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Dr. Pradeep Kumar
Executive Editor & Managing Director
Journal of Legal Studies

Live-in Relationships- A Substitute for Marriage

Homa Bansal[1]

Abstract

As per ancient Indian customs, there is nothing purer than the holy matrimonial ceremony between 2 people. But Indian society is slowly shifting toward modern western thinking, which is changing the very structure of Indian society. There is already an alternative to marriage- live-in relationships. This generation's couples are preferring live-in relationships over marriages as a trial run for long-term and serious relationships. Countries like the USA, Canada, France, England etc., have already legalized live-in relationships and a rapid rate of growth is seen in its practice. The practice of Live-in marriages increased a lot in the last few decades. From being a taboo in its earlier days to now being preferred by the small portion of a hyper-modern Indian society, live-in relationships are getting legal recognition throughout the country even by the judiciary. Even though the judiciary provided legality to the live-in relationship, there is a major part of the society who do not accepts the concept of live-in relationships. There is no specific uniform civil code regulating a live-in relationship and it is still regulated by the personal beliefs of the couple. This paper focuses on the concept of live-in relationships and how it is different from the concept of marriages in India. This paper also throws light on the legality of this concept and how much it is accepted by the general populace, its advantages and disadvantages, and why is it slowly becoming a popular way of cohabiting. It also discusses the various rights provided to live-in couples by the Legislature and through various judicial case laws.

Keywords: Live-in Relationships, Marriages, Legality, Legal Rights, Social Issues.

Introduction

For centuries, marriage is considered to be a sacred ritual performed to tie a conjugal relationship between two people of opposite sexes. In India, the tradition of marriage is practiced since time immemorial. This tradition was probably started during the Vedic period in mid-500 BCE, but there are several historical dig sites in Harappa and Indus valley dated back to 4500-3500 BCE which hints that there was a concept of marriage-like tradition where the couple mate with each other but lives with their family. There were graves in the Harappan civilization where the couples were buried together, the historians consider it to be the indication of social acceptance of a relationship in the society[2]. The concept of marriage is said to be originated in the Mesopotamian Civilization in 2350 BCE[3]. In Indian traditions, marriages or arranged marriages are dated back to the 4th century. Even though a tradition of arranged marriage is considered to be a bizarre thing in western countries, it is almost a 3 millennium-old custom followed by Indian society.

[1]***Assistant Professor of Law, Panjab University Regional Centre, Ludhiana.***
[2] Nath A., *et al.* (2015). Harappan interments at Raphigraphy, Haryana. *Man, and Environment*, *40*(2), 9-32.
[3] The Week staff, *The origin of marriage*, THE WEEK (July 16th, 2022, 4:00 P.M.) https://theweek.com/articles/528746/origins-marriage#:~:text=The%20first%20recorded%20evidence%20of,Hebrews%2C%20Greeks%2C%20and%20Romans.

Until the 1990s, in India, marriage was the only option for couples to enter into conjugal relationships. After the implementation of the LPG policy, Indian culture slowly shifted toward western customs. Now there is an alternative for marriages in Indian society, which is far more serious than love relationships but is much more lenient than marriages, it is called a live-in relationship. Live-in relationship is an arrangement where 2 people decide to live together on either a permanent or long-term basis for emotionally and sexually oriented needs without committing themselves to a serious commitment of marriage. It liberates the couples from all the complicated rituals and commitments towards each other. In fast-moving Indian society, young couples prefer it as an alternative to marriage. Even the court is treading on the matter of live-in relationships as it now affects a considerably big portion of modern society. People are inclining towards live-in relationships because it replaces old and sophisticated customs with modern, simple, and comfortable practices. These kinds of changes that are considered to be significant change in a society is a lot to take for the older generations who respected and followed their customs.

This caused a stalemate between the old, traditional society and the modern, fast-moving society. The question that whether living together without being married is morally wrong or right is not resolved as of now, but it is being stated by the Judicial courts on many occasions that live-in relationships are completely legal. Even though it is legal, it is still considered to be taboo by a big portion of Indian society. Indian culture still finds it unacceptable for 2 people of a different gender to cohabit without marriage. In a rare and worst-case scenario, it results in an honor killing. Even though there are many rights provided by the courts to live-in couples, these rights give them a legal protection from the government but not from their blood relatives. The question is not whether it is moral or not, the question is, will society accept it as a general practice in the foreseeable future?

History of Marriages in Indian Culture

Marriage is an integral part of Indian culture and has been practiced since ancient times. But the institution of marriage was not the same in the ancient ages. It all began with the Indus-valley civilization, which flourished around 2500 BCE. The archeological experts have found various artifacts that point out that women were highly respected in the Indus-valley civilization, which means it is highly likely that the Indus-valley civilization was a matriarchal society. A matriarchal society is a kind of society where a woman is a head of a family and takes all the decisions relating to all the family matters. The archeological experts also found out that the people strictly adhere to a single relationship and were buried in the same grave.[4]
In ancient Sanskrit texts, the Vedic seers prescribed a set of observances known as '*sanskara'*, marriage is one of the sixteen '*Sanskara'*.

[4] Anjali Marar, *"What a Harappan grave says about marriage"*, The Indian Express (17th July, 2022, 5:10 P.M.) https://www.google.com/amp/s/indianexpress.com/article/explained/what-a-harappan-grave-says-about-marriage-5531050/lite/

According to Manava Dharma Shashtra, there were 8 forms of marriage practised in ancient India. Brahma Vivah is a kind of marriage, where father of the girl himself invites a Veda learned and pious man and gift him his daughter in marriage solemnized by a Brahmin. DaivaVivah is a type of marriage, where a father gifts his daughter to a priest as a *'Dakshina'* (fee) for officiating a ceremony. ArshaVivah is a kind of marriage, where a girl's father gives away her daughter in exchange for live stocks, generally cows to fulfil a ritual. PrajapatyaVivah is a kind of marriage where the bride and groom were married by her father with due honour and blessings. Asura Vivah is a kind of marriage is still followed in India. In this kind of wedding, the bride's father bestows as much wealth on his daughter as he can afford at her wedding. GandharvaVivah is also known as love marriage; it is a voluntary union of a man and a woman who fell in love in solitude. In this kind of marriage ceremony, only the consent of the bride and groom was essential. Rakshasa Vivah means marriage by capture and abduction is known as Rakshasa marriage. In this type of marriage, girl gets abducted and got married to her abductor without her or her parent's consent. PisakaVivah is a kind of marriage where a girl was sexually violated while she was intoxicated or asleep, she was later given the social status of a wife of the accused.

In Ancient India, the practice of '*Swayamvara'* was also prevalent. , '*Swayamvara'* in its literal sense means 'Swayam'- self, and 'Vara'- groom, which means "right to choose the groom". In ancient India, the swayamvar was practiced by the upper-class society (nobleman, royal family, etc.). In a '*Swayamvar'*, the bride had the sole right to choose her groom (*vara*) from the bachelor participants. There was a mention of '*Swayamvar'* in both 'Ramayana', where Lord Ram marries Goddess Sita after breaking the Shiva Dhanusha at the '*Swayamvar'*, and in 'Mahabharata' where Arjuna marries Draupadi after winning an Archery competition in the Swayamvar. This custom was generally practiced by the royal family to choose a groom from the elite group of suitors. Polygamy and Polyandry was also a practice in the Ancient and Medieval period. If a man is married to multiple women, then it is called polygamy. In polyandry, a woman is married to multiple men. The practice of polygamy and polyandry was not so popular in ancient India, but it was still practiced by the upper strata of the society. Polygamy was mentioned and validated by the 'Rig Veda' even though monogamy was preferred by the majority of people. It was common for kings and noblemen to marry more than 1 woman in ancient times. These customs were practiced till the British rule.

All the aforementioned practices show that even though the custom of marriage existed since time immemorial, it was changed from time to time according to society. In the Indus valley civilization, women were treated equally to gods. In ancient India, even though women were treated equally to men, they were not allowed to have multiple husbands, but a man can marry multiple women which prevailed till the end of the medieval period. The practice of polygamy and polyandry was outlawed by the British Government, which is still prevailing in India.

Live-in Relationship

The concept of live- in relationship has gained popularity in the last 2 decades in India. There is no precise definition for a live- in relationship'. It is generally said to be a trial-run for a long-term marriage. In a live-in relationship, couples live together for sexual and emotional

relationship without being married. A very small fraction of Indian society accepted this as a normal tradition. In this modern time, young couples tend to check the compatibility of their relationship before committing themselves to a far more complex and serious commitment. In ancient Indian Vedic texts, there is no mention for a necessity of a girl to be physically pure for her to get married. Pre-marital sex was not a taboo in ancient India.[5] Whereas now, there is a big chunk of Indian society which still strongly oppose the concept of live-in relationships. In Indian society, pre-marital sex is looked down upon and is frowned upon. Most Indian grooms, irrespective of their education, still wants their bride to be virgin. It seems that Indian society now is more primitive than Ancient Indian Society. Now we will discuss the various aspects of live-in relationships.

Advantages of a live-in relationship

There are always 2 faces to a coin, nothing is perfect and nothing is completely corrupt. If there is a bad side to something, there must be a good side too. Similarly, even though live-in relationships are considered to be a taboo, it does have some good impacts on the society like-

1. It enables the couple to test the compatibility of their relationship before getting married
2. It is easier to get separated in a live-in relationship than in a marriage
3. There as a very slim chance to get summoned in a court for a separation proceeding.
4. It is cost effective, as there is no need to perform any ritual for entering into a live-in relationship.
5. It gives a complete experience of a marriage without any legal or cultural liability.

Disadvantages of a live-in relationship

1. Indian society don't accept the practice of live-in relationships and treat it as a taboo.
2. If the live-in couple separates, the woman suffers the most. Groom's family generally don't prefer to marry their son with a woman who was in a live-in relationship.
3. Even though the child born out of a live-in relationship has a right in the parent's property, he does not have a right in a property of Joint Hindu Undivided Family.
4. Society do not treat a live-in couple as same as a married couple.

Types of Live-In Relationships

Live-in relationships can be divided into 3 main categories

1. Where a heterosexual non-married couple live with each other. The court completely legalized this kind of relationship.
2. Where a married person eloped with another person and they are living together without being married. This kind of live-in relationship is immoral as well as illegal. The court *in Kusum* v.

[5]Samyuktha Nair, "*The history of the concept of virginity in India, and what makes it such a big deal today"*, ED TIMES (March 3rd, 2022).
https://edtimes.in/the-history-of-the-concept-of-virginity-in-india-and-what-makes-it-such-a-big-deal-today/

3. *The State of Uttar Pradesh*,[6] the Allahabad High court denied to provide police protection to the live-in on the ground that where a married woman eloped with another man without completely dissolving the marriage, then it could not be covered under the definition of the 'nature of the marriage' and is completely illegal.
4. Where a couple of same sex living together. Earlier it was criminalized under section 377 of the Indian Penal Code, but after the case of *Navtej Singh Johar*v. *Union of India,*[7] it is now legalized by the Hon'ble Supreme Court of India in 2018.

Position of A Live-In Relationships in India

In India, live-in relationships are generally treated as an abomination to society. As it is still a new practice in India, there is no uniform Code regulating a live-in relationship. The concept of living together without being marred is slowly spreading in the big metro cities, but are still considered to be highly immoral in the tier II cities and small villages. Maharashtra was the first State to approve a proposal which suggested that a women should get a status of a wife after a 'reasonable period'. 'Reasonable period' was not defined as it may depend upon the circumstances of each case. Socially, it is still unacceptable in many parts of India, but it is getting its way around. A lot of changes have been recorded in a live in relationships in the past one and a half decade, which provided a lot of rights and some duties which needs to be fulfilled by the live-in couples.

Live-in Relationships and Article 21

Even though a live-in relationship is considered to be a great substitute for marriage, it was not always the same. In the early 2000s, the legality of live-in relationships was in the grey area i.e., it was neither legal nor illegal. From the judicial point of view, it was held in the case of *Lata Singh* v.*State of U.P*.[8] that if 2 consenting adults of heterogenic sex are living together in a live-in relationship, it does not amount to any offence. The landmark case of *S. Khushboo* v.*Kanniammal*[9] was the most important case which decided the future of live-in relationships. In this case, the Apex court answered whether a live-in relationship is legal or not with a positive tone. The court held that even though living together is considered to be immoral, it is a personal decision and can be taken by a person who attained the majority. The court further stated that it comes within the ambit of Article 21 of the constitution, which is the Right to life and liberty.

Even though the Hon'ble Supreme Court of India legalized live-in relationships, there are many instances where the High courts of various States have constantly refused to grant protection the live-in couples. The High court of Bombay, Rajasthan, and Punjab and Haryana have constantly refused to provide police protection to live-in couples, which was condemned by the Hon'ble Supreme Court on the multiple protection. The Hon'ble Supreme Court

[6] W.P.(C) No:53503 of 2016.
[7] (2018) 10 SCC 1.
[8] AIR 2006 SC 2522.
[9] (2010) 5 SCC 600.

directed all the lower courts to take a wider and lenient view on live-in relationships before taking a decision.

Rights Provided to Women and Children Born out of a Live-In Relationship

After the case of *S. Khushboo* v.*Kannimmal*, many other judgements paved the path for legalizing live-in relationships. These rights are given after a long judicial fight. In the case of *Indira Sharma*v.*V.K.V. Sharma*,[10] the Hon'ble Supreme Court requested the Parliament to enact new legislation based on certain guidelines which were given by the court so that the victims of Domestic Violence, irrespective of being married or not, can be given protection from the partner and society.

The guidelines given by the Supreme Court are as follows-

1. The couple should cohabit with each other in a live-in relationship for a reasonable period of time. It depends upon the facts of each case and varies in each situation. The Duration of 'a period of a relationship' is defined under section 2(f) of the Protection of Women from Domestic Violence Act, 2005
2. Shared Household means to cohabit under one roof and is defined in section 2(s) of the Protection of Women from Domestic Violence Act, 2005.
3. If the couples living together is sharing each expense according to their salary, or any one of them sharing a bank account (Joint account), acquiring immovable property in joint names, investing in long-term assets etc., maybe a guiding factor.
4. Sexual relationship, not only for sexual pleasure, but for the emotional and intimate relationship, same as in a marriage for conceiving children, and for emotional support and companionship.
5. Entrusting the responsibility to generally the women to manage the home, cook, clean, manage and take important decisions regarding the house also indicates a marriage-like relationship.
6. Having children is a very strong indication of a marriage-like relationship and indicates a clear intention of the couple to hold on to the relationship.
7. Socialization in public holding out to the public and socializing with friends, relatives, and at other social gatherings as if they are married, is also a strong indication to hold the 'marriage-like relationship'.
8. Intention and conduct of the parties' common intention as to what their relationship meant and what their roles and responsibilities are in the relationship can also be used to define their relationship.

Right to Maintenance

In 2008, the National Commission for Women (Malimath committee) recommended the ministry to amend the definition of 'wife' under Section 125 Cr.P.C. The commission further stated that the definition should further include "a woman living with a man like his wife." the legislature acted upon the recommendations of the committee on the Reforms of Criminal

[10] (2013) 15 SCC 755.

Justice System and altered the meaning of wife under section 125 Cr.P.C.[11] In the case of *Chanmuniya*v.*Virendra Kushwaha*[12] The Apex court of India upheld the right of a woman in a live-in relationship to claim maintenance under section 125 of Cr.P.C. The court further stated that it protects women from men who just want to take the advantage of the loopholes of live-in relationships. In another case of *Kamla*v. *Mohan Kumar*[13], the Hon'ble Hon'ble Supreme Court further stated that a woman living in a live-in relationship should get respect and the status a wife gets after getting married. In this case, long cohabitation between a man and a woman led the court to entitle maintenance to the women and the child born out of the live-in relationship.

Right to visa extension

Earlier a proof of marriage needed to be submitted to the concerned department for a grant of visa extension to a partner in a relationship. There is no rule related to granting a visa extension to a person on the sole basis of a live-in relationship. The court, in a very interesting case of *Svetlana Kazankina*v.*Union of India*[14], stated that even though the relationship between a live-in couple is not as formal as a marriage, but now with modernization in a society, live-in couples should be treated equally to the married couples. The court further stated that just like a married couple, live-in couples also tend to enjoy the companionship of one another, love, and affection and the extension of visa enables such foreigners living together with Indian citizens to share such moments.

Inheritance

Live-in relationships have no legal status under the Hindu Marriage Act or any other personal law which brings up a question about the inheritance of the deceased partner in a live-in relationship. In 2015, a case was filed regarding a similar matter. In *Dhannulal*v.*Ganeshram*[15], a dispute broke out between the live-in partner and other family members of the family regarding the property of the deceased. In this case, the Hon'ble Supreme Court stated that where a couple is cohabiting for a long period of time, after the death of a live-in partner, a woman has a right to inherit her partner's property.

Protection of a live-in partner against Domestic violence.

When the Protection of Women from Domestic Violence Act was enforced in 2005, it did not provide protection to women in live-in relationships. It was changed in the case of *D. Velusamy*v. *D Patchaiammal.*[16] In this case the court gave the guidelines for protecting women in a live-in relationship from domestic violence. The Apex court provided the same

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[11] "Committee on Reforms of Criminal Justice System", *Government of India, Ministry of Home Affairs*, Mar. 2003, vol. 1, p. 189, (last visited on: 21st July, 2022) https://www.mha.gov.in/sites/default/files/criminal_justice_system_2.pdf.
[12] (2011) 1 SCC 141.
[13] (2019) 11 SCC 491.
[14] (2015) 225 DLT 613.
[15](2015) 12 SCC 301.
[16]AIR (2011) SC 479.

protection to the live-in couples under the Protection of women from Domestic Violence Act, it fulfills certain essential conditions, these conditions are-

1. People entering into a live-in relationship must attain the legal age for marriage
2. They must be otherwise qualified to enter into a valid marriage i.e. both of them should be of sound mind.
3. Both of them must hold themselves out to society as equivalent to the spouses in a marriage
4. Both of them must voluntarily enter into a live-in relationship and held themselves out to the world as spouses for a reasonable period of time.

If a live-in couple fulfills all of the following conditions, a woman can file a case of Domestic Violence against her partner under the Act even though she is not married.

In the *Indira Sharma case*, The Hon'ble Supreme Court clarified the legal position of a live-in relationship to some extent. In the case, the court held that where a woman is knowingly is in a live-in relationship with a man who is lawfully married is not entitled to various reliefs available to a legally wedded wife under the act. But at a same time, the court felt that it would amount to a great injustice to a woman if it denies any protection to her.

Legal Status of a Child Born out of a live-in relationship

The Hon'ble Supreme Court in one of the first cases related to live-in relationships stated that a child born out of a live-in relationship is considered as legitimate as a child born out of a marriage is. In *Balasubramanyam*v. *Suruttayan*[17], the apex court stated that if a man and a woman are living with each other for a long period of time, the child should be treated as if he/she is born out of wedlock and has a rightful share in the ancestral property. In another instance, in the case of *Madan Mohan Singh v. Rajini Kant*,[18] the Hon'ble Supreme Court again stated that if a child is born out of a long-lasting live-in relationship, he or she could not be considered an illegitimate child or an abomination in the society.

Further, in the case of *SavitabenSomabhaiBhatiya*v. *the State of Gujarat*[19], a Hon'ble Supreme Court headed by Justice Arijit Pasayat held that a child born out of a live-in relationship should not be considered illegitimate. Even if a child born out of a live-in relationship is given out for adoption shall be considered as a child born out of a live-in relationship.[20]

Inheritance Rights of a child born out of a live-in relationship

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[17] AIR 1992 SC 756.
[18] (2010) 9 SCC 209.
[19] SLP (Crl.) No. 4688 of 2004.
[20] Lydia Suzanne Thomas, *Breaking: JJ Act- Child Born In Live-in Relationship To Be Construed As Child Born To Married Couple: Kerala High Court-Read Judgment*, LiveLaw *(*Apr. 10, 2021) https://www.livelaw.in/news-updates/child-born-in-a-live-in-relationship-child-married-couple-kerala-high-court-adoption-juvenile-justice-172398?infinitescroll=1.

In 2010, in the case of *Bharatha Matha* v.*Vijey A Renganathan*[21] the Hon'ble Supreme Court held that a child born out of a live-in relationship has a right to have a share in the parent's property. Being born out of a live-in relationship does not hinder this right. In 2010, The Hon'ble Supreme Court stated that a child born out of a live-in relationship can only claim a share in the property of his parents and does not have a legal claim on the ancestral property whatsoever. But in 2022, The Hon'ble Supreme Court ruled in the recent judgement of *Kattukandi Edathil Krishnan v. Kattukandi Edathil Valsan*,[22] that a child born out of a live-in relationship even has a Coparcenary right in the ancestral property of his parents.

What Can we do Better

Even though live-in relationships are socially unacceptable in India, it is neither a crime nor a sin and is totally a personal decision of a person. Indians cannot mind their own business and love to gossip and degrade each other. Even the High Court's of some States failed to accept live-in relationships. In 2012, more than a decade after legalizing live-in relationships, the High Court of Punjab and Haryana refused to grant protection to a live-in couple, on the basis that it is immoral and socially unacceptable. The couple had to move to the Supreme Court, which ordered the High Court to provide police protection to the couple.[23] It is not the only instance of refusal to grant protection to a live-in couple, but luckily there are very few of these instances.

Society needs to change its view on live-in relationships and it cannot be done without the help of the media and the government. If the government cannot promote live-in relationships, at least it should frame laws to protect the interest of live-in couples. There are various things that can be done by the media, government, and us.

1. Media is the 4th pillar of Indian Democracy, so it must act responsibly. In this instance, the media should not show live-in relationships as taboo, or a trait of a delinquent or a bad person. The media help normalize the practice of live-in relationship.
2. The parliament should frame laws protecting the interest of live-in relationships.
3. Indian Administration should treat live-in couples as equal to married couples. It should help normalize the practice of live-in relationships. The administration should not treat them unequally just because they are unmarried.
4. As a protector of justice, the court should treat live-in couples as if they are married and should decide a case on the basis of the facts of the case and not just because it is immoral and sinful to live together without being married.
5. And lastly, as a society, we need to treat a live-in couple normally and not as a taboo. Just because they are living together without being married does not gives us the right to judge them and outcast them from society. A live-in couple is not doing anything illegal and needs the support of society the most.

[21] (2010) 11 SCC 483.
[22] (2022) SCC Online SC 737.
[23] CRWP-9821-2021.

Conclusion

In India, marriage is considered to be the only option to form an intimate and sexual relationship. Indian society cannot accept changes in their customs so suddenly unlike the western and European countries because India's culture is one of the things which make it unique and beautiful. But with modernization many traditional customs changed, like the concept of live-in relationship was introduced as a substitute for marriage. Even though it was unacceptable in a vast portion of Indian Society, it was accepted by the Hon'ble Supreme Court with open arms.

Live-in relationships got a lot of rights and duties within less than 2 decades, as this subject gained popularity, the court took it as a responsibility and paved the path to protect live-in couples. Live-in couples suffered their share of hardships to get to the rightful position where it stands right now. The Indian Judiciary and Parliament are still figuring out the various rights which need to be provided to live-in couples. Even though there are no laws regulating live-in relationships, this subject has seen a lot of growth and development regarding rights and protection in the past 3 decades. And one can only hope for a better future where Ancient Indian traditions and Modern Western Practices can co-exist and live-in couples and married couples can live in the same society without being Judged.

Power of Prescribed Authorities of Armed Forces to Grant Maintenance to Wives and Children of Armed Forces Personnel in India: A Critical Appraisal

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Abstract

The authorities in the Armed Forces are granting the maintenance to the wives and children of the members of the Armed Forces in accordance with the powers conferred in the respective legislations which were enacted in the 1950 and 1957 respectively. The intention of the parliament was entirely different than what is being followed nowadays. The object of bringing the legislations has been misconceived by the authorities at various levels in the Armed Forces which is required to be analyzed in the present Research paper.

Key Words: Armed Forces Personnel Prescribed Authorities, Army, Air Force, navy, Maintenance.

Introduction

The Air Force Act, 1950(45 of 1950) was enacted to consolidate and amend the law relating to the government of the Air Force, the Army Act, 1950 (46 of 1950) was enacted to consolidate and amend the law relating to the government of the regular Army and the Navy Act, 1957(62 of 1957) was enacted to consolidate and amend the law relating to the government of the Indian Navy. The provisions with regard to grant of pay and allowances in the Air Force Act, 1950 and the Army Act, 1950 are more or less similar. Any sum required by order of the Central Government or the prescribed officer to be paid for the maintenance of his wife or his legitimate or illegitimate child or towards the costs of any relief given by the said Government to the said wife or child in case of officers or the airmen as the case may be.[3]Any sum required by order of the Central Government or the prescribed officer to be paid for the maintenance of his wife or his legitimate or illegitimate child or towards the costs of any relief given by the said Government to the said wife or child in case of officers or the person other than the officer as the case may be.[4]However, the Navy Act has some more elaborative provisions as such any sum required to be paid for the maintenance of his wife or legitimate or illegitimate children under the provisions of section 31.[5]

Legal Provisions Relating to Maintenance in Armed Forces

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[3] Section 91 (i) and 92 (i), Air Force Act, 1950
[4] Section 90 (i) and 91 (i), Army Act, 1950
[5]Section 28 (6) and 29 (5), Navy Act, 1957

It is relevant to mention here that the view that deductions from pay and allowances of a person subject to the Act are permissible only to give effect to a decree for maintenance granted by a Civil Court.[6]This provision was brought in force mainly with the object to reduce the economic adversity the spouse and children of the serving soldiers and as an exception to the provision under which the pay and allowances of a person subject to Army Act, 1950 cannot be attached in satisfaction of any decree of a Civil Court.[7]Alternatively, it can be said that if any Civil Court or Criminal Court or Family Court grants an alimony or maintenance may be interim or final as the case may be in favour of the spouse or the children. Further to this, it shall be construed as exceptions not a general rule except to give effect to the orders and decrees granted by Civil Court or Criminal Court or Family Court. Similar applies to corresponding provisions of the Air Force Act, 1950. Therefore, for the implementation of the provision, the Army and the Air Force both have formulated the independent policies in accordance with the powers conferred to the subordinate authority for making law on the respective organizations on the subject.

All the persons belonging to the Indian Navy are duty bound as per law to maintain his wife and children in the same manner as if they were supposed to maintain while they were not the members of the Indian Navy. However, execution or enforcement of the order of the competent Civil Court or Criminal Court or Family Court but cannot be directed towards the person, pay, arms, ammunition, naval equipment or instruments or clothing.[8]

Where it appears to the satisfaction of the Central Government or the Chief of the Naval Staff or the prescribed authority that a person subject to naval law has without reasonable cause deserted or left in destitute circumstances his wife or any legitimate child unable to maintain himself or has by reason of contracting a second marriage become liable to provide separate maintenance to his first wife; or where any decree or order is passed under any law against a person who is, or subsequently becomes, subject to naval law for the maintenance of his wife or his legitimate or illegitimate children and a copy of the decree or order is sent to the Central Government or the Chief of the Naval Staff of the prescribed authority; the Central Government, or the Chief of the Naval Staff or the prescribed authority may direct a portion of the pay of the person so subject to naval law to be deducted from such pay and appropriated in the prescribed manner towards the maintenance of his wife or children but the amount deducted shall not exceed the amount fixed by the decree or order (if any) and shall not be at a higher rate than the rate fixed by regulations made under this Act in this behalf.

However, in the case of a decree or order for maintenance, no deduction from pay shall be directed unless the Central Government or the Chief of the Naval Staff or the prescribed authority is satisfied that the person against whom such decree or order has been passed or made, has had a reasonable opportunity of appearing, or has actually appeared either in person

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[6] Note, 22 (a) to Section 90(i), of the Army Act, 1950 (Manual of Military Law, Volume-II)
[7] Section 28, Army Act, 1950
[8] Section 31(1), Navy Act, 1950

or through a duly appointed legal practitioner, to defend the case before the Court by which the decree or order was passed or made.[9]

Where arrears of maintenance under a decree or order have accumulated while the person against whom the decree or order has been made is subject to naval law whether or not deductions in respect thereof have been made from his pay under this section, no step for the recovery of those arrears shall be taken in any court after such person has ceased to be so subject unless the court is satisfied that he has, since he ceased to be subject to naval law, the ability to pay the arrears or any part thereof and has failed to do so.[10]

Where a proceeding for obtaining a decree or order for maintenance is started against a person subject to naval law, the Court may send the process for service on that person to the commanding officer of the ship on which such person is serving or on the books of which he is born, or if, by reason of the ship being at sea or otherwise, it is impracticable for the court to send the process to the commanding officer, the court may, after not less than three weeks' notice to the Central Government send it to a Secretary to that Government for transmission to the commanding officer for service on that person. However, such service shall not be valid unless there is sent along with the process such sum of money as may be prescribed to enable that person to attend the hearing of the proceeding and to return to his ship or quarters after such attendance.[11]

If a decree or order is passed or made in the proceeding against the person on whom the process is served, the sum sent along with the process shall be awarded as costs of the proceeding against that person.[12]

No process in any proceeding under this section shall be valid against a person subject to naval law if served on him after he is under orders for service at a foreign station or beyond Indian waters.[13] The production of a certificate of the receipt of the process purporting to be signed by such commanding officer as aforesaid shall be evidence that the process has been duly served, unless the contrary is proved.[14]

Where by a decree or order a copy whereof has been sent to the Central Government or the Chief of the Naval Staff or the prescribed authority, the person against whom the decree or order has been passed or made is directed to pay as costs any sum sent along with the process, the Central Government may pay to the person entitled an amount in full satisfaction of that sum and the amount so paid by the Central Government shall be deemed to be a public demand recoverable from the person against whom the decree or order has been passed or

[9] Section 31(2), Navy Act, 1957.
[10] Section 31(3), Navy Act, 1957.
[11] Section 31(4), Navy Act, 1957.
[12] Section 31(5), Navy Act, 1957.
[13] Section 31(6), Navy Act, 1957.
[14] Section 31(7), Navy Act, 1957.

made, and without prejudice to any other mode of recovery, may be recovered by deduction from his pay, in addition to the deductions authorized.[15]

Where any person subject to naval law has made an allotment of any part of his pay and allowances for the benefit of his wife, that allotment shall not be discontinued or reduced until the Central Government or the Chief of the Naval Staff or the prescribed authority is satisfied that the allotment should no longer be made or should be reduced. [16]

Herein the expression "pay" includes all sums payable to a person subject to naval law in respect of his services other than allowances in lieu of lodgings, rations, provisions, clothing and travelling allowances.[17]

From the bare perusal of the above provisions contemplated under various statutory laws relating to the members of the Armed Forces with regard to the maintenance of wives and children, it is apparently evident that the Navy Act provides more exhaustive provisions in comparison to the Army Act and Air Force Act. Therefore, they have evolved their alternative mechanism for the implementation of the respective provisions for maintenance of wives and children by formulating the independent policies.[18]

Provisions for Maintenance under Civil Laws

The whole concept of maintenance was introduced in order to see that if there is a spouse who is not independent financially then the other spouse should help him/her in order to make the living of the other person possible and independent. Maintenance is the amount which a husband is under an obligation to make to a wife either during the subsistence of the marriage or upon separation or divorce, under certain circumstances. It, thus, emerges that maintenance is meant to tide over a difficult financial situation and not to lead life on someone else's expense. When determining the amount of maintenance, reasonable needs of the spouse seeking maintenance against the ability of the other spouse to pay must be balanced. Further, grant of maintenance in favour of wife, necessarily results into deprivation of the husband of his property and it is well settled by now that no one can be deprived of his life, liberty and property except after affording him a fair and reasonable opportunity to defend against such action. The Hindu Marriage Act, 1955 provides for temporary and permanent alimonies.

(a) Maintenance pendente lite and expenses of proceedings-Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the

[15] Section 31(8), Navy Act, 1957.
[16] Section 31(9), Navy Act, 1957.
[17] Section 31(10), Navy Act, 1957.
[18] Army Order 02 of 2001 and Air Force Order 03 of 2013.

proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable. However, the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.[19]

(b) Permanent alimony and maintenance- Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent. If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order, it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just. If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.[20]

(c) Alternative Mechanism for Payment of Maintenance under other Statues-The Code of Criminal Procedure, 1973 provides the aspect of maintenance to wives and children as a speedy and efficacious remedy. From a bare perusal of this provision, it is manifestly evident that a wife becomes entitled to maintenance only if she is able to establish to the satisfaction of the jurisdictional magistrate that she is legally wedded wife of the person from whom she claims maintenance, she is unable to maintain herself and her husband in spite of having sufficient means has neglected or refused to maintain her.[21]

Further, the wife loses her right to maintenance if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband. The words "upon proof of such neglect or refusal," are of great importance because these words imply that maintenance cannot be granted in favour of a wife until it is proved that the husband has neglected or refused to maintain her despite being possessed of sufficient means and the wife has no means to maintain herself.[22] A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man

[19] Section 24, Hindu Marriage Act, 1955.
[20] Section 25, Hindu Marriage Act, 1955.
[21] Section 125, Code of Criminal Procedure, 1973.
[22] *Ibid* n.20.

ought, under the circumstances of the particular case, to act upon the supposition that it exists.[23] Proving a fact requires evidence which means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence; all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.[24] The term "statement" means a statement of a witness whose veracity has been tested by cross-examination and the term "Document" means a document genuineness of which has been established in accordance the law of evidence. It, therefore, emerges that the requirements of the law of maintenance have to be proved by leading evidence including statements of witnesses tested on the touchstone of cross-examination and documents veracity of which has been established.

Supreme Court on Maintenance Laws

In the case of *Sanjay Kumar Sinha v. Asha Kumari and another,* the Hon'ble Supreme Court of India held that even consequent upon passing of the maintenance order under Section 24 of the Act by the Family Court, the order passed by the Family Court, Samastipur under Section 125 of Cr.P.C. stands superseded and now no longer holds the field.[25] Further in the case of *Rakesh Malhotra v. Krishna Malhotra*,[26]the Hon'ble Supreme Court held that since the Parliament has empowered the Court under Section 25(2) of the Act and kept a remedy intact and made available to the concerned party seeking modification, the logical sequittor would be that the remedy so prescribed ought to be exercised rather than creating multiple channels of remedy seeking maintenance. One can understand the situation were considering the exigencies of the situation and urgency in the matter, a wife initially prefers an application under Section 125 of the Code to secure maintenance in order to sustain herself. In such matters the wife would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a Competent Court either under the Act or similar such enactments. But the reverse cannot be the accepted norm.

Further the Hon'ble Supreme Court in *Rajnesh v. Nehaand another*[27], the Hon'ble Supreme Court has laid down the exhaustive guidelines in exercise of the powers conferred under Article 142 of the Constitution of India and settled the controversy of overlapping jurisdiction of maintenance in various statutes at different forums and the operating portion reads as under:

a) **Issue of overlapping jurisdiction-** To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become

[23] Section3, Indian Evidence Act, 1872.
[24]Section3, Indian Evidence Act, 1872.
[25]Civil Appeal No. 3658 of 2018 Decided on 09.04.2018.
[26]Criminal Appeal No. 246-247 of 2020 Decided on 07.02.2020.
[27]Criminal Appeal No. 730 of 2020, Decided on 04.11.2020.

necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. It was directed that where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or setoff, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding; it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding; if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding.

b) Payment of Interim Maintenance-The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the concerned Family Court / District Court / Magistrates Court, as the case may be, throughout the country.

c) Criteria for determining the quantum of maintenance -For determining the quantum of maintenance payable to an applicant, the Court shall take into account the criteria enumerated in Part B – III of the judgment. The aforesaid factors are however not exhaustive, and the concerned Court may exercise its discretion to consider any other factor/s which may be necessary or of relevance in the facts and circumstances of a case.

d) Date from which maintenance is to be awarded -It was made clear that maintenance in all cases will be awarded from the date of filing the application for maintenance, as held in Part B – IV above.

e) Enforcement / Execution of orders of maintenance -For enforcement / execution of orders of maintenance, it was directed that an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20(6) of the D.V. Act; and Section 128 of Cr.P.C., as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 read with Order XXI. A copy of this judgment be communicated by the Secretary General of this Court, to the Registrars of all High Courts, who would in turn circulate it to all the District Courts in the States. It shall be displayed on the website of all District Courts / Family Courts / Courts of Judicial Magistrates for awareness and implementation.

Jurisdiction of High Courts on Maintenance Matters

In the Case of Sergeant Ajit Kumar ShuklaVs Union of India and others,[28] the Hon'ble Delhi High Court held that the challenges against the order passed by the Army Chief or the Air

[28] WP© No. 8889 of 2020 Decided on 10.11.2020.

Force Chief or the Naval Chief would lie before the Armed Forces Tribunal as the same are being passed in conformity with the provisions contemplated under Section 91 (i) and 92 (i), Air Force Act, 1950; Section 90 (i) and 91 (i), Army Act, 1950 and Section 28 (6) and 29 (5), Navy Act, 1957 and not under the Sections 189/190 of the Air Force Act, 1950 or Sections 191/192 of the Army Act, 1950 or the Sections 184/184A of the Navy Act, 1957 which requires approvals of the Parliament and the same must be published in the gazette of the Government of India under Sections 191A/191 of the Air Force Act, 1950; 193A/193 of the Army Act, 1950 and Section 185 of the Navy Act, 1957. These provisions are in conformity with the mandate of the Constitution of India and Section 23 of the General Clauses Act, 1897 contemplates the same for making any law effective.

Jurisdiction of Armed Forces Tribunal on Maintenance Matters

That the Hon'ble Armed Forces Tribunal Regional Bench at Chandigarh in the case of Major Amit Kumar Mishra Vs. Union of India and others,[29] has held that the order of Maintenance passed by the competent Authority of the Indian Army was without jurisdiction, illegal, and unsustainable and therefore it was quashed. That the Hon'ble Armed Force Tribunal Regional Bench at Lucknow has also adopted the similar view in the case of Smt. Nisha Tomar alias Simran Vs. Union of India and others and the applicant Smt. Nisha Tomar was granted liberty to seek her remedy before the competent Civil Court in accordance with law.[30]The Armed Forces Tribunal Principal Bench also adopted the similar approach in the case of Smt. Rachna Kumari and others Vs. Union of India and others.[31]

Raksha Mantri's Committee of Experts-2015

The report of **Raksha Mantri's Committee of Experts-2015**, which was constituted for review of service and pension matters including potential disputes, minimizing litigation and strengthening institutional mechanisms related to redressal of grievances, and has highlighted that the Committee had expressed grave dissatisfaction and concern about the procedure adopted by the military authorities in processing the claims for maintenance and acting on the said report Ministry of Defence had directed the Joint Secretaries to take immediate action on the report and submit action taken report. Findings of the Committee also militate against the impugned order which, even otherwise is a non-speaking and unreasoned order, thus bad in law.It would be of benefit to cull out here observations and recommendations of the Experts Committee. It is being observed that such matrimonial disputes are essentially family/civil/private in nature and the Services do not have the wherewithal, capacity or ability to examine the veracity or truthfulness of the allegations, counter-allegations, replies and averments made by both parties, which is basically a matter of evidence. It is thus imperative that such disputes must be dealt with by civil courts and authorities under the proper law of the land legislated for this specific purpose, that is, Hindu Marriage Act, 1955, Criminal Procedure Code, 1973, the relevant Marriage Acts, Protection of Women from Domestic

[29]OA No. 1229 of 2017, Decided on 31.07.2018.
[30]OA No. 45 of 2017, Decided on 06.02.2019.
[31] OA No. 901 of 2020, decided on 07.08.2020.

Violence Act, 2005, etc. as the case and circumstances may be, rather than the employer getting into what may fundamentally be a civil dispute between a husband and his wife.

Critical Appraisal of the Issues Involved

It is correct that defence personnel have the bounden duty to maintain their families but the exercise of looking into the aspect of whether there has actually been an abdication of such responsibility or duty and the truthfulness of allegations from both sides cannot be conducted by the defence services and hence for the purposes of maintenance it should be made clear that recourse to civil courts or statutory authorities is the correct procedure where evidence can be weighed for reaching the conclusion on the veracity of statements and the amount that would be appropriate in a particular case. Grant of maintenance by military authorities, therefore, should be an exception rather than the rule. However, the powers of the competent military authority must definitely be invoked for giving effect to orders of a civil court/statutory authority in cases where they may have granted maintenance but the individual concerned is not releasing the amount to the wife/family, for which such powers are apparently primarily meant.

It should also be kept in mind that grant of maintenance by military authorities or rejection thereof may amount to endorsing the statements of the wife or the husband directed towards each other and may influence the proceedings under family law/civil law that may be underway in civil courts or which may arise in the future. Such grant of maintenance may also interfere or cause confusion in the totality of what is essentially a civil/private issue between two individuals. It is also a cause of great concern that maintenance is being granted by way of non-speaking orders on which the Armed Forces Head Quarters have also expressed anxiety. Orders that result in civil consequences and in taking away the pay and allowances of an officer or anAirman/Sailor/Soldier must be preceded by a minimum amount of inquiry on the allegations and counter-allegations and a proper speaking order by the competent authority explaining what went in his mind before granting maintenance and also explaining why was he considering the maintenance of a particular percentage as appropriate.

An opportunity of hearing whenever sought by an individual also needs to be granted. Non-speaking and bald orders just conveying the grant of maintenance from an individual's pay and allowances cannot stand the scrutiny of law being opposed to the principles of natural justice. It has also been observed that the Armed Forces authorities are passing such orders after rudimentary authentication of allegations (though all three Services are handicapped in this regard due to lack of any investigative powers) and by way of proper speaking orders while the Army is not, though the Army Headquarters has itself expressed concern on this aspect.

It must also be realized that maintenance is meant to tide over a difficult financial situation and not to lead life on someone else's expense and hence the wife's capacity to earn must be kept in mind before passing any such orders. The question to be put is not whether the spouse

is earning/employed or not, but whether she has the capacity or capability to earn or not. It is also brought to our notice that income tax on the total amount of maintenance awarded to the wife is being paid by the personnel from whom the pay and allowances are being deducted, the legality of this action also seems suspect and a clarification needs to be sought by the Services Headquarter. This is not to state that the Services should not interfere in exceptional circumstances. There still would-be cases which may be difficult to categorize and extremely exceptional which may require extraordinary measures, but then the process must meet the above parameters since reaching such conclusions is not an easy matter and is a highly technical evidentiary route which is treated even by Courts, which are fully empowered to deal with the subject, gingerly and carefully.

The Army Order 02 of 2001 or the Air Force Order 03 of 2013 was in existence when the Experts Committee submitted its recommendations in the year 2015. It did not even notice the Army Order or the Air Force Order, its approval apart and hence there is no legal sanctity of the Army Order or the Air Force Order as the grant of maintenance allowance is independent of any proceedings in Civil or Criminal Court.

The Army Order 02 of 2001 or the Air Force Order 03 of 2013 is not in the nature of the rules framed under Section 189 of the Air Force Act, 1950 nor is it shown to have been laid before the Parliament in terms of Section 191A of the Air Force Act, 1950. It runs contrary to the provisions of the Act in so far it says that authorities under the Act have concurrent jurisdiction along with the Civil Court/Family Court/Criminal Court to adjudicate claims for maintenance of the wives/ children of the persons subject to the Act, whereas the Army Act, 1950 or the Air Force Act, 1950 nowhere gives such power to the Air Force Authority to run a parallel adjudicatory authority to the Civil Court/Family Court/Criminal Court and permits adjudication of such claims on the basis of affidavit of the claimants without giving an opportunity to the other side to cross-examine the deponent and to submit a counter affidavit and also allowing the applicant to file rejoinder with regard to that, if any.

The Army Order 02 of 2001 or the Air Force Order 03 of 2013, however, requires that the wife be asked to intimate by means of an affidavit whether she is employed, and if so, indicate her emoluments; to intimate details of any independent source of income and movable/immovable property she may possess and any income therefrom. It also enjoins the authority deciding the claim for maintenance to ascertain that the petitioner is the legally wedded wife of the person, or his legitimate/illegitimate child;the person complained against is neglecting to maintain the petitioner; and the wife is unable to maintain herself and dependent children.

Further, in case it is clearly established that the wife is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent, the wife should be advised to take recourse to a court of law and should not normally be granted maintenance allowance.

In the first instance it needs to be pointed out that the impugned order does not even refer to the reply submitted by the applicant to the show cause notice, consideration and disposal of the contentions raised therein and affording an opportunity of hearing being provided to him apart. It also does not refer to any statements of the parties, affidavits of the parties, documents or any other materials which the prescribed officer might have considered. The orders do not state how the wife was unable to maintain herself and husband has neglected or refused to maintain her in spite of being possessed of sufficient means. It also does not talk of liabilities, if any, of the applicant. It is also not discernible from the order how the magic figures have been concluded by the respective authorities. Hence, it reminds me of the colonial era wherein there was no democracy and no Constitutional mandates.

The orders also do not give reasons in support of the conclusions arrived at. The impugned orders, thus, besides being without jurisdiction, is violative of the principles of natural justice and being passed as mechanical in nature and non-est application of judicial minds by the Prescribed Officers. The impugned orders leading to challenges have neither Force of Law nor Statutory Authority nor delegated legislations and the same have not been passed or promulgated in Conformity with the Constitutional mandate which have been adopted by the parliament of India, hence prima facie illegal and are being without jurisdiction and is purely illegal, and deserved to be quashed and set aside. The authorities should respect the laws of the land as well as the statutory mandates of the respective legislations and they should leave such matters for adjudication by the Civil Court/Family Court/ Magistrate Court as they are competent to adjudicate upon such issues under various statutory laws and are beyond the domain of the respective prescribed authorities.

Conclusion

The Prescribed Officers cannot take the status of the Competent Civil Court/Criminal Court/Family Court and cannot act as an adjudicatory forum of the matters wherein no specific finding can be inferred as it requires the presence of several civilian witness which cannot be enforced by the Indian Air Force and that is the only reason why the Air Force is not taking over Matrimonial Criminal Cases for trial.[32] Either party has to establish their source of income by way of an affidavit bringing out complete details of income and if necessary physical verification also needs to be done so as to establish the use of the amount of maintenance admissible to the claimant. The same cannot be done by the prescribed authorities of the Armed Forces while adjudicating the claim of Maintenance.

On perusal of the judgments of the Hon'ble Apex Court and Armed Forces Tribunal, it is inferred that the Air Force/Army /Navy cannot act as independent Adjudicatory Authority and cannot exercise the powers of the competent Civil Court/Family Court/Magistrate Court. But the same can deduct the sum from the individual's pay and allowances in compliance of the order passed by the Competent Civil Court/Family Court/Magistrate Court. The maintenance can be granted only on proof of the fact that the claimant wife is neglected by the husband and

[32] Section 475, Code of Criminal Procedure, 1973.

she does not have any independent source of income and is not guilty of forsaking the company of her husband without sufficient cause etc., which is not possible without permitting the parties to lead evidence and cross-examine the witnesses appearing against their interests but neither the Armed Forces Acts nor the Rules lay down any such procedure prescribing procedure to be adopted in such cases is without jurisdiction as the Act empowers only the Central Government to make rules to regulate the procedure for processing claims for maintenance.

Hence, grant of maintenance is without jurisdiction and lack of legislative force as it has neither been framed in exercise of the statutory provisions nor in the authority delegated by the legislation to the executive. It has also created lot of financial burden on the Government Exchequer as there are several litigations are pending or disposed-off on account of this such orders. Hence, the prescribed authorities of the Armed Forces should restrain themselves from passing such orders unless there is a specific order or decree from the competent Civil Court/Family Court/Magistrate Court as the case may be under various statutory laws.

What Makes A "Legitimate" Marriage? Exploring the Judicial Debates over the Customary Practice of *Natra* in Central India

Hana Hsin-wei Cheng[1]

Abstract

"Natra" is a customary practice among some caste-Hindu and tribal communities in Central India, through which a woman can contract a second marriage without legally divorcing her husband. Whereas it does not fit in the legal definition of marriage prescribed by the Hindu law, natra, as a custom that has a long history, obtains a general social recognition and plays an important role in dealing with marital as well as kinship arrangements in this area. Natra is among the many forms of "unconventional" marriage practices that can be observed in different parts of India. For a long time, discussions have been taking place in the court about whether customs like natra should be acknowledged as valid forms of marriage. It then becomes interesting to think about what constitutes a "legitimate" marriage, in what sense, and recognized by whom? Looking into High Court and Supreme Court judgements in which natra is referred to, this paper unpacks the judicial debates over the customary practice of natra, hoping to open up more possibilities to rethink the institution of marriage.

Keywords: Natra, Customary Marriage, Live-in Relationship, Brahminization of Law, Hindu Marriage Act

Introduction

In central India, specifically in and around the Malwa region,[2] there is a prevalent customary practice among some caste-Hindu and tribal communities[3] called "*natra*" (ukrjk), a form of remarriage practiced by women. *Natra* may happen when a woman is widowed or left by her husband. It may also happen when a married woman herself decides to leave her legal spouse and live with another person. In either case the "new husband" has to pay a considerable amount of money to the woman's former in-laws, and sometimes to her natal family as well. This practice, however, is distinctly different from the customary practice of "bride price" since *natra*can happen only when a woman is already in a form of co-habitation with another man, or at least has promised so.

While *natra* does not fit in the legal definition of marriage in terms of the Hindu law, it, as a custom, does obtain a social recognition in most parts of the Malwa region and has been

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[2] The *Malwa* region was a separate political unit in the time of the ancient *Malava* Kingdom which geologically occupied a plateau of volcanic origin. Administratively speaking, the historical *Malwa* region includes the present Madhya Pradesh districts of Agar, Dewas, Dhar, Indore, Jhabua, Mandsaur, Neemuch, Rajgarh, Ratlam, Shajapur, Ujjain, and parts of Guna and Sehore, and the Rajasthan districts of Jhalawar and parts of Kota, Banswara and Pratapgarh.

[3] By "tribal communities" I mean communities that are classified as Scheduled Tribes (ST) as per Indian Constitution. The Bhils spreading across western-central India, the Saharias residing in Madhya Pradesh and Rajasthan, and the Dhodias and Dublas of Maharashtra, Gujarat, Daman and Diu are among the tribes who practice *natra.*

playing an important role in regulating personal relations and kinship arrangements. In the courts, whether *natra* should be acknowledged as a valid form of marriage remains a debate. Navigating through the available High Court and Supreme Court judgements in India dated from the early 19th century to the present, this paper unpacks the judicial debates over *natra* marriage, with an attempt to understand the court's stance towards "unconventional" forms of marriage prescribed by customs, thereby bringing out more nuances when it comes to the discussion on the institution of marriage.

A Custom with Long History in Dealing with "Civil Matters"

The formal documentation of the practice of *natra* in India can be traced back at least to the early 19th century. Harry Borradaile, a British official who compiled the civil cases adjudged by the Court of Sudder Adawlut of Bombay between 1800-1824, appears to be the first to officially note the practice of *natra* in India. In his two-volume report (1862;1863), six cases are found to be with regards to *natra*. The earliest amongst them is the 1809 case of Hurka *Shunkar v. Raeejee Munohur*.[4]

In this case, Hurka Shunkar appealed to the Sudder Court against a previous judgement that ordered him to restore Raeejee Munohur's wife, who had earlier claimed a divorce from Munohur but the caste elders did not grant it. In a note, the court recorded the clarification of the caste elders that Shunkar's relationship with Munohur's wife could actually be acknowledged as a *natra*, or second marriage, which was allowed by their caste rules; while they did not intend to question the legitimacy of *natra*, it was due to Munohur's absence that they could not grant his wife a divorce. In two later cases, both arose out of disputes over inheritance, the Sudder Court held that a widow, on marrying again by contracting *natra*, would no longer be entitled to her deceased husband's property.[5] In both cases, "*natra*" was explicitly equated with "second marriage" in the court's judgements without confusion.

Hindu Marriage, as prescribed by the *Sastric* Law, is conceptualized as "an eternal and sacred bond which united the husband and wife" and thus indissoluble (Virdi 1972, 20). While it has been believed that a Hindu woman, once married, remains forever linked with her husband even after his death (Virdi 1972, 19), the above few cases, nevertheless, imply that remarriage of Hindu women, including widows, not only did happen under the custom of *natra*, but was legally recognized by the court as well. Interestingly, in the 1814 case of *Huree Bhaee Nana and Son Bhugoo v. Nuthoo Koober*[6] and the 1822 case of *Muhashunkur Khooshal v. Mt. Oottum and Others*[7], it was the men who had contracted second marriages with other women through *natra*, and were hence sued by their first wives who demanded either a divorce or a

[4]Harry Borradaile, Reports of Civil Causes Adjudged by the Court of Sudder Adawlut for the Presidency of Bombay between the Years A.D. 1800 and A.D. 1824. (Volume I) 391-393 (1862).

[5] See *Ramkoonwur v. Ummur* (1818) *id.* at 458-60, and *Hurkoonwur v. Ruttun Baee* (1820) *id.*at 475-7.

[6] See *id.* at 65-74.

[7]See Harry Borradaile, Reports of Civil Causes Adjudged by the Court of Sudder Adawlut for the Presidency of Bombay between the Years A.D. 1800 and A.D. 1824 (Volume II) 572-576 (1863).

repudiation of the "*natra* wife".[8] Whereas the court in the former case considered contracting *natra* under particular circumstances "warranted by the rules of the caste [to which both parties belong] and laws of *Sastra*" (Borradaile 1862, 68) and dismissed the suit,[9]an opposite result was obtained in the latter – the court granted the divorce to the wife, on the grounds that it was against the caste rules of the parties to marry a second wife during lifetime of the first spouse and the defendant must disclaim one or the other. In other words, what emerges as the basis for the court to take a stand, as indicated in these two cases, is that "whether *natra* exists as a custom in the caste to which the parties belong". As Sripati Roy (1911) writes in her discussion on customs and customary law in British India,

According to family, caste, local and tribal customs, various descriptions of marriage are prevalent amongst Hindus and those who are not strictly speaking Hindus. These customary forms of marriage, when duly performed, are as valid and binding as any marriage celebrated in orthodox or regular form. British Courts are bound to recognize such customary marriages if custom is satisfactorily established (Roy 1911, 286).

The court's position to acknowledge *natra* as a binding custom on the basis of its existence among the concerned community can be subsequently found in several other cases that occurred after Independence. A notable example would be the 1961 case of Rewaram Balwant Khati and Anr. v. Ramratan Balwant Khati and Ors.,[10] which involved disputes over land succession between the deceased's two sons from his first marriage and three sons from his *natra* relationship. In this case, the Madhya Pradesh High Court made a decision to declare the latter as the deceased's legal heirs by holding his *natra* marriage legitimate, taking into consideration that "amongst the Khatis, to which community the parties belong, *natra* form of marriage is possible even when the former husband is alive".

It was further noticed by the court that "the dissolution [of the first marriage] takes place in different shapes. Either the former husband is paid some *zagada* money or he does not care to ask for any". Four decades later in the 2004 case of *Harinarayan Khati v. Rekhabai*,[11] which appears to be a dispute over spousal maintenance involving parties from the Khati community again, the court asserted the same position by affirming the opinion of the lower court, who accepted the respondent's evidence concerning the existence of the "custom of dissolution of marriage and second marriage in *natra* form" in their community. Consequently, the respondent was acknowledged as the legal spouse of the appellant who shall thus be entitled to maintenance.

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[8] However, Borradaile points out in his note to Huree Bhaee Nana's case that "*natra*" should refer "solely to a woman marrying again". He, therefore, holds the application of the term "*natra*" to the second marriage of a man "improper, unless the man's second wife had been married before". See *id*.*3*at 66.

[9] According to Borradaile's report, both parties of this case belonged to the "Lewa Koonbee" Caste residing in today's Gujarat. See Borradaile, *id*.*3* at 65.

[10]*Rewaram Balwant Khati and Anr. v. Ramratan Balwant Khati and Ors.*, 1963 AIR (MP) 160.

[11]*Harinarayan Khati v. Rekhabai*, 2004 (4) MPHT 270.

In its judgement of the 1990 case of Ganga Bai v. Brij Lal,[12] the Madhya Pradesh High Court took the point made by the Trial Court that "*natra*, a customary matrimonial alliance recognized by the community to which the parties belong, had in fact taken place much before the coming into force of the Hindu Marriage Act, 1955" and eventually held the *natra* marriage in question valid. Likewise, in the 2000 case of *Chandarsingh v. Nanibai and Ors.*,[13] the court maintained that "in the applicant's society custom of *natra* marriage is prevailing and it is recognized as a valid marriage for all purposes". In a rather recent case of Shri Gopal v. Smt. Pushpabai that was heard in 2016,[14] the court has also taken a clear stance in recognizing the validity of the *natra* marriages between the parties, contending that "as per the tradition prevalent in their caste, *natra* is permissible".

Natra, to be sure, represents only one of the various customary forms of second marriage practiced in different parts of India. Roy, for example, notes *pat* amongst the Marhattas and *natra*in Gujarat as two of the customs under which second marriages for Hindu women are rendered valid (1911, 291). P. K. Virdi (1972) holds that though dissolution of marriage is considered sinful as per the *Sastric* Law, the Hindus in India are in fact "familiar with divorce" if one looks into the field of custom. In addition to *pat* in Maharashtra and *natra* in Gujarat as noticed by Roy earlier, Virdi further notes several other types of custom followed by different communities across India under which a Hindu marriage can be dissolved and a woman can validly remarry: for example, the custom of "*karewa*" or "*darewa*" in North India allows a widow to remarry, whereas remarriage of a woman deserted by her husband is legitimate under the custom of "*serai udiki*" among the Lingayat community of Karnataka (Virdi 1972, 33-35).

Significantly, in the 1989 case of *Shakuntalabai and Anr. v. L.V. Kulkarni and Anr.*[15] occurring in Karnataka where the legitimacy of an alleged second marriage contracted in the "*udiki*" form was contested, the Supreme Court finally decided to recognize *udiki* as an "ancient and unbroken custom" of remarriage among the Lingayats "which itself implied the dissolution of previous marriage of a woman and had been judicially noticed by the courts". In the opinion of the Supreme Court, the customary remarriage among the Jats of Punjab, *pat* in Maharashtra as well as *natra* in Gujarat among the lower castes are some customary practices similar to *udiki* in the South, through which "not only a widow, but a wife who has been deserted or put away by her husband, may marry again, and will have all the rights of a lawful wife".

Through her ethnography in northwest Madhya Pradesh covering both districts of Shivpuri and Gwalior, Livia Holden (2008) finds that the custom of "*dharicha*", which is generally used as a synonym of *natra* in this area, has been commonly practiced among the Hindus under which a woman can freely remarry another man after ending the matrimonial tie with

[12]*Ganga Bai v. Brij Lal*, II, 1992 DMC 514.
[13]*Chandarsingh v. Nanibai and Ors.*, II, 2000 DMC 660.
[14]*Shri Gopal v. Smt. Pushpabai*, WP-7533-2015.
[15]*Shakuntalabai and Anr. v. L.V. Kulkarni and Anr.*, AIR 1989 SC 1359.

her spouse. According to the local practices, *dharicha* happens along with another custom called "*chor-chutti*" that denotes a deed of releasement after which both the husband and wife are "set free". A case will then be settled by the panchayat to fix an amount of compensation to be given to the first husband by the second one, in some cases to the woman's parents as well. Remarkably, before India's independence, such custom of remarriage was legally recognized by the Princely State of Gwalior who put into force the "*dharicha* rules" in 1900, which was later replaced by the "*Kavayad Natrava Dharicha*" (Regulation of *Natra* and *Dharicha*) in 1908, thereby making it a legal obligation for people who perform *dharicha/natra* to register before the court.[16] Following national independence in 1947, the Regulation of *Natra* and *Dharicha*has ceased to have effect, and the registration of remarriages at the court no longer takes place. However, the practice of *dharicha/natra* continues to be customarily sanctioned in this area, and women who seek to remarry have turned to the notary public before whom an affidavit is signed and attested (Holden 2008).

Holden's case studies show that the main purpose of the notary procedure is, practically speaking, to ensure that there will be no confusion in the coming future about the settlement of compensation on the basis of a *dharicha/natra* marriage. But interestingly enough, by "performing the formal procedure legitimizing their decisions in the eyes of the official legal authorities", Holden writes, "not only do the spouses contractually fix the terms of their matrimonial relationship, but, and above all, they officially celebrate their remarriage, which therefore acquires a legitimacy that goes beyond the boundaries of their community's law" (2008, 92).

In Holden's opinion, the notary procedure hence plays a role equivalent to formal registration of marriage in the particular context of northwest Madhya Pradesh, though the evidentiary value of affidavits in the court can be debatable.[17] Furthermore, while "first marriages" are, in most cases, solemnized by Hindu rituals and seldom registered, there seems to be, ironically, a much greater legal certainty on these *dharicha*/*natra* marriages, which are proven by legal documents. Subsequently, despite not a legal form of marriage, the custom of *dharicha/natra*in northwest Madhya Pradesh seems to have developed its own trajectory, in Holden's words, "towards the realm of official law" (2008, 92).

Delegitimizing *Natra*: "The Value of Hindu Laws"

The State Government of Madhya Pradesh once seemed almost ready to legalize *natra*. In 2013, the final draft of Madhya Pradesh Women's Policy (*MP Mahila Niti*) with an endorsement of a provision that sanctions live-in relationships was submitted to the State Government for approval, where "the '*natra* tradition', prevalent in Jhabua, Dhar and Rajgarh region, under which a married woman could get into another relationship after the man agrees

[16] *See* Vasudha Dhagamwar, Law, Power and Justice: The Protection of Personal Rights in the Indian Penal CodeAppendix 1(1992); Livia Holden, Hindu Divorce: A Legal AnthropologyAppendix A (2008).

[17] Holden notes that affidavits are mere individual statements, "whose value in a court of law is uncertain". Some of her lawyer respondents also stated that "the affidavits are nothing else than personal statements declaring one's own free status after divorce" and thus "not really a legal practice". See *id.* at 151.

to pay bride money to the first husband and her parents" was specifically cited as a representative case.[18] In the opinion of the state's Women's Commission who proposed the provision, practices like *natra* constitute an exploitation of women as whoever enter such relationships and children from such alliances would have no claim to any legal right. Believing that "legal protection will go a long way in empowering women and children", the proposed provision suggested to "treat the live-in partners legally at par with a widow or a divorcée".[19]

Madhya Pradesh's Bharatiya Janata Party (BJP) led Government eventually did not accept this proposed provision to be part of its Women's Policy.[20] The then Minister for Women and Child Welfare, Ranjana Baghel, was ironically the first to openly criticize the draft provision on moral grounds, holding the idea of legitimizing live-in relationships "immoral and one that would promote anarchy in society".[21]Likewise, Sarita Deshpande, the then chairperson of Madhya Pradesh Social Welfare Department strongly opposed the provision "as it was reprehensible and against Indian traditions".[22] At the same time, Kaptan Singh Solanki, a senior BJP leader and a then member of Rajya Sabha, also made his stand against the draft provision by underlining the ideology of Rashtriya Swayamsevak Sangh (RSS) which "runs parallel with Indian traditions and values" and thus "does not approve steps like giving sanction to live-in relationships".[23] Solanki, however, added that if the provision would only be made for tribal women and children instead of all individuals of the state, "it could be necessary to bring in the sanction".

It is not surprising that "Indian traditions", or "Hindu traditions" more precisely, were used as the grounds for denying the legitimacy of relationships or unions that do not fit into conventional patterns. The 1864 cases of *Reg. v. Karsan Goja and Reg. v. Bai Rupa*[24] appear to be the earliest such attempts to delegitimize *natra* by the administrator. In this case, Karsan Goja, who belonged to the Talapda Koli caste residing in the Surat region, was charged with adultery under Section 497 of the Indian Penal Code (IPC) for having sexual intercourse with Bai Rupa from the same caste, who was on the other side charged under Section 494 of IPC

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[18]Narendra Ch, *Madhya Pradesh to Be 1st Indian State to LegaliseLive-in-Relationships*, Meri News (April 30, 2013), http://www.merinews.com/article/madhya-pradesh-to-be-1st-indian-state-to-legalise-live-in-relationships/15884820.shtml; Manjari Mishra, *Madhya Pradesh to Recognize Live-in Relationships*,The Times of India *(*April 30, 2013), https://timesofindia.indiatimes.com/india/Madhya-Pradesh-to-recognize-live-in-relationships/articleshow/19794001.cms.

[19]*id.*

[20]Rakesh Dixit, *Live-in Relationships: Is MP Mulling An Escape Route?*India Legal (January 21, 2018),http://www.indialegallive.com/special-story/live-in-relationships-is-mp-mulling-an-escape-route-42757

[21] Chandna C. Arora, *Will Madhya Pradesh Okay Live-in Relationship?*Firstpost *(*May 4, 2013), https://www.firstpost.com/indi a/will-madhya-pradesh-okay-live-in-relationship-751923.html; Dhiman Chattopadhyay, HemalAshar and PhorumDalal, India *Is No Country for Women*,Mid-Day *(*May 12, 2013), https://www.mid-day.com/articles/india-is-no-country-for-wom en/213040

[22]*id.*

[23]See *id*.

[24]See *Bombay High Court Report (BHCR) 1864-1866, Vol. 2*, pp.117-125. Judgment accessed from *Bombay High Court Judges' Library*: http://bombayhighcourt.nic.in/libweb/lawreports/BHCR/1864-66%282%29BHCR/bhcrvol2.1.html.

for marrying again during the lifetime of her husband. Both the accused pleaded not guilty, contending that they had contracted a *natra* marriage in accordance with the custom of their caste, through which a woman is permitted to leave her husband and marry another man during her husband's lifetime without his consent. The Bombay High Court rejected the legitimacy of the alleged *natra*, noting that,

We are of opinion that such a caste custom as that set up, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu law; and we hold that a marriage entered into in accordance with such a custom is void (BHCR 1864, 125).

Upholding "the spirit of the Hindu law", the court, on the one hand, maintained that Bai Rupa cannot be the wife of both her husband – with whom the marriage had not been legally dissolved – and Karsan Goja, for it being "peculiarly abhorrent to the principles of Hindu law" (BHCR 1864, 120). On the other hand, foregrounding the "interests of morality", the court stressed that a woman should not be given unconditional right to leave her husband or else "the marriage tie would have no force at all" (BHCR 1864, 121). It was also a concern of the court that sexual intercourse outside of marriage, tolerated by caste customs in cases like this, "would reduce its members to the level of the beasts of the field" (BHCR 1864, 121).

Recalling the cases discussed in the beginning of this paper, it can be seen that until the 1820s, the custom of *natra* were recognized by the courts simply on the basis of its evidentiary existence among the concerned communities. The court's stand, nevertheless, has changed drastically since the mid-19th century. Subsequent to Bai Rupa's case, in the 1868 case of Reg v. Manohar Raiji,[25] in which the accused denied the charge of adultery with a woman whose husband was alive by stating that they had contracted a *natra*, the judge not only refused to recognize the custom of *natra*, but went even further to make it an issue of "low caste immoralities" by linking it with the corruption of female sexuality:

The remaining defence of the accused is that he acted according to the universal custom of his caste (LeowaKunbi); but I do not consider this custom sufficiently proved. The only evidence that has been given is that the married females of that caste are in the habit of eloping with other men, and that sometimes their husbands condone the bigamy (BHCR 1868, 18).

The judge then went on to argue that even if the custom was proved, the court was bound by the decision in Bai Rupa's case which held the custom of *natra* illegitimate "as the custom was a vicious one, and entirely opposed to the Hindu law" (BHCR 1868, 18). Similarly, in the 1870 case of *Uji et al. v. Hathi Lalu*,[26] where the plaintiff sued his wife who had allegedly contracted a *natra* with another man for restitution of conjugal rights, the court reasserted the point made in the earlier judgements that "such a custom was clearly opposed to the Hindu

[25]See *Bombay High Court Report (BHCR) 1868-1869, Vol. 5*, pp.17-19. Judgment accessed from *Bombay High Court Judges' Library*: http://bombayhighcourt.nic.in/libweb/lawreports/BHCR/1868-69%285%29BHCR/bhcrvol5.html.
[26]See *Bombay High Court Report (BHCR) 1870, Vol. 7*, pp.133-136.

law" (BHCR 1870, 135). The court, distrusting the evidence offered by the defendant to prove the custom of *natra* in their caste, held that "a custom which authorizes a woman to contract a *natra* marriage without a divorce on payment of a certain sum to the caste" was an "immoral custom, which should not be recognized judicially" or else "it would be nothing more or less than legalizing adultery" (BHCR 1870, 135-136).

Prashant Iyengar (2010) perceives the Bai Rupa case of 1864 as a striking example of the "moral reform" of local customs by the British administrator through law as part of its civilizing mission. Holding the establishment of an organized judiciary since the late 18th century as a major component of the colonial state's "cultural project of control" in India, Iyengar argues that it was "the colonizers' 'enlightened' imagination of cultural restraint" (2010, 4) that had led them to the search for the "authoritative" religious texts in order to set up a modern system of uniform Indian Hindu law to govern all the natives' civil matters. Such a mission eventually "resulted in the installation of a brahmanical textual tradition as the default norm" (2010, 5) owing to the colonizers' dependency on the Brahmin interlocutors. Consequently, customs and local practices that had fewer or no textual sources got categorized as "less moral". A custom like *natra*, which "deviated from normative sexuality" (Iyengar 2010, 7) as it went against the brahmanical norms that upheld marriage as a sacrament, must therefore be disapproved on grounds of morality and "rationalized".

Iyengar's argument to a significant extent resonates with Samita Sen (1998) and Flavia Agnes (2004), both of whom have written about the negotiation of local customs within the law in colonial India. Tracing the transformation of judicial structure of British India, Agnes explores a "gradual process of homogenizing the local customs and practices which could be regulated through the state machinery" (2004, 41). She finds that a wide range of customs practiced among different communities which had no *Sastric* authority had gradually been disapproved by the administrators as a result of the "brahminization of laws" starting from the late 18th century (Agnes 2004, 44). Sen's discussion particularly focuses on the "brahminization of marriage" in the 19th century India through which a "singular definition of marriage" was constructed by the British administrator who brought marriage under criminal jurisdiction. As she observes, while the only acceptable legal definition of marriage appeared to be one that conformed to upper class and high caste norms which upheld a "putative Hindu ideal of womanhood" (Sen 1998, 82), marital practices that violated the brahmanical norm of life-long sacrament "were to be considered illegitimate and presumed 'deviant'" (Sen 1998, 84).[27]

Sen thus criticizes that the brahminization of marriage "was a means of denying poor and lower caste women their customary rights of divorce and remarriage and thereby ensuring the control of the male head of the family" (1998, 82). This view is echoed by both Agnes and

[27]The "brahmanization" manipulated by British administrators has been discussed by many other scholars as well. For example, D. D. Kosambi (1985) is sharply critical of the British "brahmanising tendency" which ignored the laws enforced by caste *sabhas* and focused exclusively on brahmanic texts for the formulation of "Hindu" law, Lata Mani (1987) raises question about the centrality and importance given to brahmanic scripture by the British and the construction of "Hindu" law from these texts, and Lucy Carroll (2007) looks into the Hindu Widow's Remarriage Act, 1856 to see how the value of orthodox Hinduism was propagated by the British administration through law.

Iyengar. Iyengar points out that women of lower castes, who used to have more freedom in terms of divorce and remarriage, were the ones affected the most by the universalization of brahmanical ideal (2010, 7). Agnes in a later work (2009) finds that women from the lower castes, who had been enjoying a "customary right of remarriage", were badly deprived of their rights to property after the enactment of the Widow Remarriage Actin 1856. As she argues, this was, again, an outcome of generalizing the Hindu doctrines in accordance with brahmanical norms through the building up of a "modern" legal structure.[28]

It is pointed out by Agnes that "the period between 1850 and 1930 witnessed the elimination of a wide range of customs which diverged from the Anglo-Hindu law as the standard of proof required was very high" (2004, 52). Indeed, despite that British Courts are "bound to recognize customary marriages if custom is satisfactorily established" as Roy (1911, 286) rightly states, it is extremely difficult to "prove" the existence of a custom, and the evidence would not be easily accepted by the courts (Sen 1998; Iyengar 2010). In case of customs of second marriage like *natra*, what a court would take into consideration to decide whether to acknowledge them or not, then, became: Does the second marriage contracted through such custom meet the 'legal definition' of marriage, i.e. one that complies with brahmanical norms?

In the Bai Rupa case of 1864 and the two cases subsequent to it discussed above, the custom of *natra* was held "opposed to the Hindu law" and thus "immoral" because it permitted a woman to marry again during lifetime of her husband – which went against the brahmanical norm of life-long sacrament. The same argument can be seen in a later case heard by the Bombay High Court in 1875, where the *natra* marriage in dispute was invalidated for its taking place during lifetime of the woman's legal spouse, and the son from the *natra* union was consequently denied entitlement to his diseased father's property.[29] Following the enactment of IPC in 1860, "marrying again during lifetime of husband or wife" became a criminal offence.[30] Almost a century later, the Government of independent India reiterated the brahmanical norm of life-long sacrament in the Hindu Marriage Act, 1955, in which "neither party has a spouse living at the time of the marriage" was prescribed as the foremost condition for a Hindu marriage to be solemnized.[31]

In several other cases that occurred after Independence, the same Brahmanical norm was upheld again and again by the court to disapprove *natra* marriages. For instance, in the 1959

[28]Under the judicial interpretation of Hindu law, a widow could claim her rights to inherit her late husband's property only on the presumption that "she was the surviving part of her husband's being". Therefore, once remarried, she lost her status to inherit. See (Agnes 2009, 25-27).

[29]Rahi Wife of Teja Kurad and Ors. v. Govinda Valad Teja, (1877) ILR 1 Bom 97.

[30]The Sec. 494 of IPC reads: "Marrying again during lifetime of husband or wife – Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

[31]Section 5(i) of the Hindu Marriage Act, 1955 reads: "A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: (i) neither party has a spouse living at the time of the marriage".

case of *Pirmohammad Kukaji v. The State of Madhya Pradesh*[32] and the 1984 case of *Dalichand and Anr. v. The State of Rajasthan and Anr.*,[33] both of which involved prosecution of criminal offences committed by the "legal husbands" against their wives who had contracted *natra* marriages with another man, the High Courts' position against the validity of *natra* on grounds of insufficient evidence to prove the legal dissolution of previous marriages had resulted either in the accused's acquittal from criminal charges or reduction of sentence. In the 1995 case of *Shakubai v. Kanchanbai and Ors.*,[34] the appellant's plea against the earlier decree that annulled her *natra* marriage was dismissed by the Madhya Pradesh High Court, for the alleged *natra*marriage being in contrast with the Hindu Marriage Act. Likewise, in the 2005 case of *Gajraj v. Fulkunwar Bai Alias Fulwati Bai,*[35] the appellant's claim for maintenance from her *natra* husband was turned down by the Madhya Pradesh High Court, who held her alleged *natra* marriage void given that "her first marriage had not been legally dissolved".

In some other cases, the court pushed the brahmanical norm of life-long sacrament even further by insisting that "essential ceremonial and ritual rites in accordance with the Hindu Law" must be performed to solemnize a legitimate marriage. The 2004 case of Sunitabai and Ors. v. Lalu[36] is one such instance where the applicant was declined maintenance from her *natra* husband as she failed to prove that her alleged *natra* marriage was solemnized following the Hindu rituals in which "*saptapadi*" should be performed. In other three cases that also happened post the 2000s, all three plaintiffs were denied entitlement to the property of their deceased *natra* husbands as their alleged *natra* marriages were held invalid by the High Courts, not only for their occurring when one of the parties still had a legal spouse alive, but also for the lack of record as to any ceremony was performed to solemnize the marriages according to the Hindu law.[37]

From "Recognized" to "Rationalized", and the Ongoing Debates

A "custom", as Sripati Roy puts forward, is "a rule of conduct which people observe and follow without any coercion from anybody" which "has the express or tacit sanction of the collective will or common consent of people among whom it prevails" (1911, 5). It comes into existence and becomes binding through repetitions of practice from generation to generation. Whereas law is created by the will of a sovereign authority, custom, having no direct author, "grows and fashions itself as the exigencies of a community arise and need" (Roy 1911, 9). Significantly, custom constitutes a fundamental source of law (Roy 1911; Furnish 1982; Bederman 2010). As P. K. Menon (1988) points out, in the Indian context, the personal law systems have emerged as a result of the codification of local customs.

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[32]*Pirmohammad Kukaji v. The State of Madhya Pradesh*, AIR 1960 MP 24, 1960 CriLJ 83.
[33]*Dalichand and Anr. v. The State of Rajasthan and Anr.*, 1984 WLN 41.
[34]*Shakubai @ Geetabai v. Kanchanbai and Ors*., I (1996) DMC 256.
[35]*Gajraj v. Fulkunwar Bai Alias Fulwati Bai*, II (2006) DMC 55, 2005 (3) MPHT 458.
[36]*Sunitabai and Ors. v. Lalu*, I (2005) DMC 49.
[37]*Mst. Loli and Ors. v. Mst. Durghatiya and Ors.*, AIR 2001 MP 188; *Parmanand and Anr. v. Jagrani and Ors*., AIR 2007 MP 242; Ambaben vs Heirs of Decd. Raiben (2011).

From "recognized" to "rationalized", the second half of the 19th century witnessed a drastic discursive shift in the way *natra* was conceptualized, which consequently led to the delegitimization of this custom. This shift was driven by the British administrators' civilizing project of establishing a modern legal system in the colonized India. Imagining a uniform system of Hindu law that universally applies to all Indian Hindus, the British administrators endorsed brahmanical norms as the authoritative textual source. The "brahminization of laws", as Flavia Agnes terms it, subsequently resulted in what Samita Sen calls the "brahminization of marriage" that upheld the *Sastric* idea of life-long sacrament, and eventually brought about a "moral reform" of local customs such as *natra*, which contradicted the normative Hindu definition of marriage.

While the discourse of "Indian traditions" continues to be upheld by the courts till recent times, the 2019 case of *Mukesh v. The State of Madhya Pradesh* opens up another interesting perspective towards the debate. In this case, Mukesh sought to revise his conviction under Section 323 and 498-A of the IPC as well as the Dowry Prohibition Act that had come about as a result of a complaint filed by his *natra* partner, Sangita bai, for cruelty and dowry harassment. Denying Sangita bai as his legally wedded wife by holding that her legal spouse was still alive and their marriage has never been dissolved, Mukesh argued that those charges against him cannot be established as they are to be committed by one party to a marriage to another.[38]

Referring to a 2011 Supreme Court judgement, the appellate Court was of opinion that the *natra* relationship between Mukesh and Sangita bai can be taken as a "relationship in the nature of marriage" as defined in the Protection of Women from Domestic Violence Act, 2005. Holding such relationship akin to a "common law marriage", the appellate Court considered Sangita bai as Mukesh's wife and turned down Mukesh's appeal. However, the Madhya Pradesh High Court held an opposite point of view.

Drawing upon a 2014 Supreme Court judgement, the High Court made clear that "the relationship in the nature of marriage" cannot be equated to "marital relationship" as the latter is based on law whereas the former is "purely an arrangement between the parties". Therefore, Sangita bai, being a legally married wife of someone else, could not live in relation as a wife with Mukesh as long as her marriage continued to exist and her legal spouse remained alive. Considering that the prerequisite of Section 498-A of the IPC and the Dowry Prohibition Act was missing, the High Court eventually set aside the charges against Mukesh under both provisions while sentence under Section 323 of the IPC was sustained.

A similar assertion was raised by the appellant of the 2020 case of Shanti Bai vs The State of Madhya Pradesh, who was prosecuted for dowry death and cruelty of her son's *natra* partner, to seek bail. She insisted that the charges against her are invalid given that the deceased was not her son's legal spouse. However, the Court took a stance to acknowledge the *natra* partner

[38]Section 498-A of the IPC states that punishable offences are to be committed by "husband of a woman" and the Dowry Prohibition Act applies exclusively to parties to a marriage.

as a wife this time, stating that "marriage through *natra* is a largely accepted traditional form of marriage" and hence dismissed the bail application. Till today, judicial debates over *natra* marriage go on, which has pushed us to think through the question Butler (2002) has earlier posted to us again: what forms of relationship ought to be legitimated by the state? How do we mark the field within which lie relationships that are intelligible, speak able, or even thinkable – and can thus be considered "legitimate"?

Grounds for Divorce: Need for Reforms

Purti Srivastava[1]
Indrayudh Chowdhury[2]

Introduction

A Divorce can be described as "an official or legal process to end a marriage"[3]. In India, marriage is considered sacramental and has considerable historical significance. The basic idea of Monogamy was firmly implanted in the Indian society during the Rig Vedic period, wherein the purpose of marriage was to empower a man to make sacrifices to the gods and procreate to create offspring, by becoming a householder. Marriage (Vivaha) was one of the sacraments that each person had to undergo and is described under the role of a Grihasthashrama (householder), as described as the four stages of life[4].

The Vedic or the post-Vedic literature makes absolutely no reference to divorce proceedings. Manu stated that a husband cannot liberate his wife either through sale or abandonment, suggesting that the marital bond cannot be broken in any way. He declared that "let mutual fidelity continue till death; this, in brief, may be understood to be the highest dharma of the husband and wife"[5]. The author of the Dharma Shastra believed that marriage is indissoluble when completed by Homa and Saptapadi. Kautilya in his Arthashastra says that if it is celebrated in one of the first four forms, namely Brahma, Arsha, Daiva and Prajapatya, then there can be no dissolution of marriage. However, if the marriage was in the form of Gandharva, Asura or Rakshasa, then by mutual consent the tie could have been dissolved.

While the Hindu law did not allow for divorce, it allowed the wife and husband to be separated under various circumstances. According to Kautilya, a woman can abandon and marry her husband's brother when her husband becomes a lunatic, a recluse, or a bad character, a state traitor, or has long gone abroad. Similarly, if she acted immorally, was barren, unable to beget a male child, ailing or a spendthrift, the husband was allowed to abandon his wife. But the situation changed with the introduction of the Hindu Marriage Act, 1955.

Section 13 of the HMA[6][7] talks about divorce, and the grounds are given below –

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[1] ***5th Year Student, School of Law, Bennett University, Greater Noida, Uttar Pradesh***
[2] ***5th Year Student, School of Law, Bennett University, Greater Noida, Uttar Pradesh***
[3] Cambridge Dictionary
[4] Ashrama Dharma
[5] Agarwal, R.K, Hindu Law, Central Law Agency, Print 2014.
[6] Hindu Marriage Act, 1955
[7] Divorce:

a) Adultery
b) Cruelty
c) Desertion
d) Conversion
e) Insanity
f) Leprosy
g) Venereal Disease
h) Renunciation
i) Presumption of Death

Special Grounds available to only Women are-

a) Pre-Act Polygamous Marriage
b) Rape, Sodomy and Bestiality
c) Non-resumption of Cohabitation after a Decree/Order of Maintenance
d) Repudiation of Marriage

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(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party
(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or
(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
(ii) has ceased to be a Hindu by conversion to another religion; or
(iii) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground
(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.
(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,
(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or
(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or
(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or
(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Despite the long strides of advancement in the changing phycology of society towards how they perceive the concept of Divorce, still there exist certain gaps and loopholes in the present legislation. The researcher endeavours to analyse various legislations with the given guidelines in this context and draw conclusions in the form of reforms needed in the present laws for the purpose of completing this paper.

Theories of Divorce

There are five distinct theories of divorce according to the various law, out of which four are recognised by Hindu Law. The five are as follows –

(1) Divorce at Will

This theory postulates that every individual is free to divorce their partner at their will, i.e., if they want to. Such a divorce can be sought even if only one of the individuals in a relationship wants it, while the other opposes it. This concept is not realised under Hindu law but can be seen in Muslim law.

(2) Frustration of Marriage

It is the law that if a condition of frustration arises between two contracted parties in relation to each other, the rights and liabilities of both parties are suspended, making the contract null and void. The same can be said to be true for marriages, for what are marriages if not contracts on a social platform? The frustration of a marriage occurs when there is a marital offence wherein one of the spouses is suffering from a physical ailment or mental unsoundness of mind or has changed their religion or renounced the world or disappeared for a long period. In such a situation, the other spouse is allowed to seek divorce on the grounds of the frustration of marriage and is allowed under the Hindu Marriage Act.

(3) Fault or Guilt Theory

Under this theory, there are two distinct parties who are subjected to it, one of them being the **Guilty Party** (who is at fault), while the other is the **Innocent party** (against whom the offence is done). The innocent party is allowed to seek divorce against their spouse when the other party commits a matrimonial offence, which consists of but is not limited to adultery, desertion, cruelty, rape, insanity, sodomy, bestiality, epilepsy, refusal to obey the court's order to pay maintenance to the wife or marrying an underage person. The drawback of this theory is that one of the parties must always be at fault for this to work, otherwise, divorce would not be granted. Also, if both the parties have committed certain matrimonial offences and/or one of the parties forgives the other for their transgression, then also divorce would not be awarded. This is an accepted theory of divorce under Hindu law.[8]

(4) Mutual Consent Theory

The logic behind this theory is that because two individuals enter into a marital relationship out of their own free will, therefore it is conclusive that they must be able to exit the same out of their free will. Under this theory, nobody has to be at fault and instead, both the parties file

[8] Section 13 of the Hindu Marriage Act, 1955

a joint application for divorce. The spouses must want to separate mutually from each other, the failure of which would lead to the irrevocable damages to their lives. The drawback of this theory is that it may allow people to be hasty in getting divorced due to trivial reasons and some argue that the consent of the other party may be obtained with fraud or force, making it divorce by collusion. This is an accepted theory of divorce under Hindu law.[9]

(5) Irretrievable Breakdown of Marriage

Husbands and Wives are interdependent throughout their lives, both mentally and physically. Once this interdependence and emotional attachment between them vaporises and instead malice and hatred for each other, then an irretrievable breakdown of marriage is said to take place. A breakdown of marriage is defined as "such failure in the matrimonial relationships or such circumstances adverse to that relationship that no reasonable probability remains for the spouses again living together as husband & wife."[10] When all the possible avenues for the repair of marriage have been exhausted without any further chance of conciliation, the marriage should be ended without looking into the causes of failure or fixing responsibility, and should be done with maximum fairness & minimum bitterness, distress & humiliation. This is an accepted theory under Hindu law, with case laws supporting it.[11][12]

Historical view of Divorce

If the concept of marriage is legally recognized, divorce must also be a part of it. The concept of divorce must have appeared and evolved after the concept of marriage became monogamous instead of polygamous, and the society shifted from a matriarchal one to a patriarchal one. Before such a time, if individuals were unhappy with their partners, they always had the option of choosing another, but after the evolution of marriage into strict parameters (only between two partners) a different remedy had to become available to those wanting to opt-out of it, giving birth to divorce proceedings. To understand its evolution, we have to analyse the mindset of people during the Vedic period (1400 BC – 1000 BC), when a marriage was considered to be a sacrament and an indissoluble union.

Both the East and the West viewed the women to be inferior to men, just because they were physically weaker, but at the same time, they were also indispensable because they ensured the continuity of the human race. They gave birth to children, who are essential to the survival of society and were their nurturers. Thus, women could not be placed above men but were also not disposable, and therefore came under the protection and rule of men, having the same value as a common property, which could be used by men as they wanted to.

The irony is that ancient Indian literature both put women on a pedestal to be worshiped and at the same time lowered their position to a child-bearer. Manu stated that women should be honoured by everyone, with those who did so being blessed in prosperity by the gods and

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[9] Section 13 B of the Hindu Marriage Act, 1955
[10] Section 13 of the Hindu Marriage Act, 1955
[11] *Naveen Kohli v. Neelu Kohli*, 2006(3) SCALE 252
[12] *Ms. Jordan Diengdeh v. S.S. Chopra*, 1985 AIR 935

those who were opposed to it being cursed by the gods.[13] But at the same time, he also stated that a wife is nothing more than the property of her husband, denying them rights to even property.[14]Certain Vedas and Sruitis have also shown women in a negative light, saying that they have wicked hearts and are weak and wretched.[15] In essence, this meant that women were only worshipped in theory, but the reality was quite different. Thus, women could not part with their husbands as they were no more than their property, making the concept of divorce non-existent during those times.

But some other Smritis[16]did recognise very crude forms of divorce, where a woman was allowed to leave the man. Several conditions were given under them to make it possible. Kautilya said that if marriage is in the form of Brahma, Prajapatya, Arsa and, Daiva, then divorce was not possible but if the marriages were performed in the form of Gandharva, Asura, Rakshasa and, Paisachathen "a woman may abandon her husband if he is of bad character, if he is absent for a long time, if he has become a traitor, or is likely to endanger her life, is an out-caste and lost his virility", with divorce being there if there was mutual disaffection between the husband and wife[17]. This shows us that although divorce was not allowed in ancient India, the modern grounds of divorce were already recognised by few as given in various texts, but was not accepted throughout because of the Manu Smriti (which was widely respected), which was followed by the higher caste who ruled India during that period.

This situation finally changed in the 20th Century in the form of the Divorce Act, 1931, wherein both the husband and wife were given the right to divorce for impotency, adultery, bigamy, desertion, conversion, cruelty, intoxication and in addition to these, if the wife was pregnant at the time of marriage or if either of the spouses disappeared for seven years or more, followed finally by the strengthening of the concept of divorce in the Hindu Marriage Act, 1955.

The Present Situation: Grounds for Divorce

Under the Hindu Marriage Act, 1955 the concept of divorce was originally laid down on the basis of Guilt theory, which gave nine reasons under which both the husband or wife could sue for divorce[18] and two reasons under which only the wife could sue for divorce[19]. The section was later amended in the year 1964, where two reasons based on the breakdown of marriage were added under Section 13(1)(A) and two more reasons based on divorce by mutual consent were added under Section 13(1)(B). The various grounds are given as follows:

[13] G. Buhler. The Laws of Manu & Kulluk Bhatta, Manusmriti.
[14] *Ibid.*
[15] Rig Veda Samhita & History of Dharmasastra.
[16] Like the Narada Smriti and the Parasara Smriti
[17] V. K. Gupta, Kautilyan Jurisprudence & R.P. Kangle, The Kautilya's Arthasastra.
[18] Section 13(1) of the Hindu Marriage Act, 1955.
[19] Section 13(2) of the Hindu Marriage Act, 1955.

(1) Adultery

The concept of Adultery[20]is deep rooted in every society, with it being strictly prohibited. The relation of marriage between a man and a woman was considered sacred and blessed by the gods, and either one of them betraying it resulted in severe consequences. Even the ancient Hindu laws condemned it, even though ironically, they did not recognise divorce at that time.

In adultery, one of the spouses in a marital relation must have voluntary and consensual sexual relations with another individual, who is not their spouse, while the individual committing is married. For e.g., if a man married another individual even though he is already married and has not been divorced to his first wife and has sexual relation with the second wife, then it can be considered adultery as the second marriage is void under Hindu law. Earlier the offending spouse had to be 'living in an adulterous relation' when the other spouse filed for divorce, but that has since been changed, with even a single act of infidelity being considered as adultery.

Proving adultery is very hard, as getting direct proof is very rare. Therefore, the courts accept circumstantial evidences while determining it. The case of *Swapna Ghose v. Sadanand Ghose*[21] can be considered to be a perfect example for a case of adultery, wherein the wife found both her husband and another lying together in bed along-with the testimonies of their neighbours (both direct and circumstantial evidence) which helped in convicting the husband of adultery and allowing the wife to get a divorce.

(2) Cruelty –

Before the Marriage Laws (Amendment) Act 1976, cruelty was only listed as a ground for judicial separation and not divorce, which later on got changed. It is an evolving concept wherein the modern idea includes both mental and physical cruelty. Cruelty can be described as behavioural manifestations due to certain environmental factors in the lives of two married individuals, which causes them to inflict mental or physical pain upon the other party.

Physical cruelty can be easily determined but mental cruelty cannot be, therefore each and every case has to be decided on the basis of its own set of facts. Mental cruelty is defined under Section 13(1)(i)(a) of the Hindu Marriage Act 1955 and can be said to be of such a nature that may not allow a reasonable individual to reside with their spouse, and failure to do so may result in pain being inflicted on the health, mind and body of the suffering individual. The court has also defined mental cruelty as a 'state of mind'[22]. Some instances of cruelty are-

a) Demands for dowry
b) Physically assaulting the spouse
c) False accusations of adultery
d) Threats of suicide

[20] Section 13(1)(i) of the Hindu Marriage Act, 1955.
[21] AIR 1979 Cal 1
[22] *Pravin Mehta v. Inderjeet Mehta,* AIR 2002 SC 2528.

(3) Desertion

Like cruelty, desertion was previously just a ground for judicial separation, but after the Marriage Laws (Amendment) Act 1976, it was also added as a ground for divorce. Desertion implies the denial of all marital commitments and obligations of one party to the other in a marriage, wherein one party abandons the other without fair cause or the consent of the other. In addition to the same, the Supreme Court has held that if an individual leaves the matrimonial home with an intention to desert, but later on changes their mind and shows an inclination to return but is prevented from doing so by the other spouse, then the individual would not be convicted of desertion.[23]

The conditions to prove desertion by any individual are as below –

a) The factum of separation
b) Animus Deserdendi (Intention to desert)
c) Desertion should be without a reasonable clause
d) Desertion should be without the consent of other party to the marriage
e) Statutory period of up-to 2 years must be completed before the filing of a petition for divorce.

(4) Conversion

An individual in a marriage has the right to ask for a divorce if his/her partner has converted to a different religion like Islam, Christianity, Judaism, etc. The interesting part is that the individual converting their religion cannot avail this ground as a reason for divorce, but it is in the hands of the other spouse to do so.

The statement of objects and reasons of the Bill stipulated that a change of religion ipso facto does not mean that the love between the partners ceased to exist, therefore the option to avail divorce was only given to the spouse who remained a Hindu, so that the other individual would not use it as an excuse to get a divorce. Also, mere allegiance to another religion does not mean conversion, but the individual must voluntarily relinquish the Hindu religion and should have a formal ceremonial conversion to another religion to be converted.

(5) Insanity

Insanity can be proved as a ground for divorce if it satisfies the following two conditions–

a) The affected individual (the spouse of the person filing for divorce) must be incurably of unsound mind.
b) The affected individual must suffer chronically or intermittently from such a kind of mental disorder and to such a degree that it cannot be reasonably be assumed that the spouse would stay with the affected individual.

Before the Marriage Laws (Amendment) Act 1976, the affected individual had to suffering from a mental disorder for a period not less than three years before the filing of petition for divorce but after the amendment, the time factor was omitted, and each case was decided on

[23]*Bipinchandra v. Prabhavati,* AIR 1957 SC 176.

its merits. The courts have also made clarifications on what constitutes as 'incurably of unsound mind', stating that feeble-minded individuals or persons of low intellect who are aware and understand the nature and consequences of their acts and are able to control them cannot be grouped under this category. The amendment also included schizophrenia and epileptic insanity into the term 'unsound mind'. The courts must have evidence beyond reasonable doubt to satisfy this ground before granting divorce under it.

(6) Leprosy

Leprosy can be used as a reason to claim divorce by an individual if they could prove in the courts their spouse had a virulent and incurable form of leprosy, which is given under Section 13(1)(iv) of the Hindu Marriage Act 1955. The term 'virulent' here was not borrowed from the medical terminology but was decided as a form a leprosy which was "malignant and/or venomous" by the decisions of different High Courts and the Privy Council.

The reasoning of the courts was that a reasonable man could not be expected to live in matrimonial harmony with a spouse who suffered from an aggravated form of leprosy which could be transferred to the individual. Thus, it was given as a ground for divorce to provide a way out of a marriage.

(7) Venereal Disease

A divorce can only be obtained under the ground of Venereal disease if it is communicable in nature, notwithstanding the period of the disease in the affected individual. It is not necessary for the spouse asking for divorce to contract a venereal disease to claim it under this head as even if their spouse has it, they can file for a divorce. Some examples of venereal diseases are syphilis, gonorrhoea, etc[24].

(8) Renunciation

This unique ground of divorce only exists under Hindu law, as renunciation is a Hindu notion, wherein an individual renounces the world and all worldly matters and enters a holy order to serve God. Such a person would be considered civilly dead and their spouse can file for a divorce.

(9) Presumption of Death

Under this ground, an individual is presumed to be dead, if he/she has not been heard of for a period of at-least seven years, the presumption being that had the person been alive, they would have contacted his/her friends or relatives. The burden of proof that the individual is missing is on the spouse who is claiming for divorce (process given under Section 23 of the Act) and once it becomes a decree, it becomes binding, even if the missing individual comes back to society.

(10) **Special Grounds only available to Women**

[24] (English) Venereal Disease Act 1917

Certain special clauses under the Hindu Marriage Act 1955 give women special grounds under which only they can file divorce proceedings, which are listed below –

a) If the husband has been guilty of rape, sodomy or bestiality after the solemnisation of murder.
b) If the husband fails to pay maintenance to the wife allowed under Section 125 of Cr.P.C., 1973 or fails to resume cohabitation awarded in a decree under Section 18, Hindu Adoption & Maintenance Act, 1956, for a period of over one year or above.
c) If the marriage was solemnised before the wife reached the age of 15 but she repudiated the marriage before she reached the age of 18. Repudiation may be done in express terms or be implied by conduct.

(11) Irretrievable Breakdown of Marriage

The theory of irretrievable breakdown of marriage has already been explained by the researcher in detail in the previous chapter. Such a theory is considered to be very useful as people in marriages who do not wish to remain so but are stuck because they cannot use any of the grounds for obtaining divorce would remain helpless. This theory assumes that marriage between two individuals is based on love and affection, and if it no longer remains to the extent that the relation of the individuals becomes completely irreparable, then it would be better to dissolve the marriage than force them to live together.

The breakdown of relationship is presumed to be de facto. If a couple live separately for a long period of time, with or without a reasonable cause and all their attempts to unite have failed, then it will be presumed under law that the relationship is dead.

The Supreme Court has recommended an amendment to include this theory in the Hindu Marriage Act because they were concerned about those cases wherein divorce could not be granted to marriages which were virtually dead due to absence of the necessary provisions.[25]The only drawback to this is that it can be misused to make divorce easy, as any one of the spouses in a relation can use this ground to dissolve the marriage out of their own pleasure.

Reforms Suggested

India is a country with a diverse culture and a population of around 134 crores. People of various different faiths reside here, and their faiths have different personal laws that govern them. Certain important laws which are necessary to maintain peace and run a country are codified into acts and provisions which have to be followed by every individual of Indian citizenship, but laws of personal nature, like that of marriage, are governed by their religious beliefs. For example, every Indian has to follow the Cr.P.C, but the marriage laws for Hindu, Muslims and Parsi's are different. The different elements of divorces that exists in several ordinances create confusion in courts. Therefore, an effort should be made to create a

[25] *Naveen Kohli v. Neelu Kohli*, 2006(3) SCALE 252

combined personal law based on the various ordinances so that divorce laws can be harmonised and reconciled to create a single act for the whole country.

Next, talking about the theories of divorce, the researcher believes that divorce in Hindu law is very heavily based on guilt theory. Majority of the cases in various courts are some forms of them. People who are stuck in marriages and are not presently able to avail the grounds for divorce are left with no choice but to stay there or try to find excuses to avail one of the grounds, which in itself is an unhealthy practise. The researcher believes that the theory of "Irretrievable breakdown of Marriage" should be promoted and amended into the present laws. This would allow couples whose marriages are beyond repair to quit them. But the legislature should carefully make this law as it has the potential to be misused by people, which would defeat its purpose. It should consider the future implications of this ground while formulating it so that they know it won't have an adverse effect on marriage as a concept.

Finally, the last reform is needed in the thinking of the Indian society as a whole. Since ancient India, wives are thought of as properties of the husband, to do with them as they will. Their will is not of any consequence as she was deemed to be a property who was transferred, and she can be used by her husband. Even though we have progressed a lot since those dark days, some form of this mentality still remains. "Marital Rape", i.e., when a husband rapes his lawfully wedded wife without her consent, is still not considered to be an offence under Indian laws. A woman has her own will and a right to her body, even if she is married. Marital rape should be considered and punished similarly to ordinary rape and should be met with low tolerance. How can the legislature or judiciary justify that a stranger does not have the right to rape somebody, but the husband in a marriage has the right to do so to her wife? This is the most immediate concern that surrounds the present debate about the grounds for divorce and should be addressed immediately by the legislature and the judiciary. Marriage cannot be considered to be an excuse to commit offences on the spouse, otherwise marriage cannot retain its sanctity anymore. Otherwise, all our customs, traditions and beliefs are for nought.

Thus, it is suggested that urgent reforms are needed in the existing laws to unify and code them under a single provision and also follow the various reforms suggested by the researcher. The only precautionary measure to be taken by the legislative is that while making reforms, they must be careful to plug any loopholes that would otherwise make the act of getting reforms pointless. The concept of Divorce must remain beyond reproach so as to maintain faith in the institution of marriage.

Doctrine of Pious Obligation- An Analysis

Harsh Tomar[1]

Abstract

*Under the traditional Hindu Law there was a religious or moral obligation on the sons, grandsons and great-grandsons to discharge the debts of their father, grandfather and great-grandfather which was termed as pious obligation. In this paper, the researcher will depict how the ancient doctrine of pious obligation has changed drastically due to- the judicial interpretation and the passage of Hindu Succession Act 1956. Then the researcher will show what was the effect of these legal actions on the effectiveness and application of the doctrine will be shown. In the end, the researcher has tried to refute the two arguments made by many scholars- **a)** that the doctrine could and should be applied to the daughters after the amendment in 2005 and **b)** it was wrong and hasty decision to delete the doctrine of pious obligation in 2005.*

Keywords: Pious obligation, coparcenary property, debt, coparceners, class 1 heirs, *avyavaharika debts*

Introduction

It is a general principle that debts incurred must be repaid by the debtor. Hindu Law, however, pays special emphasis on payment of debts. Under the traditional Hindu Law, a spiritual or religious duty was cast on the sons to pay the debts of his father. Non-payment of debts by the debtor and his sons was considered a sin which continues to haunt the debtor even in his next life. This theory of a religious or moral obligation on the sons, grandsons and great-grandsons (hereinafter sons) to discharge the debts of their father, grandfather and great-grandfather (hereinafter fathers) is called doctrine of 'Pious Obligation'. The doctrine of pious obligation was in force till the enforcement of Hindu Succession (Amendment) Act 2005.

In this paper, the researcher will depict how the ancient doctrine of pious obligation has changed drastically due to- the judicial interpretation and the passage of Hindu Succession Act 1956. Then the effect of these legal actions on the effectiveness and application of the doctrine will be shown. In the end, the researcher has tried to refute the two arguments made by many scholars-**a)** that the doctrine could and should be applied to the daughters after the amendment in 2005 and **b)** it was wrong and hasty decision to delete the doctrine of pious obligation in 2005.

Comparison between the Modern and the Ancient Doctrine of Pious Obligation

Doctrine of pious obligation was primarily a moral obligation with religious connotation attached to it. According to the Hindu legal literature, one of the reasons why sons were desired was because they would pay the spiritual and worldly debts of his father. Due to the

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fact that the obligation was based on the religious or moral authority a natural corollary it follows that the sons were not supposed to pay the debts which were irreligious or immoral in character (*avyavaharika debts*).

Changes due to Judicial Interpretation

In its ancient form, the emphasis was not that the creditor should get his due, but that the father should not face consequences in his next life due to non-payment of his debts.[2]The ancient texts suggest that the sons were liable irrespective of any property acquired from their fathers.[3]The emphasis was more on the relation between the father and the sons. This was evident from the very meaning of the Hindi term for sons i.e., *Putra*. A son liberates/delivers (*trayate*) his father from hell (*put*) hence, he was called *put-ra* (one who liberates his father from hell).[4]However, the judiciary has modified the obligation as the natural corollary of the absolute right by birth to sons.[5]

Under the ancient doctrine, the son was liable to discharge the debt with interest, the grandson without interest and the great-grandson has liability only when he got any property from the ancestor. However, under the judicially modified doctrine all of them are equally liable to discharge the debt with interest.[6]There is also a distinction as to when this doctrine becomes applicable. According to the *Smritis,* the obligation on sons arises only after the death of the father and as an exception when the father is afflicted with a deadly disease. However, in the modern doctrine, the obligation arises even during the lifetime of the father.[7]

Effect of the Hindu Succession Act, 1956

Though the Hindu Succession Act1956 (HSA) did not expressly make any changes to the doctrine of pious obligation, however, certain provisions have drastically affected the concepts of Hindu Joint Family. Sections 6, 8 and 30 of the act have made serious inroads in the concepts of survivorship and theory of absolute ownership on ancestral property on sons.[8] And as mentioned earlier these two concepts were the basis of the judicially modified doctrine of pious obligation. Hence, the researcher argues that these provisions have made an implicit effect on the application of the doctrine.

As per the proviso to Section 6 of the Act when there is a surviving female Class1 heir or a male claiming through such female relative and is part of the class, then the interest of the coparcener dying intestate shall devolve according to the provisions of the act and not by

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[2]Brihaspati says "He who, having received a sum lent or the like, does not repay it to the owner, will be born hereafter in his creditor's house, a slave, a servant, a woman, or a quadruped".
[3]Volume 1, G.N. JHA, Hindu Law in Its Sources (Indian Press 1930).
[4]George Buhler, The Laws of Manu, Banarsidass (Reprint from Oxford University's 1886 ed.) (1984).
[5]*Anthonyswamy v. M.R. Chinnaswamy Koundan,* AIR 1970 SC 223.
[6]Vijendra Kumar, *Basis and Nature of Pious Obligation of Son to Pay Father's Debt Vis-à-vis Statutory modifications in Hindu Law*, JILI (1994).
[7]*S. M. Jakati v. S. M. Borkar, AIR* 1959 SC 282.
[8]Vijendra, *supra* note 5.

survivorship. It is to be noted that the scope of application of the proviso is too broad and in most of the cases, the property is devolved according to the proviso rather than the main rule. According to the SCs decision in *Commissioner of Wealth Tax v. Chandersen*[9], the son inheriting the coparcenary property as a class I heir of the schedule will take such property as his separate property. It has been interpreted that when a Hindu male succeeds to his father's property under Section 8 of HSA then he will take it as his separate property and his sons and grandsons will have no right by birth on it.[10] Since these sons and grandsons do not have a right by birth in it, then, arguably, they should have no liability to discharge their fathers' debt under the doctrine of pious obligation. Due to such judicial interpretation, the very basis of the liability on the sons i.e., by virtue of the right of ownership by birth in ancestral property stands destroyed.

Additionally, due to such judicial interpretation, one of the most important aspects of this doctrine i.e., piousness or religious character also stands destroyed. If a person inherits any separate property of his father, then to the extent of that share inherited, he will have to pay the debts of his father irrespective of the purpose for which the debts was taken. Hence, if sons inherit property by succession, then they will have to discharge the debt even when it was incurred for an illegal or immoral purpose.[11] It is submitted that when the obligation is conceptualized in such a way the term "pious obligation" itself seems a misnomer.

In this part, it is concluded that the doctrine of pious obligation in the Ancient Indian literature evolved from a moral obligation to a legal obligation. However, in such evolution, the doctrine witnessed tremendous changes in its character. Due to these changes the doctrine has substantially lost its effectiveness. The approach of judiciary in interpreting the doctrine and the concerned sections of the HSA 1956 has been destructive of pious obligation doctrine. Now if son is obligated only in a few rare situations then it is difficult to understand how the very purpose for which the doctrine came i.e., to liberate the father's soul from the weight of these debts is served by the modern doctrine.

Daughters As Liability Bearers Under Doctrine of Pious Obligation (?)

In an unprecedented event by the Hindu Succession Amendment Act 2005 not only daughters were provided equal coparcenary rights but also the doctrine of pious obligation was deleted. To understand the rationale behind this deletion it is important to know that there were two possible alternatives before the Legislators- **1)** to delete the very concept of pious obligation and give daughters the coparcenary rights or **2)** give daughters the coparcenary rights and make the doctrine applicable also to daughters. The Legislators went ahead with the prior alternative.[12] However, many scholars opposed this decision and argued for the second

[9]*Commissioner of Wealth Tax v. Chandersen,* A.I.R. 1986 S.C. 1753.
[10]Paras Diwan, *Ancestral property after Hindu Succession Act 1956—joint family property or separate property? A muddle under tax cases* JILI (1983).
[11]Vijendra, *supra* note 5.
[12] Hindu Succession (Amendment) Act 2005, § 6(4), No 39, Acts of Parliament, 2005 (India).

alternative.[13] Their main argument rests on the fact that since daughters are now given right by birth as coparceners, they should also equally share the liabilities.[14]

To analyse the decision, first, it is to be determined, whether the doctrine can actually be applied to the daughters or not. It is submitted that the daughters could not be made liable, as argued by many scholars. The doctrine of pious obligation as rightly expressed by Justice Mukherjea in *Sidheswar Mukherji v. Bhubneshewar Prasad Narain Singh*[15] was a special liability which can only be enforced against sons and not against any other coparcener. The basis of the obligation, created on the religious grounds, was entirely on the relationship between father and sons. Applying the doctrine to the daughters will be stretching the doctrine too far by the legislators. They could not have modified the doctrine such that it becomes contradictory to its original conception grounded on religious beliefs.

Section 6(4) of amendment Act 2005 does not have retrospective effect hence sons still have to pay the debts contracted prior to this act. This has argued by scholars result in bias treatment towards sons and arguably violates equality principle under the constitution.[16] However, the researcher submits that this argument is flawed. They ignore the fact that the ancient customary practices were biased against women's property rights. Additionally, the constitution allows state to frame enabling provisions for women.[17] These provisions can be biased against men but that doesn't mean that they are unconstitutional. These, in fact, will further the substantive equality principle have enshrined in the constitution.

Assuming that the doctrine could have been applied to the daughters, then the fathers could have, during his lifetime, alienated not only his interest in the coparcenary property but also his daughters' interest. This can be done even for the payment of his personal debts which were neither necessary nor beneficial for the whole property or family.[18]As fathers can mobilize the interests of the sons and the daughters to discharge his debts during his lifetime, hence, under the doctrine, the creditor also has a right to seize the whole joint estate after debtor's death.[19] Also under the doctrine daughters would have to discharge pre-partition debts even after the partition of coparcenary property. These *in toto* would have undermined the property rights of daughters. The only way to protect her share would have been to prove that the debt was incurred for an illegal or immoral purpose. However, judiciary has placed an extra burden on heirs to prove that the creditor was actually unaware of such illegality and immorality.[20] It is submitted that such consequences of subjecting the doctrine to daughters

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[13]Priyanka Goswami, *Abolition of Doctrine of Son's Pious Obligation and Appraisal*, 5(1) IJLP (2018). See also Parliamentary Standing Committee Report no. 7th on The Hindu Succession (Amendment) bill, 2004.
[14]*Id*.
[15]*Sidheswar Mukherji v. Bhubneshewar Prasad Narain Singh*, AIR 1953 SC 487183-184.
[16]A. Gladius and S. Bhuvaneswari, *An appraisal on doctrine of pious obligation and its competent responsibility upon daughters*, 4IJPAM 120 (2018).
[17]INDIA CONST. art. 15, § 3.
[18]Vijendra, *supra* note 5.
[19]Volume 2, Kusum and PP Saxena, Family Law (LexisNexis), (2008).
[20]*Luhar Amrit Lal Nagji v. Doshi Jayanti Lal Jetha Lal*, AIR 1960 SC 964.

would have gone against the purpose and scheme of the amendment act of 2005. The statement of objects and reasons of the amendment act suggests that the purpose behind the amendment was to compensate for the hitherto denied coparcenary rights to the daughters which have resulted in their social and economic oppression. Hence, applying the doctrine could have seriously undermined the very purpose to recognize absolute rights on birth to the daughters and to protect their interest in the property.

The deletion of the doctrine of pious obligation was in consonance with the changing socio-economic scenario. Now the system of nuclear family has emerged as a viable alternative to the joint Hindu family concept. Also, it should be noted that this is not the first time that deletion of the doctrine was suggested. The Hindu code bill, the 174th Law Commission Report, the Kerala Joint Hindu Family System (Abolition) Act, 1975 were some of the legal documents which had already suggested deleting it.

In this part, the researcher has tried to argue that the decision to delete the doctrine was not hasty and was actually the better of the two alternatives. While arguing this it has been shown why daughters cannot be considered as duty bearers under the doctrine of pious obligation and were rightly not made liable through the amendment.

Conclusion

Under the ancient doctrine, the emphasis on the payment of debts was quite strong. However, this was decreased due to the judicial modification of the doctrine and passage of the Hindu Succession Act 1956. The last nail in the coffin was Hindu Succession Amendment Act 2005 which deleted the whole concept of 'pious obligation'. In this research paper, it has been shown why the decision to delete the doctrine was not incorrect and hasty. It was backed by a well-calculated rationale and was in consonance with the changing socio-economic conditions. Additionally, the effectiveness and application of the doctrine was substantially narrowed by the judiciary and their interpretation of concerned provisions of HSA 1956 which added to the reasons for deleting the age-old obligation on sons. It has also been shown that the doctrine could not have been applied to the daughters as was argued by many scholars. Hence, the deletion was also in coherence with the scheme and purpose of the amending act in 2005 where in an unprecedented event, daughters were provided with equal coparcenary rights to sons.

Enquiring the gender equality in provisions for Dissolution of Marriage under Muslim Law

Virali Joisher[1]

Introduction

India is known for its diversity, and this diversity also reflects in the law of the land. The Indian society constitutes of pluralism which leads to the conferment of unequal rights and non-uniform personal laws on individuals belonging to different sects of society.[2] This also causes the violation of individual rights and often the personal laws of different religions cause an impediment in policies that are progressive and prohibit exchange in cultures; and it can be said that this is the inevitable outcome of a multicultural law in the form of different personal laws.[3]

Personal laws for different religions in India are a derivation of customs and norms which are archaic, regressive and often reek of gender inequality. Post-independent India's primary objective was to frame laws which focused on freedom, and economic and political development. It is certain that social aspects of free India were also a goal of the Constitution makers because they enshrined liberty, equality, fraternity, justice, and welfare; but gender equality has not been the priority of India during state-formation.[4]

This paper focuses on the grounds of divorce under Muslim law and inspects whether the laws are unequal for the genders. While the Judiciary, in its landmark judgment of *Mohammad Ahmed Khan v. Shah Bano Begum* (1985)[5] created history for India by reforming laws for the sake of gender equality, these efforts of the Supreme Court lasted only for a short while because the passage of the Muslim Women's Protection of Rights Upon Divorce Act (MWPRDA) in 1986 halted these efforts. The accommodation of Muslims and other cultural minorities in the postcolonial political era has held onto a lot of colonial family law, which also challenges the constitution's goals to attain gender equality.[6]

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[2]Hooker, M. B., Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law (Oxford: Clarendon, 1975)

[3]Glendon, Mary Ann, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe. (Chicago: University of Chicago Press 1989.)

[4]Kandiyoti, Deniz, Identity and Its Discontents: Women and the Nation. 429–43. (Millennium Journal of International Studies1991).

[5]*Mohammad Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945.

[6]Sunder Rajan, Rajeswari, The Scandal of the State: Women, Law and Citizenship in Post-Colonial India. (Durham, NC: Duke University Press 2003).

Therefore, a limited scope for progress and change is the repercussion of multicultural institutions in plural country's legal machinery. Policy makers, out of the fear of hurting conservative religious groups, have unfortunately lacked in initiative to bring change for gender equality. The most vocal criticism of Muslim family law is that it is less codified than India's other major religious groups' family law. Since this law is not codified, ancient religious texts and customs become the primary references for the foundation of Muslim family law, hence they may not be gender equal.[7]

The history of adjudication of Muslim law relies on Muslim matrimonial cases playing a vital role, community courts like jama'ats (councils); qazis (judges); dar'ulquzats (courts) which constitute major Muslim religious institutions. Even though post-independent India has signed international human rights agreements, like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the personal family law for various religions isn't the most progressive and is not at par with the tenets of the Constitution[8], because despite globalisation, domestic family laws are rooted in local customs as "non-interference in the personal affairs of any community without its initiative and consent" was cited by the Indian government when it ratified CEDAW in 1993[9] and hence family law legislations have not been impacted by CEDAW. Article 14[10] (equal protection) and Article 15[11] (prohibition of discrimination on grounds of sex, etc.) of the Constitution of India have often been referred to for the advocacy of amending laws and creating progressive judicial precedent.

But this has not happened and the regressive approach of the Courts and Parliament with respect to family law has been shaped by judgments like *Narasu Appa Mali v. the State of Bombay* (1952)[12] where the Bombay High Court said that Indian law's provisions in family law which provide unequal rights across religious groups and gender were beyond the scope of constitutional tests. Therefore, common law and religious texts like those of Ameer Ali (1929), Mulla (1968), and Fyzee (1999) are the basis of case law which is governed by Hanafi law.[13] Archana Parashar in her 1992 publication 'Women and Family Law Reform in India', claims that "there has been no reform of Islamic personal law in the independent state of India."[14] The minimal codification of Muslim law has caused the Judiciary to enjoy great

[7]Menon, Nivedita. Women and Citizenship. In Wages of Freedom: Fifty Years of the Indian Nation-State, 241–66. (Delhi, India: Oxford University Press 1998).
[8]Jacobsohn, Gary J. The Wheel of Law: India's Secularism in Comparative Constitutional Context. Princeton (NJ: Princeton University Press 2003).
[9]Merry, Sally Engle. Human Rights & Gender Violence: Translating International Law into Local Justice (Chicago: University of Chicago Press 2006.)
[10]Constitution of India, art. 14.
[11]Constitution of India, art. 15.
[12]*Narasu Appa Mali v.the State of BombayAIR* 1952 Bom 84
[13]Verma, B. I. Commentaries on Mohammedan Law (in India, Pakistan, and Bangladesh). (8th, Allahabad, India: Law Publishers 2002).
[14]Parashar, Archana. Women and Family Law Reform in India. (New Delhi, India: Sage Publications 1992).

autonomy in the adjudication of Muslim law cases so much so that the judiciary's discretion drives India's Muslim law.[15][16]

Having discussed the genesis of Muslim family law in India and its challenges[17], this paper further seeks to understand what are the grounds of divorce in Muslim Law in India and what are its limitations. For understanding whether there are gender inequalities in Muslim law for dissolution of marriage, it is first important to know and analyse what the provisions are.

Research Methodology

The researcher has adopted the methods of doctrinal research in order to arrive at and prove the hypothesis, utilizing secondary sources in order to assess and analyse the subject, fulfil the research objectives, and answer the research questions adequately: considering the scope and nature of the topic, as well as the resources available and accessible. A diverse range of secondary sources including articles, journal articles, reports, and studies published by various reliable authorities, as available on the internet, and books authored by well renowned authors: were referred to. This research peruses a mixed method design thereby consisting of both quantitative and qualitative secondary data.

Research Objectives

- To understand what are the judicial methods to seek dissolution of marriage in Muslim law
- To recognize what are the extra-judicial methods to seek dissolution of marriage in Muslim law
- To inquire the gender equality in Dissolution of Marriage under Muslim Law
- To comprehend the genesis of Muslim law
- To study how does the dissolution of marriage happen by divorce by Muslim husband
- To analyse how does the dissolution of marriage happen by divorce by Muslim wife
- To reckon how does the dissolution of marriage happen by divorce by mutual consent
- To realise how does the dissolution of marriage happen by divorce by judicial decree under Dissolution of Muslim Marriage Act, 1939

Research Questions

- How does the dissolution of marriage happen by divorce by Muslim husband?
- How does the dissolution of marriage happen by divorce by Muslim wife?

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[15]Mahmood, Tahir. Islamic Law in the Indian Courts since Independence: Fifty Years of Judicial Interpretation. (New Delhi, India: Institute of Objective Studies 1997).

[16] Narendra Subramanian, Legal Change and Gender Inequality: Changes in Muslim Family Law in India, Research Gate. (September 2008)https://www.researchgate.net/publication/227663550_Legal_Change_and_Gender_Inequality_Changes_in_Muslim_Family_Law_in_India.

[17]Agnes, Flavia. Law and Gender Inequality: The Politics of Women's Rights in India. (New Delhi, India: Oxford University Press 1999).

- How does the dissolution of marriage happen by divorce by mutual consent?
- How does the dissolution of marriage happen by divorce by judicial decree under Dissolution of Muslim Marriage Act, 1939?

Research Problem

Since Muslim law heavily relies on archaic religious texts and is not codifies as compared to other personal laws, Muslim law is inherently and inevitably gender unequal and regressive, and since the multicultural and plural social fabric of the nation gives rise to individual personal laws, the amendment of such laws to be progressive and gender equal is a challenge. This paper reflects on how the obvious rights of Muslim men for unilateral pronouncement of divorce is superior to the little-to-no rights that Muslim women can exercise for dissolution of marriage.

Hypothesis

Muslim law for dissolution of marriage is not gender equal.

Review of Literature

Personal laws for different religions in India are a derivation of customs and norms which are archaic, regressive and often reek of gender inequality. (Agnes Flavia, 1999) Post-independent India's primary objective was to frame laws which focused on freedom, and economic and political development. It is certain that social aspects of free India were also a goal of the Constitution makers because they enshrined liberty, equality, fraternity, justice, and welfare; but gender equality has not been the priority of India during state-formation. (Mary Ann Glendon, 1989) (G.B. Hooker 1975) (Kandiyoti, Deniz, 1991) This paper focuses on the grounds of divorce under Muslim law and inspects whether the laws are unequal for the genders. While the Judiciary, in its landmark judgment of *Mohammad Ahmed Khan v. Shah Bano Begum* (1985) created history for India by reforming laws for the sake of gender equality, these efforts of the Supreme Court lasted only for a short while. The accommodation of Muslims and other cultural minorities in the postcolonial political era has held onto a lot of colonial family law, which also challenges the constitution's goals to attain gender equality. (Nivedita Menon, 1998) (Archana Parashar, 1992) Therefore, a limited scope for progress and change is the repercussion of multicultural institutions in plural country's legal machinery. (Gary J. Jacobsohn, 2003)

The most vocal criticism of Muslim family law is that it is less codified than India's other major religious groups' family law. (Tahir Mahmood, 1997) (B.R. Verma, 2002) Since this law is not codified, ancient religious texts and customs become the primary references for the foundation of Muslim family law, hence they may not be gender equal.(Narendra Subramanian, 2008) (Sunder Rajan, 2003)Without citing reasons or justifications, Muslim husbands are empowered to divorce their wives by repudiating marriage by pronouncing talaq, be it Talaq-ul-Sunnat, Ahsan, Hasan, Ila, or Zihar, Muslim men enjoy the exercise of their rights by pronouncing words or sentences that showcase his intention to end marital ties and obligations by disowning the wife. (Subodh Asthana, 2019) This unilateral divorce by the husband and the authority he enjoys is far more than what a Muslim woman does because the

Quran believes that men are maintainers of women because Allah has made men to spend their property for maintain the wives. Right to pronounce divorce and talaq by Muslim men is absolute and unilateral where he can do so at his whim without citing reasons, sometimes even in jest, and it will still be legally recognised in India.

How or when a Muslim husband pronounces talaq is of little significance, once he pronounces it then it becomes valid Justice Khalid has termed this unilateral enjoyment of rights by Muslim men to pronounce divorce as "monstrosity" in the case of *Hannefa v. Pathummal.* (Setu Gupta, 2021) A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. it can be said that the only single provision in Muslim Law for Muslim women having a right to seek divorce under Talaq-e-tawfeez is also given to them by their husbands. (Aqil Ahmed, 2004) Had it not been for the delegation of this power, Muslim women would not even get this one right to seek divorce which goes on to show how Muslim law has insufficient provisions for women who want to seek divorce and even for this right, they have to depend on whether the husband agrees to delegate the power or not. And as can be seen, despite delegating his power, the husband still possesses rights to pronounce talaq which means that this is not an exclusive right enjoyed by women, while on the other hand there are already several provisions in Muslim law which give the husbands the right to dissolve marriage. But evidently, there is no absolute right without any contingencies that is available for Muslim women if they want to seek for divorce, apart from the judicial divorce under Dissolution of Muslim Marriage Act, 1939.

Under an agreement the wife may divorce her husband either by Khula or Mubarat but the provisions of this type of dissolution of marriage under Khula require the wife to give consideration in the form of property of mehr to the husband (Asaf A. A. Fyzee, 1993) but this is not a mutual provision and the husband does not need to give any sort of consideration to the wife which is unequal and unfair practice. False charges of adultery, insanity or impotency of the husband have become grounds for divorce for Muslim women only after the Dissolution of Muslim Marriages Act 1939 which not only lays down these grounds but also mentions the additional grounds on which the Court may give a decree of divorce to those Muslim women who sought it. (Lawal Mohammed Bani and Hamza A. Pate, 2015) For the wife, she can file for a decree of divorce when her husband “associates with women of evil repute and leads an infamous life” Under Section 2 of the Dissolution of Muslim Marriage Act, 1939, where several grounds are mentioned perusing which a woman can seek a divorce for dissolving her marriage if she is married under Muslim law. (Altaf Hossain, 2003)

None of these grounds explicitly talk about sexual intercourse of husband with a party other than the wife but the eight ground therein does mention that when the husband “associates with women of evil repute or leads an infamous life” that would be considered a treatment of cruelty for the wife by the husband. Therefore, the act provides for a ground of cruelty for seeking divorce but doesn’t directly mention anything about adultery per se since leading an infamous life and association with women of evil repute does not necessarily mean sexual intercourse with a woman other than the wife. (Shivi Gupta, 2018) This ground of cruelty is as

close as the prevalent Muslim law goes to the concept of adultery where the wife can sue for divorce. The law does give a Muslim wife to seek for divorce in case her husband remarries, but what about when he is only committing an adulterous act? The husband may not marry the other woman but may still commit infidelity, so a provision for Muslim women needs to be available. But this change is not going to be easy keeping in mind the opposition from conservative religious groups who practice the archaic aspects of Islam which are fundamentally unequal for the genders. But in the wake of equality as an important constitutional tenet, amendment and empowerment is needed. (Anchit Bhandari & Urvashi Jaswani, 2021) (Alka Singh, 1992)

Analysis

Marriage in Muslim law is called a nikah. The privy council held in the case of Shoharat Singh v Jafri Begum[18]that marriage under Muslim law is a religious ceremony. Marriage is deemed to be a foundation of society under Islam which results into the upliftment of man and perpetuation of the human race. A Muslim marriage is deemed to be a consensual civil contract which is entered into by parties for procreation; it is not a sacrament. Free consent of adult parties is needed to enter into it. Unrestricted powers are unfortunately enjoyed by Muslim husbands under the law for dissolution of marriage whilst no such powers are enjoyed by Muslim wives and she can seek for dissolution of marriage only according to the limited grounds mentioned in the provisions of Dissolution of Muslim Marriage Act, 1939.

The Quran says "Marry of the women, who seem good to you, two or three or four, if you fear that you cannot do justice to so many, then one (only)."[19]which means that Muslim husbands can have four wives, however, the Muslim wives can only have one husband at a time wherein such a second marriage will be deemed void if her first marriage subsists, resulting into her punishment for bigamy under IPC.[20] Under Muslim law, two modes for dissolving marriage and ending marital relationships are Divorce and Talaq, which cannot be interchangeably used in Muslim since divorce can be sought by Dissolution of Muslim Marriage Act, 1939 and talaq can be sought by Muslim Personal Laws. Cataloguing dissolution of marriage under Muslim law can be made into three principal headings i.e. (i) by husband, (ii) by wife (iii) by mutual consent.

Dissolution of marriage by Husband can be sought using following ways:

Talaq- ul- Sunnat, that can further be classified into:

Ahsan:

wherein the husband, during the purity state i.e. the duration when the wife is not menstruating, has to make a pronouncement of divorce in a single sentence without indulging in sexual intercourse during iddat, after which the divorce cannot be revoked. However, if the

[18]*Shoharat Singh v Jafri Begum* (1915) 17 BOMLR 13

[19] The Quran, Sura IV, Ayat 3.

[20] Lawal Mohammed Bani and Hamza A. Pate, Dissolution of Marriage (Divorce) under Islamic Law IISTE (2015) https://core.ac.uk/download/pdf/234650383.pdf

husband has sexual intercourse with wife during iddat then the divorce is deemed to be implicitly revoked. Raad-ul-Muhtar justifies this revocation of divorce due to sexual intercourse during iddat by stating that "It is proper and right to observe this form, for human nature is apt to be misled and to lead astray the mind far to perceive faults which may not exist and to commit mistakes of which one is certain to feel ashamed afterwards "which is considered as a good way to prevent thoughtless divorces in Muslims. Further, in the circumstances of the marriage not being consummated, despite the wife menstruating; or when the wife has reached menopause, Talaq-e-Ahsan can be pronounced.[21]

Hasan

wherein the husband, during the purity state i.e. the duration when the wife is not menstruating, has to make a pronouncement of divorce in three successive pronouncements for divorce required that these pronouncements are made in three 30-day intervals in succession. If the wife is menstruating, the three pronouncements should be made in three consecutive tuhr. The pronouncement of divorce in three successive pronouncements for divorce in three 30-day intervals in succession should not have the parties indulging in sexual intercourse, otherwise the divorce will be deemed revoked. Further, regardless of the iddat period, Talaq-e-Hasan becomes irrevocable on the third and final pronouncement.

Talaq-ul- Biddat

It is recognised among Hanafi Muslims and is deemed to be a sinful talaq, and so is the case with Sunni Muslims. In this form of talaq, the husband has to make three pronouncements in tuhr (i.e. period between menstrual cycles) made in either a single sentence or in three separate sentences like “Talaq, talaq, talaq” which is why it is also commonly known as triple talaq.Such a pronouncement is indicative of the husband’s intention for seeking dissolution of marriage and therefore after the pronouncement, the talaq becomes irrevocable.

The Supreme Court of India has opined in the case of *Shayara Bano v. Union Of India And Ors*., [22] that the practice of triple talaq is ultra vires and unconstitutional, and violates the fundamental rights bestowed under Article 14 of the Constitution of India.
Since this type of talaq is irrevocable, it is condemned by the Shias who deem it to be sacrilegious.[23]

Ila

Ila, though not practised much in India, constitutes a Muslim husband of a sound mind and a major age swearing by God’s name that he leaves the wife to observe iddat and will not indulge in sexual intercourse with her for four months, if he does indulge, Ila is deemed to be cancelled, if he doesn’t indulge for four months then the marriage dissolves irrevocably. After

[21] Subodh Asthana, Talaq under Muslim Law, Blog IP Leaders (June 14, 2019) https://blog.ipleaders.in/muslim-law-divorce/
[22]supra note 4
[23] Lawal Mohammed Bani and Hamza A. Pate, Dissolution of Marriage (Divorce) under Islamic Law, IISTE (2015) https://core.ac.uk/download/pdf/234650383.pdf

four months, wife may file for either restitution of conjugal rights, or file for judicial divorce as she is entitled to do so.[24]

Zihar

It is a form of talaq that is not used anymore, but it constitutes of a major and sound-mind husband comparing his wife to his mother or any of the female within prohibited degrees so if a husband says that his wife is like his mother or sister, he cannot indulge in sexual intercourse with the wife for four months, after which zihar is complete. This comparison may also lead the wife to decide to not indulge in sexual intercourse with him. The wife's refusal from indulging in sexual intercourse with the husband is acceptable only until the husband has atoned himself using law's penance modes. However, within this duration, if husband wants to indulge in sexual intercourse and revoke zihar, the wife cannot seek judicial divorce. The penance that may lead to the revocation of zihar comprises of the husband observing a fast for a period of two months, or the husband freeing a slave, or the husband providing food to a minimum of 60 people.

Talaq by the Wife

It is pertinent to note that in order to seek talaq, a wife has to use the power that is delegated by her husband.

Talaq-e-tafweez

Accepted by both Shias and Sunnis, a Muslim woman can divorce her husband only using *Talaq-e-tafweez* wherein the power to divorce must be delegated by the husband himself in the form of an agreement (like a prenuptial agreement) signed before/after marriage which shall state that the wife has the power to divorce the husband and he can mention the conditions where this power can be used by her, if the conditions are met then the wife can legitimately dissolve her marriage. However, the delegation of power to divorce to the wife does not imply that the husband denounces his right to pronounce talaq, he can do so. The husband may delegate the power to his wife temporarily or permanently, whereby the latter is revocable but the former is not.

The husband may delegate the power to his wife absolutely or conditionally. It is upon the wife's discretion whether she wants to divorce the husband in case the conditions mentioned in the agreement are met, this is not an automatic divorce. In the case of *Md. Khan v. Shahmai*[25], the wife exercised the power to divorce the husband (Khana Damad) as delegated to her by him under a prenuptial agreement, when the conditions of payment of certain amount of marriage expenses incurred by the father-in-law by the husband were not met. This divorce was held valid because the wife exercised the power that her husband delegated to her in the agreement.

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[24]*supra note* 20.
[25]*Md. Khan v. Shahmai* Second Appeal No. 68 of 1967.

Therefore, it can be said that the only single provision in Muslim Law for Muslim women having a right to seek divorce under *Talaq-e-tawfeez* is also given to them by their husbands. Had it not been for the delegation of this power, Muslim women would not even get this one right to seek divorce which goes on to show how Muslim law has insufficient provisions for women who want to seek divorce and even for this right, they have to depend on whether the husband agrees to delegate the power or not. And as can be seen, despite delegating his power, the husband still possesses rights to pronounce talaq which means that this is not an exclusive right enjoyed by women, while on the other hand there are already several provisions in Muslim law which give the husbands the right to dissolve marriage. But evidently, there is no absolute right without any contingencies that is available for Muslim women if they want to seek for divorce, apart from the judicial divorce under Dissolution of Muslim Marriage Act, 1939.

Divorce by Mutual Consent

It isn't a concept prescribed under Muslim law but came into existence for perusal by women to give divorce only after Dissolution of Muslim Marriages Act, 1939.

Khula

Khula literally means to lay down before the law and similarly under this divorce practice, the husband actually lays down his right to divorce before his wife which reflects that both the parties are entering into an arrangement for the dissolution of marital ties in lieu of compensation that the husband receives from his wife out of her property as dower as a form of consideration by the wife. Even though it is a divorce by mutual consent, it is deemed to be a redemption of marriage where an offer must be proposed by the wife which the husband accepts as there is consideration for it. However, even in Khula, it is essential to observe iddat. Shia Muslim law gives the wife the power to retrieve the consideration given to her husband during the period of iddat and revoke divorce but once the husband accepts the offer, the divorce cannot be revoked by him.

The provisions of this type of dissolution of marriage under Khula require the wife to give consideration in the form of property of mehr to the husband but this is not a mutual provision and the husband does not need to give any sort of consideration to the wife which is inequal and unfair practice.

Mubarat

Mubarat is emancipation from marital lies that happens mutually wherein the mutual consent of both parties is an essential for dissolving marriage. Under Mubarat, either parties can make an offer of dissolution of marriage and its acceptance makes the divorce irrevocable. Even in Mubarat, observance of the period of iddat is required.

Judicial Divorce under Dissolution of Muslim Marriage Act, 1939.

Lian

Stoning to death is usually the prescribed way in Quran to deal with adultery but in democracies, a humane path has to be taken. While divorce has only recently become a phenomenon in the modern western world, the concept of divorce was commonly observed in the pre-modern Muslim era where divorce rates were always thriving. In fifteenth century, Cairo, three out of ten marriages ended with divorce and even in early twentieth century, the Malay region witnessed a divorce rate of a whopping seventy percent.[26] In modern India, the Muslim Law provides that a wife who has been falsely charged with adultery by her adult and sane husband can sue for divorce against the husband, and this practice is known as 'lian'. Here the wife is only able to sue for divorce because the husband has falsely charged her of unchastity and is thereby assassinating her character. It is pertinent to note that the wife can file for divorce only if the charges of adultery initiated by her husband against her are false. This has been affirmed by the Allahabad High Court in the case of Tufail Ahmad v. Jamila Khatun[27], where it was asserted that only such wives who are not guilty of adultery may use this as a ground for divorce.

The case of *Zaffar Hussain v. Ummat-ur-Rahman*[28]also showcases that a Muslim woman cannot file a divorce under Islam if the husband's allegation of adultery against her is true. The case revolves around a wife alleging her husband of declaring in front of many people that she and her brother had illegitimate intercourse. The court maintained that a Muslim woman can claim divorce if she is falsely accused of adultery.[29] The husband has a complete right to divorce his wife if he is competent to prove that his wife had an adulterous relationship, but it is not the same for the wife. She may only in circumstances of false accusations can either ask her husband to repudiate the accusations or divorce him under lian. However, if the husband repudiates the claims, the wife's claims is thus cancelled. Otherwise, marriage will continue until the Court passes a decree for dissolution of marriage and then judicial separation via lian cannot be revoked.

Although the Calcutta High Court in the case of *Nurjahan v. Kazim Ali*[30] said that when the husband alleges wife of infidelity as a result of the wife's behaviour which hurts the husband's feelings, such wife's bad behaviour's response of the husband can't be deemed to be a false charge of adultery by the wife and therefore cannot be used by her to seek divorce. This makes the already limited rights available to Muslim women for dissolution of marriage even more narrow, how can the Court deprive a Muslim woman her right under lian justifying such allegations by her husband as a result of her own bad behaviour? This seems fallacious, illogical, and illegitimate. The wife cannot be violated like this when it comes to her right to

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[26]Setu Gupta, The Concept of Divorce under Muslim Law, Legal Services India (March 16 2021 6:11 IST) http://www.legalserviceindia.com/article/l393-Divorce-under-Muslim-Law.html#:~:text=A%20husband%20may%20divorce%20his,marriage%20without%20giving%20any%20reason.&text=Under%20an%20agreement%20the%20wife,or%20impotency%20of%20the%20husband.

[27] *Tufail Ahmad v. Jamila Khatun AIR* 1962 All 570

[28]*Zaffar Hussain v. Ummat-ur-Rahman* 49 Ind Cas 256

[29]Shivi Gupta, Adultery As A Ground For Divorce Under Indian Laws, IP Leaders (June 30, 2018). https://blog.ipleaders.in/adultery-and-divorce/

[30]*Nurjahan v. Kazim Ali* AIR(1977), Cal, 90.

seek divorce when her husband falsely accuses for adultery, irrespective of how hurt his feelings are. This is unfair and asserts male dominance by giving him greater and unfair power.

Faskh

For Muslims, the Quran states that to respect each other and treating each other in a respectful way and abiding by the lawful orders of each other is the duty of both husband and wife, however if the husband and wife realise that they cannot cohabitate then the husband and wife can go to a qazi who shall allow the termination of their marriage after he has carefully examined. Following the same train of thought, nine grounds have been stated in Section 2 of Dissolution of Muslim Marriage Act[31], for a Muslim wife to seek divorce:-

Under Section 2(i) of the Act[32], the wife can file for a decree of divorce for the absence of husband wherein since 4 years, his whereabouts are unknown. After 6 months of such a decree of divorce being passed, the marriage stands to be dissolved however if during this duration, the husband presents himself either via an agent or in person himself, then that gives Court reason to set the decree of divorce aside.

Under Section 2(ii) of the Act[33], the wife can file for a decree of divorce if the husband is unable to maintain her by failing to provide maintenance to his wife for two years. The husband cannot use the grounds of unemployment, poverty, or bad health as defences in Court. Under Section 2(iii)[34] of the Act, the wife can file for a decree of divorce on the grounds of the husband's imprisonment wherein if there is imprisonment of the husband for seven years or more, divorce decree can be obtained by the wife. Provided that, a decree cannot be granted until the sentence has become final.

Under Section 2(iv)[35] of the Act, the wife can file for a decree of divorce due to the husband's failure to perform marital duties without any reasonable cause. This inability of the husband to fulfil marital obligations for three years enables wife to sue for divorce decree.

Under Section 2(v) of the Act[36], the wife can file for a decree of divorce citing impotency of the husband wherein not only was the wife's husband impotent at the time of marriage but he continues to be impotent. After one year of the decree of dissolution being obtained by the wife if the husband convinces the Court that he is no longer impotent, the Court shall not pass a decree for divorce if it's satisfied about the cease of the husband's impotency. This can be observed in the case of Gul Mohd. Khan v. Hasina[37] wherein the Court permitted the husband

[31] Dissolution of Muslim Marriage Act, 1939, S.2.
[32] Dissolution of Muslim Marriage Act, 1939, S. 2(i).
[33] Dissolution of Muslim Marriage Act, 1939, S. 2(ii).
[34] Dissolution of Muslim Marriage Act, 1939, S. 2(ii).
[35] Dissolution of Muslim Marriage Act, 1939, S. 2(iv).
[36] Dissolution of Muslim Marriage Act, 1939, S. 2(v)
[37] *Gul Mohd. Khan v. Hasina* AIR 1988 J K 62.

to prove his potency when applied to the Court asking for an order letting his prove his potency after his wife filed a suit for dissolution of marriage on the ground of impotency.[38]

Under Section 2(vi)[39] of the Act, the wife can file for a decree of divorce if the husband is suffering from insanity, leprosy or venereal disease since a period of two years Under Section 2(vii)[40] of the Act, the wife can file for a decree of divorce is she enables the repudiation of marriage that is to say that if a girl is married by her father/guardian before the age of 15 years then she has a right to repudiate such marriage after she turns 18 years and attains majority as conferred on her by Muslim was. However, it is contingent on the fact that whether the consummation of this marriage has happened or not, only if the marriage has not been consummated can it be repudiated by the wife thereby entitling to seek a decree of divorce Under Section 2(viii)[41] of the Act, the wife can file for a decree of divorce on the ground of cruelty by husband which can lead the wife to approach the Court and claim for a decree of judicial separation. Cruelty is described in the section as:

"Section 2(viii)(a)[42]: habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment. This was held by the Allahabad High Court in the case of *Itwari v. Asghari*[43], that 'Muslim cruelty', 'Hindu cruelty' and so on is not recognised by law in India and there are no various types of cruelty. Having said that, the Court added universal and humanitarian standards should become the basis for test of cruelty which is to say that if such bodily or mental pain is caused by the husband or his conduct that endangers the wife's safety or health can constitute cruelty.[44]

Section 2(viii)(b)[45]: associates with women of evil repute or leads an infamous life,
Section 2(viii)(c)[46]: attempts to force her to lead an immoral life,
Section 2(viii)(d)[47]: disposes of her property or prevents her exercising her legal rights over it
Section 2(viii)(e)[48]: obstructs her in the observance of her religious profession or practice.[49]

The Kerala High Court in the case of Aboobacker *Haji v. Mamu koya*[50], has dealt with this provision wherein the wife was compelled by the husband to wear a sari and watch cinema in theatres, however since the wife thought that such conduct was against Islam, she wife refused to do so and filed for divorce citing this behaviour as mental cruelty that obstructed her in the

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[38]*supra* note 25
[39] Dissolution of Muslim Marriage Act, 1939, S. 2(vi)
[40] Dissolution of Muslim Marriage Act, 1939, S. 2(vii)
[41] Dissolution of Muslim Marriage Act, 1939, S. 2(viii)
[42] Dissolution of Muslim Marriage Act, 1939, S. 2(viii)(a)
[43]*Itwari v. Asghari AIR* 1960 All 684
[44]*supra* note 25
[45] Dissolution of Muslim Marriage Act, 1939, S. 2(viii)(b)
[46] Dissolution of Muslim Marriage Act, 1939, S. 2(viii)(c)
[47] Dissolution of Muslim Marriage Act, 1939, S. 2(viii)(d)
[48] Dissolution of Muslim Marriage Act, 1939, S. 2(viii)(e)
[49]*supra* note 20
[50]*Aboobacker Haji v. Mamu Koya* AIR (1960), All, 684.

observance of her religious practice. Hence the Court was of the opinion that the mere departurefrom the standards of suffocating orthodoxy cannot be considered as obstruction of Islam and therefore the husband's behaviour cannot be mental cruelty.[51]

Although with time, the definition and interpretation of cruelty is changing. In the case *of Syed Ziauddin v. Parvez Sultana*[52], wife Parvez Sultana needed money for her education as she wanted to get admitted in a medical college since she was a science graduate. She married her husband, Syed Ziaudddin, because he said he will provide her with the needed money after marriage but he failed to fulfil his promise as a result of which she filed for divorce on the ground of cruelty which the court granted her thereby attaching a wider meaning and a wider scope of interpretation for the expression cruelty.[53]

Section 2(viii) (f)[54]: if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran"

Under Section 2(ix) of the Act[55], the wife can file for a decree of divorce on several grounds of dissolution that the Muslim Law recognises.

Conclusion

Without citing reasons or justifications, Muslim husbands are empowered to divorce their wives by repudiating marriage by pronouncing talaq, be it Talaq-ul-Sunnat, Ahsan, Hasan, Ila, or Zihar, Muslim men enjoy the exercise of their rights by pronouncing words or sentences that showcase his intention to end marital ties and obligations by disowning the wife. This unilateral divorce by the husband and the authority he enjoys is far more than what a Muslim woman does because the Quran believes that men are maintainers of women because Allah has made men to spend their property for maintain the wives.

Right to pronounce divorce and talaq by Muslim men is absolute and unilateral where he can do so at his whim without citing reasons, sometimes even in jest, and it will still be legally recognised in India. How or when a muslim husband pronounces talaq is of little significance, once he pronounces it then it becomes valid Justice Khalid has termed this unilateral enjoyment of rights by Muslim men to pronounce divorce as "monstrosity" in the case of *Hannefa v. Pathummal*.[56]A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. it can be said that the only single provision in Muslim Law for Muslim women having a right to seek divorce under Talaq-e-tawfeez is also given to them by their husbands. Had it not been for the delegation of this power, Muslim women would not even get this one right to seek divorce which goes on to show how Muslim law has insufficient provisions for

[51] *supra* note 25.
[52]*Syed Ziauddin v. Parvez Sultana* AIR (1945), Lah, 51.
[53]*supra* note 25.
[54] Dissolution of Muslim Marriage Act, 1939, S. 2 (viii) (f).
[55] The Dissolution of Muslim Marriage Act, 1939, S. 2 (ix).
[56]*Hannefa v. Pathummal 1972* KLT 514.

women who want to seek divorce and even for this right, they have to depend on whether the husband agrees to delegate the power or not. And as can be seen, despite delegating his power, the husband still possesses rights to pronounce talaq which means that this is not an exclusive right enjoyed by women, while on the other hand there are already several provisions in Muslim law which give the husbands the right to dissolve marriage. But evidently, there is no absolute right without any contingencies that is available for Muslim women if they want to seek for divorce, apart from the judicial divorce under Dissolution of Muslim Marriage Act, 1939.

Under an agreement the wife may divorce her husband either by Khula or Mubarat but the provisions of this type of dissolution of marriage under Khula require the wife to give consideration in the form of property of mehr to the husband but this is not a mutual provision and the husband does not need to give any sort of consideration to the wife which is unequal and unfair practice. False charges of adultery, insanity or impotency of the husband have become grounds for divorce for Muslim women only after the Dissolution of Muslim Marriages Act 1939 which not only lays down these grounds but also mentions the additional grounds on which the Court may give a decree of divorce to those Muslim women who sought it.For the wife, she can file for a decree of divorce when her husband “associates with women of evil repute and leads an infamous life” Under Section 2 of the Dissolution of Muslim Marriage Act, 1939, none of these grounds explicitly talk about sexual intercourse of husband with a party other than the wife but the eight ground therein does mention that when the husband “associates with women of evil repute or leads an infamous life” that would be considered a treatment of cruelty for the wife by the husband.

Therefore, the act provides for a ground of cruelty for seeking divorce but doesn’t directly mention anything about adultery per se since leading an infamous life and association with women of evil repute does not necessarily mean sexual intercourse with a woman other than the wife. This ground of cruelty is as close as the prevalent Muslim law goes to the concept of adultery where the wife can sue for divorce. The law does give a Muslim wife to seek for divorce in case her husband remarries, but what about when he is only committing an adulterous act? The husband may not marry the other woman but may still commit infidelity, so a provision for Muslim women needs to be available. But this change is not going to be easy keeping in mind the opposition from conservative religious groups who practice the archaic aspects of Islam which are fundamentally unequal for the genders. But in the wake of equality as an important constitutional tenet, amendment and empowerment is needed.

To quote from Justice *Sujata v. Manohar* of Supreme Court of India "It is not easy to eradicate deep seated cultural values or to alter traditions that perpetuate discrimination. It is fashionable to denigrate the role of law reform in bringing about social change. Obviously law, by itself, may not be enough. Law is only an instrument. It must be effectively used. And this effective use depends as much on a supportive judiciary as on the social will to change. An active social reform movement, if accompanied by legal reform, properly enforced, can

transform society."[57] Since the approach of policy makers to regulate family law depends on group norms, customs, and common law, as discussed in Chapter 1, the vision for family law in India is normative making legal mobilization challenging and shaping the prevailing unjust laws that denigrate and ignore the needs and rights of Muslim women, therefore gender-equalizing legal changes are needed.

[57]Anchit Bhandari & Urvashi Jaswani, A Critical Analysis Of Gender Inequality In The Existing Legislation Relating To Property Rights In India: A Comparative Study Of Hindu Andmuslim Law, Manupatra (May 14, 2021 6:45 am IST) http://docs.manupatra.in/newsline/articles/Upload/06EF3D18-696B-4E5F-A61E-80646EC0E664.pdf

Contrast between the North and South Indian Marriage Practices

Taru Singhal[1]

Abstract

Marriage is one of the most important institutions comprised in the society which binds people together. According to some beliefs it is regarded as a sacrament whereas it is a contractual agreement according to others. The significance of marriage does not only differ from one religion to other, but also finds parallelism with the diverse demographics in India. The article tries to compare and contrast the two most prominent systems of marriage in India, i.e. the North and South Indian marriage practices by highlighting the observations made by various distinguished sociologists as well as authors and academicians throughout the decades.

Keywords*: Marriage, Sociology, North-India, South-India, Relationship, Kinship, Contrast, Compare*

Introduction

"…and thus, by placing the same thing in various relationships, we are able to deduce new relationships and new truths."

…..Karl Marx

"Social institutions" are used to refer to a miscellany of social forms, including conventions, rules, rituals, organisations, and systems of organisations.(Miller) One such very important form of social institutions is family. Family is a group defined by a sex relationship sufficiently precise and enduring to provide for the procreation and upbringing of children. A family is the unit of socialisation and forms a basis of emotional relations. Families exist beyond individual self as it involves a collection of people who are related to each other, following various roles and responsibilities.

Traditionally, families are established by blood relations and are always guided or guarded by social factors. A family exists in many forms in a society, which is distinguished by the place of residence of the family members, head of the family, who has the authority and decision-making powers, and so on. Earlier, anthropologists researched upon the origin of families, whereas in modern times, it is believed that families cannot be measured on a judgement scale.

The family has been and continues to be one of the strong institutions of Indian society, in all regions, among: all communities and in all social classes and an important social relationship formed based on family relatedness is that of the Kinship system. Kinship is one of the most

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important organising components of society. Every culture in this world has its own kinship system. India being an immensely diverse country has various forms of kinship system across its different geographical and regional diversity. Kinship in India can be seen in families and outside families.

In kinship terms, the familial bonds that are created by virtue of blood or having descended from the same ancestor are known as consanguineous bonds, whereas those familial bonds which are related by the institution of marriage are known as affinal bonds. Kinship is basically a vital part of social organisation which sets the basis for various rules that are followed relating to marital relations to be formed in various diverse societies, castes, cultures or geographical areas found in India.

Just as kinship groups describe the form of kinship system found in a society, so also rules for marriage, categories of people who may/may not marry each other, relationships between bride-takers and bride-givers provide the context within which kin relationships operate. (Descent and Alliance Approaches to the Study of Kinship in India).

Marriage

E. K. Gough, in the section regarding the definition of marriage, mentions that marriage is a union between a man and a woman such that children born to the woman are recognized legitimate offspring of both parents.

Sociologists are interested in the relationship between the institution of marriage and the institution of family because, historically, marriages are what create a family, and families are the most basic social unit upon which society is built. Both marriage and family create status roles that are sanctioned by society (Little and McGivern)

Through marriage, Levi-Strauss (1969) observes, members are recruited to kinship groups.A female is recruited as a wife, as a daughter-in-law and so on through her marriage to another group; and a male through his marriage is recruited as husband, son-in-law of his wife's parents. Thus, kinship group alliances are transacted through marriage.

Irawati Karwe, in *The Kinship Map of India (1953)* has analysed the concept of kinship in India by observing the linguistic terminologies in various regions of India. She undertook a comparison between four cultural zones- North India, Central India, South India and East India, in order to understand the social variations in those regions. These variations were related to the caste systems, languages and cultures which further resulted in establishing various rules of marriage to be followed in all those regions.

With regards the topic, we will now look closely into two of the four cultural zones- the Northern zone and the Southern zone as described by Irawati Karwe and try to compare and contrast the marriage practices followed in them.

The Northern area, according to Karwe can be geographically found between the mountain ranges Himalayas and the Vindhayas. Moving south, the states of Karnataka, Andhra Pradesh, Kerala and Tamil Nadu comprise the geographical territory of Southern zone. Due to such vast area covered in both these zones, it is right to say that there exists more than one system of kinship and hence different marriage practices among those different systems. The north Indian regions which include states of Punjab, Haryana, Uttar Pradesh, parts of Madhya Pradesh, etc, are governed by the gotra and clan system. According to Karwe's study, most of the castes are based on the patterns followed by Indo-Aryan patriarchal family of ancient times. This means that marriage regulations are highly based on consanguinity or blood relations. There is a clear-cut distinction of family relatedness, i.e. a person may either be referred to as a consanguine or have an affinal relation.

Marriage is therefore sought with only those who are far away from being related by blood. In the South, however, there is no specific distinction of this sort. The families in the south follow the concept of tribes and believe in strengthening the existing bonds of family through tying marital knots within the blood kin. As a result, the exchange of daughters happens between a few families which might be the practice going on for generations in those families. Daughters are given much importance in southern India perhaps due to the existence of matrilineal families in many parts of the south. However, in northern India, daughters are married off to a man whom the family deems to be of a higher status. This practice, known as hyper-gamy, is widely followed in most parts of north India.

The daughter is often looked down upon as a burden or liability and sent off to her husband's house, usually far away from the natal home, where she must adjust and adapt to the changes in her lifestyle and start a new generation. In much of north India, the family which gives the bride is considered to be inferior to the groom's family. This creates an opposition based on status and structure of the marriage and the bride's family is expected to be forever answerable to the groom's family. The tradition of dowry is one such great example of this system. A different practice that happens in Bihar is that of *gottashadi* where one sibling pair is married off to the other sibling pair. This practice is very unfavourable in northern India due to the above-mentioned conception of power balance which the north Indians seek to maintain among the families of the bride and the groom.

While the marriages between cousins, either maternal or paternal, are considered to be incestuous in Northern India, marriages are preferred between cross-cousins, cousins and even uncles and nieces in most parts of South India. This happens with the belief that one must compensate for the daughter that is married into their household by giving their daughter to the former family. As explained earlier, their main motive is to establish a very tight-knit and strengthened circle of kin even if it involves establishing marriage within blood relations to a certain degree.

Brahmanas and other upper castes practice the avoidance of father's, mother's, paternal grandmother's and maternal grandmother's gotras in north India, which is also known as the

rule of four gotras. Endogamy gets restricted when caste is a concern. Marriage on a large scale of the area gets blocked It can thus be said that while northern Indian marriage practices favour exogamy, that is marriage outside the clan, southern India favours tightening the same clan's bonds by favouring endogamy. However, under certain circumstances when there is no suitable person existing among the close-knit clan in the southern region, so the family might seek for a sophisticated mate from outside the clan which could possibly match the desired level.

This contrast between the marriages among cousins, however, differs among the Muslims of both north and south India. Cross-cousin as well as parallel-cousin marriages are permissible under the Muslim personal laws and often encouraged by the families as a sense of trust and belongingness is felt between the blood kin. Another notion is that of the remarriage of widows and widowers. While in some backward parts, remarriage of widows is considered to be unfavourable, some areas do encourage widow remarriage. In northern parts, the widow is generally remarried to the husband's younger brother so as to keep the ties between the same families and ensure a sense of trust and belongingness. This practice is however followed by lower caste people and looked down upon by the people of the higher rank in the society as it is considered to be sort of incestuous and disrespectful.

Conclusion

India being a storehouse of various contrasting traditions, cultures, caste-systems, languages, and so much more diversity, it is very essential to understand each and every different practice that is followed within various societies existing in this country. All these practices have descended from the past generations and have been followed all the way down to this date. Various factors such as the social, economic, psychological, and technological and the legislative play a great role in the change of marriage institution. Only a close and detailed observation will help us understand the true nature and meaning behind all these practices and enable us to know better about the changes that have taken place and that will follow in the generations to come.

Muslim Marriage and Divorce Laws in India

Abhishek Saha[1]

Abstract

The passage deals with the various aspects of the study of Muslim laws regulating marriage and divorce and why the study of various laws and customs and intricacies of Muslim marriage and divorce are to be learned to have a better understanding of the scenario of almost 15 cores Muslims that currently constitute a part of the Indian Demographics. It deals with the various types of marriages that are a part of Islam the practise of polygamy and the various disputes regarding it and the age of marriage. In divorce the paper talks about the various forms of divorce in Islam and how such practises are mostly patriarchal in nature giving an upper hand to the husbands and then the importance of maintenance and the rights of maintenance available to a divorced Muslim wife not only under the Sharia but also under other types of law.

Keywords: *Marriage, Maintenance, Polygamy, Divorce, Age*

Introduction

The study of Muslim laws is of utmost important in a country like India where the population demographic of Muslim people is almost 15 crores. So, a comprehensive study of Muslim Laws of Marriage and Divorce are important for a proper understanding of the scenario. *Shariah*, or the Islamic Law remains perhaps the most foundational structure upholding the structural beliefs and relevance of Islam as a religion.[2]The basis of Sharia law is its inherent flexibility and built-in corrective mechanisms that ensure the bold preservation of Islamic religious practices. This flexibility comes from the understanding that in Islam law and religion are practically inseparable. Fyzee have mentioned that laws are similar to metals because they can be melted and shaped in ways that suit the needs of the present and he stressed on the fact that laws are required to be dynamic and not static to serve the best interests of the people.[3]

Mahmassani gives the various sources of distribution of Muslim laws. The primary source is the Holy book the Koran the secondary sources in *Hadith* and *Sunnah* deals with and establishes the various traditions. the *Ijma*, the *Qiyas*, the *Ijtihad* and the *Istishab* and the various regulations surrounding equity and the principle of absolute good in *Istihsan, Al-masalih al-mursalah* and *Istidlal* & *Istishab.* The extraneous sources include legal fiction, positive legislation and custom.[4]

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[2]Syed Khalid Rashid, Muslim Law 1 (3rd ed., 1996).

[3]Asaf Ali Asghar Fyzee, A Modern Approach to Islam 87 (1963).

[4]Sobhi Rajab Mahmassani, Falsafat Al-Tashri Fi Al-Islam (The Philosophy of Jurisprudence in Islam) 60-135 (*translated by* Farhat J. Ziadeh, 1961).

The primary source of Muslim Law the Koran is the holiest book for the Muslims and is communicated to Prophet Muhammad through Archangel Gabriel. The book is although not a legal text in itself but rather the principles enshrined in it states various ways to regulate social behaviour and how should a Muslim person behave with people of his community and also their duties and obligations towards the society.

Analysis of Laws on Marriage and Polygamy

Marriage under Muslim law can be defined as "to be a contract which has for its object the procreation and legalising of children"[5] Hence marriage under Islam can be considered as a contract with the objective of procreation and legalising children.[6] A similar definition was given by Mahmood J in the famous case of *Abdul Kadir v. Salima*,[7] that Muslim marriage is a civil contract as marriage as although it is solemnised by reading the verses of the holy Koran there is no peculiar ritual or service related to the occasion.

Registration of Marriage

It is appropriate here to classify the different types of marriages recognized by Muslim Personal law:

1. valid marriage (*Sahih*).
2. invalid marriage (*Batil*)
3. and, irregular marriage (*Fasid*)
4. Muta Marriage

Sahih is derived from the Urdu and it means correct or valid a sahih it is a marriage where all the essential conditions of a valid marriage are fulfilled and the groom had paid *mehr* for marriage to the bride Batil marriage is a marriage which is not enforceable by law and hence it is void i.e., there has been no marriage at all and the parties do not have any rights and obligations associated with marriage. It usually happens when one or more pre - requisites for a valid marriage is not fulfilled. In the case of *Munshi v. Mst. Alam Bibi*[8] the court held that there is prohibition of marriage for failure to comply with one of the conditions of marriage it is a void marriage. Even pregnancy pre marriage could result in a void marriage as held in the case of *Tanjela Bibi v. Bajrul Sheikh*.[9]

Fasid marriages or irregular marriages is only exist in case of Sunni Muslims for Shia Muslims these types of marriages are considered as void marriages. A famous case of fasid marriage is the case of *Ata Mohammed. v. Saiqul Bibi*[10]where the court held that in cases where the marriage is only temporarily restricted due to certain irregularity the marriage is not void but just irregular which can become a valid marriage if the irregularity is removed.

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[5]Mulla, Principles of Mahomedan Law, 1972, p 255, para 250.
[6]Ameer Ali, students' Seventh Edn., p. 97 quoted in Fyzee, Outlines of Muhammadan Law, 1974, p. 90.
[7]*Abdul Kadir v. Salima*, (1886) 8 All 149.
[8]*Munshi v. Mst. Alam Bibi*, AIR 1932 Lah. 280.
[9]*Tanjela Bibi v. Bajrul Sheikh*,1986, Cr.L.R.(Cal.) 222.
[10]*Ata Mohammed. v. Saiqul Bibi*, 1910 8 ALJ 953.

Muta marriages are marriages mainly done for enjoyment or pleasure muta literally means enjoyment or use it is only prevalent among the Shia Muslims it is usually a marriage for a limited time period in return of some in return of the payment of a fixed amount of dower at the time of divorce.

Age of Marriage

The Koran and hadith are not talking about the minimum or maximum age to get married. In Ijtihad, the concept of the minimum age of marriage is said to be found in the requirement that the husband and wife have reached puberty or adolescence. This is interpreted as 15 in this context. Exceptions are accepted in the sense that what constitutes "puberty" or adulthood is determined by national law.[11]

In *Hassan Kutti v. Jainaba*[12]the court held that in both schools of law be the Hanafi school of law for Sunnis or the Ithna or Ashari school of Law for Shias the individuals be it men or women can marry at their own free will irrespective of guardian consent and are free from parental pressure however the court held that consent of the parties involved in marriage is a pre- requisite.

When a minor reaches the age of majority, he can legally deny and deconstruct his marriage through the power conferred by Khiyar-ul-bulug. Such a marriage must have been organized by a legal guardian. However, it is not absolute freedom and the law is very strict regarding the interpretation of such cases. Abnormalities such as unforgivable delays and the requirements of formal institutions to oversee such processes are strongly considered.[13]Under Hanafi law even such right is not permitted if the marriage has been done by the father or grandfather unless there is great harm to the interests of the minor.

The Child Marriage Restraint Act 1929, in India provides the minimum age for marriage with 18 years minimum for girls and 21 years for boys and any violation of this act is considered as criminal conduct. The 2006 Child Marriage Prohibition Act, which replaced the previous law, does not recognize minor marriages as invalid, but as voidable at the option of the party whose consent was not obtained freely.[14] The case of *Mohd. Nihal v. State*,[15] the court held the Child Marriage Prohibition Act applies to even Muslims even if it violates the uncodified customs of Muslims.

Polygamy

[11]S.K. Rasid, Muslim Law 55 (3rd ed., 1998)
[12]Hassan Kutti v. Jainaba, AIR 1928 Mad 1285.
[13]S.K. Rasid, Muslim Law 55 (3rd ed., 1998)
[14] *Ibid.*
[15]*Mohd. Nihal v. State,* 2008 (4) Crimes (HL) 650 Del.

The Koran has allowed polygamy and it can be inferred from the phrase "If you cannot deal with orphans, you may keep more than a single wife. But if you cannot do justice to all your wives, then keep only one who shall protect you from injustice".[16]

There was the prevalence of unrestricted polygamy in the pre-Islamic era.[17] However Islam restricted the number of wives to four and established thatit is critical to realise that polygamy cannot be a duty, as stated in the Koran, and that a Muslim is obligated to accept the rules of the area to which he is subjected, and that if the laws of the land disapprove of polygamy, that must be consented to.[18]

In India the offence of bigamy is dealt by section 494-495 of the Indian Penal Code which defines bigamy as criminal offence and the second marriage done during the life time of the first marriage is declared void.[19] However Muslim men are able to bypass this provision because of their customary practises that allows more than one marriage and as a result Muslim law does not recognise the second marriage as void. Several Scholars and academicians have suggested that this customary practise should not be given preference over IPC and in fact many have requested the scrapping of this practise. In the famous case of *Itwari v. Asghari*, it was observed that a second marriage was a "continuing wrong" to the first wife.[20] Similarly in the case of *Sarla Mudgal v. Union of India* the Supreme Court have mentioned that IPC will be given preference over personal laws and declared all bigamous marriages will attract the wrath of IPC it was done with the objective of preventing the menace caused by non –Muslim men changing their religion with the sole objective of doing a bigamous marriage.[21]

Analysis of Laws on Divorce and Post-Divorce Rights

The idea of divorce was not something that was introduced by Islam it was a sort of prevalent activity in the pre- Islam era in Arab communities. Islam introduced progressive feminist reforms in the existing reforms related to divorce. This can be seen in the practise of not distributing wife's property post - divorce and she retains all the property which she has received before the marriage and during the course of the marriage.[22] However it is not same for a man it is divided on the basis of the marriage contract.[23] The wife's right to get support from the husband is absolute and no one can take away that right.[24]The wife is expected to

[16]The Quran, Chapter 4, Verse 9.
[17]Hammudah Abd al Ati, Family Structure in Islam 98 (1977).
[18]Imani Jaafar-Mohammad & Charlie Lehmann, *Women 's Rights in Islam Regarding Marriage and Divorce,* 4 Journal of Law and Practice 3 (2011).
[19]The Indian Penal Code 1860, § 494-495
[20] *Itwari v. Smt. Asghari,* AIR 1960 All 684
[21]*Sarla Mudgal v. Union of India*, AIR 1995 SC 1531.
[22]The Quran, Chapter 2, Verse 229; The Quran, Chapter 4, Verse 20.
[23]The Quran, Chapter 2, Verse 231; Verse 241.
[24]*Ibid.*

observe aniddat period of 3 months after divorce, during which time she cannot remarry. Such practices find their legitimacy in their usefulness in determining offspring.[25]

Divorce by Husband and wife

A patriarchal aspect of Muslim divorce can be found in the way that men have more power to give a divorce and can also do that very quickly almost in an instant. Under Sunni law divorce can be pronounced orally or by using a written document called *talaq-nama.* One such practise by which a Muslim man gives divorce to his wife under the Sunni Law is the practise of *talaq-ul-biddat* which is seen to be a rebellious variation of *talaq-us-sunnat.* The practise of triple talaq involves a Muslim man giving divorce to his lawfully married wife by pronouncing the word talaq three times in an instant and such pronouncement will result in a valid divorce. The *Ahl-e-Hadith* section of Sunni Muslims and all schools of Shia law reject *talaq-ul-biddat.*[26]

In the famous case of *Mohammed Haneefa v. PathummalBeevi*,[27] Justice V. Khalid highly criticised the patriarchal and tyrannical form of triple talaq and mentioned the need to reform it. In the case *Marium v. Md. Shamsi Alam*, Deoki Nandan, J. observed that if triple talaq is given in the fit of rage due to grave or sudden provocation the marriage can be reconciled the talaq which has been said can be removed during the iddat period.[28] In the famous case of *Shamim Ara v. State of U.P*, R.C. Lahoti, J and the Supreme Court observed that for talaq under Muslim law there is a standard procedure that has to be followed before talaq can be pronounced and if the said procedure is not followed the talaq pronounced is not considered as a valid talaq and the marriage continues to exist.[29]

Article 51-A(e) states *"to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women"*[30] The reading of the section clearly shows that triple talaq is a practise derogatory to women dignity and is highly unconstitutional. The Supreme Court finally in the case of *Shayara Banoh v. Union of India*, the court in a 3:2 majority declared that triple talaq is unconstitutional and is not an essential religious practise to receive the protection of Article 25.[31] The Muslim Women (Protection of Rights on Marriage) Act, 2019 which was passed by the government post such decision, formally scrapped of and banned the practice of triple *talaq* and declared that *talaq-ul-biddat*

[25]The Quran, Chapter 2, Verse 228; Verse 231.
[26]Tahir Mohammad, Muslim Law in India and Abroad 124 (2nd ed., 2016).
[27] *Mohammed Haneefa v. Pathummal Beevi*, 1972 KLT 512.
[28]*Marium v. Md. Shamsi Alam,* AIR 1979 Allahabad 257.
[29]*Shamim Ara v. State of UP, (*2002) 7 SCC 518.
[30]The Constitution of India, 1950, Art. 51-A (e).
[31]*Shayara Banoh v. Union of India,* AIR 2017 9 SCC 1

in any form: spoken, written, or by electronic means shall be considered illegal and void and may attract imprisonment of upto three years to the husband.[32]

The primary rights of Muslim women to divorce reside in the practices of *Khula*and *Talaq-e-Tafwiz*.The Muslim Personal Law (Shariat) Application Act 1937 gives the explanation for a valid *khula*and differentiates it from *talaq*.[33]In *talaq-e-tafwiz*, there is an existence of a marriage contract that specifies and gives rights to the wife or any person that the wife wants to represent her to dissolve the marriage under adverse circumstances. It is a very common practise in India, Pakistan and Bangladesh. The Orissa Mohammedan Marriages and Divorces Registration Act 1949 is the only known legislation that deals with *talaq-e-tafwiz* and also provides for separate forms of *talaq-e-tafwiz.*[34]

Post-Divorce Rights

In Muslim Law the husband has the obligation to fulfil his dowar duties post - divorce. Under the Muslim law, the system of maintenance, or *nafqa*, involves that the husband is required to pay maintenance during the *iddat* period, but payment beyond that is subject to special circumstances.

Muslim Women (Protection of Rights on Divorce) Act 1986 allows Muslim women the right to extinguish her right to dower and can instead ask for reasonable maintenance from her divorced husband and can also voluntarily return the property which she has received from her husband.[35] However the Muslim's woman right to dower is not affected and cannot be taken away if the marriage has been dissolved under Muslim Marriages Act 1939.[36] Sections 125 to 128 of the new Criminal Procedure Code, 1973 have also helped in the further extension of the scope of maintenance law in India and it now Includes women referred to in the law as "wife" who are divorced and not yet married.[37]

In the most celebrated and iconic case of *Mohd Ahmad Khan v. Shah Bano Begum*, [38] dealt with the issue of whether CrPC provisions will supersede personal laws. The case involved an appeal to the Supreme Court on the basis of a high court order passed by the Madhya Pradesh High Court whereby the petitioner was required to increase the maintenance amount which he was paying to his divorced wife from 25/p.a. to 179/p.a. the Supreme Court gave the judgement that the order of the High Court is valid and CrPC applies to all Muslim individuals and are not violative of any Islam provisions. Section 5 of the 1986 Divorce Act[39]

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[32]The Hindu, *President Ram Nath Kovind gives assent to triple talaq Bill*, Aug 1, 2019, available at https://www.thehindu.com/news/national/president-ram-nath-kovind-gives-assent-to-triple-talaq-bill/article28780061.ece/amp/ (Last visited on March 1, 2020).

[33] The Muslim Personal Law (Shariat) Application Act, 1937, § 2.

[34]Tahir Mohammad, Muslim Law In India And Abroad 124 (2nd ed., 2016).

[35] Muslim Women (Protection of Rights on Divorce) Act 1986

[36] Muslim Marriages Act 1939, Section 5

[37] The Code of Criminal Procedure, 1973, § 125-128

[38] *Mohd Ahmad Khan v. Shah Bano Begum*, AIR 1985 SC 945.

[39] Muslim Women (Protection of Rights on Divorce) Act, 1986, § 5.

allows Muslim couples the option to choose the mode of maintenance either under the act or under the CrPC. However, the 1986 Divorce act is a far better suited document is this context. Under the 1986 Act, the court can compel a wide set of individuals to pay maintenance to the divorced wife ranging from the divorcee's relatives, Wakf-board, would-be heirs etc are eligible to pay maintenance and can do so at the court's direction.

Conclusion

In Muslim law there are several ways by which a marriage can be solemnised and through which divorce can take place however to the meet the needs of the changing circumstance the government have introduced several measures like the Muslim Dissolution of Marriage Act, 1939, the Muslim Women (Protection of Rights on Marriage) Act, 2019 to regulate certain aspects of Muslim marriage and divorce. A thorough analysis of Muslim personal laws shows the hereditary nature of this laws and although several reforms and acts have been passed by the parliament to reduce the effect of this laws and to uphold the liberal nature of the Sharia Law. In one hand where Muslim laws are gender progressive and keeping up with modern times by providing such as providing women with strong maintenance and property rights and at the same time have also been very oppressive and have treated women merely as objects by allowing the practise of polygamy.

Sologamy – The New Gen Marriage

Sri Nandita Vunnava[1]

Abstract

Sologamy is the act of marrying oneself to declaring SL and S-com. People of the coming generations choose it to represent their individuality and unconditional SL. Unlike the RM where a person marries another person and declare themselves as a couple and promise to stay loyal and love each other till the end, a sologamist perform all the activities done in a RM but with themselves. They will promise themselves to be committed and love themselves forever. People will throw lavish weddings, or they perform sologamy in private. This trend was first started in the year 1993 by Linda Baker who reported to marry herself. The trend picked up from then and many women across the world are embracing sologamy. The first sologamy in India was committed by Kshama Bindu, a 24-year-old woman from Gujarat, who announced that she was going to marry herself faced a lot of trolls on social media and constant discouragement form the whole country. Yet she chooses to perform sologamy with her close relatives, wrote her own vows, done all the events of a Hindu wedding and became her life partner.

Sologamy is not limited to women but there are men who are performing sologamy as well. Basketball player Dennis Rodman reported that he married himself. There are many references of sologamy in Pop-C like the tv show sex and the cityand books like Quirky alone by Sacha Cagen. People slowly started to understand and encourage sologamy. People of the coming generation are supporting the idea; many producers are creating special packages and offers to sologamists. As in a RM, sologamy also has DIV. Sologamist can DIV themselves when they want. Brazilian model Cris Galera DIV herself after 90 days of sologamy. Its legal sanctity is unknown. It is neither legal nor illegal. It has no mention in any law in any country of the world. Being single, getting married, embracing sologamy, whatever the case may be one must truly have SL and S-com.

Key Words: *Sologamy, Self-love, Self- Commitment, Divorce/ Divorced, Regular Marriage*

Introduction

Sologamy, also known as autogamy or self- uniting marriage is defined as the act of marrying oneself as a lifelong S-com to maintaining a meaningful, deep, and loving relationship with yourself. But why do people choose Sologamy? There are many raising questions tagged to this like, Is it because of current stability of relationships? Is it because people do not want to sacrifice their needs for others? Or because women do not feel loved by others, or think they are not understood? Or People found a new way to love themselves and show that they are strong enough being alone and do not need any company? The list of questions is way too long as sologamy is a new and unfamiliar concept to the world.

But the answer to all and any questions relating to sologamy is as simple as its definition that is SL. Sologamy is not an act done against the normal wedding culture but is away to show how much a person loves and is committed to themselves. It is said that you cannot love others until you love yourself first. Sologamy is a cathartic declaration of self-compassion and

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a promise to give to yourself what you often seek from other people. The symbolic ceremony is used by many as an act to emphasize their SL and independence. Women in the coming generation are choosing Sologamy so that they can embrace and love themselves, get to know themselves more, discover their likes, dislikes, wants and needs, being independent financially, emotionally, and in many other ways. To sum it up Women choose self-dependency over co- dependency.

Now the next question is how is it different from not getting married at all? Not getting married might be because you want to be alone or not ready to be committed to a relation yet. But choosing Sologamy is choosing to commit to yourself rather than being alone. It is an act of self- acceptance. Some women expressed their thoughts about sologamy, starting with the question as-why to be someone's wife and seek love from another person when they can love themselves in the same way, while some of them say they always wanted to become a bride but not a wife. In addition to this few say that people marry someone they love, while we love ourselves, why not get married to ourselves.

While not getting married is simply not entering into a relationship, performing Sologamy is choosing to show the love and S-com towards themselves that is normally shown towards another person in a marriage. But sologamists also say that the possibility of marrying someone else down the line should not negate the importance of their relationships with themselves. This leads us to our question- can a sologamist marry another person? How Sologamy impacts other relationships? Yes, a sologamist can marry another person. Marrying yourself is a bold statement that says you are enough and a celebration of your wholeness. You might be open to sharing your life with another person, it is all your choice. But you do not "need" a better half. Building a strong sense of self-worth reduces the propensity to accept stultifying situations or relationships and helps maintain standards for what you expect in a relationship.

When did this trend start? It is not that too old but a new concept. It can be traced back to Linda Baker, a dental hygienist from the US, who married herself in 1993. It is widely considered the first publicized act of self-marriage which was attended by around seventy-five of Baker’s friends, where the bride said “I do” to honour herself in sickness and in health until the day she is not there. Following this many people around the world committed Sologamy. It became more popular in the 21st century especially among affluent women. Celebrities, too, have embraced this marriage; in 2017, Victoria’s Secret model Andriana Lima announced on Instagram by wearing a diamond ring that she is committed to herself. Nneka Carter, an Italian 40-year-old master cosmetologist and fitness instructor, in 2017 reported to have had this marriage.

Roberta Lyndall Fincham an Australian women married herself on her 55th birthday and Palmonia Gordon, a life coach, on her 50th birthday, she donned the gown and married herself in Niagara Falls. After learning about Sologamyn online, Ghia Vitale, a 32-year-old writer from Long Island, New York, proposed to herself in her bedroom. There are manysologamists

like Ghia who are enjoying their self- marriage without going for a public announcement or a huge wedding planned like many, some of them call in a small house party to celebrate their sologamy with a small circle of people or never break the news to the world. Again, it is a personal choice of the sologamist.

Sologamy in India- A24-year-old young Gujarati woman, Kshama Bindu, identified herself as bisexual and announced that she will marry herself on 11th June 2022. Kshama claims that her marriage is India's first Sologamy. But after she was trolled on social media, a political leader announced that he will not let her get married in a temple as it goes against Hinduism, the Hindu Marriage Act incorporated monogamy and strictly prohibited bigamy and polygamy; the act uses the term 'either of the spouse', which means there must be two persons to complete the marriage. So, after all this, she decided to get married sooner and got married on the 8th of June 2022 at her own residence, with all the Hindu rituals including *haldi*, mehndi, *pheras* and applying *sindoor*.

She has written the five vows for herself and has planned to go on a two- week solo honeymoon to goa. After being questioned about why she embraced sologamy, she said "I always wanted to become a bride but not a wife. Self- marriage is a S-com to be there for yourself and unconditional love for oneself. Itis also an act of self- acceptance. People marry someone they love. I love myself and hence this wedding" She said she got this idea from the Canadian Netflix series 'Anne with an E.'

It is said that people get influenced by movies quickly, it is true. It might be good or bad Based on how a person receives the content. As Kshama Bindu mentioned there are a lot of references of sologamy in the Pop-C. Many movies, television shows and books have depicted the sologamy concept. One of the most popular shows, "Sex and the City", has one of its characters, Carry Bradshaw, marrying herself. Likewise, in the American comedy-drama "Glee", the character Sue Sylvester also marries herself. Holly Franklin in the sitcom The Exes, who work as a DIV lawyer, is also shown to follow sologamy.

The famous soap opera doctors have shown the storyline of sologamy for the character Valerie Pitman. The critically acclaimed Spanish comedy film Rosa's wedding follows the storyline of sologamy. Benedict Cumberbatch portrayed the role of All, the man who marries himself, in the film Zoolander 2 in the year 2016. Sacha Cagen's book "Quirky alone" has much popularised the concept of sologamy. In her book Sasha writes as follows-"The common theme in most of the stories (about self-marriage) that I hear is a S-com to take care of oneself as one hopes or imagines that a lover would. Women also frame self-matrimony as a unique solution to the problem of women sacrificing their own needs in a relationship. Marry yourself first, they say, before marrying anyone else."

How do you think people react to the people who perform sologamy? While most of them are having a hard time to understand this concept as it is new and unpopular, some of them tend to Discourage and contradict these ideas they find it wrong, unethical and as an extreme act of

degrading the original concept of marriage where two people get married to each other. Anyway, people in the upcoming generation are showing a lot of support to sologamists. Since the trend picked up, the world is slowly accepting it and happily welcoming this tradition. Service providers too have come up in different corners of the world to help their self-marrying clients. In the year 2014, a travel agency in Kyoto, Japan started offering self-marrying packages for women embracing sologamy and for those women who were not satisfied with their original weddings. IMarriedMe.com in San Francisco offers sologamy ceremony kits, including wedding band and vows, while "Marry Yourself" in Canada offers consulting and wedding photography.

Alexandra Gill, the founder of Marry Yourself Vancouver, told "Today, for the first time in history, women can afford to live on their own, build their careers, buy their homes, create their own lives, have children if they choose. Our mothers and grandmothers did not have this option. The idea of sologamy could involve the practice of self-marriage, but it is also turning the stigma of the sad, lonely spinster on its head. Women are tired of being told they are failures if they have not married by a certain expiry date."

Now, are you wondering if sologamy is only for woman? No. sologamy is not restricted to women, even men can impress sologamy. There are very few of them but not zero. The basketball player Dennis Rodman reported having married himself in 1996.In 2014, a British photographer was also reported to have married himself. Ru a sologamist gave a full-length interview about how he married himself. SL is the same for men and women. Anyone who is committed enough to love themselves unconditionally can embrace sologamy. However, we can see that a greater number of women practice sologamy than men. Even if there are many men who commit the sologamy, they tend to keep it private, yet another personal choice.

In the traditional marriage where two people get married, some of them get DIV. No now can this happen with sologamy? how cana sologamist DIV themself? Is that possible? Cana sologamist do that? Yes, Sologamists can DIV themselves if they want to. When a sologamist decide to marry another person and perform a normal marriage they can DIV themselves. Getting married without divorcing themselves is also fine, it would not result in Bigamy, there is no legal binding to this.

A 33-year-old woman, *Cris Galera*, who hails from Sao Paulo in Brazil married herself in 2021 and has decided to DIV herself after 90 days after she met someone special. Another example is of a celebrity Andriana Lima, who after embracing sologamy later DIV herself and gave birth to a child with her partner. Unlike the traditional marriage, Where the two people stop being a couple after divorcing, a sologamist does not have to stop loving themselves after a DIV from sologamy. Though sologamy declaration of SL and S-com, it does not mean that will stop being committed to yourself after you get DIV.

What is the legality of Sologamy and its DIV? Though it is on the rise globally sologamy is not recognised by law in any country across the world. Legally speaking, in India sologamy is

not permitted as the marriage is perceived as uniting two people. Even across the globe no country has ever mentioned the laws relating to sologamy, as this is a new and upcoming trend which needs to be carefully looked into before making any laws. There are no rules or regulations about getting married to yourself or getting DIV to yourself. until further laws are developed on sologamy people are free to get married to themselves and can DIV themselves.

Conclusion

Married or unmarried, monogamy or sologamy, whatever you choose, never forget to love yourself. With or without the ceremony of sologamy, one should always be committed to themselves and love themselves in all the ways possible. Mostly women who face many problems must learn to embrace themselves and become a strong and independent person.

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The Special Marriage Act, 1954 - An Analytical Study

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Abstract

This paper critically analyzes the Special Marriage Act, 1954 which was acted to ease the process of registration and validity of marriages that seemed to be recognised as a taboo and usually not recognised by the personal laws on which Indian family laws are based. It has been observed that there is a rise in the number of marriages through the Special Marriage Act, 1954.According to the data obtained from the stamps and registrations department 2,624 marriages were registered under the Act in 2013 - 14 and the number jumped to 10,655 in the year that followed. The number had reached 8,391 in 2015-16, up to January, i.e. a 306 per cent rise from2013-14 to 2014- 2015.1 It has been recorded that many marriages today are interreligious and inter-caste, and are largely beyond the purview of spiritual-based marriage laws. This Act provides an opportunity to perform the marriage ceremony as per the Indian Constitution. The numbers of weddings from different beliefs are growing after the implementation of this Act. While having a positive intent, this act needs a positive and effective implementation as well. Scope of the study mainly focuses on required or future amendments needed in the Special Marriage Act, 1954. Understanding the act from the basics along with looking at some land mark cases will help us identify the loopholes of the act which can further develop a better framework to improve this act.

Keywords: *Critical Analysis, Special Marriage Act, 1954, Inter-Faith Marriage, Inter- caste Marriage, Special Marriage*

Introduction

In India, Marriage is not just a formality but rather an event of a lifetime to which some individuals look forward to from a young age. For the majority people of the country, it is a commitment and bond for not just this life but the next seven lives but what about the ones who do not want to enter into a commitment for seven lives and neither want to do a civil contract i.e., Muslim marriage but rather want to get married to a person of different faith and that too without having the need to convert to that religion? The answer to this question is the Special Marriage Act enacted in 1954, which was aimed to enable cross faith marriages or a marriage which lacks the essential ingredients according to the religion it was supposed to be performed under to get the legal validity.

The requirements for a valid marriage under this act are very simple and basic such as there should be consent among both the individuals, both of them need to be above 18 years and male to be more than 21 years old and their relation should not be of prohibited degree for example they should not be related by blood to one and another. Essentially, the need for special legislation was realized when the problem of Inter-Caste marriage being shunned from Indian Society came into light. This act is also considered one of the most important steps towards a fair and secular society since India being a country with different religions but

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maintaining a secular character, this act removes the barrier which is ingrained in every religious specific act that deals with marriage, divorce and related provisions for people belonging to that particular religion. Special Marriage Act, 1954 enables people belonging to different religions to marry each other and create a bond which is free from societal standards and expectations which is also sometimes very rebellious and for this very reason Special Marriage Act, 1954 needs to be a very strong legislation with zero to none drawbacks.

Background

This act has originated from a proposed legislation during the British era by Sir Henry James Sumner Maine who was a British official assigned to Family Laws in British India, though the proposal failed to get enacted, the makers of the constitution had it in their minds. In the final wording, the law sought to legitimize marriages for those willing to renounce their profession of faith altogether. The Bill faced opposition from local governments and administrators, who believed that it would encourage marriages based on lust, which would inevitably lead to immorality.[2]

The Special Marriage Act, 1954 replaced the old Act III, 1872. The new enactment had three major objectives:

- To provide a special form of marriage in certain cases,
- To provide for registration of certain marriages and,
- To provide for divorce

This act includes every Indian citizen regardless of caste or religion, it even includes Indian nationals who live abroad. For marriage under this Act, the parties must file with the district's Marriage Registrar a notice stating their intention to marry each other in which at least one of the parties to the marriage has lived for at least 30 days prior to the date on which such notice is filed. After the expiry of 30 days from the date that such notice was published, the marriage is then solemnized, but if any person objects to this marriage and the registrar finds that it is a reasonable cause of objection, on such grounds he can cancel the marriage. For a valid marriage, the parties must also give their consent to the marriage before the marriage officer and three witnesses.

Analysis Of Sections 5, 6, 7, 8 AND 19

Section 5

of the Special Marriage Act, 1954 states that: "*Notice of intended marriage. ―When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given."*[3]

This section is the first problem in this act, which deals with the notice of intended parties to

[2]Amartya Bag, 10 things every Indian should know about the special marriage act,1954 iPleaders (2019), http://blog.ipleaders.in/10-things-every-indian-should-know-about-the-special-marriage-act1954/ (last visited Oct 20, 2021).

[3]Sec 5, Special Marriage Act, 1954

marriage requiring at least one of them to have resided in that particular jurisdiction for a period of not less than 30 days immediately preceding the date on which such notice is given to the Marriage Office of the district. This is an unnecessary hurdle that couples must face and this situation becomes worse when it is a love marriage which is against the acceptance of the parties' parents or families, 30 days is enough for the couple to get harassed.

In *J. Shaik Mohammed v. Inspector General of Registration &Ors.*[4]the petitioner prayed before the Hon'ble Madras High Court to waive off the obligation upon the Marriage Officer to wait for 30 days before registering the marriage since, both the intending parties belonged to Backward Classes and their families were against their marriage which was Inter - Religion in its nature and both the intending parties faced backlash from the society, despite these facts the Hon'ble High court of Madras refused to accommodate parties' demands and this judgement shows the inconsistency of Indian Judicial System when it comes to rebelling against the traditional structures and unwillingness to amend a lacklustre piece of legislation, which should be criticised as it was need of the hour to protect the citizens from a faulty law.

Section 6

Of the Act states that "*Marriage Notice Book and publication. ―(1) The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same. (2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office. (3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under section 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office."*[5]

This section again creates an obligation on the Marriage Officer to publish the notice which could've as it does not have rational basis to support the extra step to get a marriage registered under the act. Clause (3) of this section has a detrimental effect on parties that are not living in India as in *Augustine v. Marriage Officer Ernakulam*[6], Hon'ble Kerala High Court had to intervene to make sure that a legally valid marriage was registered between an Indian Citizen who was marrying an Uzbekistan citizen, the marriage registrar according to section 6 of the Special Marriage Act, 1954 had sent a notice of intention to marry according to section 5 of the act to the Indian Embassy in Uzbekistan and in his reasoning to deny the registration of marriage even after expiry period of 30 days to raise an objection, said that they were still waiting for a reply from the embassy. The Kerala High Court after hearing the flawed and

[4] J. Shaik Mohammed vs Inspector General of Registration &Ors, 2018 SCC OnLine Mad 5430
[5]Sec 6, Special Marriage Act, 1954
[6]Augustine vs. Marriage Officer, 2013 SCC OnLine Ker 10781

lethargic arguments from the defendants directed the Marriage Officer to immediately register the marriage and issue a valid marriage certificate, this was a rare instance where the judiciary intervened to make sure that the legislative intent of ease of registration was also executed by the authorities.

Section 7

States that: *"Objection to marriage. — (1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of Section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in Section 4.*
(2) After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of Section 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1).
(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained, if necessary, to the person making the objection and shall be signed by him or on his behalf."[7]

This above-mentioned section enables anyone before the expiry of 30 days from the date on which such notice has been published, to object to the solemnisation of marriage on the grounds that it can contradict one or more of the conditions specified in section 4 which are neither party has a spouse living, neither party is incapable of giving a valid consent in consequence of unsoundness of mind, the requirement of minimum age and that they are not within the prohibited relationship. While the legislative intent behind drafting of this section could have been that if any party has a living and legally wedded spouse and if they came into knowledge of their spouses' intent to marry someone else again, they can object to the marriage but while the intent is positive, the application of this section goes against the entire spirit of the legislation as it is often used by the dissenters to the marriage to harass the parties and in *Shafi K.K &Anr v. Marriage Officer*[8]*Kerala* High Court was disappointed after the court found out that the Marriage Officer refused to register the marriage under section 7 when the mother of one of the parties' filed an objection but that objection had no basis to which the marriage shouldn't have been registered. These kinds of procedural loopholes in the act weakens its positive intent when it is applied in a way which goes against its fundamentals which focus on an easy procedure with less restrictions.

Section 8

The Special Marriage Act, 1954 states that *"Procedure on receipt of objection.—(1) If an objection is made under section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the*

[7]Sec 7, Special Marriage Act, 1954
[8]Shafi K.K vs Marriage Officer, 2016 SCC OnLine Ker 39460

date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.
(2) If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the court."[9]

This section basically empowers the Marriage Officer to inquire into the objection and satisfy himself that it does not prevent the solemnization of the marriage. If the objection is upheld within 30 days, either party to the intended marriage can appeal to the respective district court and the decision of the court shall be considered final. While the procedural implementation of this section is based on correct and logical rationale, the problem can arise when the marriage officer is given an arbitrary power to not register the marriage and inquire into even the outright false objections and addition of extra step of approaching the courts when intention to marry is rejected creates a avoidable cycle of inquiry, investigation and appeal which is again a rather not welcome move for the rebellious parties' who are already harassed by their families and the only law which is supposed to ease their tensions also harasses them.

Section 19

This section talks about *"Effect of marriage on members of an undivided family. —The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religions shall be deemed to affect his severance from such family."*[10]

This is perhaps the most controversial and problematic section in the entire act because of its punitive nature which seems to affect succession rights of people belonging to a few certain religions which in fact is very hypocritical since this Act was supposed to be the landmark piece of legislation when it came to the topic of secular laws. While the basic right of every person whose marriage is registered under the Special Marriage Act, 1954 is that their succession to property would be governed by the Indian Succession Act, however if the parties belong to Hindu, Sikh, Jain or Buddhist religion the succession of the property then would be governed under the Hindu Succession Act. This goes against the philosophy of the act which focuses on the part that individuals are not required to renounce their religions in order to marry the partner of their choice. In *Maneka Gandhi v. Indira Gandhi*[11], Smt. Maneka Gandhi who was married to Shri Sanjay Gandhi, younger son of Smt. Indira Gandhi faced unnecessary problems when it came to succession of the estate that belonged to Varun Gandhi's Father, Shri Sanjay Gandhi.

[9]Sec 8, The Special Marriage Act, 1954.
[10]Sec 19, The Special Marriage Act, 1954.
[11]*Maneka Gandhi v. Indira Gandhi,* 1984 SCC Online Del 108.

Suggested Amendments and Conclusion

Justice S. Ravindra Bhat in the case of ***Pranav Kumar Mishra v. Govt. of NCT, Delhi***[12] observed : "the special marriage Act was enacted to enable a special form of marriage for any Indian national professing different faiths or desiring a civil form of marriage. The unwarranted disclosure of matrimonial plans by two adults entitled to solemnize it may, in certain situations, jeopardize the marriage itself. In certain instances, it may even endanger the life or limb of one or the other party due to parental interference. In such circumstances, if such a procedure is being adopted by the authorities, it is completely whimsical and without authority of law."

After thorough readings, it is very clear that some of the sections of the act need urgent amendments or straight away should get repealed and it is only logical to do so to save this landmark legislation which is often hailed for its unique secular character that is ingrained in the Constitution and Directive Principles of State Policy to implement a Uniform Civil Code, this act is the key or simply a getaway to the future of legislations which should be faultless and to make this law into a more effective piece of legislation the following changes are suggested :

(1) The provision of a month gap as mentioned in section 5 should be annulled so as to prevent the parties from being harassed.
(2) Section 4 is reasonable yet the fact that similar conditions are not applicable to marriage held outside the purview of the Act makes one wonder whether they are just.
(3) The need for such a provision as mentioned in section 19 is inexplicable especially when such severance could result in deprivation of inheritance and other rights of the couple intending to marry under this so-called secular Act.

[12]*Pranav Kumar Mishra v. Govt. of NCT. of Delhi,* 2009 SCC OnLine Del 725.

Essentials of Marriage under different Personal Laws

Jayashre E[1]

Abstract

"In all religions, we hear of the seven planetary genii: The Hindu tells of seven Rishi, The Parsi of seven Ameskaspentas, The Mohammedan of seven Archangels & The Christian religion has its seven spirits before the throne" Max Hoindel. Marriage is a universal institution; it is the foundation of a society. It also plays an important role in transferring the culture, traditions and civilisation to the future generation. In India marriages are governed by each person's personal laws which are law that applies to a certain class or group of people or a particular person, based on the religion, faith and culture. This study has been derived for various articles and research papers. This essay analyses the essentials of marriages that is considered necessary under various personal laws depending on the religious beliefs that they follow. These practices differ from religion to religion since the idea and the objective of marriage differs from different religions. Through this study we find that the institution of marriage is governed by personal laws and there are different essentials under different personal laws due to their understanding of marriage which can be seen from the difference n the nature of marriage for example marriage is considered as a sacrament and a contract according to the Muslims.

Keywords: *Marriage, personal laws, institutions, religions, essentials*

Marriage

Robert H. Loure defined marriage as "Marriage denoted those unequivocally sanctioned unions, which persisted beyond sexual satisfaction. It thus came to underline family life, since sexual satisfaction could often be amply gratified outside wedlock.[2]

B.P Beri says that the main aim of a marriage that it is the source of all domestic comfort from infancy to the old age, it is necessary for the preservation and well-being of our species, it wakens and develop the best feelings of our nature, it is the source of important legal rights and obligations and in its higher forms it has tended to raise the weaker half of human race from a state of humiliating servitude.[3]

The idea of governing marriage through personal laws was first introduced by warren Hastings the first governor general of British India. Even after the independence India continued with this policy of not interfering with citizen's religious sentiments.[4]

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[2] Concept of Marriage and Personal Laws in India - Ignited Minds Journals, https://ignited.in/I/a/211245 (last visited Aug 17, 2022). 2022).

[3] *id*

[4] Rachit Garg - et al., Marriage laws in India: An Analysis of Legal Solemnization of Marriages iPleaders (2021), https://blog.ipleaders.in/marriage-laws-india-analysis-legal-solemnization-marriages/ (last visited Aug 17, 2022).

Hindu Law

The marriages of people who follow Hinduism will be governed by the Hindu marriage act of 1955. According to Hindus their marriage is a sacrament where the man and woman are bounded in a relationship which is permanent in nature for the purpose of physical, social and spiritual for dharma, procreation and sexual pleasure. [5]According to the Satpatha Brahmana "the wife is verily the half of the husband. Man is only half, not complete until he marries".[6]

Essentials of a Hindu Marriage

One of the basic necessities for a Hindu marriage is that the woman should have attained the age of 18 and the man should have attained the age of 21. The essential for a Hindu marriage for it to be held as valid are given under section 5 of the Hindu marriage act of 1955.

The essential for a marriage to be solemnized are as follow, this act prohibits polygamy that is, a marriage is not considered to be valid if a person is already having a spouse who is living, going against this law can also attract punishment under the section 494 of the Indian Penal Code of 1860[7]. A marriage can be considered invalid or void, if a person was in unsound mind at the time of marriage. A marriage can be considered to be valid only if there was free consent which means that now can force a parent cannot force their children to get married[8].

The next one is the Sapinda relationships, people who are in a sapinda relationship cannot marry each other, the sapinda relationship is described under both Mitakshara and Dayabhaga, Mitakshara defines sapinda relationship 'person who is linked by the same body particles' and Dayabhaga refers it to "a person who is linked by the same Pinda" which is a ball of rice or funeral cake offered at sraddha ceremony. [9]The Hindu Marriage Act of 1955 prohibited this type of relationship under the rule of exogamy except if a person can prove that their customs permit this kind of marriage.[10]

Section 7 of the Hindu Marriage Act provides for the ceremonies which are considered to be essential for the solemnization of a Hindu marriage. The customary rites and customs are referred to as Shashtrik ceremonies and they are performed by a community for a considerable amount of time, these ceremonies may differ from community to community, therefore the parties of the marriage can decide whose practices to follow but they have to be constant

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[5] legal Service India, Legal articles Latest legal Articles written by imminent writers and legal experts - Law Library - legal Resourses, https://www.legalserviceindia.com/articles/articles.html (last visited Aug 17, 2022).

[6] Home - PMC - NCBI, National Centre for Biotechnology Information, HTTPs://www.ncbi.nlm.nih.gov/pmc/ (last visited Aug 17, 2022).

[7] Ayush Verma - et al., Nature of Hindu marriage under the Hindu Law iPleaders (2022), https://blog.ipleaders.in/nature-hindu-marriage-hindu-law/ (last visited Aug 17, 2022).

[8] *id*

[9] Rachit Garg - et al., All you need to know about sapinda relationships iPleaders (2022), https://blog.ipleaders.in/all-you-need-to-know-about-sapinda-relationships/ (last visited Aug 17, 2022).

[10] *id*

throughout the ceremony for e.g. if they choose to follow the groom's custom then the entire marriage should follow the groom's custom.[11]

Some of the essential ceremonies that are necessary for the solemnization of a marriage are homa which is a sacred fire ritual, panigrahana is where the bridegroom and the bride go around the fire chanting Vedic mantras, Kanya dan is a custom where the bride's father gifts the bride to the bridegroom and Saptapadi is taking seven steps around the sacred fire[12]. The language in which the marriage is declared should be the language that has to be understood by both the parties.[13] Section 8 provides for the registration of marriage. In the year 2006 the supreme court made it mandatory to register a marriage for the purpose of validating the marriage and the wedding photos, passport, ration card etc can be considered for the marriages performed before 2000.[14]

Muslim Law

Unlike Hindu marriage, Muslim marriages are considered to be a civil contract rather than a sacrament. They perform certain rites and rituals though they are not vital for a Muslim marriage[15], but there are some essentials to validate.

Essentials of a Muslim Marriage

Proposal and Acceptance

Here, a proposal is known as 'ijab' and the acceptance of ijab is known as 'qubul'. [16]There must be two witnesses along with the man and the woman and one of the essential is that the man himself or someone on his behalf and the woman or someone on her behalf has to accept the agreement in front of the witness. [17]The man is asked whether he is ready to marry the woman along with the payment of dower and the woman is asked whether the woman accepts the marriage proposal and the dower and their answer is conveyed to each other.[18] After this, the man reads a part from the Quran and the marriage is solemnised if there is free consent.[19]

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[11] Arya Sharma, Analysis of section 7 of Hindu Marriage Act, 1955 LawLex.Org (2021), https://lawlex.org/lex-pedia/analysis-of-section-7-of-hindu-marriage-act-1955/26587 (last visited Aug 17, 2022).

[12] Ayush Verma - et al., Nature of Hindu marriage under the Hindu Law iPleaders (2022), https://blog.ipleaders.in/nature-hindu-marriage-hindu-law/ (last visited Aug 17, 2022).

[13] *id*

[14] Amrita Chakravorty, Marriage registration in India guide IndiaFilings (2021), https://www.indiafilings.com/learn/marriage-registration-in-india-step-by-step-guide/ (last visited Aug 17, 2022).

[15] legal Service India, CONCEPT OF MARRIAGE IN MUSLIM LAW LEGAL SERVICE INDIA, https://www.legalserviceindia.com/article/l162-Concept-of-Marriage-in-Muslim-Law.html (last visited Aug 17, 2022).

[16] Harshit Khare, 'Muslim Marriage in India' https://www.legalserviceindia.com/article/l418-Muslim-Marriage.html (last visited Aug 11, 2022)

[17] Ashish Agarwal, 'Essential Conditions for Muslim Marriage in India' ; https://www.legalbites.in/essential-conditions-for-muslim-marriage/ (last visited Aug 11, 2022)

[18] *id*

[19] Harsh Nayak, Nikah - A Contract of Marriage, 1 Jus Corpus L.J. 607 (2021).

The law differs for Muslims belonging to different section, Sunni law states that there should be two witnesses, [20]the Shia law states that the presence of witness is not necessary [21]while the Hanafi law states that free consent is not considered as an essential of marriage.[22]

In the case *Rashida Khatoon v. S K Islam*, the man promised to marry woman and started to live with her and they both gave birth to the baby and the woman gave herself the status of wife, but their union cannot be recognised as marriage since as per law there needs to be a proposal and acceptance whereas here it was merely a promise and there was no presence of witness.[23]

Competence to Marriage

a) The age of the parties: the girl and the boy must be 9 and 12 respectively and in case if the parties to the marriage is minor then the consent of the legal guardian becomes essential whereas the Prohibition of Child Marriage Act of 2006 states that the age for a boy and a girl is 21 and 18 respectively in this case the marriage is voidable;
b) the soundness of mind: in case of full unsoundness of mind the person cannot enter into the contract and if the person is mentally unstable in lucid interval, then the person can enter into the contract only when he or she is in a sound mind;
c) the marriage can be performed under the Muslim law only if both the parties are Muslims, if not then the marriage comes under the purview of the Special Marriage Act;
d) a marriage is invalid if there is no free consent;
e) the Dower which is provided by the bridegroom to the bride is considered as a consideration without which the contract is considered as invalid.[24]

No Legal Incapability

1. Absolute incapability: A marriage is considered as void if the parties are blood related or in prohibited relationship, it is of 3 types
    a. Consanguinity: it means that a person cannot marry his blood relative. For e.g., mother, grandmother, daughter, granddaughter, sister, niece etc., [25]
    b. Affinity: it means that a person cannot marry another who is a close relation.
    c. Fosterage: it says that when a child is orphaned the mother who raises the child is known as the foster mother. in such a relation a person cannot marry his foster mother or foster daughter. But Sunni law has some exceptions to this type of restriction.[26]

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[20] *Id*
[21] *Supra 18*
[22] *Supra 18*
[23] Saumya Shukla, Essentials of valid marriage under Muslim Law Column (2021), https://www.lawcolumn.in/essentials-of-valid-marriage-under-muslim-law/ (last visited Aug 17, 2022).
[24] Prerit Yadav, Essential of valid Muslim Marriage & Classification of Muslim marriage - law times journal essential of Muslim Marriage & Classification Law Times Journal (2021), https://lawtimesjournal.in/essential-of-valid-muslim-marriage-classification-of-muslim-marriage/#:~:text=The%20basic%20aim%20of%20marriage,necessary%20for%20a%20Muslim%20marriage.&text=In%20a%20Muslim%20marriage%2C%20Proposal,the%20same%20is%20'qubul'. (last visited Aug 17, 2022).
[25] Shalini Goswami; LEGAL IMPEDIMENTS ON MUSLIM MARRIAGE JUS CORPUS (2022), https://www.juscorpus.com/legal-impediments-on-muslim-marriage/ (last visited Aug 18, 2022).
[26] *Supra 23*

2. Relative incapability: this type of marriage is not considered as void but considered irregular, when the irregularities are dissolved then the marriage will be considered as valid.

   If a person marries two women who share consanguinity, affinity or fosterage then the marriage will be considered as invalid unless he divorces one of them. this kind of marriage is irregular under Sunni law and void under Shia law

   Muslim law allows a man to marry 4 wives but if he marries 5, then the marriage becomes irregular until the death or termination of one marriage. The fifth marriage is completely void under Shia.

   A Muslim man cannot marry a woman who is an idol worshipper.

3. Directive incapability: a Muslim man cannot marry a woman who bears a child from her previous marriage. This also prevents marriage with a sick man and marriage during pilgrimage.[27]

Christian Law

Christians believe that marriage as a gift from God and cannot be taken as granted. It is sacrament with god's blessing to share the life with someone who they love and have children who can follow the same faith.[28]

Essential of a Christian Marriage

The essentials of Christian marriage are mentioned in part VI under section 60 of the Indian Christians Marriage Act of 1872. It states that

1. A groom cannot be below the age of 21 and the bride below the age of 18,
2. they should not have a spouse living at the time of marriage,
3. the marriage should be conducted in the presence of a person who is licenced under section 9 and two witness in front of whom they may say the following
   "I call upon these persons here present to witness that I[name of the person], in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, [name of the person]., to be my lawful wedded wife or husband" or the words that will have the same effect,[29]
4. if there is no concern from either of the party then the marriage won't be considered valid and

[27] *Supra 18*
[28] Esther Visser, What does it mean to have a Christian marriage? Biblword.net (2022), https://www.biblword.net/a-christian-marriage/ (last visited Aug 18, 2022).
[29] Admin, Essential and procedure of Christian marriage National Journal for Legal Research and Innovative Ideas (2021), https://www.njlrii.com/2021/08/essential-and-procedure-of-christian.html (last visited Aug 18, 2022).

5. if in case the other person being non-Christian and in case their personal law forbids such kind of marriage, then the marriage is considered as invalid.[30]

Parsi law

Even Parsis consider marriage as a contract. A Parsi marriage cannot be valid without *'Ashirwad'* which means blessing, also a prayer for their marital obligation is important, it also object monogamous and endogamous[31]. The essentials of a Parsi marriage is given in section 3 of the Parsi marriage and Divorce Act of 1936.

Essentials of a Parsi Marriage

1. The marriage cannot be valid if the relationship between the parties falls within the degrees of prohibited relationship,
2. it is also necessary for 'Ashirwad' in the presence of the priest and two witnesses,
3. the age of the male cannot be below 21 and 18 for female,
4. if the marriage is considered invalid due to the absence of the above conditions, any such child born out of such marriage would be considered legitimate if the child is legitimate in the case of valid marriage.[32]

Sikh Laws

There has been always a demand for a separate marriage legislation since they are also included in the same legislation. In the case of Birendra Kumar vs. Union of India. The appellant of this case filed a Public Interest Litigation in the High Court of Haryana and Punjab to change the name of the Hindu Marriage Act, Hindu Succession Act, Hindu Minority and Guardianship Act and Hindu Adoptions and Maintenance Act to a secular name due to the problems faced by them abroad, when this petition was dismissed the appellant appeared in front of the Supreme court and in 2012, Anand Marriage (Amendment) Act which gave the Sikhs the legal right to register their marriage under this act.[33]

Essentials of a Sikh Marriage

The essential ceremonies were laid by the High court case of *Resham Singh v. Kartar Singh* and by the Supreme Court's case *Kanwal Ram and Ors v. Himachal Pradesh Administration* according to which four Lavans performed by the groom and the bride around the Holy Guru Granth Sahib along with the hymns by Guru Ram Dass and a matrimonial ceremony Anand

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[30] Lawnn.com - et al., Essentials of a valid Christian marriage, rules and procedure for its solemnization Homepage - Legal News India, Legal News World, Supreme Court -1 (2019), https://www.lawnn.com/valid-christian-marriage/ (last visited Aug 18, 2022).

[31] The Parsi Marriage And Divorce Act, 1936 - toppr-guides, , https://www.toppr.com/guides/legal-aptitude/family-Law-I/parsi-marriage-and-divorce-act/ (last visited Aug 18, 2022).

[32] Parsi law regarding marriage and divorce. an overview, LEGAL SERVICE INDIA - LAW, LAWYERS AND LEGAL RESOURCES, https://www.legalserviceindia.com/legal/article-1883-parsi-law-regarding-marriage-and-divorce-an-overview.html (last visited Aug 18, 2022).

[33] Rachit Garg - et al., Marriage Laws In India: An Analysis Of Legal Solemnization Of Marriages IPLEADERS (2021), https://blog.ipleaders.in/marriage-laws-india-analysis-legal-solemnization-marriages/#Parsi_marriage_laws (last visited Aug 18, 2022).

Karaj which means 'blissful event' for the registration of Sikhs marriage under the Anand Marriage Act are considered essential.[34]

Conclusion

We can thus conclude that religions play an important role in India and thus these personal laws govern the institution of marriage and there are also generalised laws governing it but these laws need to be updated with the evolution of humans. People are therefore governed by their own beliefs in the matter of marriages thus not hurting their personal beliefs.

[34] *id*

Interstate Succession of Parsis

Nandini Modi[1]
Kushagra Gupta[2]

Abstract

In order to defend their rights as citizens of India, a small community of Parsi Zoroastrians must maintain both their religious values and their personal identity, and they must also adhere to the Indian Constitution since they resemble a distinct population. These Parsi Zoroastrians are concerned about how the Legislature's whipping up of the Uniform Civil Code issue in India may influence their right to succession. It is therefore of the highest significance to examine their development in India and perhaps the succession law patterns that have been established for them.

The purpose of this study is to explore who constitutes a Parsi under the Indian Succession Act of 1925 and if an illegitimate kid can be considered as a successor. This study will primarily focus on the evolution of the Parsi succession through time as a result of statutes and legal decisions. This study would also scrutinize areas of the existing Succession Law to see how the tiny community may maintain its customary rules while also giving the society's women with the rights that they have recently demanded.

In addition, the purpose of the study article is to thoroughly examine the development of Parsi succession laws and the transfer of property for infants born of Parsi and non-Parsi marriages. It is notable that there are fewer literatures written about the succession of the Parsi's and that the idea of an illegitimate child or an adopted child inheriting the estate has not been proposed in many places; rather, the literatures and judgement precedents have solely been decoded.

Keywords: *Intestate Succession, Parsi Inheritance, Parsi Marriage, Adoption*

Introduction

Zoroastrians, also known as Parsis, are a minor religious group in India whose numbers are steadily declining. The Indian legislation has done a good enough job of protecting the little religious community's rights and customs to provide them privileges in several ways. Due to the Arab invaders' persecution of religious minorities in the Parsi community first appeared when their forefathers immigrated to India. It is still unclear from ancient manuscripts if the Parsis carried any laws to India when they first arrived and established in the little town of Sanjan in the year 716 A.D. As soon as they arrived in India, Hindu and Muslim laws had a substantial influence on their customs, which were later modified by laws such as the Parsi Chattels Real Act of 1837, the Parsi Marriage and Divorce Act of 1865, the Parsi Intestate Succession Act of 1865, as well as the Indian Succession Act of 1925. Prior to 1837, English common law governed the rules that applied to Parsis and their land, with a few modifications for marriage and bigamy.

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In order to protect the succession rights of the Parsi Community, Sections 50 through 56 of the Indian Succession Act of 1925 guarantee testamentary rights and broadly encompass the instate succession of the Parsi. It is noteworthy to note that the Act does not accept the right of illegitimate children, since the Parsi succession is given according to blood relations. The term Parsi is not defined by this statute, but rather by The Parsi Marriage and Divorce Act of 1936. It has been noted that the Parsi succession and the Christian succession share some of the same fundamental tenets in their respective lineages.

The succession Act has been under scrutiny as of late from Parsi women who marry outside the tribe but still want their offspring to be considered "Parsi." This is because they are treated differently than a Parsi man who marries outside the community. As the ranges of Succession laws associated with other faiths have expanded, it is regrettable that the Parsi succession rules have not yet been brought far too much attention. As the slightest religious community in India, they must be protected and it must be ensured that they are not dispossessed of their privileges.

Evolution of Succession Laws

The Hindu and Muslim legal systems have been a significant source of inspiration for the customary laws of the Parsi community. Communities, after multiple changes, various amendments, and legislation, such as the Chattels Real Act of 1837, The Parsi Marriage and Divorce Act of 1865, and The Parsi Intestate Succession Act of 1865. For Parsis, the Indian Succession Act 1925 was approved by the British Indian Parliament. The new primogeniture illustrates the tremendous impact of Hindu and Muslim laws on the Parsi inheritance system, despite the fact that the current succession laws have altered significantly and fundamentally diverged from the original customary regulations.

Before 1837, the norm that applied to the Parsis and their property was, according to English common law, exceptions were allowed for situations like marriage and polygamy, among other things. A Parsi man who had died without leaving a will in 1835 and had significant piece of property in Bombay and whose oldest child had filed a lawsuit before the Supreme Court of Bombay for a proclamation that, in accordance with the law of intestate succession that was in effect in England at the time, he was privileged to his father's complete estate lodged the court case.

The Parsis of the Madras Presidency were startled by this unsubstantiated claim, so they petitioned the government, which responded by passing the Parsee Chattels Real Act 9 of 1837, which stated that, effective June 1, 1837, all estate within the domain of each proceeding established by His Majesty's Charter must, with respect to the transfer of such real estate upon deaths. Because of this Act (9 of 183(7)), Parsis in Bombay are no longer subject to the English precedent - based law in terms of immovable property, but they are vulnerable to the English dissemination penal code in the event of an intestate succession, in which one-third of the estate goes to the widow and the remaining two-thirds is allocated accordingly among the kids and

their heirs.[3] Prior to1855, there were no activities. On August 20, 1855, Bombay's Parsis gathered a session to discuss and endorse a sample Code of Laws tailored to the Parsi community and to request the Legislative Indian Council to enact it. At this session, an organisation was established to develop a Code of Laws suitable to the Parsi community members.

Ardeseer Cursetjee v. Peerozebai[4] was a case outlined to the Bombay Supreme Court from the monastic branch in 1856, and the Privy Council issued its decision that year. The respondent objected to the jurisdiction of the court, but the Chief Justice ruled that the court had the necessary expertise to hear the case. As a result, a petition for the revival of conjugal privileges could not be granted to parties who identified as Parsees.[5] After the verdict was handed down on July 17, 1856, the legislature's endorsement was once again deemed crucial.

The Parsi code of law was first determined and endorsed by the Parsi Law Association on December 5, 1859. It was presented to the legislative council on March 31, 1860, along with a plea. Inspections were started on June 13, 1860 at the request of the Bombay administration.[6]When it came to issues of intestate succession, inheritance law, and real estate as between marriage, the Parsis took a firm stance against the constitutional rights of women as well as of married women to keep or trade of their part of the estate during covertures. The sub divisional Parsis and the Bombay Parsis both came to the conclusion that the English Inheritance and Succession Law and the English Property Law as it applied to marriage were wholly inappropriate for the needs of the Parsi community.[7]

Upon October 13, 1862, the Commission issued its findings, rejecting the claim that the sub divisional Parsis in the city of Bombay should have a different set of inheritance and succession laws than the mofussil Parsis. As a consequence, two legislations were approved by India's legislative council, namely the Parsi Marriage and Divorce Bill; and the Parsis Succession and Inheritance Bill, passed on 17 February 1865 and denoted on 24 February 1865 to the select committee. The document of the special committee on the succession bill was given on March 31, 1865, and it was discussed on April 7, 1865. The Parsee Intestate Succession Act 1865 was the name given to the Bill when it was put into effect. The widow and daughters of a Parsi who passed away intestate in the taif received a part, which was one of the significant changes introduced by this Act. Previously, they had only been entitled to support.[8] Two important rulings on the law governing Parsis were rendered during the year 1881. The question raised was whether Parsis were covered by the law in Shelley's case in *Mithibai v. Limji N Banaji*.[9] It was deduced that such provisions relating to Parsis was not appropriate to the sort of situations

[3] Gender Justice in Succession laws in India, Sarkar and Santosh Kumar, Chapter4, University of North Bengal Publication, (August 10, 2022), https://sg.inflibnet.ac.in/bitstream/10603/137137/9/09_chapter_04.pdf .
[4] 6 MIA 348.
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] Law Commission of India 110th Report, February 1985.
[9] 5 Born 506 (In appeal 6 Born 151).

in India, even taking into account that the English law prolonged to Parsis could not be seen as a regime in the sense of Shelley, which is the law of country or estate originally established on feudal considerations and unsuitable for the scenarios in India.[10]

In *Payne & Co. v. Pirosijha Patel*[11], it was ruled that the Parsis of Bombay were subject to English common law, meaning that a woman may use her husband's finances to defend herself in court if she was sued for divorce. It was unnecessary for the wife to prevail in the lawsuit.[12]

In *Hirabai v. Dinsha,*[13] the issue of whether specific injury had to be shown in a case of slander against a woman was decided. It was decided that since the Parsis in the city versus Bombay were subject to English common law, special hardship had to be proven. The conundrum of what law governed the Parsis in the mofussil was posed in *Kuberdas v. Jerkish Navroji*[14] as early as 1941. It was determined that, in the apparent lack of a constitutional provision, the Parsees in the mofussil were governed first by the use and then foremost by the provisions of capital and good faith, that is, by the basic guidelines of English law that applied to a similar set of conditions.[15]

Indian Succession Act 39 of 1925 included the Parsi Intestate Succession Act word for word in Chapter III of the Act. Schedule IX of the Act explicitly revoked the whole Act. An intriguing question arose in the 1936 case of *Ratanshaw v. Bamanji*.[16] Dorabji and Hirabai had separated via a joint fargat, which was recognised by law in Baroda State. Dorabji passed away unexpectedly and left behind some real estate in Bombay. Plaintiff Khurshedbai sought a portion of the estate he left behind for her and her daughter Baimai. For the purposes of succession of immovable property in British Raj, the question was about whether or not Heerabai's divorce byfargat could be regarded a valid divorce. According to section 5 of the Indian Succession Act of 1925, Heerabai's petition by fargat was invalidated if the succession of Dorabji's immovable property in British India was to be governed by British law. Since the petitioners claimed his marriage to Khurshedqai was invalid and gave her no legal standing, they were successful in their motion to dismiss.[17]

The Indian Succession Act, 1925 From the Parsi's Perceptions

The Indian Succession Act, 1925 presently governs the Parsi community in India with regard to succession. The Act has not been retroactively applied. This is true whether a testamentary or no testamentary instrument is signed previous to the passage of this Act as long as the actions under it take place after its passage. It also imposes when a Parsi passes away intestate, – i.e., not leaving a will. This does not extend to farmland because the federal legislature lacked the

[10] *Ibid.*
[11] 3 Born LR 920.
[12] Ibid.
[13] 28 Bom LR 391.
[14] 43 Bom LR 981.
[15] Ibid.
[16] 40 Born LR 141.
[17] Supra at 8.

authority to enact laws governing the "transfer, alienation and transfer of agricultural land" outlined in Item No. 21 of Schedule II to the Seventh Schedule of the Government of India Act 1935 (see section 100 of the aforementioned Act); in the event that an instate Parsi wishes to inherit agricultural land, the matter will then be handled in accordance with the Act of 1865 of 1925, which existed prior to its amendment.[18] The Parsi Zoroastrians of India and the Zoroastrians of Iran have both been included in the Bombay High Court's interpretation of the word "Parsi" as used in the Succession Act.[19]

Instate Succession

The Act's Chapter III, Part V establishes the Parsi without a will rules that apply to the Parsi community. The Parsi Intestate's property is distributed to his heirs in accordance with provisions 51–56 of the Statute. Intestate succession laws are those that- If a direct heir of an instate passes away before the instate, that heir will not get a share. If he has a Parsi intestate child who has died without leaving any surviving spouse, children, or other direct heirs, that kid's share of the estate will not be considered since there will be no surviving spouse, children, or other direct heirs.

The portion of any surviving child of a Parsi intestate who is not listed above will be included in the partition as specified in section 53. If a Parsi intestate leaves behind a wife or widower and a kid or toddlers, the wife or widower plus child or children shall inherit that child's portion. This is especially true if the dead child was a boy. The fraction of such a dead son must be apportioned as u / s. specified if he leaves behind a widow or widower who has no linear descendants. Exception 53(a).[20]

In addition, if the decedent was a woman, her widower would not be eligible for benefits under Section 53(b), but would be eligible for benefits under Section 53(c) (b). If that daughter does not have a linear successor after her death, her portion will be shared equally among her descendants. If an intestate's widow or widower remarries during the intestate's lifespan, neither spouse is entitled to any portion of the assets. Conversely, the law provides an exemption for the intestate's mother and great grandmother, who would be entitled to a portion of the estate even if they remarry during the intestate's lifespan.[21] The kid of a Parsi Zorastrian man who marries outside the religion has a chance of being raised as a Parsi. Some ladies have challenged this in public and even taken it to court. Not even in a nation as secular as India would it be simple to implement a unified Civil Code.[22] In the case of *Raj Kumar Sharma v. Rajinder Nath*

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[18] Phiroze K. Irani, 'Personal Law of Parsis in India', Family Laws in Asia and Africa, (ed.JND Anderson), 1972, p.274.
[19] Marlou Bilawala,' Succession for Mohammedans, Parsis and Christians' 315(2018)50BCAJ, (September11,2020),https://www.bcasonline.org/BCAJ%20Golden%20Content%20201819/Articles/Dec%202018/19%20%2024%20Succesion%20Marylou%20Bilawala.pdf .
[20] Supra at 11.
[21] *Ibid.*
[22] According to the court's decision in *Raj Kumar Sharma v. Rajinder Nath Diwan*, only children who are born inside valid marriages are to be considered lawful by the state. Therefore, the legal marriage is the basis for the connection recognised underneath the Parsi Succession Act. 24.

Diwan,[23] it was held by the court that the children born out of wedlock are not to be recognised as legitimate children and deal only with children born out of legitimate marriages. Hence, the relationship under the Succession Act relating to the Parsi Succession flows from the lawful wedlock.[24]

Conclusion

Special provisions for Parsi instate are specified for in Sections 52–56 of the 1925 Indian Succession Act, while before to 1837, Parsi and its natural connections were protected by the common English law (subject to specific marital requirements). The Parsi Marriage and Divorce Act of 1936 establishes the Parsi Principal Marriage Tribunal and creates specialised courts in the presidency of Calcutta, Madras, and Bombay. When disputes arise, it is common practise to nominate special representatives, who are usually highly respected members of the small community of Parsi Zoroastrians, as parties.[25] It is understood that the previous privy council rulings would be null and void if the Uniform Civil Code is implemented, since the protections he offered to a marginalised group like the Parsis will no longer exist in such a legally uniform state. If a Parsi couple chooses to adopt a child, they cannot have mandatory inheritance rights if the kid is a member of a certain religious denomination or has the ability to choose whether or not to become a member since there is no legal adoption amongst Parsis. The personal rule of that denomination, which is founded on religious institutions, determines the right to utilise such institutions.

According to Article 25(1) of the Indian Constitution, everyone has an equivalent right to freedom of expression. The freedom to practise one's religion openly and without interference from others is also protected by Article 26(b), which states that each religious group is free to conduct its own internal religious affairs.[26] From the perspective of Parsi statutes, there is still much that has to be improved and added to the Succession Laws in designed to facilitate illegitimate offspring to inherit the territory. Additionally, unique adoption child legislation will be developed with the declining Parsi community in mind. It is more difficult to standardize a community's inheritance or opinions on adopting or passing down an inheritance to an illegitimate kid when there is less literature in the area.

[23] AIR 1987 Del 323.
[24] *Ibid.*
[25] Homair Nariman Vakil, 'Why Parsis need their distinct family laws', The Times of India, September 20, 2017, (September 10, 2017), https://timesofindia.indiatimes.com/india/why-parsis-need-their-distinct-familylaws/articleshow/60759119.cms.
[26] Constitution of India, 1950.

Rights of Muslim Women Under Dissolution of Muslim Marriage Act

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Abstract

These days, the rights of women under Islamic personal law are a hotly debated topic, especially among Muslims. In particular, issues concerning the rights of Muslim women, such as the triple talaq divorce practice, inheritance, and maintenance, have recently received considerable media coverage. Despite the fact that the Indian Constitution protects its citizens from bias of any kind, including that which is based on gender or religion, numerous behaviours rooted in the country's traditional conservatism persist. It is well-known that most Muslim personal law has not yet been codified, with most judicial pronouncements instead being based on the standards set out in the Quran and hadith. Both sides of the key dispute on the interpretation of Muslim personal regulations have merit. There is a school of thought that holds that Islamic personal law grants Muslim women certain freedoms in areas like marriage, inheritance, and other areas. Some people argue that certain actions go against the spirit of the Indian Constitution. In this way, the goal of this research study is to look at the current debate about the effects of Muslim Personal Law in India and offer a number of ways to improve the status of Muslim women. The advancement of the rights of Muslim women necessitates the removal of certain irregularities by revealing the Holy Quran in its purest form. This study contends that discriminatory laws in India are approved by a systemic cultural patriarchy that predates any one religion and has a profound effect on women's and girls' lives. This paper contends that Muslim women in India are living in a deplorable state because they are not aware of their rights under usul-ul-fiqh. Even though Muslim personal law gives women the same rights as men, many people think it is hard on women because they don't know about usul-ul-fiqh.

Keywords: *Marriage, Dissolution of Marriage, Islamic Teachings regarding Dissolution of Marriage, Divorce, Khula*

Introduction

In India, each person is subject to the personal law of their respective faith. For decades, Muslim women have fought for parity in the Islamic laws that regulate marriage, divorce, and property ownership. However, one of the most significant organisations in the Muslim community is Many people have both praised and criticised this forum. This proposal to amend Muslim personal law was voted down by the board because they felt it would violate the rights of non-Muslims and the essential tenets of Islam. What's more, the group is overwhelmingly male-specific. But the Quran does not endorse an authority-based structure or cultural norms based on male dominance. Muslim women now have more legal protections in areas like marriage, divorce, and inheritance, which has made some of them want to stand up for their rights.

Muslim personal law, in particular, has been a serious political and social issue in India for many years and has been argued extensively; this is a contentious issue. It has been a democratic

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republic since independence, a catalyst for activism not only among Muslim groups but also among Hindus advocating for greater individual rights. The Muslim Women's (Protection of Rights of Muslim Women and Their Children) Act was enacted in response to the Shah Bano Case, which took place in 1986.[2]

After the passage of the Marriage and Dissolution of Marriage (Children's Rights on Divorce) Act, the issue became front and centre, and the majority. The rise of identity politics and the subsequent decline of moderate secular parties is an undeniable fact. Women have a greater risk of violence in Muslim personal law due to the lack of a defined legal framework in a precarious situation because of the ambiguity of the rights at play and the wide range of possible interpretations pertaining to the Quran. Furthermore, many arbitrary "fatwas" typically work to undermine Muslim rights for women. As a group, Muslim women continue to suffer the most from economic and social deprivation in the Muslim community.

The formulation of Islamic personal law is urgently needed now. In order to accomplish this immediately or as soon as time permits, what is currently called Muslim personal law was formerly known as Anglo-Mohammendan law during the British era or as Mohammendan law nowadays, which the British government enacted. However, after the country gained its freedom, in an effort to erase its colonial legacy, Mohammendan law eventually became known as Muslim law. The branch of law concerned with an individual's person. Its contents, however, remained unchanged. In light of this, it was necessary to make certain adjustments to the language it used as a political act rather than a precursor of social change like that seen in other Muslim countries in an effort to decolonize its Decolonizing only the name isn't enough; the contents must be done as well. During the time of the colonials, at least among some social and political groups, women were not expected to take an active role. Even though some people didn't follow Islam, like Biamma, the mother of the Ali brothers, they were still very important in the fight for freedom.[3]

Marriage Under Muslim Personal Law

Marriage in Islam is viewed as a legal contract whose primary purpose is the bringing up of offspring and establishing their identity in society. The kabinnama is the standard legal document used to formalise the terms of a marriage in Japan. A marriage cannot be disproven, however, if the Kabinnama cannot be produced. However, if it is important to note that neither a written document nor a religious ceremony is required to legally consummate a marriage in accordance with Muslim law. Having a proper ceremony in place is crucial. As long as there is a proposal and an acceptance of it, everything is set and permission is granted in the presence of a witness. An established marriage can be proven either directly or indirectly, in the form of a reasonable assumption, because of these variables in light of the fact that their legitimacy has been acknowledged, motherhood, marriage, and the arrival of a kid are all possible triggers for

[2] Razia Patel, Indian Muslim Women, politics of Muslim personal Law and struggle for life with dignity, Economic and Political Weekly, page 44, Vol. 44, No 44 (Oct, 2009).
[3] Asghar Ali Engineer, Abolishing Triple Talaq what next? Economic and Political Weekly, page 3093. Vol 39, no 28, (July 2004).

extended living together, in addition to other factors. It's true that assumptions are often made, but they can't be used if the parties' actions are inconsistent.

In addition, it is a well-established concept of Islamic law that the nikah is the foundational institution of the Islamic family and cannot be carried out without the bride's informed permission. It is entirely up to her whether she accepts or declines. Marriages have various terms and conditions. The question that arises, though, is how to guarantee that Muslim women's agreement is indeed voluntary, as there are a lot of Muslim women who refuse to provide their consent. Assent is sometimes coerced by family members. So, we must use every sacrament in a way that is both literal and true to the verses in the Quran.[4]

The Personal Law of Islam Relating to Polygamy and Talaq

It is up to Muslim thinkers to take the first steps toward writing a complete set of laws. This shall be infused with the spirit of the Quran. As a result of triple divorce and unrestricted polygamy, many have been the target of criticism despite Islamic personal law being generally progressive. Polygamy is possible and should be managed in accordance with the Quran's directives rather than outlawed entirely. The two, in fact the polygamy verses (4:3) and (4:129) need to be read in tandem to gain a true sense of the Quran as a whole. The very first verse, 4:3, demands strict justice for all spouses by threatening that "if" you can't marry just one partner and do them both honour. It is clear as crystal in the second verse, in this case, 4:29, that fair justice cannot be achieved by humans. It is unacceptable to practise polygamy in light of this warning without any kind of oversight. In addition to Saudi Arabia and Kuwait, other Muslim countries have adopted stringent measures to control it A bill is needed to implement these sorts of regulations and conditions under which a second wife could be legally accepted. In those cases, in which the first wife has been diagnosed with a terminal illness or is proven to be infertile by a medical professional or infertile, and only with the first wife's consent and the law's backing.[5]

Moreover, the Quran sanctioned polygamy as a means of providing for vulnerable women like widows and orphans to treat them unjustly and to wrong them. So, codifying personal law, which has been needed for a long time, is likely to make Islamic law a model for the legal systems of other Muslim countries. So, Muslim women will be fully protected by the law in all areas, such as marriage, divorce, inheritance, and remarriage.

Mr. Justice Krishna Iyer, a former member of the Supreme Court, explained that "a more in-depth look at the topic reveals a surprisingly sensible, realistic, and divorce in today's modern legal system. Some inaccuracies in dispensing justice appear to have slipped into British in India, the right of a Muslim wife to divorce her non-Muslim husband was established in a Privy Council ruling, and on a whim, he decided to divorce his wife. Such erroneous beliefs have been

[4] Dr. Nanda Chiranjeevi Rao, presumption of marriage under Muslim Law, Indian bar review, page 133, Vol. 39, issue 4, 2012.
[5] Ibid

sustained by the thoughts of the malicious. Educated Moulvis have been telling their clients the wrong things about the divorce law in the Quran for a long time.

Property Rights of Indian Muslim Women

As in any other country, Indian Muslim women's property rights have grown out of a fight between traditionalists and modernizers over what is right and what is wrong. Historically, Muslim women in India had fewer legal protections when it came to owning property in contrast to males. It is common knowledge that Muslim personal law does not define property rights. Neither Shias nor Sunnis support the equal rights of Muslim women[6]. Despite this, Mahr is a crucial idea central to Islamic law that underpins Muslims' property rights, women's rights, and women's empowerment.

Mahr is essentially a present that can be the gift a Muslim husband owes his new wife on the day of their wedding, signifying the high regard in which he holds her, her genuineness and devotion to her. A mahr can be about anything valuable, including but not limited to value, contingent on the wife's approval. Depending on the nature of the gift, women are the sole owners of mahr. In addition, the fact that the Muslim woman is given full ownership of the mahr demonstrates that Islamic personal law has taken the groundbreaking step of granting women full property rights protections meant to provide a level playing field in the marital realm. Many married Muslim women who were aware of property rights that are only available to married people who have never invested in full ownership rights

Judicial Response to Centralized Muslim Personal Law:[7]

The way the courts have responded to cases involving the rights of women under Muslim personal law has mixed feelings. It appears from several of the cases that our judicial system has been fine and to my liking. The Supreme Court has put personal laws to the test in a number of cases to determine basic rights and to bring them into line with basic rights. However, the courts have ruled in some cases that it is impossible to contest the constitutionality of personal laws on the grounds that parties in these cases are violating their constitutional rights by forgetting about basic freedoms when it comes to personal legislation. It's worth noting that Muslims have benefited from significant rulings in their favour. Women aren't in the historic category, but they're hugely important to this issue.[8] A few are, to wit:

In *Shah Bano Begum v. Mohd. Ahmad Khan*[9], case the question at hand in this particular instance concerned the extent to which a Muslim husband was responsible for supporting his wife, a husband or wife who had filed for divorce under Section 125 of the Criminal Procedure Code of 1973. This case's court delved into the specifics of a number of authorities and their

[6] Asghar Ali Engineer, Abolishing Triple Talaq what next? Economic and Political Weekly, Vol 39, no 28, July 2004 page 3094

[7] Asghar Ali, The Right of women in Islam, 1996, New Delhi page 159

[8] Khan Noor Ephroz, Women & Law Muslim Personal Law perspective, page 367, Rawat Publication, New Delhi 2003

[9] AIR 1985 SC 945

respective translations of the relevant verses. Using the Holy Quran as proof that a Muslim woman whose husband has divorced her doesn't have to get remarried, the husband is entitled to support payments when the *Iddat* term is over. Another victory in court was that maintenance under Cr.P.C. Section 125 is not contingent on the religious affiliations of the partners. All people, regardless of their religious beliefs, are subject to this rule because it is a secular one. Because of this, the decision has caused a lot of debate and controversy among Muslims about a woman's right to ask her ex-husband for alimony. In the end, it resulted in the Muslim Women's Act (Protection of Rights on Divorce) being passed in 1986.[10]

In *Union of India v. Danial Latif*[11], Case the constitutionality of the Muslim women's rights (protection of rights of divorced women) Act 1986 was challenged on the grounds that it violated articles 14, 15, and 21 of the Indian Constitution. The court stated, "Legislation does not intend to create unconstitutional laws," but the absence of a constitutional challenge to a law on the basis of its unconstitutionality is not enough to justify sustaining the legislation. The Court adopted the interpretation as final, sealing the statute's constitutionality.

In *Judgement in the case of Bai Tahira v. Ali Hussein*[12] case, the Supreme Court ruled that a couple going through a divorce could be paid small amounts of money. One cannot simply replace the upkeep with a Muslim woman. The question at hand is whether or not an offer to marry can be considered an acceptance of that proposal for a formal union.[13] All of the people involved in this case are devout Muslims who practise the Mohammedan faith Based on personal customs and laws in the present dispute about the legality of the marriage, it insisted that the Muslim marriage ceremony didn't need any more pomp and circumstance, and that the Muslim couple. As the marriage is a civil contract, the respondent must agree to marry the petitioner. They lived together for a while, and that was enough to establish that she was legally his wife. The court agreed, therefore, that the proposal of marriage was not accepted but rather only guaranteed to proceed in the future, and therefore simple living arrangements with those who can provide it do Marriage is a fact.[14]

In Shamim Ara v. State of Uttar Pradesh[15], case, the judge ruled that the recitation of the talaq aloud is necessary for it to take effect. Further, the court ruled that, based on a single plea in the divorce petition, the divorce should be granted on some unspecified day in the past, which cannot be considered as legally binding talaq at the time of shipment. Therefore, the purpose of the judgement is to provide some limits and guidelines on how a talaq might be pronounced by the husband. The mere thought and honour of repeating it three times in a row Nonetheless, it's

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[10] Saleem Akhtar and Mohs Wasim Ali, Repudiation of marital Tie at the Instance of Muslim Wife: Misgiving and Clarification, Journal of the Indian Law institute, Page 506, Vol. 45, issue 3 & 4, 2003
[11] 6 SCALE 537 (2001).
[12] AIR 1979 SC 362
[13] Available at http://www.muslimpersonallaw.co.za/inheritancedocs/Property Rights of India (Last visited on April 20, 2014).
[14] Kusum, Cases and Material on Family law, page 413 & 414. Universal Law publishing co. 3rd ed. 2013
[15] *2002, 7 SCALE 183.*

been attacked So, it's clear from the above cases that the court has been very important in making sure that Muslim personal law does its job of making sure that women are treated equally.[16]

Muslims' Personal Law Reforms

As many remember, in the late 1950s, while Justice V. R. Krishna Iyer was on the bench, Kerala's minister proposed new legislation to change the state's inheritance rules. Christian women in that state face discrimination. The reason he was unsuccessful in his endeavour was that he was in opposition to the Christian elite, Muslim leaders, and other opposing party members. This is for self-evident reasons. If legislative attempts to modernise the laws governing A legal reform that benefits one religious group is likely to pave the way for comparable changes that benefit all groups of alternative faith. There is an urgent need for a well-rounded piece of law to be developed under their direction.

Because of its progressive nature, Islamic law has the potential to form the basis of a worldwide civil code. However, conservative Muslim culture has elevated the Quran's proclamation to its own level and introduced many measures that restrict women's rights based on the logical thinking of humans.[17]Despite the fact that the ulma is only a partial realisation of gender equality achieved through reforms in other countries, admit in theory for Muslims, the Quran is the only unifying holy text, and it also happens to be the most forward-thinking text where the rights of women are respected. In a perfect world, it would ensure parity for women and be the primary source of laws protecting their rights.

Traditions about how to read the Quran say that the social and economic conditions of the past shouldn't affect the present or the future. Muslims of the future This is a point supposedly made by every major Islamic thinker, and they have recognised ijtihad's (innovative interpretation) preeminent position. Our only means of social interaction is through our ulama. It is conservatism, not a lack of religious approval, that stops our ulama from using it. A further step toward this goal is the debate over mandatory marriage registration. A change for the better in Islamic personal law[18]

For example, in 2006, the Supreme Court ordered that everyone's rules for mandatory marriage registration be communicated to all states and union territories. The month of July the next year, the court was made aware that certain states had enacted laws that applied only to Hindu community marriages. In light of this, the court mandated mandatory registration in October 2007. People of different faiths can get married, and new laws that make this possible will go into effect in the next three months. This was considered interference in religious affairs by more traditionalist members of the Muslim community, although in their personal statutes, liberals emphasise one crucial point: marriage is a legal union, not a social contract. deal making

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[16] Kusum, cases and Material on Family law, page 413 & 414. Universal Law publishing co. 3rd ed. 2013.
[17] Vimal Balasubrahmanyam, Women, Personal Laws and the struggle for secularism, Economic and Political Weekly, Page 1216, Vol. 20 no 30 (July 27, 1985).
[18] Asghar Ali Engineer, Abolishing Triple Talaq what next? Economic and Political Weekly, page 3093 Vol. 39, no (28, July 2004).

in Islam. In fact, an expert in Indian law who is also a member of the country's Law Commission has said

Tahir Mahmood, an authority on Islamic law, noted that because Muslim marriage partners enjoy complete legal protection under Islamic law, parties to a contract have the right to freely determine the terms of the agreement. As long as the new *nikahnama* does not break any shariah law, it is lawful. Opponents of the aimplb also highlight the fact that more moderate Islamic scholastic traditions, such as the *Shafi'i, Malik'i,* and Hanbali schools, all agree that the board of directors pays no attention to the Hanafi. Consequently, it can be seen from this evidence that there have been a number of reforms made to the area of personal law.[19]

Evaluation of the Muslim Women's Rights on Divorce Act of 2019

Just what is this "triple talaq" thing all about?

Triple talaq, also known as *Talaq-e-Biddat,* was a kind of divorce recognised by Islam in which a Muslim man might legally separate from his wife only by saying the word "talaq" three times. The husband can divorce his wife with just the word "talaq," and his wife need not even be present.

A Plea for the Prohibition of Triple Talaq

Muslim women have long demanded an end to the harmful practise of Triple Talaq. Shayara Bano, a lady from Uttarakhand, had her 14-year marriage abruptly ended by her husband via a document granting her fast Triple Talaq since she had refused to provide the money he and his family had demanded. The custody of their two children was also something her husband had tried to keep from her. Since this practise is unfair and degrades women's worth, Shayara Bano took it to the Supreme Court.[20]

The High Court's Decision:

The Supreme Court ruled that divorce is unconstitutional because a Muslim spouse can end a marriage at their whim and fancy without making any effort to reconcile and save it. On August 22, 2017, the Supreme Court ruled that instant Triple Talaq could not be used as a way to get a divorce because it went against Article 14 of the Constitution. A recent Supreme Court decision agreed with the government's claim that *talaq-e-biddat* goes against the Constitution of India's morality, the dignity of women, and the principles of gender equality. It also goes against the gender equity that the Constitution of India guarantees.

Reforms are being sought

The Supreme Court's ruling that Triple Talaq is unlawful did not stop its use. Since the Supreme Court's ruling on the matter on August 22, 2017, there have been about 100 recorded cases of Triple Talaq in the country up until December 28, 2017, when the bill was brought to

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[19] *ibid*

[20] A Nakahama for Muslim Women, Economic and Political Weekly, Vol. 43, No. 12/13 (Mar. 22 - Apr. 4, 2008).

Parliament. The necessity for a law to effectively enforce the Supreme Court's ruling on "Triple Talaq" arose because no law existed to punish those who persisted in using the practise and to give victims of it access to legal remedies. A big reason for the project was that the government, led by Prime Minister Shri. Narendra Modi, was determined to give Muslim women justice, dignity, and equality between men and women.

The Need for New Laws

The decision of the Supreme Court went into effect right away on September 19, 2018, when the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018, and two other ordinances were passed. Both the Lok Sabha and the Rajya Sabha have approved the Muslim Women (Protection of Rights on Marriage) Bill, 2019, which was initially introduced on July 25th, 2019. The Muslim Women (Protection of Rights on Marriage) Act, 2019 became law in India after being signed by the country's president, and it applied to marriages that had already taken place as of the 19th of September, 2018.

Punishment by Act and Sentencing Guidelines

The instant divorce given by the proclamation of talaq three times is null and void according to the Muslim Women's (Protection of Rights on Marriage) Act of 2019. The law penalises quick triple talaq by mandating a three-year prison sentence and a hefty fine for the offending husband. A Muslim woman who has been given talaq is also given financial support and child custody by her husband. Finally, Muslim women have a legal way to fight back against the unfair and arbitrary Triple Talaq. This law could stop husbands who are thinking about an extreme divorce from going through with it.[21]

Benefits Quantification

Triple talaq has become much less common since the government, led by the Hon'ble Prime Minister of India, Shri. Narendra Modi, took action through legislation, according to a number of media reports that cite a range of sources, including state police agencies.

Substantial Alterations

So many Muslim women's lives will be better off if this act is passed, and they will be better able to escape the cycle of home violence and social prejudice that so many have been trapped in.

Achievements

The elimination of Triple Talaq has helped elevate women's status in society and given them more agency. By passing a law prohibiting the practise of Triple Talaq, the government has preserved the constitutional, fundamental, and democratic rights of Muslim women in the country while also bolstering their "self-reliance, self-respect, and self-confidence." After the Act was passed, the number of reported cases of triple talaq dropped by 82% in the first year.

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[21] Barbard D. Metcalf, Imrana Rape, Islamabad Law in India, Islamic Studies, Vol. 45 No 3, 2006 available at www.jstor.org (last visited on April 11, 2013).

On August 1, 2021, "Muslim Women's Rights Day" was celebrated all around the country in light of the passing of a law prohibiting the practise of Triple Talaq.

Conclusion and Recommendations

During the 20th century, religious and political leaders like Zoya Hasan became important figures. During the 20th century, religious and political leaders like Zoya Hasan became important figures. They suggested beginning the process of having a state-level codification of Muslim personal law enacted in the name of public good harmony and a sense of self-reliance. The Muslim Personal Law (Shariat) Application Act and the American Muslim Act of in addition to the Muslim Marriage Act of 1937 and the Muslim Marriage Dissolution Act of 1939, there is also the Muslim Marriage Law of 1986 to protect the rights of divorcing women.

The last one, despite its label, actually did its job and A Muslim lady (who was previously married in accordance with Muslim personal law and who is now divorced or divorced) or women of other religions (married or divorced) who resort to the criminal procedure code are prohibited by Islamic law from getting a small amount of support from their ex-husband.

Therefore, it is clear from the foregoing that public opinion should be steered toward approving lenient rulings and certain standardised legislation that provide a significant contribution toward compensating for personal Sharia law, which is the legal code followed by Muslims. In light of this, a public education effort against the abuse of Muslim women's rights in several areas, including marriage, divorce, inheritance, and more. Polygamy, polygamy, etc. It should also be taken into account that the 'Mahr' payment is quite large in order to support Muslim women's rights and work to end the practise of talaq.[22]

[22] Vimal Balasubrahmanyam, Women, Personal Laws and the struggle for secularism, Economic and Political Weekly, Page 1216, Vol. 20 no 30 (July 27, 1985).

A case analysis on Joseph Shine v. Union of India

Bhawartha Nikhade[1]

Petitioner – Joseph Shine

Respondent – Union of India

Citation – AIR 2018 SC 1676

Bench - CJI Deepak Mishra, Justice A.M khanwilkar, Justice Indu Malhotra, Justice D.Y Chandrachud, Justice R.F Nariman

It has always been in the history of our country that there are certain laws that have become archaic that they have lost their relevance over a period of time. The law related to Adultery was one of such laws. We all are well aware that Adultery has been defined under Section 497 of the Indian Penal Code. The case has been marked with the golden words in the history of judiciary and has made Adultery no longer a criminal offence. As during the British era, our society was patriarchal in nature and no rights and freedoms were provided to people and hence there was no independence so the laws that were made were according to the British norms and rules and also discriminatory in nature. After independence this section was challenged multiple number of times and at last after the struggle of many years our Hon'ble Supreme Court struck it down on historical date of 27thSeptember 2018.

Facts of the case

As IPC was made during British times so it was quite discriminatory in nature and hence in 2016 our President called for a thorough revision of the whole IPC to correct the defects. As a result, in October 2017, Joseph Shine who is a non-resident of Kerala file a writ petition under Article 32 of the Constitution of India into the Supreme Court challenging the constitutionality of Section 497 of IPC read with Section 198 of Cr. P.C., being violative of Article 14, 15 and 21. This was at first a PIL filed against adultery. Petitioner claimed that this section of IPC is arbitrary and discriminatory in nature and also it demolishes the dignity of the woman. Section 497 provided for the punishment to a man who engaged in sexual intercourse with another person's wife without his consent. On the other hand, the consenting women had been exempted from any punishment under this provision. Thus, the provision was considered as discriminatory and hence a 5 judge bench was set up in order to hear the petition.

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Issues Raised

1. Whether Section 497 of Indian Penal Code is unjust, arbitrary, unconstitutional and violative of Fundamental Rights and is based on the gender biased discrimination under Article 14 and 15 of the Constitution of India?
2. Whether Section 198(2) of the Code of Criminal Procedure, 1973 is unconstitutional and violative of Fundamental Rights?
3. Whether the dignity of the woman is compromised as due to denial of her right to self-determination?

Petitioners Contentions

- Petitioner argued that this law is of British era and is discriminatory in nature. The discrimination on the basis of sex has no rational nexus with the objective that the law actually wants to achieve. Women had no right to file a complaint if she finds out about her husband being engaged in sexual intercourse with some other women. The provision criminalizes adultery on classification based on sex which has no rational nexus. Hence it is a clear violation of Article 14.
- Petitioners also took the support of Article 21 and stated that two adults having sexual intercourse with each other comes under Right to privacy and has everybody has a right to decide what he/she has to do with their body. The petitioner also contended that this law is unconstitutional as is undermines the dignity of woman by not respecting her sexual autonomy.
- Such legislation also violates Article 15(3) of the Constitution as it takes away a woman's right to prosecute also. It only provides men with right to prosecute against adultery.
- Also the problem arises when under this law only when the husband has a problem with the woman having sexual intercourse with other man and if the consent is been provided of the same then no crime is done. This clearly implies that woman have no right over their body and are merely treated as chattels. Woman is treated just as the property of the husband as if the consent is been provided by husband then no adultery is committed.

Respondents Contentions

- The Defence taken states that Adultery is something that is morally outrageous to the society and is against the norms and rules of the marriage. Marriage is a pure sacrament between the people and the crime Violates the sanctity of the society and family. It breaks the family and deterrence should be there to have things into control.
- When we look this matter under article 21 the there are certain reasonable restrictions under Article 21that does not warrant protection of privacy to a person who is having sexual intercourse with a married person outside the marriage.
- The discrimination under 15(3) is saved by saying that it provides state with the right to make special laws for women and children. It is specially designed for the benefit of women.

Judgement

The court while giving judgement to this case and after considering all the points from both the sides struck down Section 497 of the IPC and held that this Section is violative of Articles 14, 15 and 21 and declared it unconstitutional. Court also held that Section 198(2) of the CrPC is also unconstitutional to the extent it is applicable to Section 497 of IPC. Thus court also mentioned about the previous judgements which are being overruled here.

Court mentioned the case of Yusuf Abdul Aziz v. State of Bombay[2] In this case, the constitutionality of Section 497 was challenged on the grounds that it violates Article 14 and Article 15, by saying a wife cannot be a culprit even as an abettor and also held And Article 14 is a general provision and has to be read with other Articles and sex is just classification, so by combining both it is valid. Court also took the case of V. Revathi v. UOI. [(2)]in which the court upheld the constitutional validity of Section 497 read with Section 198 by stating that this provision disables both wife and husband from punishing each other for adultery hence not discriminatory. It only punishes an outsider who tries to destroy the sanctity of marriage.

While talking on the point of discrimination based on Article 14 then Court laid down the principle of manifest arbitrariness under which the arbitrary law shall be stuck down and held that The classification is found to be arbitrary in the sense that it treats only the husband as an aggrieved person given the right to prosecute for the offence and no such right is provided to the wife. The provision is not based on equality and as in today's time where women are as equal as that of men, this provision is discriminatory and made reference of case of *Shayara Bano v. UOI*[3] regarding this.

With respect to that of Article 21, Hon'ble Supreme Court made a glimpse on case of *K. S. Puttaswamy v. UOI*[4] and held that when the penal code was drafted women's were just treated as chattels and no rights were provided to them but now women's are equal as that of men. Hence the enforcement of forced fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality provided under Article 21. By considering all the points the Court held that-

- Every individual has a right to choose for their life and make an autonomous decision regarding their sexual life.
- A crime is defined as an offence which affects society as a whole. Adultery, on the other hand, is an offence which tantamount to entering into the private realm.
- When this law was laid down then at that time the society was gender biased and patriarchal in nature but now so such patriarchal law is in need. Hence this law should be made void
- This provision makes a husband an aggrieved person and a woman a victim. Even if the law changes and provides equal rights to women against adultery, it is totally a private matter.

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[2] (1954) SCR 930.
[3] (2017) 9 SCC 1.
[4] (2017) 10 SCC 1.

- Adultery is better left as a ground for divorce and not a crime.

Conclusion

This judgement marked as the era of transformation and is marked with golden letters in the history. The court while declaring this law unconstitutional took a landmark step in the Indian legal history. The supreme Court rightly recognized the rights and dignity of the woman and keeping the thought in mind that women's are not just chattels gave this historical judgement. This will surely improve the condition of women in the male dominated society.

Though the judgement is a progressive one but it totally rules out the crime of adultery from our laws and hence making the protection of the rights of a spouse in a marriage quite vulnerable. Critics are also being heard on the basis of social perspective that it will result in breaking of marriages.

This judgement decriminalizes the offence of adultery and makes it a ground for civil wrongs only. The Legislature should have taken this step long ago but nevertheless our judiciary has been very efficient in filling the gaps and removing redundant laws with changing societal notions. This case gives just a vague ending to this law but in future it will surely be interesting in knowing that what step does the Apex Court takes for justice.