Reform of Family Law

MARRIAGE AND DIVORCE

Marriage and divorce have had a disproportionate share in public debate among all matters of family law. Marriage is frequently theorised as the foundation of a family, and family the foundation of society. The glorification of marriage sometimes also means that there are arguments made for non-interference in personal matters, however, discrimination and even violence in intimate relationships cannot be overlooked on pretext of privacy.

There are significantly different attitudes towards how a union between two people is imagined.

While in Hindu law, marriage is a sacrament, in Christian law, divorce continues to be stigmatised; in Muslim law, marriage is a contract and Parsi law registration of marriage is central to the ritual of marriage. It is important that these different attitudes are respected and not placed in hierarchy, pitting one religious attitude against another. At the same time marriage cannot be defined in religious terms alone, and religiously inspired gender roles and stereotypes cannot be allowed to come in the way of women‘s rights.

For instance, the relatively easier procedure of divorce under Islamic law for men and women is also reflected in the relatively open attitudes towards remarriage of divorced and widowed women, a right that most Hindu women achieved through legislation. However, once the legislation was in place, Hindu law evolved through a series of piecemeal legislative interventions on recognition of women as coparceners in 2005, recognition of diverse customs within the Hindu Marriage Act (Madras Amendment) 1967 incorporating priest-less marriages among many others. Amendments

to Christian marriage and divorce laws in 2001, and Hindu Adoption and Maintenance Act,1956 and Guardians and Wards Act, 1890, in 2010 are also examples of how once codified, personal laws can be opened up for further public debates and scrutiny. Thus, history shows that amendments to codify personal laws is not only a tried and tested way of bringing targeted social legislation but also of developing jurisprudence on family laws.

Through codification of different personal laws, one can arrive at certain universal principles that prioritise equity rather than imposition of a uniform code in procedure which can also discourage many from using the law altogether given that matters of marriage and divorce can also be settled extra judicially. Thus, there are certain universal principles with regard to adultery, age of consent, grounds for divorce et al that can be integrated into all existing statutory provision on marriage and divorce under personal and civil laws, while the procedure for divorce, and grounds for divorce may vary between communities the Commission will address the difference in grounds

of divorce available to men and women within the same community.

GENERAL CHANGES APPLICABLE TO MARRIAGE AND DIVORCE LAWS:

Adultery:

The First Law Commission (1834) under Thomas Macaulay while drafting Indian Penal Code did not include adultery as a criminal offence and instead kept it under the purview of civil law as a matrimonial offence. However, the Second Law Commission, headed by John Romilly, recommended criminal punishment for the offence, but given the social conditions of the time, excluded women from it19.

Section-497 of the Indian Penal Code, 1860 (IPC) makes the offence of adultery as a punishable offence, only for man without holding woman responsible. So, far as Jammu and Kashmir is concerned section 497 of Ranbir Penal Code, 1932 makes the ‗errant wife' also an accused along with her ‗paramour'.

Adultery‘ remains a ground for divorce under various family law Acts. Under Christian law before the 2001 amendment in the Divorce Act, 1869, for a woman to seek a decree of divorce on grounds of adultery was insufficient until she also included _cruelty‘ as a ground for divorce. However, in 2001 this was amended and both men and women were given the right to seek divorce on ground of adultery alone. Further, it also did away with the provision of _compensation for adultery‘ finally acting on the recommendations of the Law Commission of India 15th report, _Law relating to Marriage and Divorce amongst Christians in India‘, (1960). This provision reduced women to chattels, as adultery was something that could be compensated for almost as a compensation or _damages‘ to property.

Under Muslim law adultery is not recognised as a ground for divorce unless it is committed with _women of evil repute or leads an infamous life‘, which is included under _cruelty‘. The Dissolution of Muslim Marriage Act, 1939, also requires amendment to explicitly include adultery as a

ground for divorce for both spouses. Bigamy is dealt with separately later in this chapter.

Under Section 32(d) of the Parsi Marriage and Divorce Act, 1936 a person can file an application of divorce if the defendant, after marriage has committed the offence of adultery, fornication bigamy, rape or an unnatural offence. However, this ground of divorce is available only when the other spouse files the application within two years of discovery of the fact.

Thus, while all family laws include adultery as a ground for divorce it is important to ensure that the provision is accessible to both spouses. There have been multiple attempts by women‘s organisations, NGOs to reduce the offence of adultery from criminal to matrimonial, but the provision has been preserved in the statute books, ironically, on the argument that it is _pro-women‘.

The Malimath Committee, which suggested that the offence of adultery should indeed be made gender-neutral, but it should remain punishable by two years was opposed by the National Commission of Women in 2007. The Report on

Status of Women 2015 recommended a wholesale removal of this provision.

The Indian Penal Code (Amendment) Bill 1972, suggested for removing the special privilege guaranteed to woman under section 497, IPC but the Bill lapsed and could not be carried out. The validity of the provision has been challenged several times on the ground of discrimination, as the woman indulging in adultery is not an accused. However, the Supreme Court has consistently upheld its validity in Yusuf Abdul Aziz v. State of Bombay20; Sowmithri Vishnu v. Union of India21 ; V Revathi v. Union of India22.

In Hirachand Srinivas Managaonkar v. Sunanda23 the Supreme Court observed that living in adultery on the part of husband is a _continuing matrimonial offence' and the said offence is not wiped out even on passing of decree of judicial separation, as the same merely suspends certain obligation of spouse in connection with their marriage and does not snap matrimonial tie.

In Joseph Shine v. Union of India24 the Supreme Court, while referring the matter to Constitutional Bench, observed:

—The provision (Section 497) really creates a dent in the individual independent identity of a woman when the emphasis is laid on the connivance or

20 AIR 1954 SC 321

21 AIR 1985 SC 1618

22 AIR 1988 SC 835

23 AIR 2001 SC 1285

24 (2018) 2 SCC 189

consent of the husband. This tantamounts to subordination of a woman where the Constitution confers (women) equal status,‖

By presuming, that only women can be victims, the law takes a patronising attitude towards women. The prosecution under section 497 entirely contingent on the husband's word to the extent that a woman can practically enter into an

adulterous relationship upon her husband‘s consent, thereby reducing her to a commodity of a man.25

In the course of the correspondence between the Ministry of Law and Justice and the Law Commission, the Commission was assigned the task of undertaking a study on the provision of adultery within its report. As the judgment of the Constitution Bench in Joseph Shine v. Union of India is awaited, (hearing stood concluded) it is not appropriate for the Commission to make any suggestion in this regard at this stage but it urges a consideration about the utility or the lack there of, of a provision such as 497 IPC.

Compulsory Registration of Marriages:

The 270th report of the Law Commission of India on Compulsory Registration of Marriages (2017) states:

Since independence, numerous initiatives have been taken to address the issue of gender inequality. Reform initiatives taken so far have

succeeded to a large extent, however, child marriages, bigamy and gender violence continue to persist in our society, despite legislations prohibiting and penalising such practices. Several disputes are pending before the courts regarding matrimonial status of the parties. Women are often denied the status of wife due to absence of record proving a valid marriage. The courts have time and again emphasised on making registration of marriage compulsory, to prevent denial of status to women and to children born out of wedlock. Instances of marriage fraud have also come to light in recent times. In the absence of compulsory registration, women are duped into marrying without performance of the conditions of a valid marriage. This deprives women of societal recognition and legal security. Such fraudulent marriages are especially on rise among non-resident Indians. Compulsory registration can serve as a means to ensure that conditions of a valid marriage have been performed.

From the Supreme Court‘s reference in Seema v. Ashwini Kumar26, to repeated attempts by

National Commission for Women (NCW) to Convention on Elimination of All Forms of Discrimination Against (CEDAW) women have repeatedly argued that registration of marriages would go a long way in addressing discrimination towards women and children. The problem of different ages of consent provided under various personal laws and repeated violation of the Prevention of Child Marriages Bill has created a situation that needs immediate attention. The Law Commission‘s 270th Report _The Compulsory Registration of Marriages‘ (2017) recommended that the Registration of Births and Deaths Act be amended to include marriages. The report further clarified that:

Once enacted, the amended law would enable better implementation of many other civil as well as criminal laws. It would provide citizens, not new rights but better enforcement of existing rights under various family laws that grant and provide to protect many rights of spouses within a marriage. Registration of a marriage under any of the prevailing marriage Acts e.g. the Indian Christian

Marriages Act. 1872; the Kazis Act, 1880; the Anand Marriage Act, 1909; the Parsi Marriage and Divorce Act, 1936; the Sharia Application Act, 1937; Special Marriage Act, 1954; Hindu Marriage Act, 1955; any other custom or personal law relating to marriage will be acceptable and a separate standalone legislation may not be required so long as an amendment is made to the Births, Deaths Registration Act to include Marriages…..

26 (2006) SCC 578

The details of how this procedure will address the various anomalies in the law have been explained in the 270th report (2017) and it is suggested that the report be read along with this report on family law reforms. However, in the absence of a clear status for child marriages - be it void, voidable or valid – the required age for registration of is a question that needs to be decided separately.

Age of Consent For Marriage:

A uniform age of consent between all citizens of marriage warrants a separate conversation from a discussion about prevention of child marriages for the simple reason that maintaining the difference of eighteen years for girls and twenty-one years of age for boys simply contributes to the stereotype that wives must be younger than their husbands.27

If a universal age for majority is recognised, and that grants all citizens the right to choose their governments, surely, they must then be also considered capable of choosing their spouses. For equality in the true sense, the insistence on recognising different ages of marriage between consenting adults must be abolished. The age of majority must be recognised uniformly as the legal age for marriage for men and women alike as is determined by the Indian Majority Act, 1875, i.e. eighteen years of age. The difference in age for husband and wife has no basis in law as spouses entering into a marriage are by all means equals

and their partnership must also be of that between equals.

27Response submitted by Anoop Baranwal and his group, _Uniform civil code‘, to the Commission.

The Criminal Law (Amendment) Act 2013 now deems any intercourse under the age of eighteen years as rape. The law in such cases needs to duly consider whether criminalising all intercourse, even between the ages of sixteen-eighteen after 2013 amendment may also have the consequence of criminalising consensual intercourse. The end goal of any legislative endeavour for empowerment of women or gender justice should prioritise autonomy of women.

In Independent Thought v. Union of India28, the Supreme Court read down Exception 2 to Section 375 of IPC that allowed the husband of a girl child — between fifteen and eighteen years of age the right to have intercourse with her. The Supreme

Court dealt specifically with the exception dealing with married girls aged between fifteen to eighteen.29 The Court rightly held that a child remains a child regardless of whether she is married or unmarried and therefore intercourse with a minor would be rape regardless of her marital status.

A large number of judicial pronouncements recognise persons under the age of eighteen as ‗children'. To argue that marital status of a woman under eighteen years of age would have a bearing on a criminal offence such as rape would amount to holding a difference between underage women without ‗distinction'.

The current interlaced legislative system often leaves unanswered gaps where in the absence of pronounced court orders, several cases seem to fall astray. Section 5(iii) of the Hindu Marriage Act, 1955 (the Act 1955) and section 2(a) of the Prohibition of Child Marriage Act, 2006 (PCMA) prescribes eighteen years as the minimum age for the bride and twenty-one years as the minimum age for the

28 AIR 2017 SC 4904

29 The law as it stands does not delve into whether consent of married women is significant to sexual intercourse between the partners.

groom. Hindu law recognises the marriage between a sixteen-year-old girl and eighteen-year-old boy as valid, but voidable. Muslim Law in India recognizes marriage of minor who has attained puberty as valid.

The Special Marriage Act, 1954 (the SMA 1954) also prescribes eighteen years and twenty-one years as the legal minimum for women and men respectively. However, under section 11 and 12 of the Act, 1955 marriages where one or more parties do not meet the legal minimum age are neither void nor voidable and merely liable to pay fine. Section 3 of the PCMA deems a marriage where one or more parties are minor as voidable at the option of the minor. The laws on guardianship are clear, the husband will be the guardian of his

wife30 minor or major. The issue also becomes relevant if the husband of the minor girl himself is a minor. The question then arises that when it comes to compulsory registration of marriage should the law encourage this tacit compliance of child marriage by allowing these

—valid marriages‖ under various personal laws to get registered, or should the law not register these marriages which may amount to turning a blind eye allowing the activity continue unregulated. The Delhi High Court emphasized need for compulsory registration of marriage:

—… registration of marriages has still not been made compulsory. Compulsory registration mandates that the age of the girl and the boy getting married have to be mentioned. If implemented properly, it would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriages. This would probably be able to tackle the sensitive issue of minor marriages upheld by personal laws.‖31

As of now, under the Dowry Prohibition Act, 1961, in a marriage between minors the bride‘s stridhan lies with her father in

30 See, Section 21 of The Guardians and Wards Act, 1890; section 6 (iii) of Hindu Minority and Custody Act, 1956.

31 2012 (6) AD (Delhi) 465

law and husband who stand as trustees till she attains the age of majority. Though the law wishes to exterminate underage marriages, such marriages remain a harsh reality in India and therefore a conversation about ‗trustee‘ of stridhan needs to be had so that women are not denied their access to stridhan once they attain majority, regardless of the success achieved in preventing child marriages.

Further, Medical Termination of Pregnancy Act, 1972, section 3 provides that at the time of termination of pregnancy if the wife is a minor consent of the husband is required. However, on

occasion that the husband himself is a minor, the consent stands vitiated. Thus, all these laws operate on the belief that child marriage is a reality in India and till the time such marriages are common the existing laws must be updated so as to not contradict other existing laws.

Grounds for Divorce

The Law Commission in its 71st Report _Hindu Marriage Act, 1955‘ (1978), dealt with the concept of irretrievable breakdown of marriage in substantial detail. The report mentions that in as far back as 1920, New Zealand was the first of the Commonwealth countries to introduce the provision that a three-year or more separation agreement was ground for filing a petition in the courts for divorce. In 1921, in the first case of the granting of divorce on these grounds in New Zealand, the court laid down that when matrimonial relations have, in fact, ceased to exist it is not in the interest of the parties or in the interest of the public to keep a man and woman bound as husband and wife in law. In the event of such a separation, the essential purpose of

marriage is frustrated and its further continuance is not merely useless but mischievous. This formulation has become a classic enunciation of the breakdown principle in matrimonial law.

The Law Commission in the 1978 report observed that restricting divorce to matrimonial disability results in an injustice in cases where neither party is at fault, or if the fault is of such a nature that the parties do not wish to divulge it and yet the marriage cannot be worked out. It refers to a situation where the emotional and other bonds, which are the essence of marriage, have disappeared and only a façade remains. This commission echoes the suggestion that where a marriage has ceased to exist both in substance and in reality, divorce should be seen as a solution rather than a taboo. Such a divorce should be concerned with bringing the parties and the children to terms with the new situation and working out a satisfactory basis for regulating relationships in the changed circumstances. Not to dwell on the _wrongs‘ of the past.

In the case of Naveen Kohli v.Neelu Kohli32, the Supreme Court held that situations causing misery should not be allowed to continue indefinitely, and that the dissolution of a marriage that could not be salvaged was in the interest of all concerned. The court concluded that the husband was being mentally, physically and financially harassed by his wife. It held that both husband and wife had allegations of character assassination against them but had failed to prove these allegations. The court observed that although efforts had been made towards an amicable settlement there was no cordiality left between the parties and, therefore, no possibility of reconnecting the chain of marital life between the parties.

Much is spoken about the misuse of section 498A of IPC, 1860. Simplifying the procedure for divorce would discourage lawyers from invoking section 498A as a means to secure a quick exit. Very often, women wanted to exit a difficult marriage are encouraged to use section 498A as a way to expedite divorce proceedings. While

registering a police complaint, sections 498A and 377 IPC are used by

32 AIR 2006 SC 1675

women only because of the prevailing marital rape exception. It is therefore important to take into account the reasons why certain provisions are overused and acknowledge that often this happens because of the lack of other provisions in the law to address the specific nature of grievances.

After Arnesh Kumar v.State of Bihar,33 there are strict guidelines to ensure that there are no frivolous complaints under section 498A IPC. However, the problem of its overuse can only be truly addressed by understanding what is the exact nature of grievance that underlies the complaint. Simplifying divorce procedures will ensure that unhappy couples can exit their marriage rather than resorting to criminal law provisions only to separate.

In a recent judgement the Court has reiterated that in cases of mutual consent the period of cooling off could be waived in certain circumstances. The Court in Amardeep Singh v Harveen Kaur34 stated:

Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

Encouraging a simplified procedure for divorce is imperative for sustaining a healthy perception of marriage which is free of any discrimination or violence. Simplifying the procedure for couples where no reconciliation is possible would also be beneficial in curbing the false allegations against parties, which are often made in order to hasten the process of divorce. Lengthy procedures incentivise the use

33 AIR 2014 SC 2756

of severe grounds such as cruelty and adultery rather in order to secure a divorce which may have been prompted merely by inability of the partners to find mental, emotional or physical compatibility.

Lastly, given that matrimonial suits take years to conclude often results in individuals spending a substantial part of their lives fighting in courts whereas they could give their lives a second chance if the divorce is amicably concluded35. Further, the children of such wedlock would also not be caught up in the whole process.

The Marriage Laws (Amendment) Bill, 2010, proposed that under the HMA 1955 and the SMA 1954 there should be a ground of irretrievable breakdown of marriage for divorce, provided that the wife has a right to oppose such petition on the grounds of grave financial hardship. The maintenance of child(ren) born out of the marriage should be consistent with the financial capacity of the parties to the marriage. The Bill also provides that after filling for divorce by mutual consent, the

six months waiting period should be done away with. The Bill for Irretrievable Breakdown of Marriage was introduced in Parliament in 2013 addressing many of the problems of the 2010 bill. However, due to the reasons explained in next part, it lapsed.

Community of Property upon Divorce and Maintenance

The Bill for Irretrievable Breakdown of Marriage of 2013 lapsed and faced criticism over the fact that while allowing for immediate and unilateral divorce left women in a particularly vulnerable position. To address this there needs to be a robust doctrine for recognising the community of property of all self acquired

35 It is important that we address the problem of violence- physical, mental, economic in a marriage to address the larger problem of young people growing up with the notion that such violence is normal to a marriage. Normalisation of male aggression and emphasis on hyper-masculinity is as harmful for boys as it is for girls. Introducing

irretrievable breakdown of marriage as a ground for divorce will safeguard children from being caught in long drawn court proceedings over a divorce which often necessitate the levying of grave accusations on both parties in order to secure divorce.

property, acquired after marriage. All property acquired after marriage of either spouse be treated as a unit between the couple. It is often women, who compromise on careers in order to support families, they also contribute in most households in India to a major share of housework which is never calculated in monetary terms. The society inadequately values housework and further for working women, childbearing results in a career break which affects their employment in a way that it does not affect their husband‘s career. Therefore, it is important that regardless of whether the wife _financially‘ or

_monetarily‘ contributes to the family income, her contribution to a household in terms of household labour, home management, and child bearing and care should entitle her to an equal share in a

marriage and thus all property for income gained after marriage should be divided equally upon divorce. This does not mean that inherited property will also be included in this division but its value can be taken in to account by the court for determining maintenance and alimony.

The idea is not a novel one, nor is it new to India. In 1938 there was a report called ‗Women's Role in Political Economy' which discussed women's contribution to a household in substantial detail and argued for its calculation in economic/ monetary terms.36

Under the United Kingdom law in the case of White v White37, the courts rely on the principle of equality of division to both parties, ensuring they receive their rightful share of the matrimonial property on divorce or dissolution of partnership. Lord Nicholls had stated

―there should be no bias in favour of the money-earner and against the home-maker and child-carer‖.38

36 Banerjee, Nirmala. "Whatever happened to the dreams of modernity? The Nehruvian era and woman's position." Economic and Political Weekly (1998): WS2- WS7.

37 (2000)UKHL 54

38 Ibid.

However, this principle does not automatically translate to an _absolute' equal split of property at the end of the relationship, both the Court as well as the legislature recognises that in a number of cases such a yardstick may bring an unfair burden to one of the parties.

Thus, it is important to retain the discretion of the Court in such cases but the availability of a _no fault divorce' must accompany community of self-acquired property. The Hindu Marriage Act, 1955, Special Marriage Act, 1954, the Parsi Marriage and Divorce Act, 1936, the Dissolution of Muslim Marriages Act, 1939 can be amended to reflect this.

Rights of Differently-Abled Persons in Marriage:

The Personal Laws (Amendment) Bill, 2018, proposes to amend the Christian Divorce Act, 1869, Section10 (iv); the Dissolution of Muslim Marriages Act, 1939, Section 2 (vi); the Hindu Marriage Act, 1955, Section 13 (iv) the Special Marriage Act, 1954 Section 27 (g) and the Hindu Adoptions and Maintenance Act, 1956, Section 18 (2)(c) to remove leprosy as a ground for seeking divorce or as a ground to deny maintenance. Not only the disease is now curable but it is also common, and maintaining such a provision amounts to discrimination against individuals suffering from this condition.

Leprosy, however, is one in many ways that the laws may intentionally or unintentionally discriminate against persons with disability. There have been multiple occasions on which a parent with disability is unable to negotiate custody of children. A submission made by The Equals Centre for Promotion of Social Justice offers fine comparative review of how various countries have systematically moved towards incorporating provisions that end discrimination towards

persons who are differently abled. Further, India having

ratified the UN Convention on the Rights of Persons with Disabilities in 2007 is also obligated to respect, protect and fulfil the rights of persons with disabilities:

Respect: Refrain from interfering with the enjoyment of the right

Protect: Prevent others from interfering with the enjoyment of a right

Fulfil: Adopt appropriate measures towards full realization of the right

This is particularly important given that mental health is inadequately addressed in our country, and therefore despite no law specifically preventing the access of persons with disability to a marital or familial life, they continue to be in a disadvantaged position, for example:

1. Persons with visual impairments cannot read the documents associated with the execution of personal laws;

2. Persons with speech and hearing impairments cannot communicate with authorities and officials;

3. In general, attitudinal barriers portray women with disabilities as inferior and often leads to situations where they are married to men who are already married and are made to provide childcare and other domestic work, with no rights as a ―second wife‖.

4. Persons with disabilities, particularly women, are denied inheritance either directly (excluded from Wills) or indirectly (not given their share of the property);

5. Women with disability are subjected to non-consensual sterilization by their families or by the institutions that they are residing in.

6. Women with intellectual, developmental and psychosocial disability (mental illness) who fall pregnant have their pregnancies terminated on the

grounds that they cannot take care of their children or a fear that the disability will pass on.39

Thus, in order to move towards a more inclusive framework of rights, the general reference to terms such as _unsound mind‘, _lunacy‘, _mental disorder‘, need to be broken down and analysed further.

The explanations under section 13 (1) (iii) of the Act, 1955 and in section 32 (bb) in Parsi Marriage and Divorce Act,1936 needs to be opened up such that each definition can be narrowed to exclude forms of illnesses that can be cured or controlled with adequate medical treatment or counselling.

Presumption of Marriage for Cohabiting Couples:

The law is well settled on the question of presumption of marriage for couples cohabiting. In Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.,40 this was affirmed relying upon a large number of precedents.

The issue of maintenance, therefore, is also settled given as the claim for maintenance of wife or presumed wife will be identical.

40 AIR 2010 SC 2685.

is also urged that a greater study be initiated into rights of all persons who are cohabiting as a conjugal unit.41

HINDU LAW

The Hindu Marriage Act, 1955 brought with it some significant reforms, but remained far from satisfactory. Reform of Hindu law which has historically been celebrated as a watershed moment, has in the recent decades also been viewed with a critical lens, which highlighted that codification of Hindu law in essence was a codification of North Indian upper caste morality.42

In the subsequent decades the law saw a number of amendments where the law was forced to incorporate customs and other forms of solemnisation of marriages that did not necessarily entail _saptapadi‘ or other Brahmanical norms. For instance, the Hindu Marriage (Madras Amendment Act), 1967 enabled couples married under Suramariathai customs of a priest-less marriage to register their marriage under the Act, 1955.43 Thus, the significance of the Act, 1955 lay in the fact that it made religious customs and practices amendable, and these practices, in order to prevail had to meet the test of constitutionality.

Despite codification, there remained areas where inequality between men and women continued that these practices if tested against the fundamental rights under the constitution may not hold

41 At a later stage the possibility of a civil partnership must be assessed. It needs to be debated alongside the moves to enact a _transgender bill‘. The broader definitions of

_man‘ and _woman‘ that the law now presumes, should now imply that matrimonial rights must also be accessible all persons inhabiting these legal definitions. We urge deeper consultation with the LGBTQI communities to take this conversation forward.

42 Som, Reba. "Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?." Modern Asian Studies 28, no. 1 (1994): 165-194. Sinha, Chitra. Debating Patriarchy: The Hindu Code Bill Controversy in India (1941-1956). Oxford University Press, 2012. Newbigin, Eleanor. "The Hindu Code Bill and the making of the modern Indian state." PhD diss., University of Cambridge, 2008.

43 Anandhi, S. "Women's Question in the Dravidian Movement c. 1925-1948." Social Scientist (1991): 24-41.

good. Slowly but surely through legislative attempts to codify fair and acceptable laws to govern marriage, and Supreme Court‘s attempt to nullify the unfair traditions and the civil society

movement‘s tireless campaign in highlighting the problems in personal laws, India is now taking small steps towards creating a more egalitarian society.

Nowhere in the Hindu texts does one find support for practices such as Maitri Karaar or Draupadi-vivah, yet these practices prevail as _customs‘. Before the codification of Hindu law in 1950s there were a number of prevailing provincial legislations governing marriage and divorce among Hindus. With challenges to statutes such as Prevention of Hindu Bigamous Marriage Act, 1946, there emerged cases that not only informed, but also in many ways defined the boundaries of personal law and had a significant bearing on the relationship between religion and the state. In State of Bombay v. Narasu Appa Mali44 the Court laid the ground for the degree to which the State could intervene in religious practices under religious

_personal law‘. The Bombay High Court concluded:

A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.

While the intervention was worded largely as _social reform', the court also clarified that there was a distinction between religious faith and religious practice. While the former warranted protection by the State, the latter had to face the constitutional test. What practice qualified as reform-worthy or worth preserving often depended on whether it entailed a _criminal' offence or not.

44 AIR 1952Bom 84

However, the boundary between _civil' and _criminal' law is a porous one and what would

constitute ‗criminal' at a particular point in history could be revisited in the course of time. For instance, the condemned practices such as dowry were ‗criminalised' over time. Therefore, in Narasu Appa Mali the Court took the view that the regulation if not a total banning of bigamy among Hindus was in line with the social, political and even economic demands of the time. Therefore, concluding that such an intervention finds its basis in democratic social movements.

Even though there remains substantial controversy over whether the judgment of Narasu Appa Mali is binding in its conclusion that personal laws cannot necessarily be tested against fundamental rights guaranteed in the Constitution because there is uncertainty about whether personal laws in fact qualify as ‗laws in force'. However, the more persevering legacy of the case should in fact, be that it categorically held that practices not ‗essential' to religion need not be preserved as personal law of that religion, as bigamy was held to be not ‗essential' to Hinduism.

However, soon after Narasu Appa Mali, the Hindu Marriage Act, 1955, abolished bigamy among Hindus. Six different legislations were passed by Parliament between the years 1954 and 1956, which codified Hindu family law, and also the Special Marriage Act, 1954 to govern cross-community marriages. Polygamy was banned and divorce was introduced and women‘s right to inherit property was also supported. The significant achievement of codification of family law was that despite the imperfect nature of the legislation,45 once written in the form of statutes the Hindu law Acts served to open up new public discussions and debates on various aspects of religion and the

45 Agnes, Flavia. "Hindu men, monogamy and uniform civil code." Economic and Political Weekly (1995): 3238-3244.

ways in which these could be contradicted or reconciled with constitutional provisions and in particular with Fundamental Rights.

Repudiation of marriage:

The 1955 Act has seen a number of amendments since its enactment. However, one particular provision has escaped amendment even as it contradicts the Prohibition of Child Marriage Act, 2006 (PCMA). Section 13(2) (iv) of the Act, 1955 provides that a girl given in the marriage before the age of fifteen years, has an option to repudiate the marriage after attaining fifteen years of age but before she is of eighteen years of age.

Under PCMA, however, the window for repudiation of a child marriage is not limited to fifteen-eighteen years of age. Section 3(3) provides that either party, who was given in the marriage before attaining the age of eighteen years, can repudiate the marriage. The party also has a span of two years, after eighteen years of age, to avail this remedy.

Restitution of Conjugal Rights:

Section 9 of the HMA 1955, provides for the restitution of conjugal right. While hearing the petition of divorce the Bombay High Court even suggested that women _should be like Sita‘ and follow their husbands everywhere46. In the current context when a number of women are as educated as men are and are contributing to their family income, the provision of restitution of conjugal rights should not be permitted to take away these hard-earned freedoms. In Suman Kapur v.Sudhir Kapoor47 the Supreme Court cited women‘s focus on their careers as _neglect‘ of their household responsibilities. If women

46 See, https://timesofindia.indiatimes.com/city/mumbai/A-wife-should-be-like- goddess-Sita-Bombay-HC/articleshow/13054421.cms; http://www.womensviewsonnews.org/2012/05/bombay-high-court-judge-tells- woman-to-be-like-sita/

47 AIR 2009 SC 589

are given equal opportunity to study it should be presumed that they will seek equal opportunity to advance their careers and as a corollary, men should not just cooperate but contribute actively towards household activities and responsibilities such as management of household, childcare and equal partners in marriage, rather than misusing the provision of restitution of conjugal rights to force their wives to cohabit.

In Bhikaji vs. Rukhmabai, 1885 Rukhmabai a physicist, had refused to cohabit with the man she was married to in her childhood. Justice Pinhey observed that English law would not apply in this case because it presumed that a marriage would have been solemnised between two consenting adults and so far as Hindu law was concerned, there was no precedent for forcing cohabitation. While the appeal to the decision was allowed in the re-trial, restitution of conjugal rights remains a

colonial inheritance which finds no precedent in Hindu law before it was codified under the HMA.48

In T Sareetha v.Venkatasubiah49 the Andhra High Court had struck down Section 9 of the HMA 1955 but this view was disapproved by the Supreme Court in Saroj Rani v.Sudarshan Kumar Chaddha50. The conjugal relations in a marriage are indeed significant, and are well safeguarded under _grounds available for divorce‘ and the forced nature of cohabitation must be discouraged socially and also reflected in the law. The Madras High Court in NR Radhakrishna v. Dhanalakshmi51 and the Delhi High Court in Swaraj Garg v. RM Garg52 also agreed that in the modern day, it cannot be presumed that wifely duty is fulfilled by following their husbands everywhere and it is an unreasonable ask.

48 Ee also, Sarkar, Tanika. "Rhetoric against age of consent: Resisting colonial reason and death of a child-wife." Economic and Political Weekly (1993): 1869-1878. 49 AIR 1983 AP 356

50 AIR 1984 SC1562

51 (1975) 88 LW 373

52 ILR(1979)1 Del 41

The Report by High Level Committee on Status of Women, Ministry of Women and Child Development in 2015 had also recommended that restitution of conjugal rights had no relevance in independent India and the existing matrimonial laws already protects conjugal relations, as denial of consummation is recognised as ground for divorce.53 The report, under the leadership of Pam Rajput highlighted the fact that this provision was only being used to defeat maintenance claims filed by wives and served little purpose otherwise. The Commission echoes the recommendation of the Committee in this regard and suggests the deletion of section 9 from the Act, 1955, section 22 of the SMA,1954, and section 32 of Indian Divorce Act, 1869.

Bigamy upon Conversion

Anthropological evidence has shown that bigamous arrangements among Hindus continue to exist and have local recognition despite their being a law against it. In fact, data suggests that many Hindus convert to Islam in order to practice bigamy as highlighted by the Sarla Mudgal v.Union of India54 in 1994. Such conversion takes place despite there being clarity on the fact that another marriage of a spouse by conversion would not be considered valid if the previous partner of the spouse continues to remain of the religion under which the marriage was solemnised.

The Law Commission 18th Report _Converts' Marriage Dissolution Act, 1866' (1961) had dealt with rights of spouses in the case of conversion in substantial detail. The report had clarified that conversion from a monogamous religious to a polygamous one did not by itself dissolve the marriage. This however needs to be clarified by

53 The Report by High Level Committee on Status of Women, Ministry of Women and Child Development 2015. Chaired by Pam Rajput.

54 AIR 1995 SC 1531

statute rather than on a case to case basis. The Law Commission's 227th Report Preventing Bigamy via Conversion to Islam – A Proposal for giving Statutory Effect to Supreme Court Rulings (2009) had exclusively dealt with the subject of bigamy by conversion. The existing law on bigamy, section 494 Indian Penal Code (IPC) provides that a person shall be punished with the imprisonment, which may be extend to seven years, if he/she marries during the lifetime of their spouse.

This also carved out the exception where marriage with such husband or wife has been declared void by a court of competent jurisdiction, or falls within the ambit of sections 107-108 of the Evidence Act of 1872, i.e. that the husband or the wife has not been heard of for seven years. Section 495 IPC,

further provides that if the offence of bigamy is committed by not disclosing the fact of former marriage, to the person with whom the subsequent marriage is contracted, it shall be punished with imprisonment which may be extend to ten years and fine. With regard to this the recommendation of the Committee on Status of Women, Ministry of Women and Child Development (2015) are very relevant, as it recommended making such marriages void.

The report further highlighted that often women tend to be on the receiving end of a society‘s disapproval of bigamy. Often the second wife whose marriage is declared void suffers without maintenance and bears the burden of maintaining her children who are deemed illegitimate. Therefore, the report further recommended that,

—Section 16 should be amended to include all children born out of wedlock and not just those from void and voidable marriages. Further the

term ‗illegitimate' should not be used in any statute or document.‖

Thus, the Law Commission reiterates the recommendations of the previous reports55 and urges swift legislative action on clarifying a precedent that has repeatedly been upheld by the courts.

SIKH LAW:

There has been a long-standing demand for registering marriages under the Anand Marriage Act, 1909 (the Act 1909), for Sikh couples, who do not wish to use the provisions of the HMA 1955. This was enabled in a limited way by the Government of Delhi and Sikh marriages can now be registered under the Act, 1909 instead of the Act, 1955.56 After the 2012 Amendment it is no longer necessary to register the marriage under Registration of Births Deaths and Marriages Act of 1969, however in this respect the Law Commission of India's recommendations in 270th Report ‗Compulsory Registration of Marriage' (2017) must apply.

On March 15th 2018 in Pakistan, the Punjab government enacted the Punjab Anand Karaj Marriage Act, 2018. Under the Act all marriages between Sikhs should be registered as Sikh Marriages, it also laid down definition of who was recognised as ‗Sikh' and that Guru Granth Sahib be recognised as the last and eternal-living guru. Under this Act, they provide for an arbitration council which the couple can approach for seeking Dissolution of Marriage. The council first takes the necessary steps towards facilitating reconciliation, however, if after ninety days the dispute is not resolved the marriage can be dissolved by order of the Chairperson of the arbitration council.

The Anand Marriage Act, 1909 in India, however, lacks a provision for divorce and couples therefore rely provisions of the

55 The 227th Report (2009); the Status of Women, Ministry of Women and Child Development (2015)

56 L-G gives nod to notify Anand Marriage Act for Sikhs. Press trust of India, 02-02- 2018.

Hindu Marriage Act, 1955. There has also been a demand for codifying provisions for a divorce but no steps have been taken towards creation of a provision for dissolution of marriage. While the provisions of the Hindu Marriage Act can be accessed for seeking divorce, the Commission‘s suggestions to changes to Hindu Marriage Act, 1955 such as community of property, provision for a no-fault divorce will therefore also apply to Sikh marriages.