'.

[18] ibid (n 15) 70.

[19] R J Stephens, 'Sites of Conflict in the Indian Secular State: Secularism, Caste and Religious Conversion' (2007) Journal of Church and State 251, 252.

[20] Hindu Marriage Act 1955, s 2(1).

[21] ibid (n 19) 251.

[22] L D Jenkins, 'Legal Limits on Religious Conversion in India', (2008) Law and Contemporary Problems 108, 111.

[23] ibid (n 15) 69-70.

[24] The Constitution of India 1950, art 17.

[25] The Constitution of India 1950, art 25.

4. OF CONVERSIONS AND CHANGING TESTS

Standard commentaries of Hindu law including Mayne[26] and Mulla[27] have used terms such as 'elastic', 'broad' and 'amorphous' while dealing with the term 'Hindu'. It is by virtue of these absorptive powers of the Hindu religion that elements of Hindu law have been found applicable to otherwise distinct religions such as Buddhism, Sikhism and Jainism.[28] Thus broadly speaking Hindu law not only governs the so-called Hindus (religious connotation) but also a large number of other communities (legal connotation).

This paper though while focussing on the former, as has been stated earlier, restricts itself only to the question of applicability of personal law. Hindu law applies either by birth or religion.[29] This means that one can either be a Hindu in the legal sense if one is born as one, or if one undergoes a religious conversion.

It is the latter condition which is the concern of this paper. In *Betsy's* case it was this sufficiency of a test to show conversion to Hinduism that became the bone of contention. The Court's response to this predicament in the past has been varied and multifarious but before going into that it is important to understand the premise behind personal laws and religious affiliation.

The noted legal scholar Derrett argues that religious affiliation is not a question of personal belief but of social belonging.[30] This view has also evolved into a primary argument against conversions which views them as being disruptive of social life and motivated by political considerations.[31] Religion when viewed as a social question, ties in well if the premise behind personal laws is assumed to be the recognition of distinct legal communities observing their own practices in domains such as that of marriage and succession. But, in light of the work done by post-colonial theorists[32] who explain that these so-called legal communities as at best artificial and constructed, the argument becomes slightly tenuous.

[26] John D Mayne & Vijender Kumar, Mayne's Treatise On Hindu Law & Usage (16th edn, Bharat Law House 2012).

[27] Dinshah Fardunji Mulla & Satyajeet A Desai, Mulla Hindu Law (21st edn, LexisNexis 2013) 94, 95.

[28] *Rani Bhagwan Kaur v JC Bose* (1903) 30 IA 249.

[29] ibid (n 27) 67.

[30] ibid (n 13) 58.

[31] ibid (n 3) 381.

[32] ibid (n 15).

At the same time it must be borne in mind that the Constitution under Art. 25[33] subject to public order, morality and health recognizes the freedom of conscience and the right freely to profess practise and propagate religion. But does this freedom of conscience entitle the convert to change her personal laws needs to be analyzed. This becomes intrinsically linked to the issue in *Betsy's* case since a test for conversion to Hinduism and hence the definition of a Hindu for that purpose is limited by religious affiliation to law. The investigation is thus undertaken within this intersection of law and religion.

Thus the issue in *Betsy's* case can be seen at two different levels, the first concerns the definition of Hindu in terms of the application of Hindu law and the second is in terms of a religious conversion into Hinduism, such that it warrants a simultaneous change in personal law. Thus the need to ascertain a necessary and sufficient test to conclude that religious conversion to Hinduism in not in the realm of the vagaries of belief but rather merits the application of a new personal law.

Perhaps one of the most influential expositions on the essentials of 'Hinduism' was by Gajendragadkar C.J. in the case of *Shastri Yagnapurushdasji* v. *Muldas.*[34]The plea raised was that the provisions of the Bombay Temple Entry legislations would not be applicable to the places of worship of the Swaminarayan sect, since its members, the Satsangis were not Hindus. The Supreme Court did not restrict itself to the question of whether Satsangis were Hindu or not but rather asked the larger question of who a Hindu was?

The court generously relied upon the views of Dr Radhakrishnan and freedom fighter Tilak to finally delineate the features of Hinduism as, "*acceptance of Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and the realization of the truth that the number of gods to be worshipped is large*."[35] The philosophical nature of this definition is of little assistance when trying to ascertain the application of person law but then judgement in *Satsangi's* case was not really concerned with that issue.

In the case of *Punjab Rao* v. *Mesh Ram*[36] the election to the legislative assembly under Scheduled Caste Order of 1950 was impugned. The Court held that a public declaration of conversion to Buddhism was sufficient to establish conversion and thus the election was set aside. Mayne criticizes this judgement as he compares the application of law to an existing status and a new status, in his opinion, can only be created by converting into such a religion that would destroy the old status.[37] He thus advocates an approach

[33] The Constitution of India 1950, art 25.

[34]*Shastri Yagnapurushdasji v Muldas* AIR 1966 SC 1119.

[35] ibid.

[36]*Punjab Rao v Mesh Ram* AIR 1965 SC 1179.

[37] ibid (n 27) 69.

which takes into account one's historical or geographical background and factors the opinion of the community in which he lives.[38]

In the case of *Perumal*v. *Ponnumsawmi*,[39] wherein a Christian Nadar woman had married a Hindu Nadar man, it was held that since the marriage was conducted in accordance with Hindu ceremonies and parties has lived as Hindu, coupled with the prevalent practice in the community that Christian woman were considered Hindu upon marriage, the court held:

"*A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion.*"[40]

The test in *Perumal* has largely been established as the position of law with respect to religious conversion.[41] It is important to note that by *bona fide* the court implies that the conversion cannot be for the purpose of committing a fraud upon the law. This situation has arisen more frequently in cases involving conversions to Islam. The Supreme Court in the case of *Rakhiya Bibi* v. *Anil Kumar Mukherjee*[42] held that inquiries into the intention can be conducted by the courts. To prove this element of *bona fide* the court in *Perumal* insisted upon the need for unequivocal conduct. At the same time if the conversion has led to unjust outcomes, the court has not shied away from creating remedies.[43]

Unlike other religions such as Islam or Christanity which have more or less settled tests for conversion Hindu texts such as the *Dharmshastras* do not prescribe a test.[44] The Arya Samajists though have come up with the *shuddhi* ceremony which was held to be sufficient to prove conversion[45] but the practice is neither universal nor widespread.

[38] ibid (n 27).

[39] *Perumal* v Ponnumsawmi AIR 1971 SC 2352.

[40] ibid.

[41] Law Commission of India, Conversion/reconversion to another Religion – Burden of Proof, (Law Com No 11 2010).

[42] *Rakhiya Bibi v Anil Kumar Mukherjee* ILR (1948) 2 Cal 119.

[43] *Sarala Mudgal v Union of India* 1995 AIR 1531.

[44] Paras Diwan & Peeyushi Diwan, Modern Hindu Law (22nd edn, Allahabad Law Agency 2013).

[45] *Kusum v Satya* (1903) 30 Cal 999.

Similarly a formal conversion was considered sufficient to establish the religion of a European woman in the case of *Ratansi D. Morarji* v. *Administrator General*.[46] Here, again it must be pointed that though Hindu Missionary activity of the sort seen in the above-mentioned case is indeed prevalent but instances of the same have only been few and far between and are usually specific to a sect or community rather than to Hinduism generally.[47]

In an unusually large number of cases, the question of caste has also become intertwined with religious conversion. This goes on to show how the tussle for affirmative action benefits has become a ripe ground for defining the term 'Hindu.' As recent as in the case of *M. Chandra* v. *M. Thangamuthu*[48] the Supreme Court held that, "*It is a settled principle of law that to prove a conversion from one religion to another, two elements need to be satisfied. First, there has to be a conversion and second acceptance into the community to which the person converted*".[49]

However it must be kept in mind that in this case the Supreme Court was primarily resolving the question of whether upon reconversion the person gets back the membership of her caste or not. In this regard the case law seems to be fairly settled and there seems to be a series of authorities supporting the proposition that in order to prove membership of caste upon re-conversion there has to be acceptance by the members of the concerned caste-community.[50]

The reasoning behind such test of community rests on the premise that caste disabilities are always recognised in a community context and therefore caste identity cannot be seen in exclusion of it. Whether a similar test can be applied to religion, even though suggestions to the effect were made in the *Thangamuthu* case, is a separate question. Notions of religious community are much more abstract than that of caste, and it will be almost impossible to come up with a settled standard of community acceptance in today's context.

In the case of *Mohandas* v. *Dewaswan Board*[51] the Kerala High Court further diluted the test laid down in *Perumal*. The case revolved around a devotional singer named Jesudas who was prevented from entering the temple on the ground that he was not a Hindu.

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[46] *Ratansi D Morarji v Administrator General* (1928) 55 MLJ 478.

[47] ibid (n 3) 387, 388.

[48] *M Chandra v M Thangamuthu* AIR 2011 SC 146.

[49] ibid.

[50] *Kothapalli Narasayya v Jammana Jogi* AIR 1976 SC 937; CM Arumugam v S Rajgopal (1976) 1 SCC 863.

[51] *Mohandas v Dewaswan Board* 1975 KLT 55.

The court however concluded that a declaration on his part that he was a Hindu was enough to prove his conversion. The Court thus held that if a person declared that she was a Hindu and if that declaration was *bona fide* and without any ulterior motive or intention she would deem to have been converted.

The tests for proving conversion have thus been varied and changing, depending upon the context the courts have enunciated tests ranging from, formal ceremony of conversion, *bona fide* intention accompanied by unequivocal conduct expressing that intention, declaration of being a Hindu to acceptance by members of the caste. In *Betsy's case* after concluding that none of the above tests were satisfactory the court advocated a kind of amalgamation and held that any assertion of the party had to be given due weight. This assertion had to be explained by conduct such as nature of marriage, worship of Hindu gods and general self-identification in the world as a Hindu.[52]

The judgement in *Betsy* citing the immense uncertainty attached to proving religious conversion thus called for a national level legislation for standardizing conversion and in pursuance of the same requested the Law Commission to look into the matter.[53] The Law Commission while considering the matter concluded that, "*statutory prescription of procedure to establish conversion or nature of proof is neither desirable nor practicable.*"[54] The premise behind the conclusion was that such a procedure lay within the domain of appreciation of evidence and statutory requirement for the same would lead to further complications.[55] Further, the Registrar's office was the suitable forum for deducing whether the claim was *bona fide* or *mala fide*.[56]

In a country as diverse as India with varying levels of literacy and access to justice, documenting every conversion is almost an impossible exercise. This should not serve as a deterrent for creating such a mechanism but at the same time it should not be made mandatory as that would render all possible *bona fide* conversions illegitimate. In keeping with this view the Law Commission finally suggested an option for registration to formalize conversion.[57]

Since the famous decision in *Abraham v. Abraham*[58] it is now the settled position that one can change the law applicable to oneself by religious conversion. However, this

[52] *In Re Betsy and Sadanandan* 2009 (4) KLT 631).

[53] ibid.

[54] ibid (n 41) 10.

[55] ibid.

[56] ibid.

[57] ibid (n 41) 20-22.

[58] *Abraham v Abraham* 9 MIA 195.

relationship between personal laws and religion does not play out so simplistically in courts where often the contest may arise due to marital, succession or dispute relating to affirmative action benefits. Thus it becomes necessary to devise some working test to characterize such conversion. The courts in different settings have come up with test of varying degrees.

These tests assume a distinct complexity since the conversion in these cases is to Hinduism which when called upon to, has been characterized by words such as 'subtle' and 'indescribable'. But as was remarked in *Betsy's* case, "*the courts cannot throw their hands up. Resolve they must, in the event of controversy or conscientious and objective doubt (even when parties raise no controversy) of the question whether there was conversion or reconversion to Hinduism.*"[59]

5. CONCLUSION

The question 'Who is a Hindu?' in a sense is a redundant question in most instances for the purpose of application of personal law. This is because of an overarching presumption of Hinduism which has been envisaged in the Hindu code bill. Coupled with the fact that the term Hindu does not reflect actual social realities but is a category that was constructed in the colonial context for the purposes of administration of law implies that any endeavour to substantively define a Hindu would prove futile.

However, in instances where there is a conflict which are cases primarily involving marital/ succession disputes or affirmative action benefits. A majority of these cases concern religious conversion which is undoubtedly an area of conflict even in secular state like India. Keeping the amorphous definition of a 'Hindu' in mind it is apparent that religious conversions to Hinduism come with their own brand of difficulties.

The courts in this regard have formulated a number of tests, the latest in the long line being *Betsy* which goes to the extent of a formal registration. But sadly all of them come with inherent difficulties. Perhaps the test laid down in *Perumal* seems to be the most comprehensive and just due to its requirement of *bona fide* intention and unequivocal conduct to support that intention. However, while applying the same the courts cannot follow a laconic approach and mere assertions cannot be held to be conclusive. Rather while interpreting the test the courts need to keep in mind the premise behind religious affiliation and thus appreciate that the conduct should prove conversion in the social sense.

[59] *In Re Betsy and Sadanandan*, 2009 (4) KLT 631.