MUSLIM LAW

Parts of Muslim personal law codified in 1937 as the Muslim Personal Law (Shariat) Application Act, 1937 as well as the Dissolution of Muslim Marriages Act, 1939 in many ways led the reforms in religious family laws. Muslim law not only recognised women as absolute owners of property, but also have built in rights for women to divorce. Attempts towards codification were made in 1960s by Nehru along with the AAA Fyzee who proposed the idea of a Muslim Law Committee. However, this was later dropped owing to opposition within the community and the then Law Minister A K Sen responded to a question about this committee in Parliament that it was felt that the committee is not necessary at that moment.57 After this, mostly it was the judiciary that offered progressive interpretation of what the Quranic texts could have desired or intended.

Maintenance

On the vexed question of maintenance of the divorced wife in Muslim law the Supreme Court in Bai Tahira v.Ali Hussain Fiddalli Chothia58 and Fazlunbi Bivi v.Khader Vali59 observed that there was no contradiction between Muslim personal law and Section 125 of the

57 _Amendments to Muslims law, No Committee Proposed', Times of India, 21st August 1963. See Saumya Saxena, _Commissions, Committees and Custodians of Muslim Personal Law in Post-Independence India', Comparative Studies in South Asia Africa and Middle East, (Forthcoming December, 2018).

58 AIR 1979 SC 362

CrPC that contained the provision for maintenance of children, parents and wives and the definition of wife included a divorced wife.

This judgement, in effect laid down the procedure for how maintenance issues were to be dealt with in circumstances when women were threatened with destitution. This precedent was also relied upon in the Fazlumbi v Khader Vali case, emphasizing a

_merciful' reading of the provisions of Muslim law to extend greater protections to women and provide them with adequate maintenance upon divorce that extended beyond three months _iddat' period.

Mohammad Ahmad Khan v.Shah Bano Begum60 though not substantially different from Fazlunbi or Bai Tahira, the judgement as well as the subsequent decision to enact the Muslim Women's Protection of Rights on Divorce Act 1986, triggered large scale protests across the country. The case led

to the crystallisation of the binary opposition between right to ‗freedom of religion' and right to

‗equality'. In 1986 while many organisations applauded the judgement, the political context of the time led to an equally strong backlash against any perceived interference with Muslim personal law. Thus, it is worth noting that the judgement itself was not attempting any reinterpretation of Muslim personal law as it stated:

The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. Thus there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself. Aiyat No. 241 and 242 of 'the Holy Quran' fortify that the Holy Quran imposed an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of Quran.

The Muslim Women Protection Rights on Divorce Act, 1986 however, overturned this judgement. The Act although was subjected to much criticism, it also provided a number to compensatory schemes61 which in effect served to enhance judicial discretion in matters of Muslim Personal Law.

The 1990‘s were a significant period for the development of the debates on personal law. Even while there was no national legislation that surfaced in the period, there were significant court rulings in the decade that informed the debate on family laws. The judgements in the Sarla Mudgal v.Union of India62 , and the Ahmedabad Women‟s Action Group v.Union of India63, and the Danial Latifi v.Union of India64, produced widely different but critical rulings on the nature and scope of religion even within the category of personal law.

In Danial Latifi which challenged the perception that Muslim personal law, after the enactment of Muslim Women‘s Protection of Rights on Divorce Act, 1986 did not offer sufficient maintenance to divorced Muslim women beyond the iddat period. It clarified that the term _mata‟ which was translated to English language to imply _maintenance‘, in fact, implied a _provision for maintenance‘.

…the word provision in Section 3(1)(a) of the Act incorporates mate as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair

61 Flavia Agnes, 2012. _From Shahbano to Kausar Bano: Contextualizing the _Muslim Women‘ within a Communalized Polity.‘ South Asian Feminisms, pp. 33-53.

62 AIR 1995 SC 1531

63 AIR 1997 SC 3614

provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Bano's case, actually codifies the very rationale contained therein.

This implied that the first responsibility of maintenance of a divorced Muslim woman lay on her husband who would make a provision for maintenance within (rather than for) three months; failing which the responsibility would lie on the parents and relatives of the woman in order in which they would inherit her property and failing that it would be the responsibility of the Waqf board to maintain her. However, the ‗provision' was enforceable only again the husband which was interpreted as the responsibility lying with the spouse.

While the procedure for seeking maintenance may be settled under Muslim law, the principle of 'community of property' upon divorce must also apply here, as discussed in the earlier section on irretrievable breakdown of marriage. Maintenance claims are frequently flouted by husbands, and qazis as well as judicial magistrates have had limited success in having even the meher amount paid65. Particularly in cases where women themselves initiate divorce, alimony becomes very difficult to negotiate and judicial delays and expenses contribute to

women withdrawing their claims. Therefore, the idea of community of (self acquired) property is crucial when unilateral divorce is permitted. The Act, 1939, needs to be amended to reflect this.

65 Sylvia vatuk, 'marriage and its discontents: Women, Islam and Law in India' 2017

Divorce

On the question of triple talaq or talaq-ul-biddat, the Courts have expressed their disapproval of the practice in multiple observation even before it was formally set aside in 2017.66 In Shamim Ara v. State of Uttar Pradesh67, the Court dealt with the issue of triple talaq in substantial detail. In this case the Supreme Court relied on the observation of the Kerala High Court in A.Yousuf Rawther v. Sowramma68. The Kerala High Court observed that the statute must be interpreted to further a _beneficent object'. The Supreme Court further observed that _Biddat' by its very definition has been understood as a practice that evolved as an aberration and it has been held to be a practice that was against the principles of Sharia, against the Quran and the Hadees. Further, it has been argued here that what has been deemed to be a practice that is bad in theology, cannot be good in law. The 1937 Act was brought in precisely to curb practices that are antithetical to the Sharia. If the source of Sharia is to be found in the Quran, and the Quran has no mention of the practice of triple

talaq or talaq-ul-biddat then the practice has no religious sanction.

However, the observation of the Supreme Court in Shamim Ara over triple talaq was obiter dicta in a matter that was primarily concerning payment of maintenance of the divorced wife. It is for this reason that the judgment did not become binding and the practice continued till August 2017, when it was categorically set aside by the Supreme Court.

In Shayara Bano v.Union of India69 the Court further held that section 2 of the Muslim Personal Law (Shariat) Application

66 Shayara Bano v. Union of India, AIR 2017 SC 4609

67 AIR 2002 SC 3551

68 AIR 1971 Kerala 261

69 AIR 2017 SC 4609

Act,1937, falls squarely within Article 13(1) of the Constitution. Therefore, the practice of triple talaq which finds no anchor in Islamic jurisprudence and is permitted only within a limited sect of Hanafi school of Sunni Muslims, is not a part of Sharia and therefore is arbitrary. The section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 through which the power and procedure for dissolution of marriage by triple talaq is said to be derived (by the respondents), is declared void (only to the extent that procedure is

_arbitrary‘). Once this is struck down the arbitrariness of this procedure ceases to be a part of personal law and therefore does not qualify for protection under the fundamental rights guaranteed under Articles 25-28 of the Constitution.

Giving affirmative answer on the question that whether or not the Act, 1937 is violative of fundamental right, to the extent that it enforces the practice of triple talaq, Justice Nariman observed that since the practice permits to break the matrimonial tie by the husband, without even any scope of reconciliation to save it70, it is unconstitutional. The practice now should be squarely covered under the Domestic Violence Act, 2005, and in case abandonment of wife is caused through pronouncement of triple talaq, should be covered under the 2005 Act‘s provisions on economic abuse, right to residence, maintenance among others.

Thus, in this case it is revealed that sometimes religious edicts and fundamental rights desire the same thing- triple talaq had the sanction of neither. Therefore, the issue of family law reform does not need to be approached as a policy that is against the

70 See also: In Must. Rukia Khatun v Abdul Khalique Laskar, (1981) 1 GLR 375 held that the correct law of talaq, as ordained by Holy Quaran, is:

(i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife

from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.

religious sensibilities of individuals but simply as one promoting harmony between religion and constitutionalism, in a way that no citizen is left disadvantaged on account of their religion and at the same time every citizen‟s right to freedom of religion is equally protected.

The conflict within personal laws here is not merely between fundamental rights of equality and that of freedom of religion as it is popularly framed. It is, in fact, located even within each personal law code. For example, as the Shamim Ara pointed out, in reference to triple talaq there is also a conflict between what the true sources of personal law propagate and the way in which anglo-religious laws were codified.

The Muslim Women (Protection of Rights on Marriage) Act, 2019

The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 was repealed on 31st July, 2019 when the bill was passed by both houses of the legislature, Lok Sabha and Rajya Sabha, and was notified by the President of India in the official gazette, and thus became an Act of Parliament. The Act has 8 sections.

Provisions

The act statutorily provides:

- Any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.
- Any Muslim husband who pronounces talaq upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.
- A married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.
- A married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate.
- An offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage;
- An offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;
- No person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced,

is satisfied that there are reasonable grounds for granting bail to such person.

Section 2 of the Act, 1939 provides for a number of grounds based on which women can seek divorce. Men on the other hand are not required to qualify their decision under any of these grounds. Therefore, uniformly applying the grounds available under the Act, 1939 to both men and women will have greater implications of ensuring equality within the community rather than equality between different communities. The same applies to the law on bigamy.

It is important that men and women both have access to the same rights and grounds for divorce. The Act, 1939, should also contain _adultery‘ as a ground for divorce and should be available to both men and women.

Mubaraat or mutual consent is not covered under the Act, 1939 because generally when the Act was available only to women as a judicial divorce it assumed that mubaraat or talaq had not taken place and that is why the wife has to resort to the provisions of the Act 1939. Validity of the section 2 of the Act 1937, is also under challenge before the Supreme Court, it is desirable to deal, with the issue at hand after it is finally decided71.

Any man resorting to unilateral divorce should be penalised, imposing a fine and/or punishment as per the provisions of the Protection of Women from Domestic Violence Act, 2005 and anti- cruelty provisions of IPC,1860, especially section 498

(Enticing or taking away or detaining with criminal intent a married woman). Bringing an end to the practice of triple talaq should automatically curb the number of cases for Nikah Halala72. Since triple talaq is already outlawed, pronouncing of triple talaq in one sitting has no effect on marriage. In cases of divorce given by talaq-e-ahsan mode, or a mubaraat, or khula reconciliation should be available to spouses. A number of Nikahnamas73 have been floated from time to time and many of these provide a blueprint of what a _model' Nikahnama could look like. A document, Women Living Under Muslim Laws, was an effort to provide comparative law on how Muslim women's rights have evolved in Islamic countries.74 These contain discussions on not only model Nikahnamas but also explanations about how a contractual nature of marriage recognised under Muslim Personal law could in fact be beneficial for women if the terms of the contract are genuinely negotiated and agreed on by both parties. The Nikahnama, discussed by Zeenat Shaukat Ali in her book, Marriage and Divorce in Islam75, can be considered alongside Nikahnamas recommended by the All India Muslim Personal Law Board (AIMPLB) and by various other organisations. The Nikahnama itself can be broadened to constitute

71 Sameena Beguma v. Union of India, WP(C) No. 222/2018; Nafisa Khan v. Union of India, WP(C) No. 227/2018.

72 The matter is before the Constitutional Bench in Sameena Beguma v. Union of India, WP(C) No. 222/2018; Nafisa Khan v. Union of India, WP(C) No. 227/2018

73 Civil societies, such as Muslim Women's Rights Network, Majli, Awaaz-e-Niswaan, Bharatiya Muslim Mahila Andolan and Bebaak Collective, working for the Muslim Women's rights, also advocates for the same.

74 www.wluml.org/

75 Ali, Z.S., 1987. Marriage and Divorce in Islam: An Appraisal. Bombay: Jaico Publishing House. See also, Vatuk, Sylvia. Marriage and Its Discontents: Women, Islam and the Law in India. Women Unlimited, an associate of Kali for Women, 2017.

the _Dissolution of Muslim Marriages Act, 1939, can be amended to include suggestions made in the first section which are common for all marriage laws with respect to grounds for divorce, community of property and the Act will apply to both men and women. The changes community of property would entail for other inheritance laws has been discussed in the last chapter.

Polygamy

There are various arguments on the _morality' aspect of polygamous relationships and whether it should be prevented for the benefit of women or because the society simply deems it to be immoral.76 In the majority of the cases in the Indian context it is clear that women have had no say in their

husband‘s second or subsequent marriages. Thus, the prime and paramount consideration while dealing with polygamy is the interest of women. Polyandrous relationships where consent of the wife has not been taken are violative of her marital rights. Further, in bigamous relationships, where men are permitted more than one wife and is a blatant violation of equality.

Although polygamy is permitted within Islam, it is a rare practice among Indian Muslims, on the other hand it is frequently misused by persons of other religions who convert as Muslims solely for the purpose of solemnising another marriage rather than Muslim themselves. Comparative law suggests that only few Muslim countries have continued to protect the right to polygamy but with strict measures of control.

76 The matter is pending before the Constitutional Bench of the Supreme Court in Sameena Beguma v. Union of India, WP(C) No. 222/2018; Nafisa Khan v. Union of India, WP(C) No. 227/2018

In Pakistan law has been successful in preventing bigamous marriages as tough procedures are in place for its regulation. In 2017 the subordinate Court of Lahore gave a progressive interpretation to the provision of 2015 family law enactment

on bigamy and held that a second marriage conducted without the permission of the existing wife amounts to ‗breaking the law'. Lahore court, orders the man to serve a six-month jail term and pay a fine of 200,000 Pakistani rupees.77

In Pakistan, the law prohibits contracting a marriage during the subsistence of an earlier marriage. If, in exceptional circumstances such a marriage is to be contracted, an application in writing to the Arbitration Council has to be made. The application so made, shall also have prior permission of the existing wife/ wives. The Council will record its decision in writing, whether granting such application or not, and such decision shall be final. However, if the husband marries without the permission of the Arbitration Council, he shall be liable to pay the entire amount of dower to his existing wife/ wives, immediately. And on complaint he can be convicted for the same.

The Law Commission of India in its 18th Report ‗Covert's Marriage Dissolution Act, 1866' (1961), acknowledged for the first time the international context of Islamic laws. The report highlighted that reforms relating to Muslim Personal law such as enforcement of monogamy by imposing restrictive conditions for polygamous arrangements had been carried out in various countries such as Morocco, Algeria Tunisia, Libya, Egypt, Syria, Lebanon and Pakistan.78 The practice however, continued to prevail in Saudi Arabia, Iran, Indonesia and India.79

77https://www.reuters.com/article/us-pakistan-marriage-court/pakistan-makes-landmark-ruling-against-man-for-second-marriage-idUSKBN1D15GG

78 The 18th Law Commission's 18th Report on _Covert's Marriage Dissolution Act, 1866 (1961)

79 Ibid.

The Law Commission of India in 227th Report _Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings' (2009), discusses how the section 494 applies to persons under various personal laws and also to Muslim women:

As regards the Muslims, the IPC provisions relating to bigamy apply to women – since Muslim law treats a second bigamous marriage by a married woman as void – but not to men as under a general reading of the traditional Muslim law men are supposed to be free to contract plural marriages. The veracity of this belief, of course, needs a careful scrutiny.

The Sachar committee report of 2004 was also a significant step in this direction, which took stock of the status of Muslims in India. It also referred to problems of health and education.80

Under the India Administrative Service (cadre) Rules, 1954, the Central Civil Services (Conduct) Rules 1964 bigamy attracts penalties. These conduct rules provide that a person who has

contracted a bigamous marriage or has married a person having a spouse living shall not be eligible for appointment to such services – Rule 21. The All India Services (Conduct) Rules 1968 also place restrictions on members of any such service – Rule 19. The 227th report states:

Both the Rules, however, empower the government to exempt a person from the application of these restrictions if the personal law applicable permits the desired marriage and —there are other grounds for so doing.‖ These provisions of Service Rules apply to the Muslims and their constitutional validity has been upheld by the Central Administrative Tribunal and the courts. See, e.g., Khaizar Basha v Indian Airlines Corporation, New Delhi AIR 1984 Mad 379 [relating to a

80 Social, Economic and Educational Status of the Muslim Community, 2006

similar provision found in the Regulations framed under the Air Corporation Act 1953].

It is therefore suggested that the Nikahnama itself should make it clear that polygamy is a criminal offence and section 494 of IPC and it will apply to all communities. This is not recommended owing to merely a moral position on bigamy, or to glorify monogamy, but emanates from the fact that only a man is permitted multiple wives which is unfair. Since the

matter is sub judice before the Supreme Court, the Commission reserves its recommendation.

CHRISTIAN LAW

Early 1960s are characterised by productive discussions on family law reform which was also the global trend in the period. Globally, the late 1960s witnessed a focus on family law reform.81 In Canada, the 1968 Divorce Act attempted to include ‗formal equality' between spouses, the American senate popularised ideas of

‗rehabilitative alimony' in the 1970s; and in 1969 Britain enacted the Divorce Reform Bill. In Italy the Divorce law was passed in 1974, after a controversial and heated debate on the subject and strong objections from Vatican City. In India as well, there was hesitation on the subject of divorce.

The 15th Law Commission Report ‗Law relating to Marriage and Divorce Amongst Christians in India' (1960) did not culminate in successful legislation and faced opposition from the Catholic Church. In early 1960s the amendments to the Indian Christian Marriage Act, 1892, were introduced in Parliament but the Bill lapsed. In 1969 the Indian Divorce Act, 1869 was amended but this did not accommodate most of the concerns raised by the Law Commission in its 15th Report.

81 For a brief account on how the period of decolonisation 1950s and 1960s globally experienced debates on retention or replacement of religious laws, in Egypt, Malaysia, Indonesia,

see Narendra Subramanian, 2010. ‗Making family and nation: Hindu marriage law in early postcolonial India.'

It is owing to the failure of legislative intervention that family law has largely been interpreted by the Courts in India. The Courts in many ways have had to lead the way to reform of the personal laws. Even while Courts hesitate in directly asking the legislature to enact, a series of cases from Sarla Mudgal to the minority judgment in Shayara Bano, have urged the legislature to look into the inequalities within family laws because a fair law would always be far more useful than a case by case delivery of justice.

One may find lack of consistency in the matter of women's right in the decision of Court. In the case of Dawn Henderson v.D Henderson82, where a husband forced his wife into prostitution, the court admitted the evidence of ‗cruelty' as a ground for divorce but rejected the divorce petition for want of sufficient evidence of adultery by the husband. While for a husband a divorce on ground of cruelty alone was sufficient but for the wife cruelty along with adultery had to be proved in order to get a divorce.83

In 2001 reformation of the Act,1869 took place. This debate was focussed on the reform of Christian Personal Law and attempted to do away with a number of discriminatory provisions such as compensation for adultery, and the fact that women needed to supplement adultery with cruelty or another ground while pleading a ground of divorce, but the same was not the case for the husband. While the

amendments addressed a number of discrepancies, the government also conceded to recognition of certain exceptions. For instance, despite the majority of the population of Nagaland being Christian, the State was granted an exception and the amendments to the Act,1869, are not applicable. This was owing to the Naga Accord

82 AIR 1970 Mad 104

83 See also, Kapur, Ratna, and Brenda Cossman. Subversive sites: Feminist engagements with law in India. Sage Publications, 1996. See also, Parashar, Archana, and Amita Dhanda. "Redefining family law in India: essays in honour of B. Sivaramayya." (2008). Agnes, Flavia. "Protecting women against violence? Review of a decade of legislation, 1980-89." Economic and Political Weekly (1992): WS19- WS33, for a critique of law and how legal intervention also has limitations, and codified standardised laws have not always translated to justice for women.

signed in the year 1961 to ensure the territorial integrity of India in exchange for granting exceptional status to Nagaland with respect to domestic or personal laws that applied in the State84.

In 2001 Amendment the clause of two-year separation had been preserved by Parliament keeping in mind that the Christian community and in particular the Catholic community had not been historically in favour of divorce. Showing consideration to such religious sentiments, the government

had, in fact, hesitated even from the use of the term divorce altogether referring to it instead as

_dissolution of marriage‘.85 However, many Christian women‘s organisations have argued that the period for confirmation of a decree of divorce is significantly longer than for the couples of other religions. A writ petition is also pending before the Supreme Court, questioning the two years separation period86. This can be rectified and brought in line with the SMA, 1954.

PARSI LAW

The Parsi community‘s personal law has remained largely untouched so much so that it continues to preserve the jury system for hearing divorce cases. In the recent case filed by Naomi Sam Irani87, Parsi law‘s jury system has been challenged before the Supreme Court. The bench sits only twice in a year to confirm divorces and it entails a jury to oversee the divorce proceedings despite the fact that the jury system has been abolished in India several decades ago for all other cases in 1950‘s and 60‘s. Section 18 of Parsi Marriage and Divorce Act, 1936 (the Act, 1936) provides for Constitution of special Court in Mumbai, Chennai and Kolkata where

84 See discussion sixth schedule, Introduction.

85 Lok Sabha debates The Indian Divorce (Amendment) Bill, 2001 Act No. 51 of 2001. 30 August 2001 to 24 September 2001. Law Minister, Arun Jaitley: _I am correcting myself and

I am preferring to use the words ‗dissolution of marriage' because of the factors, particularly in a large section of Christians says that the marriages are not really intended to be divorced.' Lok Sabha debates, Col. 389-90.

86 Albert Anthony v. Union of India, WP(C)No. 127/2015

87 Naomi Sam Irani v. Union of India & Anr., W.P(C) 1125 of 2017

the respective Chief Justice of the High Court has the power to appoint a judge who would then decide on issues of maintenance, alimony, custody of children etc. with the aid of five other appointed delegates.88

The requirement of a jury to confirm divorce is not only archaic but also tedious and complicated. The procedure for divorce should entail citing of available and recognised grounds, subsequent to which the divorce may be confirmed as done under the Special Marriage Act, 1954. Not only does this cause inordinate delays and inconvenience to people living outside metropolitan cities, but also these systems discourage inter-community marriage. The approach of the Commission, towards these reforms is not to attain similarity of procedure, but to address the ‗delay' and ‗discrimination'. Once this is achieved, all procedures, ceremonies, customs, even if different will lead to the same end.

For Parsis, the procedure of divorce not only needs to be simplified, but also marrying outside the community should estrange persons from their religion nor should they have to

forfeit their inheritance rights. The very idea that upon marriage a woman must discard her religious or social identity and acquire only that of her husband goes against the idea of equal partnership in marriage. Not only should women have a right to follow their customs, rites and rituals, but also they should be under no obligation to give up their maternal or paternal surname.

All grounds recognised under Parsi Marriage and Divorce Act, 1936 may remain as they are, the only amendment may be with respect to procedure of divorce. In the Parsi Marriage and Divorce

88 https://timesofindia.indiatimes.com/india/sc-seeks-centres-response-on- quashing-jury-system-for-divorce-in-parsi-community/articleshow/61882239.cms

Amendment Act, in 1988, mutual consent was recognised as a ground for divorce, however, the Act does not recognise irretrievable breakdown of marriage as ground for divorce or community of property which should be incorporated.

Further, section 33 which applies in the case where the ground for divorce is adultery, makes the person with whom the adultery was committed, a co-defendant. This should be deleted. Marriage is premised on an understanding between two individuals, while adultery should remain a ground for divorce for both parties, the inclusion of the third person for purposes of compensation, only serves to commoditise the

person who has committed the adultery as though compensation monetary or otherwise is settlement for damages. Under no religion it is permissible that a husband can treat his wife as chattel. The issue of adultery as discussed earlier is sub judice before the Supreme Court.89

SPECIAL MARRIAGES ACT, 1954

While the SMA, 1954 has often been considered a model law, it suffers from various serious lacunae. One of the major problems highlighted in the series of consultations held by the Commission was that the 30-day notice period after the registration of marriage under the Act is often misused. The 30-days period offers an opportunity to kin of the couple to discourage an inter-caste or an inter-religion marriage. It is of paramount importance in the current scenario that couples opting into cross-community marriages are adequately protected. While previous Law Commission's 242nd Report _Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Traditions): A Suggested Legal Framework' (2012) have discussed honour killings and the power of the Khap Panchayats, it is important to ensure that at least, willing couples can access the law to exercise their right to marry when social attitudes are against them.

89 Joseph Shine v. Union of India WP(Crl) No. 194/2017

Recently, the procedure for registration under SMA,1954, was challenged in the Punjab and Haryana High Court in A & Anr. v. State of Haryana & Ors.90 and the court strongly urged the State to modify the Court Marriage Check List (CMCL)so that inter-religious marriages are promoted and not hampered.

It is suggested to the State of Haryana to suitably modify and simplify the CMCL to bring it in line with the Act by minimal executive interference. It may restrict the list to conditions which account for fundamental procedure avoiding unwarranted overload of obstructions and superfluity. The State is not concerned with the marriage itself but with the procedure it adopts which must reflect the mind-set of the changed times in a secular nation promoting inter- religion marriages instead of the officialdom raising eyebrows and laying snares and land mines beneath the sacrosanct feet of the Special Marriage Act, 1954 enacted in free India to cover cases not covered by any other legislation on marriages as per choice of parties for a court marriage.

Thus, while the 30-day period was retained, bearing in mind that this would also aid in transparency, particularly if facts about previous marriage, real age, or a virulent disease were concealed from either spouse, the object of the Act was to enable couples to marry by their own will and choosing.

The Commission urges a reduction of this period to bring the procedure in line with all other personal laws, where registration of under Hindu Marriage Act,1955 can be attained in a day and signing of a Nikahnama also confers the status of husband and wife on the

90 CWP No. 15296/2018(O&M), decided on 20/07/2018

couple immediately. This procedural tediousness forces couples to adopt alternate measure of marrying in a religious place of worship or converting to another religion to marry. Moreover, it also discourages couples from registering their marriage altogether because marriages outside the purview of the Act, remain valid even without registration, or marriage may take place anywhere (jurisdiction). Steps for the protection of the couples can be taken, if there is reasonable apprehension of threat to their life or liberty, and the couple request for the same91. Thus, the requirement of a thirty days notice period from sections 5, 6, 7, and 16 needs to be either deleted or adequate protections for the couple need to be in place.

All other general amendments such as introduction of irretrievable marriage as ground for divorce and community of property discussed earlier must also be incorporated in the SMA,1954.

91 Shashi v. PIO Sub-divisional Magistrate Civil Lines, CIC/SA/A/2016/001556