



Government of India

Law Commission of India

Consultation Paper

on

Reform of Family Law

31 August 2018

Acknowledgements

The Ministry of Law and Justice made a reference to the Law Commission of India dated 17th June, 2016 to ‘examine matters in relation to uniform civil code’. The issue of uniform civil code is vast, and its potential repercussions, untested in India. Therefore, after detailed research and a number of consultations held over the course of two years, the Commission is presenting its consultation paper on reform of family laws in India.

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1. INTRODUCTION:

1.1. In June 2016 through a reference by the Government of India, the Law Commission was entrusted with the task of addressing the issues concerning a uniform civil code. The Law Commission of India has taken this opportunity to address the ambiguity that has long surrounded the questions of personal law and uniform civil code in India. This consultation paper has been an endeavour to understand, acknowledge and finally suggest potential legislative actions which would address discriminatory provisions under all family laws. In doing so, the Commission has endeavoured to best protect and preserve diversity and plurality that constitute the cultural and social fabric of the nation.

1.2. Various aspect of prevailing personal laws disprivilege women. This Commission is of the view that it is discrimination and not difference which lies at the root of inequality. In order to address this inequality the commission has suggested a range of amendments to existing family laws and also suggested codification of certain aspects of personal laws so as to limit the ambiguity in interpretation and application of these personal laws.

1.3. Whether or not 'personal law' are laws under Article 13 of the Constitution of India or if indeed they are protected under Articles 25-28, has been disputed in a range of cases the most notable being *Narasu Appa Mali*.¹ In the absence of any consensus on a uniform civil code the Commission felt that the best way forward may be to preserve the diversity of personal laws but at the same time ensure that personal laws do not contradict fundamental rights guaranteed under the Constitution of India. In order to achieve this, it is desirable that all personal laws relating to matters of family must first be

¹ *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84.

codified to the greatest extent possible, and the inequalities that have crept into codified law, these should be remedied by amendment.

1.4. By virtue of being 'enacted' as laws, personal law cannot be codified in a way that contradicts the Constitution. For instance, codification of discriminatory custom regardless of how commonly acceptable they may be, can lead to crystallisation of prejudices or stereotypes. Therefore, codification of any law requires a rigorous debate and the Commission has taken only the first step in this direction. At the same time, the very act of codifying 'separate' personal laws could itself be challenged as an exercise against Article 14 of the Constitution. Therefore, it is urged that the legislature should first consider guaranteeing equality 'within communities' between men and women, rather than 'equality between' communities.² This way some of the differences within personal laws which are meaningful can be preserved and inequality can be weeded out to the greatest extent possible without absolute uniformity.

1.5. For long there has been a battle of sorts between freedom of religion and one's right to equality. While the more fundamentalist forces within the society have historically demanded an absolute right to freedom of religion whereby religious customs cannot be tested against even constitutional provisions, on the other hand are the advocates of the right to equality who suggest that the law should be blind to cultural difference when it comes to matters of human rights. Both these positions are not exclusive of one another and one has to reconcile both freedom of religion and right to equality in order to justly administer the law. Both these rights are valuable and guaranteed to every citizen of the country and to necessitate women to choose between one or the other is an unfair choice. Therefore, women must be guaranteed their freedom of faith without any compromise on

² See also, Menon, Nivedita. State, community and the debate on the uniform civil code in India. 2000.

their right to equality. At this stage these rights can be reconciled by making piecemeal changes to laws wherever necessary. The fact that secular laws such as the Special Marriage Act, 1954 also continue to suffer from lacunae suggests that even codified or religion-neutral laws offer no straightforward guarantee of justice.

1.6. At the same time, while freedom of religion and right to not just practice but also propagate religion must be strongly protected in a secular democracy, it is important to bear in mind that a number of social evils take refuge as 'religious customs' these may be evils such as sati, slavery, devdasi, dowry, triple talaq, child marriage or any other. To seek their protection under law as 'religion' would be a grave folly. For these practices do not conform with basic tenets of human rights are nor are they essential to religion. While even being essential to religion should not be a reason for a practice to continue if it is discriminatory, our consultations with women's groups suggested that religious identity is important to women, and personal laws along with language, culture etc often constitute a part of this identity and as an expression of 'freedom of religion'.

1.7. Right to equality on the other hand can also not be treated as an absolute right. In a country like ours where social inequalities plague our society and economic inequality is insurmountable it would be erroneous to presume that all citizens uniformly benefit from the right to 'equality'. Therefore 'equity' and not mere equality would mean that preferential rights and protections are maintained for vulnerable or historically subordinated sections of the society, for there is no equality in treating unequals as equals. There are various laws, affirmative action policies and schemes in this country to bring all citizens to share common ground on significant matters. In family law too, different laws were codified over time for various communities to slowly align them with constitutional values. The task began at the time of independence itself.

1.8. The category of personal law may well have evolved in colonial India, but post-independence this category was strengthened, reconstituted and reinforced. One of the foremost social legislations that were introduced in independent India was, in fact, the amendments to Hindu law. These amendments generated enormous protests in many parts of India and most notable and vociferous opposition came from the Hindu Mahasabha.³ Despite sustained protests the Hindu Law Committee continued to contemplate reforms, under the stewardship of Nehru and Ambedkar.

1.9. Ambedkar's position in the Constituent Assembly debates towards a uniform civil code was that such a code would be desirable but for the moment would remain voluntary. He recommended:

It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary [...] so that the fear which my friends have expressed here will be altogether nullified.⁴[..] This is not a novel method. It was adopted in the Shariat Act of 1937 when it was applied to territories other than the North-West Frontier Province. The law said that here is a Shariat law which should be applied to Mussalmans who wanted that he should be bound by the Shariat Act should go to an officer of the state, make a declaration that he is willing to be bound by it, and after he has made that declaration the law will bind him and his successors.⁵

³ Hindu Mahasabha Publication, *The Hindu Outlook* from 1941-1956. Managing editor Indra Prakash
Editor VG Deshpande: 'Hindu Code Bill Disrupts Family System and Stable Society' 29 November 1948, 'Hindus "Distressed and Disappointed"' Mahasabha Gl. Secretary on P.M.'s speech. 13 August 1951.

⁴ Constituent Assembly debates, Volume VII (here on, CAD, Vol.) 3 December 1948 p. 1979.

⁵ Ibid.

1.10. Ambedkar however, also pointed out that before the Muslim Personal Law Shariat Application Act 1937, Muslims in many parts were governed by Hindu law and even *Marumukkatayam* system of inheritance and succession which had been prevalent in many of the Southern Indian States. Tracts of the Constituent Assembly debates reveal that there was no consensus in the Constituent Assembly about what a potential uniform civil code would entail. While many thought uniform civil code would coexist alongside personal law systems, while others thought that it was to replace personal law.⁶ There were yet others who believed that a uniform civil code would deny freedom of religion. It was due to this uncertainty about what exceptions were acceptable as ‘freedoms’ and what exceptions would in fact deny this very freedom that led the assembly to contain the provision of uniform civil code in Article 44 of the constitution among Directive Principles of State Policy rather than Fundamental Rights. Interestingly there were also groups that staunchly opposed the Hindu Code Bill but found the uniform civil code more palatable thus betraying the lack of clarity on the potential implication of a code.

1.11. The Hindu Code Bill was a comprehensive omnibus legislation that sought to reform, unify and ‘statutorise’ family law for all people who were not Christians, Muslims or Parsis. While the original bill located complex links between importance of inheritance and succession rights and the right to divorce, the Bill was severely diluted in the face of strong opposition from conservative quarters of the Hindu society. The multiple drafts of the Hindu code were repeatedly revisions and increasingly watered down with each revision. It was argued that the Constituent Assembly was not

⁶ See, Constituent Assembly debates, Vol. VII. Speeches of Maulana asrat Mohani, KT Shah, B Pocker Sahib Bahadur. For discussion See also, Rochana Bajpai, 2011. *Debating difference: group rights and liberal democracy in India*. Oxford University Press. Saxena., 2016, ‘Politics of personal law in post-independence India’, Unpublished PhD Dissertation, University of Cambridge.

constituted by elected members but by selected members that therefore was not representative of the will of the people.

1.12. The constituent assembly agreed on putting the clause of a uniform civil code as a directive principle rather than a fundamental right. In the subsequent years there were a number of interventions by legislature, judiciary as well as civil society organisations seeking amendments to personal laws or instituting a uniform civil code. The most notable of these judgments were the *Mohd. Ahmed Khan v. Shah Bano Begum*⁷, *Jordan Diengdeh v. S.S. Chopra*⁸, and the *Sarla Mudgal v. Union of India*⁹. The court in *Shah Bano* observed:

Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the State which entrusted with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning.

1.13. However, the judgment does not acknowledge the history of attempts made towards reforming family laws in the country. The State is an ‘enabler’ of rights rather than an ‘initiator’, particularly in sensitive matters such as that of religious personal laws. At this stage one can conclude with conviction the Commission’s initiative towards reform of family law is driven by civil society organisations, educational institutions, and vulnerable sections of the society themselves, rather than by legislative mandate.

⁷ AIR 1985 SC 945

⁸ AIR 1985 SC 935

⁹ AIR 1995 SC1531

1.14. When the Law Commission put forth its questionnaire in public domain in November 2016, for the people to respond, it received over 75,378 responses suggesting various ways in which reforms could be executed. This indicated that the public now desires a reform of the law. Majority of these responses, however, dealt specifically with the issue of triple talaq or talaq-ul-biddat, which is a one among the various other issues that need attention.

1.15. While diversity of Indian culture can and should be celebrated, specific groups, or weaker sections of the society must not be dis-privileged in the process. Resolution of this conflict does not mean abolition of difference. This Commission has therefore dealt with laws that are discriminatory rather than providing a uniform civil code which is neither necessary nor desirable at this stage. Most countries are now moving towards recognition of difference, and the mere existence of difference does not imply discrimination, but is indicative of a robust democracy.

1.16. The recent Supreme Court judgment *Shayara Bano v. Union of India*¹⁰ outlawing the practice of triple talaq has taken a first step towards ending personal law practices that are discriminatory towards women but largely on the premise that triple talaq is also not an essential practice of Islam suggesting that bad in theology cannot be good in law. The court has not delved on the supremacy of fundamental rights in case of a conflict between the personal law and fundamental rights and the premise of *Narasu Appa Mali* has not been overturned.

1.17. Since battle lines are so firmly drawn on the issue of family law, it is fruitful to engage with complex issues while also keeping in view the limitations of law. While the commission is in a position to suggest amendments to various laws, many of the issues raised before

¹⁰ AIR2017SC609

the Commission were those of implementation and not the language of law itself.

1.18. There are also a number of issues that are brought up frequently in public debate but cannot be and need not be dealt with the law. For instance, in the recent case of a Kerala church where the father exploited a woman blackmailing her for the confessions she made to him led to a widespread demand for declaring the practice of confessions altogether illegal. These are precisely the type of knee-jerk reactions we must be wary of. Confessing in itself cannot be a criminal act, it's the misuse of confessions by select priests that needs to be checked. It's a far more progressive and sensible suggestion to eventually also include nuns are individuals who can hear confessions.¹¹ This need not be enforced by law, but the brought in through consensus building within communities. No legal change can satisfy all sections of the society but that does not mean that legislative changes should not be contemplated. However, it is important to separate the disease from the symptom of disease. The issue itself is not about religion for the individuals who indulged in such exploitation also do not have the patronage of any religion. Thus, such criminal cases cannot be seen as a problem with family law. The law already exists on the matter.

Sixth Schedule and exceptions and exemptions

1.19. The sixth schedule of the constitution of India provides certain protections to a number of states. While some tribal laws in fact protect matriarchal systems of family organisations some of these also preserve provisions which are not in the interest of women. There are further provisions that allow for complete autonomy on matter of family law which can also be adjudicated by the local panchayats which once again, follow their own procedures. Thus, while framing a

¹¹ Times of India. 'Let women confess to nuns, say activists: Church won't hear it'. Jul 29, 2018.

law it has to be borne in mind and cultural diversity cannot be compromised to the extent that our urge for uniformity itself becomes a reason for threat to the territorial integrity of the nation.

1.20. At the same time it is important to strengthen the local initiatives that are bringing about piecemeal changes. The efforts of Non Government Organisations that are working towards creating awareness have shown promising results. As the Commission has already indicated that the conversation that it hopes to begin on the uniform civil code will focus on family laws of all religions and the diversity of customary practices, to address social injustice rather than plurality of laws. India has historically prided itself over its diversity. Conversations on 'secularism'¹² and also 'multiculturalism',¹³ have intrigued not only philosophers, political scientists and historians but also common Indian citizens.

1.21. The term secularism only has meaning if it can also assure that the expression of any form of 'difference', not just religious but also regional does not get subsumed under the louder voice of the majority; and at the same time no discriminatory practice hides behind the cloak of 'religion' to gain legitimacy. No religion defends discrimination or permits deliberate distortion had been observed by the Supreme Court in the *Sarla Mudgal* case;

.. ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. Even the slightest deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression'.

¹² See writings of Bhargava, Rajeev. "Secularism and its Critics." (1998); Bilgrami, Akeel. Secularism, identity, and enchantment. Harvard University Press, 2014.

¹³ On group rights and individual rights see writings of Taylo and Habermas. Taylor, Charles. Multiculturalism: Examining the politics of recognition. Princeton University Press, 41 William St., Princeton, NJ 08540., 1994. Habermas, Jürgen. "Intolerance and discrimination." International Journal of Constitutional Law 1, no. 1 (2003): 2-12.

1.22. Thus, this consultation paper aims to point towards and problematise certain well accepted practices within the various family law regimes in India that discriminate against women. India is a diverse country and the problems of women are very often class, caste and community specific. In *Madhu Kishwar & Ors v. State of Bihar*¹⁴ the Court had observed that:

In face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort.

...it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution and each case must be examined when full facts are placed before the Court.

1.23. While there is certainly a desire for change, there is also equally a need to acknowledge the hindrances to any endeavours to institute a uniform civil code. The first foreseeable problem with feasibility is with respect to the sixth schedule of the Constitution. Articles 371 (A) to (I) and the sixth schedule of the constitution of India provides certain protections or rather exceptions to the states of Assam, Nagaland, Mizoram, Andhra Pradesh and Goa with respect to family law.

1.24. The Government of India Act, 1915, was amended in 1919 adding section 52A giving exemption to the application of Indian laws to “backward tract” to be declared by the Governor-General-In-Council. In exercise of that power a large area was declared to be Backward-Tract in North-East including Garo Hill District, Naga Hills District and Khasi and Jantiya Hills District except Shillong Municipality and Cantonment.

¹⁴ 1996 AIR 1864

1.25. In Government of India Act, 1935, the analogous provision was brought substituting the Backward -Tract with “Excluded Areas” or “Partially Excluded Areas”. Indian (Provisional Constitutions) Order, 1947, retained it. While drafting the Constitution it was realised that certain laws of India would be unsuitable in other contexts as there was an apprehension of exploitation of the innocent masses by migrating communities from outside areas, more so, there was no political stability. The 6th Schedule was adopted which provides for autonomous districts and autonomous regions. The District Councils and Regional Councils have legislative competence to deal with the subjects like inheritance, succession, marriage and divorce as well as administration of justice. Such Councils can frame Rules for laying down the procedure for trial of suits and criminal cases and for execution/enforcement of Orders and Judgments.

1.26. Article 371A was inserted by Constitution (13th Amendment) Act, 1962, which provides that, no Act of Parliament in respect of:

- (i) religious or social practices of the Nagas,
- (ii) Naga customary law and procedure,
- (iii) administration of civil and criminal justice involving decisions according to Naga customary law, and
- (iv) ownership and transfer of land and its resources,

shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland, by a resolution so decides.

1.27. Thus, Article 371A contemplates a different treatment to the part of Nagaland in view of the difference between the needs of the social conditions in Nagaland and the various stages of development of different parts of the country. Articles 371 B- 371 I offer similar exemptions to other states in the North East.

1.28. In 2012 the Nagaland Assembly passed a resolution that the state may be exempted from the reservation policy. The Special Leave Petition for this is pending before the Supreme Court. Nagaland witnessed a strong protest against the provision of reservation of 33 per cent seats for women. The ground for such opposition is that the carving out of reservations for women confirms their status as inferior and in need of special protection. While this is the logic offered, it is also worth acknowledging that our Constitution provides for policies of protective discrimination because of historical injustices that have accrued to women over a long period of time.

1.29. These protective provisions help us create gender-sensitive laws rather than gender blind laws. Various Central Acts have been held to be not applicable, being in conflict with the customary law or local laws. For example, recovery of debts due to Banks and Financial Institutions Act, 1993 was held to be non-applicable being in conflict with the Rules for Administration of Justice in Nagaland, 1936. Section 1(3) of the Code of Civil Procedure, specifically provides that it shall not apply to the State of Nagaland and the tribal areas.

1.30. Similarly, the Code of Criminal Procedure (CrPC), 1973, is not applicable to the State of Nagaland and to the tribal areas. The tribal areas have been explained in section 1, as the territories referred to in paragraph 20 of the 6th Schedule of the Constitution but other than those within the local limits of the municipality of Shillong. Thus, in the city of Shillong, CrPC applies only if the alleged offence relates to the area within the municipal limits. Offences committed outside will be tried by District Council courts and Deputy Commissioners. It is so in spite of Article 50 the Constitution which provides for separation of Judiciary and Executive. The Supreme Court of India has passed several judgments orders to enforce the provisions of Article 50 of the Constitution, but the process is not yet complete.

1.31. Many of these exceptions entail the preservation of not only distinct family law systems but also various other exceptions relating to other aspects of civil law. In Nagaland, women can now inherit self-acquired property even though some tribes are sceptical of women inheriting village land and then marrying outside their tribe.¹⁵ Undoubtedly, the young generation has social attitudes and aspirations of universal and global principles which require adherence to the principles of equality and humanity. Many also argue that a uniform code may advance the cause of national integration, however, this may not necessarily be the case when cultural difference inform people's identity and its preservation guarantees the territorial integrity of the nation. Further, the law has to be within the framework of the Constitution. The constitutional exception has to be harmonised and a fair and just balance is to be struck, keeping in view societal interests.

1.32. For instance, Garo and Khasi tribes of Meghalaya are matriarchate, that is, they follow a female line of descent and property is inherited by the youngest daughter. Among the Garos, the son-in-law comes to live with his wife's parents.

1.33. While such customs may not fit 'mainstream' notions of morality these are treated as common practices in Meghalaya and such marriages are also compulsorily registered under the 'Meghalaya Compulsory Registration of Marriages Act 2012', which recognise differences in tribal cultures. Thus, secularism cannot be contradictory to plurality. It only ensures peaceful co-existence of cultural differences. In fact, if one was to look for gender-just norms, many of the tribal customs can even be instructive. For instance, among Mikirs if the girl is an heiress and an only daughter, she does

¹⁵ 'Denied for centuries, Naga women get to own land now' *Times of India*, Aug 16, 2018.

not leave her house upon marriages. The National Commission for women in its report on Status of women under tribal laws observed:

The Dimasa and Garo come under the Sixth Schedule that recognises community ownership (CPRs) but have to interact with the individual based formal laws. The Aka who are close to their tradition are governed by their customary law but the Sixth Schedule does not apply to them. Article 371A of the Constitution recognises the Angami customary law but there are indications that because of their interface with modernity men interpret it in their own favour (Kikon 2002: 176). The Adibasi whose ancestors came from Jharkhand and Chattisgarh as indentured labour to work in the tea gardens of Assam, have even lost their customary law. The Mongoloid tribes have only now started feeling an identity crisis in their move towards modernisation but the Adibasi have felt its worst effects for over a century because of land alienation that forced them to migrate to Assam. Their identity continues to be under attack.¹⁶

1.34. The Supreme Court in *T.M.A Pai Foundation v. State of Karnataka and Ors*¹⁷ reiterated that:

The essence of secularism in India is recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole united India.

1.35. Thus a 'united' nation need not necessarily have 'uniformity' it is making diversity reconcile with certain universal and indisputable arguments on human rights.

International Conventions

1.36. India is signatory to a number of international covenants and conventions for instance the **Article 16 of the Universal Declaration of Human Rights, 1948 reads as under:**

¹⁶ 'Customary Laws in The North East', National Commission for Women accessed on 12..12.2017 <http://ncw.nic.in/pdfreports/Customary%20Law.pdf>

¹⁷ (1994) 2 SCC 195.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

1.37. India is a party to this Convention and is bound to give effect to it. Even the provisions contained therein are in consonance and conformity with our constitutional scheme and particularly part III of the Constitution. Article 253 of the Constitution read with entries 10 and 14 of List 1 of the Seventh Schedule empowers the Parliament to enact a law to give effect to the said Declaration, 1948. Even otherwise, there is an assumption that the Parliament does not breach the principles of international law, including any specific treaty obligations. It may be relevant in view of the provisions contained in Article 51 (c) of the Constitution which provides that “*the State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another.*”

1.38. Indian courts are under an obligation to give due regard to international conventions and norms while interpreting domestic laws and particularly when there is no inconsistency between them and there is a void in domestic law. Even otherwise, provisions of the covenant which elucidates and go to effectuate the fundamental rights which have been guaranteed by the Constitution can certainly be relied upon by the courts. Thus, any international convention which is consistent with the fundamental rights can be read into the provisions of Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and intent therein of, to promote the Constitutional

philosophy. A Convention which incorporates principles derived from the common law of nations may also be applied as common law of India though the convention may not have been adopted by enacting legislation. A survey of Indian cases clearly shows that international law and international conventions have been used not only for interpretation of statutes, but also interpretation of the Constitution, and Indian courts have heavily relied upon the International Convention on Rights of Child, Convention of the Elimination of All forms of Discrimination Against Women, International Covenant on Civil and Political Rights, etc., as is evident from a number of judgments.¹⁸

1.39. The Commission through this consultation paper suggests a series of amendments to personal laws and further codification of certain other laws, particularly with respect to succession and inheritance. The suggestions are not limited to religious personal laws alone but also significantly address the lacunae in general secular laws such as the Special Marriage Act, 1954, Guardians and Wards Act 1869 among others.

¹⁸ *Nilabati Behra v. State of Orissa*, AIR 1993 SC 1960; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Jolly George Verghese v. Bank of Cochin*, AIR 1980 SC 470; *Kubic Dariusz v. Union of India*, AIR 1990 SC 605; *M V Elisabeth v. Haryana Investment & Trading Pvt. Ltd., Goa*, AIR 1993 SC 1014; *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 1203; *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011; *Vineet Narain v. Union of India*, AIR 1998 SC 889; *Apparel Export Promotion Council v. A K Chopra*, AIR 1999 SC 625; *Githa Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149; *Javed Abidi v. Union of India*, AIR 1999 SC 512; *Chairman Railway Board v. Chandrima Das*, AIR 2000 SC 988; *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, AIR 2000 SC 1274; *Dwarka Prasad Agarwala v. B D Agarwala*, AIR 2003 SC 2686; *John Vallamattom v. Union of India*, AIR 2003 SC 2902; *Suman Sood v. State of Rajasthan*, AIR 2007 SC 2774; *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663.¹⁸

2. MARRIAGE AND DIVORCE

2.1. 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.

2.2. 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.

2.3. 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.

2.4. 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:

2.5. 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.

2.6. 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

¹⁹ Flavia Agnes @ <http://www.deccanchronicle.com/opinion/op-ed/170218/adultery-law-deeply-flawed-must-be-dumped.html>

concerned section 497 of Ranbir Penal Code, 1932 makes the 'errant wife' also an accused along with her 'paramour'.

2.7. '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.

2.8. 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.

2.9. 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.

2.10. 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’.

2.11. 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.

2.12. 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 Bombay*²⁰; *Sowmithri Vishnu v. Union of India*²¹ ; *V Revathi v. Union of India*²².

2.13. In *Hirachand Srinivas Managaonkar v. Sunanda*²³ 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.

2.14. In *Joseph Shine v. Union of India*²⁴ 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,”

2.15. 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

2.16. 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:

2.17. 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

²⁵<http://www.thehindu.com/news/national/supreme-court-agrees-to-examine-adultery-provision-in-ipc/article21296775.ece>

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.

2.18. From the Supreme Court's reference in *Seema v. Ashwini Kumar*²⁶, 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

This Bill would supplement the domain of family laws that already exist and is not aimed at removing, abolishing or amending specific religious/ cultural practices and laws that are accepted under personal laws prevailing in India.

2.19. 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:

2.20. 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

2.21. 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.

2.22. 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.

2.23. In *Independent Thought v. Union of India*²⁸, 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.

2.24. 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’.

2.25. 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.

2.26. 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

2.27. 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.

2.28. 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

2.29. 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.

2.30. 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.

2.31. In the case of *Naveen Kohli v. Neelu Kohli*³², 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.

2.32. 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.

2.33. 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.

2.34. 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 Kaur**³⁴ 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.

2.35. 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

³⁴ AIR 2017 SC 4417

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.

2.36. 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.

2.37. 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

2.38. 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.

2.39. 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

2.40. Under the United Kingdom law in the case of *White v White*³⁷, 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.*

2.41. 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.

2.42. 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:

2.43. The Personal Laws (Amendment) Bill, 2018, proposes to amend the Christian Divorce Act, 1869, Section 10 (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.

2.44. 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

2.45. 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.

2.46. 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:

2.47. 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.

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

³⁹ Position Paper on Inclusive Personal Laws
For the Law Commission of India Report on the Uniform Civil Code, April, 2018, The
Equals Centre for Promotion of Social Justice; see also *Suchita Srivastava and Ors.*
v. Chandigarh Administration, AIR 2010 SC 235

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

2.49. 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

2.50. 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.

2.51. 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.

2.52. 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 Mali*⁴⁴ 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.

2.53. 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

2.54. 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.

2.55. 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.

2.56. 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:

2.57. 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.

2.58. 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:

2.59. 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 Kapoor*⁴⁷ 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.

2.60. 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

2.61. In *T Sareetha v. Venkatasubiah*⁴⁹ 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 Chaddha*⁵⁰. 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. Dhanalakshmi*⁵¹ and the Delhi High Court in *Swaraj Garg v. RM Garg*⁵² 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

2.62. 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

2.63. 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 India*⁵⁴ 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.

2.64. 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.

2.65. 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.

2.66. 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.”

2.67. 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:

2.68. 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.

2.69. 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.

2.70. 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.

MUSLIM LAW:

2.71. 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

2.72. On the vexed question of maintenance of the divorced wife in Muslim law the Supreme Court in *Bai Tahira v. Ali Hussain Fiddalli Chothia*⁵⁸ and *Fazlunbi Bivi v. Khader Vali*⁵⁹ 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

⁵⁹ AIR 1980 SC 1730

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

2.73. 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 *Fazlunbi 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.

2.74. *Mohammad Ahmad Khan v. Shah Bano Begum*⁶⁰ 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:

2.75. 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

⁶⁰ AIR 1985 SC 945

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.

2.76. 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.

2.77. 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 India*⁶², and the *Ahmedabad Women's Action Group v. Union of India*⁶³, and the *Danial Latifi v. Union of India*⁶⁴, produced widely different but critical rulings on the nature and scope of religion even within the category of personal law.

2.78. 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 *mata* 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

⁶⁴ AIR 2001 SC 3958

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.

2.79. 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 against the husband which was interpreted as the responsibility lying with the spouse.

2.80. 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

2.81. On the question of triple talaq or *talaq-ul-biddat*, the Courts have expressed their disapproval of the practice in multiple observations even before it was formally set aside in 2017.⁶⁶ In *Shamim Ara v. State of Uttar Pradesh*⁶⁷, 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. Sowramma*⁶⁸. 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.

2.82. 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.

2.83. In *Shayara Bano v. Union of India*⁶⁹ 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.

2.84. 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.

2.85. 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 Khaliq Laskar*, (1981) 1 GLR 375 held that the correct law of talaq, as ordained by Holy Quran, 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.

2.86. 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.

2.87. 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.

2.88. 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.

2.89. *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.

2.90. 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 Halala*⁷². 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 *Nikahnamas*⁷³ 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 Islam*⁷⁵, 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 'Muslim Marriages Act', and 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

2.91. 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.

2.92. 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

2.93. 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

2.94. 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.

2.95. 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

⁷⁷<https://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.

2.96. 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.

2.97. 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

2.98. 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].

2.99. 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:

2.100. 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.

2.101. 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.

2.102. 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 Henderson*⁸², 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

2.103. 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.

2.104. 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

2.105. 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

2.106. 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.

2.107. 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.

2.108. 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.

2.109. 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

2.110. 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

2.111. 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.

2.112. 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.

2.113. 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. Increasingly, with moves to announce such a notice online, or with registrars directly contacting parents of the couple, the purpose of the Act, 1954 is being defeated.

2.114. 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.

2.115. 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

20. The Commission (CIC) recommends both the Governments Union and States, to consider:

a) Incorporating a column or leaving sufficient space for declaration in the application form for registration about reasonably apprehended threat to their life or liberty for exercising their choice and request for protection, and direct Marriage Officers to get the report from the concerned Station Housing Officer after due enquiry of the allegations of threat and secure their lives, if SHO concludes the threat is prima facie real, or

b) Take any other adequate measures to offer protection to would be partners, including taking up the draft Bill referred above with necessary changes.

21. The Commission, as per Section 19(8)(a)(iv), require public authority i.e., the Marriage Officers or SDMs, to:

a) incorporate declaration about apprehended threat in the application form, and provision for due enquiry by SHO, b) provide necessary protection in the standard operative practice or procedure,

c) add a warning against assaulting the liberty of would be partners in the form of notice for solemnization & registration of marriage, and d) ensure wide reach to the mandatory notices to be issued under law, by placing the same on the official website, in an easily accessible link, highlighting under the title of 'marriage registration notices' as that is mandatory duty of public authorities under Section 4(1)(d) to facilitate the interested persons (including parents or guardians) to know and raise objections, if any, to safeguard the interests of the partners to the proposed marriage.

3. CUSTODY AND GUARDIANSHIP

Introduction: Welfare and best interest of the Child to be the paramount consideration.

3.1. Emphasising the importance of the childhood of a human being, Universal Declaration of Human Rights (UDHR), 1948, under Article 25 proclaims that childhood is 'entitled to special care and assistance'. Similar, concern also finds place in the preamble of the Convention on the Right of the Child (CRC), 1989.

3.2. The CRC, 1989, further emphasised on the principle of 'best interest of the child'. While laying down different provisions for the protection of the child, Article 3 (1) of CRC also stipulates that for an institution⁹², while taking actions for the welfare of the child, its primary consideration shall be the best interest of the child. Article 9(1) further provides that a child should not be separated from his/her parents, except in situations where such separation is in best interest of the child⁹³. Thus, the principle can be applied in a variety of circumstances and to a certain extent makes a number of laws on custody and guardianship personal or general irrelevant, since this principle should prevail even if the 'law' privileges a particular sex in determining matters of custody.

3.3. The principle is rooted in all statutory and personal laws in India. For example, section 13 of the Hindu Minority and

⁹² See, Article 3(1):- 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.

⁹³ Article 9 (1):- States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
See also, Articles 9(3); 37 (c); 40(2) (b) (iii).

Guardianship Act 1956, stipulates that whenever a court appoints a guardian for a Hindu minor, the principle of best interest of the child shall be the paramount consideration. The section further specifically mentions that no party can claim a right if it is violating the principle and is against the welfare of the child.

3.4. The Guardians and Wards Act, 1890, under section 17 lays down that while appointing the guardian of a minor the court has to keep in mind the welfare of the minor. For the same, the court shall consider factors, such as, age and sex of the child.

3.5. The Supreme Court of India, over time, has also acknowledged the 'principle of best interest of the child' to be the paramount consideration, especially in the matter related to the custody or guardianship of a minor. The separation of a couple does not affect the couple alone, it also affects their child(ren). The magnitude of the impact on a child may vary from mild to extreme, varying from case to case. Embroiled in the legal battle, parents might be clouded by their own interest and might not be in a position to think what is best for the child; at this point, the role of the court becomes crucial. The court has to determine the issue of custody and the guardianship of the minor, considering the best interest of the child. Contents of the list of 'best interest of the child' are not exhaustive in nature; rather vary from case to case, as every child and his/her requirements are unique in themselves.

3.6. The Supreme Court of India, has used the principle very carefully, with sensitivity to the particularities of each case. The Court has not relied on any strict formula, rather it has arrived at an understanding of 'best interest' with the passage of time. The cases discussed below are illustrations of how in different cases the Court has employed the principle.

Order of Custody of Child is Interim in Nature

3.7. Order passed while deciding the custody of a child, is interim in nature. If the court is of the opinion that over time the needs of the minor have changed and variation in the order would be in the best interest of the child, the court may do so. Deeming an order passed as final, and sticking to it, is against the spirit of the principle of best interest of the child⁹⁴.

3.8. In *R.V. Srinath Prasad v. Nandamuri Jayakrishna & Ors.*⁹⁵, the apex Court noted that the custody proceedings are sensitive matter and while deciding it a balance has to be maintained between the sentiments and approach of the parties. The guiding principle, however remains the best interest of the child. A custody order passed, therefore, can never be final in nature. On multiple occasions, the Supreme Court has observed that with the change in the circumstances, the wards can seek for alteration in the order of custody proceedings⁹⁶.

3.9. In *Dhanwanti Joshi v. Madhav Unde*⁹⁷, the Court while applying the principle of *res judicata* in custody matter observed that before changing the order it must be established that the arrangement made by the previous order was not in the welfare of the child. However, in *Dr. Ashish Ranjan v. Dr. Anupma Tandon*⁹⁸, the Court opined that the mutual agreement between the parties could not be a ground for not admitting a fresh application for the custody of a minor. It is against the principle of the welfare of the child. The Court

⁹⁴ See: *Rosy Jacob v. Jacob A. Chakramakkal*, AIR 1973 SC 2090.

⁹⁵ AIR 2001 SC 1056

⁹⁶ See: *Jai Prakash Khadria v. Shyam Sunder Agarwalla*, AIR 2000 SC 2172; *Mausami Moitra Ganguli v. Jayanti Ganguli*, AIR 2008 SC 2262; and *Vikram Vir Vohra v. Shalini Bhalla*, AIR 2010 SC 1675

⁹⁷ (1998) 1 SCC 112

⁹⁸ (2010) 14 SCC 274 See also, *Vivek Singh v. Romani Singh* AIR 2017 SC 929; *Jitender Arora v. Sukriti Arora* (2017)3SCC 726; *Ruchika Abbi v. State (NCT of Delhi)*, AIR 2016 SC 351.

further noted that the doctrine of *res judicata* is not applicable in the case of custody of a minor.

Best Interest of the Child Supersedes Any Other Legal Right

3.10. In *Dr. (Mrs.) Veena Kapoor v. Shri Varinder Kumar*⁹⁹, the Court made it clear that “*the paramount consideration is the welfare of the minor and not the legal right of this or that particular party.*” In *Surinder Kaur Sandhu v. Harbax Singh*¹⁰⁰, while giving the custody of minor boy to his mother, the Court stipulated that laws cannot overlook the settled principle that welfare of the child is of the paramount consideration.

3.11. The Court *Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw & Anr.*¹⁰¹, again laid down that the legal rights of the parties are not to be taken into consideration, but the case is to be decided “*on the sole and predominant criterion of what would best serve the interest and welfare of the child.*”

3.12. There have been instances where the Supreme Court has awarded the custody of the minor not to the father but to the grandparents, solely keeping the best interest of the child as the guiding principle. In *Anjali Kapoor v. Rajiv Bajaj*,¹⁰² the Court took into consideration the fact that the child was living with the grandparents for a long time and the environment was conducive for his growth. Therefore, the custody of the child was handed over to the grandmother, rather than the father. Similarly, in *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekram*¹⁰³, the Court stating the welfare of the child to be the paramount consideration and not the legal rights

⁹⁹ AIR 1982 SC 792

¹⁰⁰ AIR 1984 SC 1224

¹⁰¹ (1987) 1SCR175

¹⁰² AIR 2009 SC 2821

¹⁰³ (2010) 10 SCC 31

of the parties, the custody was given to the maternal grandfather and not to the father.

Wishes of the Child(Ren) Should Be Taken Into Consideration

3.13. Along with other factors, the wishes of the minor should also be given a serious consideration. Regard should be given to the child's opinion, if s/he can understand her/his welfare. In *Purvi Mukesh Gada v. Mukesh Popatlal Gada & Ors.*¹⁰⁴, the Supreme Court, beside other factors, also took into consideration the wishes of the minors and accordingly, awarded custody to the mother. The Court observed that the children of a particular age (seventeen and thirteen in this case) "*are better equipped, mentally as well as psychologically, to take a decision*". The Court noted that though the minors wanted to be with both the parents, but if asked to choose one, they preferred their mother. Thus, these preferences cannot be ignored by the court.

3.14. The Court further offered a word of caution that the tutored and pre-prepared statements of the minor are not be considered as their wishes, and importance has to be given to their level of maturity and their surroundings et al. The Court has to be satisfied that the preference of the child is free from any undue influence.

3.15. For the fair application of the principle, the position of both the parents should also be equal as far as possible, which can be enabled through community of (self acquired) property upon divorce. The law should not give preference to one parent over the other. The following parts deal with such provisions under law, where the legal position of the parents is not equal. It is further followed by the suggestions, wherever required, to make a just case for both the parties, so that the principle of best interest of the child can be applied fairly.

¹⁰⁴ AIR 2017 SC 5407

THE GUARDIANS AND WARDS ACT, 1890

3.16. The Guardians and Wards Act, 1890 (the Act, 1890) governs the principle of the custody and guardianship of a minor. The Act, 1890 is a secular Act, implemented with a view to govern the guardianship and custody matters in colonial India. The Act, 1890, is based on the foundation that both ancient Hindu law and English law recognise 'the king' to be the '*parens patriae*', the same position has now been taken by the Courts. They have the sole responsibility to look after the welfare of the minor falling under their care¹⁰⁵.

3.17. Another objective of the Act, 1890 was to consolidate all the laws and rules regarding the custody and guardianship of the minor. The laws were scattered in different Acts, such as Act 40 of 1858; Act 09 of 1861; Act 20 of 1864; and Act 13 of 1874, which deal with custody and guardianship governing minors of different nationality. The defects in different laws and regulations were highlighted by the courts and need was expressed to have a consolidated Act with the rules of custody and guardianship of the minors, applicable to the whole of Indian territory, without exception. The Act, 1890 was largely based on the framework of the Act 13 of 1874. It further superseded all other Laws and regulations regarding the subject¹⁰⁶. However, the Act, 1890 put in an exception for personal laws. Taking into consideration of the plurality of the Indian society, the Act directs the court to decide the matter in sync with the personal laws of the parties¹⁰⁷.

3.18. With the change in the time and structure of the society, the principle of guardianship has also changed. Declaring the best

¹⁰⁵ The Guardians and Wards Act, 1890, Introduction.

¹⁰⁶ Id. Statement of Object and Reasons.

¹⁰⁷ Section 6.

interest of the child to be the paramount principle governing the custody of the child, the court does not let any other right or law prevail over it. As, the welfare of the minor and his/her future is at stake and not the preferential rights of one party or the other.

3.19. Thus, it becomes important to address any kind of inequality present in the Act, which is applicable to all communities and the current version could conflict with the welfare of the child. For instance, section 7 of the Act, 1890 gives power to the Court to appoint/declare guardian of a minor or their property. Section 19 (a) states that if the husband of the minor is not unfit, then the Court cannot appoint any other person as her guardian. The problem in the section is twofold. First, as the wife is being treated as the property of the husband. Secondly, the section does not take into consideration the welfare of the husband in case he is also a minor. If a minor cannot be a competent party to enter into a contract, making him a guardian by giving him the responsibility of another person is also unfair. Further, Section 21 not only gives the guardianship of the wife to a minor husband, but also make him guardian of the child born from wedlock.¹⁰⁸

3.20. Thus, it is suggested that section 19 (a) should be deleted, and mother or father of the minors be their guardians. Section 21 also needs to change to the extent that a husband is not regarded as the guardian of the wife, and both the parents equally share responsibility of the child born from such wedlock.

HINDU LAW:

HINDU MINORITY AND GUARDIANSHIP ACT, 1956

3.21. The Hindu Minority and Guardianship Act, 1956 (the Act, 1956), codified the law regarding the principles of custody and

¹⁰⁸ Age of marriage has been discussed in the chapter on marriage and divorce.

guardianship of a Hindu minor.¹⁰⁹ Section 6 of the Act, 1956 discusses who can be the natural guardian of a minor's person as well as their property. The section appoints father and after him the mother as the natural guardian of a boy and unmarried girl. The guardianship of the illegitimate boy and unmarried girl is however with the mother and after her the father. However, the expression mother and father do not include stepmother and stepfather. The provision, further, appoints husband as the guardian of his wife.

- **The Father, and after him**

Section 6 (a) remained in controversy for a long time since the plain reading of the law portrays that father is the natural guardian of the minor. In addition, it is only when he dies; mother could be the natural guardian. Thus, on the face of it the sub clause violates the doctrine of equality enshrined in Articles 14 and 15 of the Constitution. The Articles give equal protection to all before the law and prohibits any kind of discrimination based on the religion, race, caste, sex, or place of birth.

3.22. In *Githa Hariharan v. Reserve Bank of India*¹¹⁰, question arose as to whether section 6(a) of the Act, 1956, discriminates between father and mother on the sole basis of sex.

Section 6(a) of the HMG Act and Section 19(b) of the GW Act are violative of the equality clause of the Constitution, inasmuch as the mother of the minor is relegated to an inferior position on the ground of sex alone since her right, as a natural guardian of the minor, is made cognizable only "after" the father...¹¹¹

3.23. The Court held that in case of custody or guardianship, the welfare of the child is of the paramount importance and therefore, no

¹⁰⁹ The Hindu Minority and Guardianship Act, 1956, Statements of objects and reasons.

¹¹⁰ AIR 1999 SC 1149

¹¹¹ Ibid. Para 5

such preferential right can be given to any party. The Court further held that the word ‘*and after him*’ should be read as ‘*in the absence of*’. It observed:

Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word “after” in the section would have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor...¹¹²

...The word “**after**” **need not necessarily mean “after the lifetime**”. In the context in which it appears in Section 6(a), **it means “in the absence of”**, the word “absence” therein referring to the father's absence from the care of the minor's property or person for any reason whatever...¹¹³ (emphasis added)

3.24. The judgment was considered to be gender just and gave Hindu women equal right in matters of custody and guardianship. However, a closer reading of the judgment indicates that the father is the default guardian, and only after him could the mother be a natural guardian during a father’s lifetime. The Court has listed various situations where the father is alive but is *absent* from the life of the minor or is not taking care of the affairs relating to the minor. The relevant paragraphs of the judgment reads:

If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural

¹¹² Ibid. Para 8

¹¹³ Para 10

guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a).¹¹⁴

While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations **where the father is not in actual charge** of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the **father for any other reason is unable to take care of the minor** because of his physical and/or mental incapacity, **the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be “absent”** for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act.¹¹⁵ (emphasis added)

3.25. The judgment addresses situations where either one of the parties is at fault. However, what happens when both the parents are equally taking care of the minor and are fit for the custody and guardianship of the minor? How then would section 6(a) of the Act, 1956 be applied? By default, the father will be given preference, as he is alive and not absent from the life of the minor. Even if the principle of paramount interest of the child is applied, the father would be the first choice according to the language of the said section read with the judgement.

3.26. Further, the sub-clauses (a) and (b) of the section 6 seem to be indicating two different perspective of the same person. On the one hand, sub-clause (a) is indicating that a mother is to be treated inferior to the father; whereas sub-clause (b) stipulates that if the child is illegitimate, mother shall be the natural guardian of the

¹¹⁴ Para 10

¹¹⁵ Para 16

minor. Therefore, when the child is legitimate, mother is considered incapable to be the child's guardian but is deemed capable when the child is illegitimate.

3.27. The logic behind the sub-clause (b), may be that if and when tracing the father of a child born out of the wedlock is difficult the mother should be the guardian. Again, the responsibility is been given to the mother when either the father is not traceable, or is not ready or unable to take the responsibility. In other words, the father is *absent* from the scene. However, ideally where both the parties are fit and deserving, for the fair application of the principle of welfare of the child, they should be on an equal footing in law.

3.28. The Law Commission of India in its 133rd report: 'Removal of Discrimination Against Women in Matters Relating to Guardianship and Custody of Minor Children and Elaboration of The Welfare Principle' (1989), while examining the section 6 (a), observed that:

...the provisions of contained in section 6(a) of the Hindu Minority and Guardianship Act is extremely unfair and unjust and has become irrelevant and obsolete with the changing times. ...

3.29. The Law Commission's 133rd report accordingly recommended:

...The concerned provisions, therefore, deserve to be amended so as to constitute both the father and the mother as being natural guardians 'jointly and severally,' having equal rights in respect of a minor and his property. The provision according preferential treatment to the father vis-à-vis the mother has to be deleted and has to be substituted be a provision according equal treatment to the mother...

3.30. The Law Commission of India in its 257th report: 'Reforms in Guardianship and Custody Laws in India', (2015), recognised that to maintain equality between the parents, the preferential rights, based

on the gender stereotypes, have to be curbed.¹¹⁶ It is important that parents are not only equal in terms of roles and responsibilities but also with regard to rights and legal position of the parents.¹¹⁷ The Law Commission recommended:

... this superiority of one parent over the other should be removed, and that both the mother and the father should be regarded, simultaneously, as the natural guardians of a minor.

3.31. The concept of welfare being paramount is already captured in Section 13 of the 1956 Act. Thus, it is suggested that, the sub-clause (a) of section 6 should be amended. The language of the provision should be constructed in such a manner that the same does not reflect gender bias, in any way. Instead of using term father or mother the term “parents” should be used to leave no room for the interpretation of the law in such a manner that it gives preferential right to one parent over the other.

Guardianship of women

3.32. Manu, one of the ancient Hindu law givers, in *Manu Smriti*, stated that a woman should be guarded throughout her lifetime and the duty is of the male member of the family. In the every ‘new phase’ of the woman, the author appoints a ‘guard’. He prescribed:

पिता रक्षति कौमारे भर्ता रक्षति यौवने ।

पुत्रो रक्षति वार्धक्ये न स्त्री स्वातंत्र्यमर्हति ॥

Meaning,

... Her **father** guards her in childhood, her **husband** guards her in youth, and her **sons** guard her in old age, a woman is not fit for the independence¹¹⁸. (Emphasis added)

¹¹⁶ Para 2.3.8 of 2015

¹¹⁷ Id.

¹¹⁸ The Laws of Manu Penguin Classics, 197

3.33. Women are not guarded when they are confined in a house by men who can be trusted to do their jobs well; but women who guarded themselves by themselves (sic) are well guarded¹¹⁹.

3.34. Similarly, another law giver, *Narad*, considers the wife to be the property of the husband and stipulates that if a person takes in the widow of a sonless dead man, he also becomes liable for his debts (even if he is dead)¹²⁰. Thus, for every valid transaction on her behalf, prior consent of the husband is deemed necessary in this text.¹²¹

3.35. Kamasutra also depicts the character of the women in line with its contemporary literature. The content of the text is considered to be advance in nature,¹²² but there are many instances where the character of the woman is woven on the same lines as those in *Laws of Manu* and *Narada*. Chapter five of the book five¹²³ illustrates a list of women who can be ‘taken’ by the men in power. One of the categories indicated by the author is that of **the woman who are not guarded** by anyone or **who wander around without claim of any man** to her¹²⁴. Such a statement emphasises women are not to be left unguarded and unclaimed and their agency and autonomy is not only undermined but demolished in this writing.

3.36. Section 6 of the Act, 1956 seems to have been constructed on the above understanding. A plain reading of the section indicates that

¹¹⁹ Id. 9.12

¹²⁰ Julius Jolly, Translator. *Naradiya Dharmasastra*; or, the Institutes of Narada (1876)

¹²¹ Ibid.

¹²² See, Wendy Doniger, *On the Kamasutra*, 131 On Intellectual Property 126-129 (Spring, 2002).

¹²³ Wendy Doniger and Sudhir Kakkar, *Vatsayan Kamasutra*, 108(2002)

¹²⁴ Id. 122

the man in charge of threads may take widows, women who have no man to protect them, and wandering women ascetics; the city police-chief may take the women who roam about begging, for he knows where they are vulnerable, because of his own night-roaming's ; and the man in charge of the market may take the women who buy and sell.

a woman does not have authority on herself. She is to be under the guardianship throughout her life. A father and after him mother, is to be the guardian of an unmarried daughter and a husband to be the guardian of his wife.¹²⁵ Relevant portion of the said sections are:

- (a) in a case of a boy or **an unmarried daughter**-the father and after him, the mother...
 - (b) in case of illegitimate boy or **illegitimate unmarried daughter**: the mother, and after her the father;
 - (c) in the case of **married girl**- husband;...
- (emphasis added)

3.37. One of the ideas behind bringing a codified Hindu Law was to do away with the discrimination against the women¹²⁶. While the law has now recognised certain rights, it has, at the same time either bluntly or latently, kept women at the lower pedestal than men. The notion, men being superior and thus in control, still persists.

3.38. The section comes in conflict with other laws as well. One such example is the right to adopt by unmarried woman. Section 8, of the Adoption and Maintenance Act, 1956 (after amendment of 2010) gives right to an unmarried woman to adopt a child¹²⁷. However, if according to section 6, of the Act, 1956, the woman is under the guardianship of her father/mother can she be declared as the guardian of another person? If she does not have autonomy of self, can she accept the responsibility of a minor?

3.39. While the Act, 1956 considers women to be under the guardianship of another, the Indian Courts have repeatedly

¹²⁵ Report of High Committee on the Status of Women, Government of India, Ministry of women and Child Development, New Delhi, June 2015

¹²⁶ The BN Rau Committee Report, 1947.

¹²⁷ Section 8 Capacity of a female Hindu to take in adoption. –

Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind."

emphasised that once a girl attains majority she has the full autonomy of herself. In *Lata Singh v. State of Uttar Pradesh*¹²⁸, the Supreme Court observed that two consenting adults could marry the life partner of their choice, or even a 'live in relationship' if they choose. A major girl is free to marry anyone she likes or "*live with anyone she likes*".¹²⁹

3.40. In *S. Khushboo v. Kannimaal*¹³⁰, the apex Court held that two willing adults engaging in sexual act outside the institution of marriage is not an offence, though the society might not approve of the same, but that does not make it an offence. The Court ruled that morality and criminality are not co-extensive, and recognised the autonomy of a major girl. A close reading of the judgment, reflects that once an individual attains majority, irrespective of their sex, they are free to make their own choices and not be 'guarded' by anyone. While deciding the case *Shakti Vahini v. Union of India*¹³¹, the Supreme Court held that two consenting adults could marry the person of their choice. The right is vested on them by the Constitution of India and any infringement of the right is a violation of the Constitution.

3.41. While emphasising the right to freely marry and condemning the offence of honour killing, the Court deliberated the importance of the 'individual liberty, freedom of choice and one's own perception of choice'.

The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid

¹²⁸ AIR 2006 SC 2522

¹²⁹ *Lata Singh v. State of Uttar Pradesh*, AIR 2006 SC 2522

¹³⁰ AIR 2010 SC 3196

¹³¹ AIR 2018 SC 1601

provisions of law, the life of a person is comparable to the living dead ... The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. ... life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

3.42. The Law Commission of India, in its 242nd report: 'Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework', (2012), while emphasising on the importance of self-autonomy, was of the view that:-

The autonomy of every person in matters concerning oneself - a free and willing creator of one's own choices and decisions, is now central to all thinking on community order and organization. Needless to emphasize that such autonomy with its manifold dimensions is a constitutionally protected value and is central to an open society and civilized order. Duly secured individual autonomy, exercised on informed understanding of the values integral to one's well-being is deeply connected to a free social order. Coercion against individual autonomy will then become least necessary¹³².

3.43. There is one other related aspect of child marriage that has to be examined. To curb the evil of the child marriage, the first Act was enacted in the year 1929 i.e. the Child Marriage Restraint Act, 1929, followed by the Act of Prohibition of the Child Marriage, 2006 (the Act, 2006). But, still the desired prohibition on child marriage is not yet accomplished. Child marriages are still common, and near about 46% of the female children are married before attaining the age of majority¹³³. The Act, 2006 does not deal with the situation where the

¹³² Para 4.1

¹³³ National Family Health Survey-3 (2005-2006) referred in *Independent Thought v. Union of India*, AIR 2017 SC 4904; see also: United Nations Children's Fund, Ending Child Marriage: Progress and prospects, UNICEF, New York, 2014, in the

husband is also a minor. Section 6(a) declares that guardianship of a minor boy is with his father and after him, with his mother; at the same time under sub-clause (c) he is given the guardianship of another person i.e. his wife, in case a marriage is being solemnised. The question does arise as to how a minor can have the guardianship of another minor? Giving responsibility of a person to another, who himself is not legally responsible for his own conduct, is contradictory. It is therefore, suggested that Section 6 (c) be deleted and word unmarried be omitted from the section.

Natural Guardian of Adoptive son

3.44. Even in the year 2018 section 7 of the Act, 1956 provides only for the guardianship of adoptive son only. It is silent about the guardianship of an adoptive girl. The Law Commission of India in its 257th report 'Reforms in Guardianship and Custody Laws in India' (2015) recommended the desired change in the language of the section, and to include 'adoptive girl' as well.

3.45. Section 7: This section provides that the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. The language of this section is incongruous in that it refers only to the natural guardianship of an adopted son, and does not refer to an adopted daughter. ... The Commission merely corrects this by amending the Hindu Minority and Guardianship Act, 1956 to be in consonance with the Hindu Adoptions and Maintenance Act, 1956.

survey it was found that India alone is the home of one third of the total global population of the girls married before attaining 18 years of age; District-level study on child marriage in India: What do we know about the prevalence, trends and patterns? New Delhi, India: International Centre for Research on Women(2015); National Health Survey-4 (2015-2016)

3.46. It is further recommended that the language of the law be changed and shall read as recommended for section 6 (a) and recommendations of the 257th report be given affect.

MUSLIM LAW

3.47. The Shariat Application Act, 1937, provides that in the matter of custody and guardianship, the Muslim personal law shall be applicable.¹³⁴ The rules governing the matters of custody and guardianship under Muslim Law, however, are not expressly codified and are thus governed according to the prevailing customs and usages.

3.48. The custody and guardianship of a minor though varies among different schools of Muslim personal law, but the common thread running under the is application of the principle of best interest. For example, Shafai jurists observes that:

“The right to custody is not for an imbecile person, nor for those indulging in immoral acts. For this right is essentially about protecting the interest of the child. It is not in the interest of a child to put him/her under the care of a debauched person.”¹³⁵

3.49. According to *Hanafi* law, the mother will take care of her daughter until she comes of age i.e. has her menses. Son will be under his mother's care until he is able to eat, drink, dress and

¹³⁴ The Muslim Personal Law (Shariat) Application Act, 1937 Section 2:-

“ *Application of personal law to Muslims.- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ıla, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).*”

¹³⁵ See: Al-Majmu, 18, 320, Kitab Al- Nafgat, Bab Al-Hizana; see also, Hashiya Al-Sawi ala Al-Sharah Al-Sagir, 2,759, Bab Wujub Nafqa ala Al-Ghair, Al-Hizana, Sharah Zad Al-Mustanqa li Al-Shinqiti, 9,344, Bab Al-Hizana, Maney Al-fisq, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB]

attend to the call of nature on his own. After this, his father will have the right to bring him up. Since there could be some difference of opinion about the stage when son could accomplish the above basic necessities on his own, jurist have the fixed the age of 7 years. So, mother is entitled to bring up her son until he is 7 years old.¹³⁶ While examples such as:

“The important point is that if the carer (mother) is engrossed in immorality or sinfulness in a way that may adversely affect the child, she will lose her right. Otherwise, she has a greater right to bring up her child until he/she develops some understanding.”(Radd Al-Mukhtar, 3,557 Bab Al-Mizana, see also Hidayah, 2,284).

3.50. This also highlights the welfare of the child as the under lying concern, but these can also be easily biased against the mother such that if mother marries someone who is not child's mahram, she will lose her right to custody. This deserves to be reconsidered. Before going into the principles of custody and guardianship, it would be important to recognise the definition of a minor under Muslim personal law.

Who is a Minor?

3.51. The Indian Majority Act, 1875, (the Act, 1875) as a general rule, under section 3 declares that a person of eighteen years of age is a major. At the same time, giving enough space to the communities to practice their personal laws, section 2 of the Act, 1875, specifies an exception, to the said rule under section 3. Section 2 stipulates that provisions contained in the Act, 1875, are not to affect the capacity of a person to act in the matters of marriage, dower, divorce and adoption¹³⁷ and it shall also not interfere with the religion or religious

¹³⁶ (Al-Durr Al-Mukhtar 3,566, Bab Al- Hizana See also. Al-Hidayah 2,284, Al-Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm Al-Walad ind iftiraq Al-Zawjayn.) in Ibid.

¹³⁷ The Indian Majority Act, 1875, Section 2 (a)

rites of the citizens of India¹³⁸. The Muslim Personal Law (Shariat) Application Act, 1937, also states that Muslim personal law shall govern the matters relating to marriage, divorce, dower, guardianship and others¹³⁹.

3.52. Under Muslim personal law, the age of majority is calculated based on the attainment of puberty. The moment a child attains puberty he/she is said to be major in the eyes of the personal law and is considered competent to perform independently in case of marriage, divorce and dower.¹⁴⁰ The age prescribed for determining majority differs among the various schools of Muslim law. For example, the Shias consider a boy to attain puberty at the age of fifteen years and a girl at the age of nine or ten years.¹⁴¹ Whereas, the Hanafi school consider it to be fifteen years of age for both the sexes.¹⁴² Syed Ameer Ali also states that the age of majority for the Shia and Sunni schools should be same, and be fifteen years of age¹⁴³. In line of the Ameer Ali, Mulla also writes that the age of puberty, where the evidence of puberty is not available, would be based on the completion of the fifteen years of age.¹⁴⁴ Therefore, the common agreement is, a person is said either to be major when he/she attains puberty or on completion of the age of fifteen years.

3.53. Puberty is considered only for the purposes of contracting a marriage, or determining dower and deciding divorce. In the matters related to the property, the provisions of the Indian Majority Act, 1875, governs the person and one is said to be major after attaining

¹³⁸ Id. Section 2(b)

¹³⁹ The Muslim Personal Law (Shariat) Application Act, 1937 Section 2

¹⁴⁰ Mulla on Mohammedan Law, Dwivedi Law Agency

¹⁴¹ Mulla on Mohammedan Law Chapter 15 Guardianship pp 406, Dwivedi Law Agency

¹⁴² Id.

¹⁴³ Syed Ameer Ali, Mohammedan Law.

¹⁴⁴ Mulla's Principles Of Mohammedan Law Article 251(3) explanation

Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

the age of eighteen (18) years.¹⁴⁵ However, given that the age of attaining puberty may be contingent on diet, genes, region, maturity among many other factors, it may be more beneficial- for the purposes of law to recognise a common age for majority at 18 years.

3.54. Although such a recommendation may also compromise on the agency or freedom of teen-aged children in choice of partners, and this is exacerbated by the fact that parents even after their children acquire majority, frequently deny their children their partners of choice; it is equally important to understand that marriage between minors even by consent is regressive because children may not fully comprehend, understand the consequences of their choices.¹⁴⁶

Concept of Guardianship

3.55. There are three types of guardianships recognised under Muslim Personal Law. Guardianship:-

- a) of a person;
- b) in marriage;
- c) of property.

The guardians of property under Islamic law are rarely appointed;¹⁴⁷ an appointed executer (*wasi*) is the guardian of the property.¹⁴⁸

Guardianship of a person

3.56. The concept of custody (*hadanah*) and guardianship (*Wilayah*) mixed in the different parts of the Quran. Mahdi Zaharaa and Normi A. Malek describes the relationship between custody and guardianship as a “*complex structure of rights and duties distributed*

¹⁴⁵Mulla on Mohammedan Law, pp 407

¹⁴⁶ (Recommendation with regard to the concept of age of minority is discussed in the chapter on the marriage and divorce.)

¹⁴⁷ Mulla on Mohammedan Law, pp 404

¹⁴⁸Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship, pp 196

between entitled person".¹⁴⁹ Custody, in terms of rights and duties, is more inclined towards the duties and responsibilities. It is the duty and responsibility of the custodian to look after the child and ensure the overall development of the child. The guardian on the other hand is given the power to take major decisions for the future of the child, ranging from education to marriage, to career choices.¹⁵⁰ He takes all decisions on behalf of the minor and supervise the child even when he/she is in custody of the mother or any other female relatives.

Principles Governing Custody (*hadanah*) and Guardianship (*Wilayah*)

3.57. In the Hanafi school, the mother is to be the custodian of the minor for a specified period. In case of a boy, the mother shall be the custodian by default if the child is below the age of seven years. Whereas in case of a girl, mother gets custody till the time girl attains puberty¹⁵¹. After which the custody and the guardianship of a boy above seven years of age and of unmarried girl above puberty is transferred to the father. In the absence of the mother, following female relations are entitled for the custody of the minor.

- (i) Mother's mother, how high so ever;
- (ii) Father's Mother, how high so ever;
- (iii) Full Sister;
- (iv) Uterine Sister;
- (v) Consanguine Sister;
- (vi) Full Sister's Daughter;
- (vii) Uterine Sister's daughter;
- (viii) Consanguine Sister Daughter;
- (ix) Maternal aunts in the same order as sisters;
- (x) Mother's father;

¹⁴⁹ Mahdi Zaharaa and Normi A. Malek "The Concept of Custody in Islamic Law" Arab Law Quarterly, Vol 13, No. 2(1998), pp. 155-177

¹⁵⁰ Id.

¹⁵¹ See, Al-Durr Al-Mukhtar 3,566, Bab Al-Hizana See also. Al-Hidaya 2,284, Al-Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm Al-Walad ind ifтираq Al-Zawjayn, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB]

- (xi) Paternal aunts in the same order as sisters;
- (xii) Paternal aunts of mother and father in the same order,

and in the absence of them.

(a) to the following female paternal relations in order;

- (i) Father;
 - (ii) Nearest paternal grandfather;
 - (iii) Full brother;
 - (iv) Consanguine brother;
 - (v) Full brother's son;
 - (vi) Consanguine brother's son;
 - (vii) Full paternal uncle;
 - (viii) Consanguine paternal uncle;
 - (ix) Full paternal uncle's son;
 - (x) Consanguine paternal uncle's son,
- and in the absence of them.

(b) To the following relation in order:

- (i) Uterine brother;
- (ii) Uterine brother's son;
- (iii) Father's uterine brother;
- (iv) Maternal uncle; and
- (v) Mother's uterine brother.

Provided that a male relation be within the prohibited degrees of a girl.

3.58. The rules applicable in Shia law, are different. Here, the mother is entitled for the custody of a boy until the age of two years and of the girl until she attains seven years of age. The custody after the prescribed period dwells upon the father and after him to the grandfather how highsoever.¹⁵² The rationale given is that after birth,

¹⁵² Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship

a two-year period is sufficient for breast-feeding a boy, after which he needs the guidance of his father.

3.59. The mother might have the custody of the child but the father has the guardianship. Entitling him for the right to take any decision for the future of the child. He has the ultimate authority to decide matters regarding future of the child be it his/her education, or contracting marriage. That is why mother living far from the residence of the father was one of the grounds for the disqualification of the mother for taking custody.¹⁵³ In *Gulamhussain Kutubuddin Maner v. Abdulrashid Abdulrajak Maner*¹⁵⁴, the Supreme Court, observed that during the lifetime of the father, mother cannot be the guardian of the minor to accept a gift on his behalf.

...we are of the view that where the father of a minor is alive, the mother of a minor cannot be appointed as a guardian of a minor to accept the gift on his behalf.¹⁵⁵

3.60. Thus, during the lifetime of the father, mother cannot technically accept a gift for the minor, or take any other decision for the welfare of the child as a guardian. The role prescribed here indicates the typical division of the labour based on gender. It flows from the notion that a man is provider of the family and he has the ultimate responsibility to protect them; on the other hand, a woman is to look after the house and the needs of the children.¹⁵⁶ This may have been acceptable in a specific context or a point in history when these rules were laid down. However, with time such gender stereotypes have been challenged.

3.61. If both the spouses are earning then the financial responsibility of the child should also be shared. At the same time mother should also have the equal right to decide the matter related to

¹⁵³ Mulla's Principles of Mahomedan Law, section 354(2)

¹⁵⁴ (2000) 8 SCC 507

¹⁵⁵ Id. para 2)

¹⁵⁶ See, Nivedita Menon Seeing like a feminist, Penguin India, ed. 2012

the welfare of the minor. She should not only be there to take physical or emotional care of the child, but also have equal say in the matters deciding the future of the minor.

3.62. The earlier discussion on the best interest of the child indicates that the court does not take into consideration the personal law of the parties, when it comes to determining the custody of the child¹⁵⁷. It does not adhere to the principles prescribed in the personal law or even for that matter preference given in any statute.

3.63. It is therefore suggested that a Muslim mother should also be treated as the natural guardian of the minor, both the parents should be at an equal footing. Further, in the matter of custody a father should also get an equal opportunity to be considered as a custodian. Thus, in the absence of a clear codified law on custody of children the principle of best interest of the child should continue to be of paramount consideration.

Guardianship in marriage

3.64. The other type of guardianship, Muslim Personal Law talks about is 'guardianship in marriage'. The guardian has the right to contract the marriage of a minor. If the guardian is of the opinion that the marriage is for the welfare of the minor, then he has the right to contract such marriage. Even the consent of the minor, whose marriage is to be contracted, is not relevant. This form of marriage is called '*jabar*' marriage.¹⁵⁸ Under this the guardian can impose the marriage on the minor, before he/she attains puberty.¹⁵⁹ However, this too would be covered by the overriding effect of the Prevention of Child Marriages Act, 2006. The Court is not entitled to appoint a guardian for the marriage, though it can appoint a guardian for

¹⁵⁷ See, Flavia Agnes, Custody and Guardianship of Minors, available at <https://flaviaagnes.wordpress.com/>

¹⁵⁸ Mulla on Mohammedan law

¹⁵⁹ See: Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship

person or property. In some cases, the *kazi* can act as a guardian for the purpose of marriage.¹⁶⁰

Who can contract the marriage of a minor

3.65. Under Hanafi school the father has the right to contract the marriage of the minor. After him the right dwells upon the father's father, how highsoever. In the absence of these two relations, the right is further given to the brother and other male relations on the father's side in the order of inheritances. In the absence of all the above mentioned male relations the right belongs to the mother, maternal uncle or aunt.¹⁶¹ Under Shia law, however, the right is vested upon the father and after him the father's father how highsoever.¹⁶²

3.66. The consent of the minor is not relevant, even the consent of the mother is not acknowledged. The right of the mother over her child is given preference when there is no male relation from paternal side. Allocation of right in such a manner indicates as underlying assumption that a mother is not capable of taking the decision for the welfare of the child and therefore if there is any possibility of locating a 'male' member, preference is given to him, to exercise the right. However, after the Prohibition of Child Marriage Act, 2006, the child marriage has been prohibited and also made punishable. Now, the father or the grandfather or as the case may be, do not have any 'right' to give their minor children in marriage.¹⁶³

CHRISTIAN LAW:

3.67. The statutes codifying the Christian laws do not deal with the concept of custody and guardianship. The reason might be that they are covered under the Indian Divorce Act, 1869 and the Guardians

¹⁶⁰ Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship

¹⁶¹ Mulla section 271 pg. 233(Act sort of); Asaf A.A Fyzee *Outlines of Mohammedan Law* Chapter VI Guardianship, 209

¹⁶² Mulla on Mohammedan law page 412(book)

¹⁶³ See also *Yunusbhai Usmanbhai Shaikh v. State of Gujarat*, 2016 CriLJ 717

and Wards Act, 1890. The above said two statutes somewhat cover guardianship and custody under Christian Law.

The Indian Divorce Act, 1869

3.68. Chapter XI of the Indian Divorce Act, 1869 (the Act 869), contains sections 41 to 44 for the custody of a minor. The sections give the sole authority to the Court to decide the matter of the custody of a child for affecting the doctrine of welfare of the child. The provisions do not seek a final decision in the matter relating to custody but suggest reviewing the orders and such conditions from time to time, according to the need of the minor.

3.69. The provisions deal with two situations where the question of custody of the minor may appear. First, where the parents of the concern minor have applied for the decree of judicial separation¹⁶⁴ and second where they have applied for the dissolution or nullity of the marriage.¹⁶⁵

3.70. Section 41 of the Act 1869 stipulates the power of the Court to give interim orders for the custody of the minor with regard to his/her maintenance and education, in cases where the proceedings are ongoing. The Court has the power to make such decisions from time to time. Section 42 provides that on attaining the decree of the judicial separation the parents can approach the Court for the custody of the child. The Court on receiving such application may make such orders regarding the custody, maintenance and education of the minor.

3.71. Section 43 similarly deals with the situation where the proceedings for decree of dissolution or the nullity of marriage are still pending. Sections 44 deals with the application of the parents in case

¹⁶⁴ Section 41 of the Act, 1869.

¹⁶⁵ Section 43 of the Act, 1869.

where the decree of dissolution or the nullity of the marriage has been finalised.

3.72. The Act 1869 further provides the Court with an option to keep the child under its protection if it appears to be the need at that point of time. The proviso to section 41 further states that the application with respect to the maintenance and education of the minor shall be decided within the period of sixty days, from the date of notice served to the respondent.

3.73. The provisions laid down in the Act 1869 endorse the principle of best interest of the child and do not talk about the preferential right of one parent over the other. Thus, leaving no room for gender inequality. The matter related to the guardianship of minor are dealt under the provisions of the Guardians and Wards Act, 1890.

PARSI LAW

3.74. The law governing guardianship for the Parsi community is the Guardians and Wards Act, 1890. Section 49 of the Parsi Marriage and Divorce Act, 1936, (the Act 1936) provides that the court has the power to decide the interim custody of the child. The court can, from time to time prescribe such terms and conditions, which it deems necessary for the welfare of the child. The court can also pass order with regard to the maintenance and education of the minor.

3.75. The Act, 1936 does not discriminate between parents. However, section 50, stipulates that in case of adultery committed by the wife, the court can pass a decree of divorce or judicial separation. In that case, if any property is devolving upon the wife, one half of the same can be reserved for the welfare of the child(ren). The section is discriminatory simply for not providing the same for the father. This

matter is also sub-judice before the Supreme Court in the matter of *Naomi Sam Irani v. Union of India & Anr.*¹⁶⁶

¹⁶⁶ W.P. (C) no. 1125 of 2017

4. ADOPTION

4.1. According to Black's law dictionary, adoption is a juridical act creating between two persons certain relations purely civil, of paternity and filiations. Adopted child is someone who is not the natural child of the parents but has become a true child by a legal action.¹⁶⁷ Adoption of children is a socio-legal concept it has existed in India and abroad since ancient times. It primarily meant that a parent- child relationship was established where none existed. The child of one set of parents became the child of another set of parents, as if it were a natural born child.¹⁶⁸

4.2. In *Corpus Juris Secundum*,¹⁶⁹ volume 2 'adoption' in legal contemplation is an act by which the parties thereto establish the relationship of parent and child between persons not so related by nature, and which, in all respects, severs the natural relations existing between the child and its parents, although in a narrower sense it is restricted to the act of the person taking the child. It is further contemplated that adoption is a practice of great antiquity. It appears to have been known to the Egyptians, Babylonians, Assyrians, Greeks, and ancient Germans, and among the Hebrews, probably not recognised by their system of jurisprudence but was undoubtedly well-known.¹⁷⁰

¹⁶⁷Black's Law Dictionary 8th Edition.

¹⁶⁸ HM Billimoria, *Child Adoption A Study of Indian Adoption* 1 (Himalaya Publishing House 1st edn 1984).

¹⁶⁹ *Corpus Juris Secundum* is an encyclopaedia of U.S. law containing an alphabetical arrangement of legal topics as developed by U.S. federal and state cases. *Corpus Juris Secundum* provides basic but clear statement of each area of law including areas of the law and provides footnoted citations to case law and other primary sources of law.

¹⁷⁰ *Manuel Theodore v. Unknown*, 2000 (2) Bom CR 244.

Babylonia Code of Hamurabi¹⁷¹

4.3. One of the earlier legal texts referring to adoption is the Code of Hammurabi. This code dating from 18th century BC contains many features that are still relevant to modern adoption law. The code established that adoption was a legal contract that could only be executed with the consent of the birth parents. The code of Hammurabi granted adopted child equal rights to those of birth children.¹⁷² The code also contained several norms that differ from modern practices such as punishment for adoption children for attempting to return to their birth families and the adoption could also be annulled on various conditions. The adoption contract could also be dissolved by a court at the request of adopted persons, if the adoptive parent failed to teach the adopted person a trade or if the adopted person has not been properly reared by the adoptive family. If the adoptive parent remarried and decided to dissolve the contract with the adopted child, the latter was entitled to inherit one third of a child's share in goods but had no claim to the house or land of the adoptive family moreover only adoption of male child was permitted.

Roman Law on Adoption

4.4. Adoption termed as *adoptio* or *adoptatio* meant a relation of a child and a parent that arose through taking in of a child, commonly a boy, by a married couple, for purposes of inheritance of the estate. Adoption, in its specific sense, was the ceremony by which a person

¹⁷¹ The diorite stela of Hammurabi was found in 1901 at the excavations of the ancient city of Susa capital of Elam contains 282 laws, which cover all areas of social life including a few sections related to adoption regulations. It is assumed that these laws were written during the reign of the Babylonian king Hammurabi (1792-1750 B.C.).

¹⁷² Child Adoption Trends and Policies UNITED NATIONS, New York (2009) *available at:*

http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf (last visited on March 09.2018).

who was in the power of his parent (in *potestate parentum*), whether child or grandchild, male or female, was transferred to the power of the person adopting him. It was given effect under the authority of a magistrate (magistratus). The person to be adopted was emancipated (mancipatio) by his natural father before the competent authority, and surrendered to the adoptive father by the legal form called in jure cession.¹⁷³

Adoption in Ancient India

4.5. In India 'Adoption' has been practised for thousands of years. Among Hindus, historical epics such as Mahabharata and Ramayana have recorded adoption among saints and royals, who were adopted and also did adopt. One of the main motivations for adoption has been the importance attached to producing a son. The son enabled the father to pay off the debts he owed to his ancestors.¹⁷⁴

4.6. Twelve kinds of sons are named in Dharmasastras. The most desirable is the natural son (*aurasa*) the legitimate biological son of a man and his lawful wife.¹⁷⁵ Manu declares the natural son to be paradigmatic (*prathamakalpita*), while all the others are substitutes (*pratinidhi*), necessitated by the fact that someone must perform the family rites. The final type of son which finds mention in the social and legal history of India is the adopted son i.e. *Dattaka*, *Datta*. After the natural born son, adopted son was most important in both theory and practise. Adoption entailed both legal and religious processes.

¹⁷³ William Smith, *A Dictionary of Greek and Roman Antiquities* (John Murray, London, 1875) (last visited on March 09, 2018).

¹⁷⁴ Billimoria H.M., *Child Adoption A study of Indian Experience* 6 (Himalaya Publishing House, Bombay, 1st edn., 1984).

¹⁷⁵ Ludo Rocher, *Studies in Hindu Law and Dharmashastras* 613 (Anthem Press, New York, 1stEdn., 2012).

Dattahoma is the special rite that formalises the act of legally categorising a male, usually but not always a boy.¹⁷⁶

Statutory law on adoption

4.7. The absence of a general law for adoption has caused dissatisfaction among many willing individuals and families. As a result of this there have been instances where people had to knock the doors of the courts to facilitate the adoption.

4.8. First step to introduce secular law on adoption of children (not merely as wards) was introduced in the form of Adoption of Children's Bill 1972. It was first introduced in Rajya Sabha in 1972 but in the year 1972 itself it was dropped as it received stern opposition from the newly formed All India Muslim Personal Law Board and also from the Parsis. Adoption of Children's Bill was again introduced in Lok Sabha on December 16, 1980. It contained an express provision of non-applicability to the Muslims, however, it could become a law as the Bill lapsed.¹⁷⁷

4.9. Personal laws of Muslims, Christians, Parsis and Jews do not recognise complete adoption. As non-Hindus do not have an enabling law to adopt a child those desirous of adopting a child can only take the child in 'guardianship' under the provisions of The Guardian and Wards Act, 1890. However, the child taken in guardianship would not have the same status as that of a biologically born child.

¹⁷⁶Patrick Olivelle and Donald R Davis Jr. (eds.), *The Oxford History of Hinduism :Hindu Law :A New History of Dharamshastras* 156- 159 (Oxford University Press ,United Kingdom, 2018).

¹⁷⁷*Lakshmi Kant Pandey v. Union of India* 1984(2) SCC 244.

Guardians and Wards Act 1890

4.10. The Act 1890 recognises only guardian-ward relationship. It does not provide same status as that of a natural-born child. Under the Act 1890 the child becomes a ward not an adopted child. Anyone under the age of eighteen years can be ward and both spouses can be guardians. Once the individual turns twenty-one they lose the status of a ward. The child does not have the same status as that of a biological child and also does not have the right of inheritance. But the male Guardian can bequeath to wards through a will, but any 'blood' relative of the male guardian can contest this will. Unlike the Hindu Adoption and Maintenance Act 1956, there are no age restrictions for single males/females to take a child in guardianship. Also, the guardians or the Courts can revoke the guardianship; likewise the Court or any competent authority can appoint guardians.

4.11. This Act 1890 is applicable as a prerequisite for inter-country adoptions as well. In case a foreigner wants to adopt an Indian child, he/she must first become the legal guardian of the child and when the court is convinced that parents are fit to adopt a child the said parents can legally adopt a child within two years after the arrival of child in their country as per their adoption laws.¹⁷⁸

HINDU LAW

Hindu Adoption and Maintenance Act 1956

4.12. Hindu law treats an adopted child equivalent to a natural born child. The Hindu Adoption and Maintenance Act, 1956 extends to only the Hindus defined under section 2 of the Act, and include any person, who is a Hindu by religion, including a *Virashaiva*, a *Lingayat*

¹⁷⁸ *Lakshmi Kant Pandey v. Union of India*, AIR 1984 SC 469, See also: Adoption law in India available at: helegiteye.in/2016/12/05/adoption-law-india/

or a follower of the *Brahmo*, *Prarthana* or *Arya Samaj*, or a *Buddhist*, *Jaina* or *Sikh* by religion, to any other person who is not a Muslim, Christian, Parsi or Jew by religion. It also includes any legitimate or illegitimate child who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jain or Sikh.¹⁷⁹

4.13. This Act 1956 deals with the capacity to adopt, capacity to give in adoption, effect of adoption etc. The Act 1956 does not recognise adoption by a Hindu male or a female if such person is of unsound mind or minor. A Hindu male shall adopt a child only with the consent of his wife except where the wife has relinquished the world or is of unsound mind or she has converted to another religion. Only the father, mother and guardian shall have the right to give a child in adoption and no one else. The Act further specifies that only unmarried Hindu shall be taken in adoption unless the custom or usage permits to the contrary. The Act 1956 stipulates certain conditions for adopting a child for both males and females separately.

4.14. In *Amrendar Man Singh v. Sanatan Singh*¹⁸⁰ The Privy Council observed:

Under Hindu Law the purpose of adoption is the religious efficacy of sonship, it was recognised as a duty which every Hindu owes to his ancestors for continuance of lineage and solemnisation of necessary rites.

4.15. In *V.T.S Chandrasekhara Mudaliar v. Kulandainsh Mudaliar*¹⁸¹ the Supreme Court observed:

Among Hindus the substitution of a son was for a spiritual reason and consequent devolution of property merely accessory to it.

¹⁷⁹Hindu Adoption and Maintenance Act, 1956 (Act 78 of 1956), section.2.

¹⁸⁰AIR 1933 PC 155.

¹⁸¹AIR 1963 SC 185.

4.16. In *Hem Singh v.Harnam Singh*¹⁸² the Supreme Court retreated the same view observing that the substitution of son is for a spiritual reason. Thus, adoption has been given importance in Hindu religion due to the spiritual and religious connotations attached to it. Although many of ancient texts overwhelmingly emphasise adoption of sons, owing to the emphasis on producing a male progeny among Hindus, this has largely been remedied in terms of law but change in social attitudes is coming about at a slower pace.

4.17. The Hindu Adoption and Maintenance Act was amended by the Personal Laws Amendment Act 2010¹⁸³ which included a provision granting right to married women to take a child in adoption. Moreover, the parent of the child shall have identical rights for giving their child in adoption, but only with permission of the other parent. Therefore, the Act recognised the rights of woman as equal to those of a man. Certain aspects of Hindu Adoption and Maintenance Act and the Juvenile Justice (Care and Protection) Act 2000, are in disagreement, this is discussed later in the section on the JJ Act.

MUSLIM LAW

4.18 Adoption was common among the Arabs before Islam, and remained valid during early days of Islam until it was prohibited under the Quranic edict

..... nor hath he made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But the God sayeth the truth and he showeth the way. Proclaim their real parentage. That will be more equitable in the sight of God. And if ye know nor their fathers then (they are) your brethren in the faith and your clients.¹⁸⁴

¹⁸²AIR 1954 SC 581

¹⁸³ Personal Laws (Amendment) Act, No. 30 of 2010.

¹⁸⁴ SuraAhzab,XXXIII,verse 4-5

4.19 Parentage confers upon the child the status of legitimacy. It can be established in the natural father and mother of the child. Adoption is not recognised in the Sharia under the quranic ruling mentioned herein above¹⁸⁵. In Islam the tie between parents and children can only exist between children born to a lawfully married couple. This tie cannot be established verbally or through any other contract. Nor can there be the mother-son tie between a boy and a woman based on his utterance alone. Allah declares:

Those among you who divorce their wives by zihar (likening their wives to their mothers or another woman in a prohibited relationship) should realise that they are not their mothers. Their mothers are those who gave birth to them. Those guilty of zihar use dishonourable and (use) false words. [Al-Mujadalah, 58:2]¹⁸⁶

4.20 It states further that if one calls someone his son or considers him so, this does not establish the father-son tie between the two. Rather, the Quran proclaims:

Allah has not made your adopted sons as your own sons. These are only words from your mouth. However, Allah speaks the truth and guides to the right path. Call (the adopted sons) by the names of their fathers. In the sight of Allah this is just. If you do not know their true fathers, then regard them as your brothers in faith and your allies. (Al-Ahzab 33:4-5)

4.21 In Islam it is unacceptable to sever the relationship between adopted child and his/her biological parents, the legal relationship between child and parent should not be broken merely for the sake of supporting child's life beyond his/her own family circle due to the fact that genealogical relationship between two persons cannot be separated by any means.¹⁸⁷ This is also reflected in inheritance law

¹⁸⁵ Jamal J.Nasir, *The Islamic Law of Personal Status*, 2nd edn. Graham and Tortman Ltd. London.

¹⁸⁶ Reference Supplied by consultation paper of the All India Muslim Personal Law Board, dated July 30, 2018.

¹⁸⁷RatnaLukito, *Legal Pluralism in Indonesia* 139-140(Routledge Press, New York, 2013).

where natural children cannot be easily disentitled from inheritance and only 1/3rd of one's property can be willed, the rest would devolve as per the law.

4.22 **Islamic law instead of adoption practices “*kafala*” system under which child is placed under a kafil/ foster parent which provides for the well-being of a child including financial support and is legally entitled to take care of the child.** There are multiple cases where children of deceased relatives have been adopted by families and these children have certain rights as wards and in many cases, they can be given some share in assets and properties through ‘hiba’ or gift. But these children do not become legal heirs.

4.23 There is substantial emphasis upon protection and care of orphans in Islamic jurisprudence.¹⁸⁸ It mentions also specific provisions for maintenance of destitute relatives, but does not recognise adoption for it may also be construed as an injustice to natural heirs. There have also been fears expressed about the uncertain relationship that may exist between a male adopted child and the female members of his adoptive family, where hijab-observing women members may not be comfortable with the presence of a non-mahram.

4.24 There are two modes of filiation known to the law: as a rule, the law treats the natural father as the father of the child, and by acknowledgment of paternity.¹⁸⁹ However, historically there have been exceptions where the adoption has been enabled in certain ways.¹⁹⁰

(a) By Custom: if there is some custom prevailing among Mohammadan community then that may be by force of law (sic). Among some Hindu converts to Islam the custom of adoption still prevails. But the burden of proof that such custom is prevailing is on the person who asserts but

¹⁸⁸(see Al-Bahr Al-Raiq, 4,843, Bab Al-Hizana), (Musnad Ahmad, 4,281, Hadith No. 861)

¹⁸⁹ *Muhammad Allahdad v. Muhammad Ismail*, (1886)ILR 8All234

¹⁹⁰ Dr Rakesh Kumar Singh, *Textbook on Muslim Law*, 218, Universal law Publishing ltd, New Delhi, edn. 2011.

after coming into force of Muslim Personal Law Shariat Application Act 1937, such custom seems to have abrogated because custom will prevail over the provisions of Muslim law except to the extent they have been abrogated by section 3(1) of this Act and if declaration is made as required by it the custom shall stand abrogated.

(b) By Law: if some provision of any Act permits adoption then it may have the force of law.¹⁹¹ Section 29 of the Oudh Estates Act 1869 permitted a Mohammedan Talukdar to adopt a son.

4.25 Custom of adoption has been prevalent amongst many classes of Muslims in India it has been prevalent in Punjab¹⁹², Sindh¹⁹³, Kashmir.¹⁹⁴ However, it is to be examined as to whether such an act continued even after commencement of Shariat Act 1937.

4.26 In *Maulvi Mohammad v. S Mohboob Begum*¹⁹⁵ the Madras High Court has held:

If in fact the custom of adoption is prevailing it can be pleaded and proved. If such custom or usage is proved there is no need of any declaration to be made under section 3(1) of the Shariat Act, 1937 by anyone concerned so as to rule out the existence of custom of adoption. But where the Shariat Act is not applicable, a Muslim may adopt under the customary Law, if it prevails, an instance is given of Jammu and Kashmir State where the Shariat Law is not applicable, a Muslim may adopt under the customary law. "Pisarparwardhah" is the term which is used for the adopted son.

However, after the Application of J&K Muslim Personal Law (Shariat) Application Act 2007 such custom of adoption stands abrogated and Shariat Act is applicable in the State of J&K¹⁹⁶.

¹⁹¹ *Nur Mohd. v. Bhawan Shah & Anr*, AIR 1936 Lah 465.

¹⁹² See: *Khair Ali Shah v. Imam Shah* AIR 1936 Lah 80.

¹⁹³ See: *Usman v. Asat* AIR 1925 Sind 207.

¹⁹⁴ See: *Yaqoob Laway & Ors. V. Gulla & Anr.* 2005(3) JKJ 122.

¹⁹⁵ AIR 1984 Mad 7.

¹⁹⁶ *Ahad Sheikh v. Murad Sheikh & Ors* 2012(4) JKJ 860 HC.

4.27 In *Sunder Shaekhar v. Shamshad Abdul Wahid Supariwala*¹⁹⁷ the claim of the appellant that he had been adopted by one Haji Mastan Mirza in 1994, before his death, stood rejected by the High Court of Bombay on the grounds that the appellant failed to prove the factum of adoption. Performance of last rites of the deceased by the appellant were irrelevant as there was no such requirement in Muslim law. Moreover, the application of Shariat Act 1937 did not recognise adoption. Thus, under Islamic law adoption is not recognised as a mode of affiliation however there are certain exceptions to the same i.e. custom, or by law but ambiguity remains on the matter. Among Muslims the concept of ‘acknowledgment of paternity’ is the nearest comparison to adoption.

4.28 While concerns affecting inheritance and family dynamics are understandable, an enabling law for adoption remains voluntary and an act that parent/s consent to undertake bearing in mind that the adopted child will be of a different and often unknown lineage. Enabling voluntary act such as the Juvenile Justice (Care and Protection of Children) Act, 2015 for adoption does not erode upon Muslim personal law on adoption, but simply provides a provision for people who do not wish to accept the religious objections to adoption and are willing to let their adopted child inherit as their own offspring would. In this respect, codification of Muslim law on adoption would only confirm that under Islamic jurisprudence does not, for a variety of reasons permit adoption. While followers of the faith may choose to accept this as a matter of faith, there must remain a provision in the law under which willing couples may adopt.

4.29 In *Shabnam Hashmi v. Union of India*¹⁹⁸ the Supreme Court observed that though the concept of adoption is prohibited under Muslim law, the Juvenile Justice (Care and Protection of Children)

¹⁹⁷ 2014(2)BomCR195

¹⁹⁸ AIR 2014 SC 1281.

Act, 2000 as amended in 2006 is a secular and enabling legislation that has been enacted for the welfare of children. It enables any person to adopt a child. The existence of Muslim Personal Law will not prevent a Muslim to apply under the Act 2000. Thus, a Muslim may choose to be governed by personal law and may not adopt a child or he may choose to be governed by the Act 2000 and may adopt a child. So as far as the position is concerned today a Muslim may choose to be governed by the Juvenile Justice (Care and Protection of Children) 2015 and take a child in adoption.

CHRISTIAN LAW

4.30 While no laws of adoption as such are found formulated in the Old Testament, it does find mention in scriptures.¹⁹⁹ In Exodus 2:10²⁰⁰ Moses becomes son of Pharaohs' daughter. In Ruth 4:16²⁰¹ Naomi adopts son of Boaz and Ruth. In the New Testament, there are references to adoption as sons in Rom, 8:15, 23, Gal. 4:5.²⁰² There is further an interpretation and reference that a Slave, if adopted as a son would inherit his master's property in a phrase addressed to Slaves in Col. 3:24²⁰³. The idea of adoption has also been linked to the idea of the Holy Spirit in the New Testament and Rom. 8:23 speak of waiting for adoption as sons wherein Paul regards adoption as a promise for future.

¹⁹⁹ *Manuel Theodore v. unknown* 2000 (2) BomCR 244.

²⁰⁰Exodus 2:10 available at:

<https://www.biblegateway.com/passage/?search=Exodus+2%3A10&version=NIV> (last visited on March 13, 2018).

²⁰¹ Ruth 4:16 available at: <http://biblehub.com/ruth/4-16.htm> (last visited on March 13, 2018).

²⁰²Galatians4:5availableat:

<https://www.biblegateway.com/passage/?search=Romans+8%3A15%2CRomans+8%3A23%2CRomans+9%3A4%2CGalatians+4%3A5%2CEphesians+1%3A5&version=NIV> (last visited on March 13,2018).

²⁰³ Colossian 3:24 available at: <http://biblehub.com/colossians/3-24.htm> (last visited on March13,2018).

4.31 There is no specific statute enabling or regulating adoption among the Christians in India. Here too, adoption can take place from an orphanage by obtaining permission from the courts under Guardians and Wards Act. In *Sohan Lal v.A.K Mauzin*²⁰⁴ for the first time customary law on adoption came to be recognised by the Lahore High Court observing:

In the case of (a) Punjabi convert Christians it may be possible to prove the customary right of adoption applicable to them as members of their original caste.

Adoption among Kerala Christians:

4.32 There is an ancient custom of Adoption amongst the Syrian Christian of Travancore where in case a person dies leaving behind daughter(s) with no son, then when the youngest daughter gets married, her husband would become the adopted son of his father-in-law and assume the latter's family name. He would also generally reside with his wife in her natal home along with her parents.²⁰⁵

4.33 In *Philips Alfred Malvin v. T.J. Gonsalvis*²⁰⁶ the Kerala High Court held that it is an admitted fact that the Christian Law does not prohibit adoption, also canon law recognises adoption, and adoption by Christian couple was therefore declared valid. In *Maxin George v. Indian Oil Corporation*,²⁰⁷ same view was taken by the division bench of Kerala High Court. However, the court explained that an abandoned child fostered by a couple does not get the status of an adopted child unless the formalities of adoption takes in the physical act of giving and taking of the child and the giver of the child is duly competent in that role.

²⁰⁴ AIR1 1929 Lah 230.

²⁰⁵ Anthropology of Syrian Christians *available at*:
https://archive.org/stream/AnthropologyOfTheSyrianChristians/Anthropology%20Of%20The%20Syrian%20Christians_djvu.txt.(last visited on August 17,2018).

²⁰⁶ S.A. No. 375/92J

²⁰⁷ 2005(3)KLT57

4.34 An initiative towards adoption was taken by the Christian community of India way back in the year 1995 in the form of a Bill known as the 'Christian Adoption and Maintenance Act of 1995'. It had the support of the Catholic Bishops Conference of India as also of the various other Christian denominations throughout the country. However, in spite of the readiness of Christian community in the country to accept the bill on Adoption and Maintenance the bill could not be enacted.²⁰⁸

PARSI LAW

4.35 There is no legislation for the adoption of children by Parsis in India. In Parsi community the only custom which comes near adoption is to designate a "palak" son. Under this custom a widow of a childless Parsi can adopt a child on the fourth day of her husband's death simply for the purpose of performing certain annual religious ceremonies. However, the adopted child acquires no property rights.²⁰⁹

4.36 The Adoption Bill of 1972 aiming to provide for an enabling law on Adoption was opposed by the Bombay Zoroastrian Jashan Committee which formed a special committee to exempt Parsis from the Bill.²¹⁰ This bill was twice tabled in the Parliament in the 1970's but could not enter into the statutory books.

4.37 Thus, for willing couples the JJ Act of 2015 should serve as an enabling legislation for couples willing to adopt, the child would inherit as a natural born child. The variation in inheritance laws has been addressed in the final chapter which would ensure that personal

²⁰⁸ *Manuel Theodore Desouza v. Unknown*, Para 21, (2000) 3 Bom CR 244.

²⁰⁹K.B Aggarwal , *Family law in India* 185(Kulwar Law International, New York,2010).

²¹⁰Asha Bajpai, *Child Rights in India, Law Policy and Practise*, (Oxford University Press, New Delhi 3rd edn.,2017).

laws do not disentitle from inheritance a child who is adopted under the JJ Act, 2015. Since this report suggests largely a common framework for all inheritance and succession rights, the difference in personal law codes of parents and the adopted child, or whether the child is of any gender, would not be relevant.

PERSONAL LAWS AMENDMENT ACT 2010

4.38 The Act 2010 was enacted to amend the Guardians and Wards Act, 1890 and the Hindu Adoptions and Maintenance Act, 1956. Before the 2010 Amendment a married Hindu woman was legally incapable of adopting a child by herself even with the consent of her husband, while a male Hindu was capable of doing so. The wife could only 'consent' to the adoption, she could not adopt on her own. In *Malti Roy Chowdary v. Sudhindranath Majumdar*²¹¹ the Calcutta High Court observed that the Hindu wife has no capacity to adopt when the husband is alive even when he consents to it leaving consent solely in the domain of male husband.

4.39 In the case of *Brajendra Singh v. State of MP*,²¹² a question arose whether adoption by a married woman is valid without the consent of her husband. In this case, a differently-abled woman was living with her parents because her husband had abandoned her. She adopted a male child overtime but the Court invalidated the adoption stating that 'living like a divorced woman' and 'being a divorced woman' both cannot be equated. This gender discrimination was removed by amendment in the Hindu Adoption and Maintenance Act 1956, through Personal Laws (Amendment) Act 2010.²¹³

²¹¹ AIR 2007 Cal 4.

²¹² AIR 2008 SC 1058.

²¹³ THE PERSONAL LAWS (AMENDMENT) ACT, 2010 NO. 30 OF 2010 [31st August, 2010.]

International Conventions and Covenants:

4.40 India is a signatory to various International Conventions pertaining to Child and Children welfare. Declaration on Social and Legal Principles relating to Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally²¹⁴ 3 December 1986. The relevant Articles are as follows:

Article 3: The first priority for a child is to be cared for by his or her own parents.

Article 4: When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute-foster or adoptive-family or, if necessary, by an appropriate institution should be considered.

Article 13: The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.²¹⁵

Convention on the Rights of the Child²¹⁶ was adopted and ratified by India on 20th November 1985. The preamble to this covenant has referred to various other declarations and conventions with regard to a child.

Article 20: Speaks about the special protection of child and assistance by State to children in need of special care and protection. Such care could include Kafala System, foster placement and regard being paid in his upbringing to his religious, cultural, ethnic background.

4.41 In *Manuel Theodore D'Souza* case²¹⁷ the Bombay High court while referring to the fore mentioned Articles to which India is signatory also revealed a gloomy picture of how the State has yet to

²¹⁴ 41/85. Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally *available at:* <http://www.un.org/documents/ga/res/41/a41r085.htm> (last visited on March 28th 2018).

²¹⁵ *Ibid.*

²¹⁶ Convention on Rights of Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

²¹⁷ *Manuel Theodore v. Unknown*, 2000 (2) Bom CR 244.

frame laws in line with these conventions even after ratifying it. In spite of a secular provision in form of a Juvenile Justice (Care and Protection of Children) Act 2015 the country is yet to frame a full legislation exclusively dealing with adoption encompassing religion and in reality adhering to the conventions and declarations and giving a true meaning to it.

4.42 The Law Commission therefore suggests that in the interim, the JJ Act be made more comprehensible and accessible. A look at these conventions illustrates the commitment of the international community towards the protection of children and their childhood. Effort should be made to effectively integrate these conventions in the national policy on children.

JUVENILE JUSTICE ACT: AN ENABLING LEGISLATION:

4.43 The lead in the development of the secular law on adoption was laid down by the *Lakshmi Kant Pandey* case.²¹⁸ The Court in dealing with the issue of adoption provided for elaborate guidelines to protect the interest of child. A regulatory body was recommended to be set up i.e. Central Adoption Resource Agency (CARA) which would lay down norms both substantial and procedural in inter as well as intra country adoption.

4.44 The Juvenile Justice (Care and Protection of Children) Act 2000 recognised adoption as one of the ways to facilitate the rehabilitation of children. The former Act 2000 introduced a separated Chapter IV under the head 'Rehabilitation and Social Integration' under it a provision for Adoption was also included as a means to rehabilitate and socially reintegrate children. Section 41 of the JJ Act of 2000 was substantially amended in 2006 which gave a prominent role to the courts in matters of adoption. The amendment also added a definition of adoption, and major changes were made in the other sub-

²¹⁸ 1984(2) SCC 244.

sections of Section 41 of the former JJ Act, 2000. The CARA, as an institution, received statutory recognition.²¹⁹ 'Juvenile Justice Rules' 2007 were framed to give effect to the provisions of the JJ Act 2000. Thus, the Act acted as a secular provision facilitating adoption irrespective of religion. The JJ Act was amended again in 2011 and stands repealed by Juvenile Justice (Care and Protection of Children) Act 2015 (2 of 2016). The Act 2015 has also streamlined the adoption procedures for abandoned, orphaned and surrendered children.

4.45 Some of the features of the JJ Act 2015 are as follows

- Adoptive Parents should be financially and physically sound, a single or divorced parent may also adopt.²²⁰
- A Single Parent (male) shall not be eligible to adopt a girl child.²²¹
- Disabled children will be given priority for adoption.²²²
- Illegal adoption is a punishable offence with imprisonment fine or both.²²³

Central Adoption Resource Authority Regulations 2017

4.46 The Adoption in India is regulated by the Central Adoption Resource Agency (CARA), Adoption Regulations 2017 have been framed under section 68(c) of the JJ Act 2015, and supersede the Guidelines Governing Adoption of Children, 2015.²²⁴

4.47 It provides a broad framework according to which adoption is to be regulated whether it is within country adoption or inter country adoption. It covers within its ambit, the adoption of orphan, abandoned, surrendered children, step parent and also adoption by relatives.

²¹⁹ *Shabnam Hashmi v. Union of India*, AIR 2014 SC 1281.

²²⁰ See Section 57 of the Act 2015: Eligibility of Prospective Adoptive Parents.

²²¹ See Regulation 5 (c) of Adoption Regulations, 2017.

²²² Ibid.

²²³ See Section 80: Punitive Measures For Adoption without Following Prescribed procedures.

²²⁴ Adoption Regulations *available at*:

http://cara.nic.in/PDF/Regulation_english.pdf (last visited on June 29, 2018).

4.48 CARA facilitates all adoptions under the Act 2015 through Child Adoption Resource Information and Guidance System. Necessary safeguards for all adopted children have been taken care of by maintaining their records and ensuring post adoption follow up. While having consultations with the various stakeholders there were certain apprehensions raised by some that since adoption involves making new relationships between a father and child, mother and child and which are not biological relationships there is a possibility of developing non-consensual sexual relationship, strange relationship between the adopted child and the adoptive parents.

4.49 Moreover, this is one of the many reasons given within Muslim law while prohibiting adoption. It is pertinent to mention that the new CARA regulations have taken care of this issue by mandating that the minimum age difference between the child and the adoptive parents shall not be less than twenty-five years of age.

4.50 The age criteria for prospective adoptive parents have been waived off in case the adoption is by a relative or by a step-parent. There has been substantial criticism of the CARA regulations 2017, as well which is worth flagging. One of the principles governing adoption has been that preference should be given to put children in adoption with an Indian citizen as the child will grow in familiar socio-economic cultural environment. However, given the diversity within the country, there is no real study that substantiates that within-country adoption would help child preserve its biological social practice.²²⁵ The conscious and deliberate attempt to promote one form of adoption leads to an unscientific hierarchy and disadvantage to some.²²⁶

²²⁵S Aarthi Anand, Prerna Chandra, "Adoption Laws Need For Reforms" 37, *EPW* 3891(2002).

²²⁶*Ibid.*

4.51 CARA functions as information centre both at the pre-adoption stage and post adoption stage. It cooperates with the diplomatic missions abroad to watch over the welfare of children given in inter- country adoption.²²⁷ The new online method provided by the CARA regulations, however, also has its loopholes as it is based on an image-based approach (photos of adoptive children will be put on CARA website along with child's study and medical examination) this can be seen as being insensitive to children put in for adoption and also unfair to the prospective adoptive parents who do not have access to online communication or familiarity with English language. Further, it is very impersonal method. The new CARA guidelines therefore leave gaps provoking more deliberation and adjustments. The long-term goals of finding homes for disabled children and older children, and motivating more citizens to adopt requires focus.²²⁸

4.52 It can be said that the Juvenile Justice (Care and Protection of Children) Act 2000 and its subsequent amendment in 2006, 2011, and re-enactment in 2015 is a major step towards recognition of a child-centric legislation which allows for adoption of orphans, abandoned and surrendered children by parent/s irrespective of their religious status. Juvenile Justice Act 2015 spells out a detailed procedure for adoption providing for accountability, transparency and auditability of children entering into the adoption stream.

4.53 At the same time this process of adoption is riddled with corruption lack of administration sensibility and pressure of political appointees without the required expertise in regulatory bodies which needs to be addressed. Given the number of babies waiting to be adopted, adoption agencies strongly advocate the creation of a robust

²²⁷ See CARA Regulations 2017, chapter IV Adoption Procedure for Non-Resident Indian, Overseas citizen of India and Foreign Prospective Adoptive Parents

²²⁸ Editorials, "Adopting a New Approach" *EPW* 50, Issue 45-46, 2015.

and clear adoption law with the choice available to all citizens to adopt.²²⁹

4.54 In *Re Adoption of Payal @ Sharinee Vinay Pathak*²³⁰ a question arose before the Bombay High Court, whether a Hindu couple governed by the Hindu Adoptions and Maintenance Act, 1956, with a child of their own can adopt a child of the same gender under the provisions of the Juvenile Justice Act of 2000. the Bombay High Court observed:

Adoption is a facet of the right to life under Article 21 of the Constitution. The right to live that is asserted is, on the one hand, the right of parents and of individual women and men who seek to adopt a child to give meaning and content to their lives. Equally significant, in the context of the Juvenile Justice Act, 2000, the right to life that is specially protected is the right of children who are in need of special care and protection. The legislature has recognized their need for rehabilitation and social integration to obviate the disruptive social consequences of destitution, abandonment and surrender. There is legislative recognition of adoption as a means to subserve the welfare of orphaned, abandoned and surrendered children.

4.55 The court on the question of conflict between the Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice Act, 2000 stated that both must be harmoniously construed observing:

The Hindu Adoptions and Maintenance Act, 1956 deals with conditions requisite for adoption by Hindus. The Juvenile Justice Act of 2000 is a special enactment dealing with children in conflict with law and children in need of care and protection. While enacting the Juvenile Justice Act 2000 the legislature has taken care to ensure that its provisions are secular in character and that the benefit of adoption is not restricted to any religious or social group. The focus of the legislation is on the

²²⁹ Editorial, "Expanding Adoption laws" 45 *EPW* 8 (2010).

²³⁰2010(1) Bom CR434.

condition of the child taken in adoption. If the child is orphaned, abandoned or surrendered, that condition is what triggers the beneficial provisions for adoption. The bar on adoption of same sex child in the Hindu Adoption and Maintenance Act will pave the way for Parents to look to a more secular provision like the JJ Act 2015.

4.56 “Best Interest of the Child” has been the guiding principle in deciding the adoption and custody matters which is a progressive step in the broader perspective of having uniformity in adoption laws. India is signatory to various Conventions and covenants relating to a Child. One such being the *Declaration on Social and Legal Principles relating to Protections and Welfare of Children with Special Reference to Foster Care and Adoption Nationally and Internationally*²³¹, Article 3, 4 and 15 of the Convention places emphasis on Foster and Adoption where child’s parents are unavailable. India is yet to frame a full legislation exclusively dealing with Adoption.

4.57 The major flaw with the Act 2015 is that the Act is primarily drafted for rehabilitation and reformation of delinquent juveniles. It may incidentally deal with the concept of adoption but it is inadequate in addressing the jurisprudential questions on adoption. The Commission strongly suggests the use of the term ‘parents’ in place of ‘mother and father’ in adoption provisions under the JJ Act, so as to enable individuals of all gender identities to avail of the Act.²³² Importantly, the Commission also recommends that the word ‘child’ should replace son and daughter so as to ensure that intersex children are not excluded from being adopted.

4.58 It is further suggested that let the Juvenile Justice Act 2015 remain the central statutory law on adoption and this can be resorted to by the parents who wish to adopt. Juvenile Justice Act 2015 caters

²³¹ 41/85, came into force on December 3rd 1986.

²³² Consultations with organisations such as LABIA, Forum Against Oppression of Women showed valuable studies on ways in which the provisions could be made more inclusive.

to the need of child's right to a family and is applicable to all irrespective of caste, creed, religion or region.

Inheritance Rights of the Adopted Child

4.59 A look at the definition of "adoption" in the definition clause in Act 2015 gives us a quite fair idea that the adopted child is equated with a biological child and is entitled to same rights and privileges that a biological child will get.²³³ Also after Act 2015 has come into force the question of inheritance has been well settled. Article 63 states that:

A child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family: (emphasis added).

4.60 So combined reading of the definition of adopted child and section 63 of the Act 2015 suggests that the adopted child is kept on a same pedestal as a natural born child and shall be subject to same rights and obligations as are bestowed on the natural born child.

Inheritance Rights from Step Parents

4.61 Under the present law child or children of spouse from an earlier marriage surrendered by the biological parent can be adopted by the step parent. In case of "step-parent adoption", the couple including one of the biological parents will have to register with Child

²³³For detailed discussion of a natural Heir see Chapter on inheritance and Succession.

Adoption Resource Information and Guidance System. They will also need consent of other biological parent for adoption and file application in court for adoption order. Once the formalities are completed, the adopted child of the step parent will have the same rights as that of a biological child which will include the right of inheriting the property of step parent.²³⁴

4.62. It is important to see the adoption from the humanitarian perspective rather than through the lens of religion.²³⁵ For individuals unwilling to adopt for religious reasons, it is suggested that that personal law be left untouched, however, for those willing to adopt, the option should remain open. It was held by the Kerala High Court that right of a couple to a child is a constitutional right which flows from Article 21.²³⁶ However the same was not approved by the Supreme Court in *Shabnam Hashmi v. Union of India*²³⁷ wherein the court stated that now is not an appropriate time for the 'right to adopt' and 'right to be adopted' to be declared as a fundamental right or that it comes within the preview of Article 21 of the Constitution, however, the Court showed the way forward for willing couples of all religions to adopt. In *Stephany John Backer v. State*²³⁸ the Supreme Court relaxed the rigour of the guidelines of the Central Adoption Resource Authority, as the proposed adoption was beneficial to the child.

4.63 The JJ Act 2015 serves the citizen's interest and is a welfare legislation which must be resorted to by all till the time something substantial on adoption is placed on the statute books. Given the extremely high instances of child abuse in the country, it is understandable that the law on adoption has remained strict, However, the procedures should not be so tedious as to discourage

²³⁴ See Adoption Regulations 2017, rule 52

²³⁵ Prema Chandra and S Arthi Anand , " Adoption Laws Need Reform" 37 *EPW*, Issue 38, 2002.

²³⁶ *Philips Alfred Malvin v. YJ Gonsavalis & Ors*, AIR 1999 Ker 187.

²³⁷ *Shabnam Hashmi v. Union of India* , AIR 2014 SC 1281.

²³⁸ AIR 2013 SC3495.

couples from adopting. The current law even after the amendments under the Act 2015 does not permit a male adult to adopt a female child. It is suggested there should be a provision of adoption to a single parent irrespective of gender and gender identity of the child as well as the parent. The Commission urges that there is a need to have further studies into why and how adoption by single male has been dealt with globally so that it can be incorporated in the national framework on adoption.

MAINTENANCE OF CHILDREN

4.64 Maintenance can be defined as the periodic monetary sum paid by one spouse for the benefit of other on separation or on dissolution of marriage it is also referred to as alimony or spousal support. It also means amount payable by a parent to his child for his personal living expenses and also means the support one person is legally bound to give to another for their living.

4.65 The concept of 'maintenance' in India is covered under section 125 of the Code of Criminal Procedure, 1973 and under laws relating to marriage and divorce as well as under various personal laws. This concept further originates from Article 15(3) of the Indian constitution which envisaged that the State can make special provision for women and children. This is further reinforced by Article 39 of the Constitution, that states that the State shall direct its policy towards ensuring that all citizens, both men and women have equal access to means of livelihood and children and youths are given facilities, opportunities in conditions of freedom and dignity.²³⁹

²³⁹ Wandaia Syngkon, "Maintenance For Wife And Children Section 125 of the Code of Criminal Procedure" 6 JBM & SSR.

HINDU LAW

4.66 The law of children's maintenance applicable to Hindus, Jains, Buddhists and Sikhs, is contained in the Hindu Adoptions and Maintenance Act, 1956²⁴⁰ and Hindu Marriage Act 1955²⁴¹.

4.67 Section 20 of Act 1956 specifically deals with the maintenance of children and aged parents. It imposes an obligation upon the parents equally to maintain the children, legitimate and illegitimate, and daughters till they get married.²⁴² In *State of Haryana v. Santra*, AIR 2000 SC 1888, the court observed that the obligations to maintain these relations is personal, legal and absolute in character and arises from the very existence of the relationship between the parties. A claim for maintenance under the section can be made by an illegitimate child born of adulterous intercourse,²⁴³ or a child born of a void marriage.²⁴⁴

4.68 Section 19 of the Act 1956 imposes, on the Hindu father-in-law, an obligation to maintain his widowed daughter-in-law, whether minor or major, if the latter cannot maintain herself out of her own income or out of her late 'husband's estate or her parents' estate or from her own son or daughter or their estate.²⁴⁵

4.69 The obligation is, however, subject to his having a coparcenary property in his possession so, if he has considerable self-acquired property or income, but no ancestral property, he need not provide any maintenance to his widowed daughter-in-law, even if minor and destitute. However, the Punjab and Haryana High Court has stated that she is entitled to claim maintenance from the father-

²⁴⁰ The Hindu Adoption and Maintenance Act, 1956, Act 78 of 1956.

²⁴¹ The Hindu Marriage Act, 1955 Act 25 of 1955.

²⁴² Ibid.

²⁴³ *Kalla Maistry v. Kanniammal*, AIR 1963 Mad 148.

²⁴⁴ *Sollomon v. Jaini Bai*, AIR 2004 Mad 210.

²⁴⁵ Ibid.

in-law's self-acquired property or from his donee.²⁴⁶ Also if the father in law is dead the obligation will not pass on to the mother-in-law²⁴⁷.

4.70 Under section 24²⁴⁸ of Act 1956 a Hindu child who ceases to be a Hindu by conversion to another religion loses all his right to claim maintenance from anybody. This provision seems to be incorrectly positioned and it is conflict with the Caste Disabilities Removal Act, 1850.

4.71 In case of marriage outside one's religion, daughters were frequently disentitled from inheritance if they changed their religion, and it remained unclear under what personal law, such a case would be decided if property or maintenance were to be claimed. This also dissuaded Muslims from registering their marriage because registration meant that succession law would apply differently. To address this, we have dealt with the problem of maintenance under chapters on marriage and succession laws. The changes to maintenance have to be read along with provisions such as 'community of property acquired after marriage' in deciding divorce and the various amendments to succession and inheritance laws.

4.72 The Hindu Marriage Act 1955 also deals with the Maintenance of Children. Section 26 of the Act 1955, empowers the courts to grant various remedies relating to maintenance, education, and custody of the children. The term children under this section seems to include not only legitimate children but also those deemed to be legitimate by operation of section 16,²⁴⁹ and also those children whose parent's marriage was the subject matter of any proceedings under Hindu Marriage Act. The test of jurisdiction under the present section is the parenthood not the legitimacy of the child. The

²⁴⁶*Balbir Kaur v. Harinder Kaur*, AIR 2003 P&H 174.

²⁴⁷*Jagdev Singh v. Paramjit Kaur*, 2017(2)RCR(Criminal)272.

²⁴⁸See section 24:Claimaint to maintenance should be a Hindu.

²⁴⁹See section 16:Legitimacy of children of void and voidable marriages.

children's best interest should be given the foremost importance while dealing with the above issues.²⁵⁰

4.73 Under Special Marriage Act, 1954, a similar provision exists which empowers the court to pass order regarding custody, education and maintenance of children while entertaining the matrimonial dispute.²⁵¹

MUSLIM LAW

4.74 Under Muslim Law maintenance has been defined as follows:

The Arabic equivalent of maintenance is *Nafqah*, which literally means what a person spends for his family. In its legal sense maintenance signifies and includes three things (i) Food (ii) Clothing (iii) Lodging. Fatwa-i-Alamgiri says "Maintenance comprehends (sic) food, clothing and lodging, though in common parlance its limited to first."²⁵²

4.75 It is the father who has the absolute liability to maintain his children and is not affected by his indigence so long as he can earn. He is bound to maintain them, even if they are in their mother's custody. A father is liable to provide maintenance to (a) minor children of either sex (b) un married daughter (c) married daughter if she is poor (d) Adult son, if he is indigent.²⁵³

4.76 A father is not bound to provide separate maintenance to his minor son²⁵⁴ or unmarried daughter²⁵⁵ who refuses to live with him without reasonable cause. Further father's obligation is not lessened even if the child is in the custody of the mother. A father is not bound

²⁵⁰Satyajeet A Desai, Mulla Hindu Law, 1055 (Lexis Nexis 24thedn. Gurgaon 2010).

²⁵¹Section 38 Custody of Children, THE SPECIAL MARRIAGE ACT, 1954.

²⁵² Aqil Ahmad Mohammedan Law 232, (Central law agency, 25THedn. 2015)

²⁵³Ibid at 232.

²⁵⁴*Dinsab Kasimsab v. Mahmad Husen*, (1994) 47 Bom.L.R.345.

²⁵⁵*Bayabai v. Esmail*, [1941] Bom.643.

to maintain an illegitimate child but under Hanafi Law a mother is under a legal obligation to support her illegitimate minor children²⁵⁶

Children's maintenance in absence of Father

4.77 In case children are minor or adults unable to make a living, and their father dies, the obligation to provide for them falls on the grandfather.

Know that if father dies, in proportion to the share in inheritance, the child's mother and paternal grandmother will be responsible for maintenance. Grandfather will bear two-third and mother one-third expenses. According to one report only grandfather will provide maintenance²⁵⁷.

4.78 It will be applicable only when grandfather and mother will be in positions to provide maintenance. If either of them is unable, the other one will be responsible. For instance the eminent Hanafi jurist, Allama Sarkhasi observes:

If one is needy, he will be excluded, and the next heir will provide maintenance in proportion to his/her share in inheritance.²⁵⁸

4.79 Going by this principle, if grandfather too, dies, the next of kin will provide maintenance. This viewpoint is endorsed by Shafai jurists. Further if father is not there or unable to pay maintenance, grandfather will be responsible for this: Imam Shafai observes that:

Father will bear maintenance of children until they come of age, and in the case of daughter until she menstruates. After this he is not obliged. However, if the child is disabled and not able to support himself,

²⁵⁶Asaf A.A. Fayzee, *Outlines of Mohammadan Law* 215 (Oxford University Press, New Delhi, 4th edn.)

²⁵⁷ See: *Radd Al-Muhtar*, 3,614, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB] to the Commission.

²⁵⁸ See: *Al-Sharkhasi, Al-Nabsut*, 5,227, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB] to the Commission.

father will provide. Same holds true for the maintenance of grandson. If father and grandfather are not there the next of kin will have this obligation²⁵⁹.

4.80 What is implied is that the maintenance of not only grandson but also of his children and grandchildren will be provided, if he does not have anyone in the parental line who is able to provide maintenance.

4.81 Thus, it is clear from the discussion herein above that it is the obligation of the father to maintain his children, till they attain the age of puberty and in the case of daughter, it is the obligation of the father to maintain her till she is married. He is bound to maintain them even if he is indigent and the children are in the custody of the mother. The flaw here is that the father is not bound to maintain his illegitimate child. These inconsistencies in the garb of personal laws add to the plight of such children who already suffer from societal stigma.

4.82 Section 125 of the Criminal Procedure Code, 1973, (which ensures that all such destitute children are maintained by their fathers except a married daughter) binds the father to pay for the maintenance of such children. In *Noor Sabha Khatoon v. Mohd Quasim*²⁶⁰ It was held by the Supreme Court that the children of Muslim parents are entitled to maintenance under Section 125 CrPC for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females till they get married. This exclusion of married women is addressed in the section of succession.

²⁵⁹ Al-Hawi Al-Kabir, 1,484, cited in the reply submitted by the All India Muslim Personal Law Board [AIMPLB] to the Commission.

²⁶⁰AIR 1997 SC 3280.

CHRISTIAN LAW

4.83 As regards Christians, there is, like Parsis, no separate law relating to maintenance of children. However, the Indian Divorce Act, 1869 includes certain provisions relating to custody and maintenance of the children of those couples who seek judicial separation under that Act. These are contained in chapter XI. The court, hearing an application, for judicial separation, may make interim as well as final orders regarding the custody, education and maintenance of minor children. Similar powers are vested in the courts dealing with suits for dissolution of marriages or for nullity of marriages under the provisions of the Indian Divorce Act, 1869.²⁶¹

4.84 The Muslim law and the modern Hindu law (applicable also to Sikhs, Jains and Buddhists) both are quite comprehensive in regard to maintenance of children. The statutory laws applicable to Christians and Parsis deal only with maintenance of children of those parents who seek any of the matrimonial remedies. However, the provisions of the CrPC 1973, are applicable to all Indians alike. The religious as well as non-religious laws in this field suffer from some flaws as detailed in these pages above. It is desirable to bring piecemeal changes to personal laws to ensure that maintenance of children is ensured uniformly.

PARSI LAW

4.85 The provisions contained in the Hindu Marriage Act, 1955 and Special Marriage Act, 1954, relating to the custody, maintenance and education of children, were first made under the Parsi Marriage and Divorce Act, 1936. Section 49 of that Act confers the same powers on Parsi matrimonial courts as are conferred in this respect on the courts by the law of civil marriages and by Hindu law. The language of

²⁶¹Ibid.

the provisions under the three laws is nearly identical. All of them provide safeguards for the interests of children likely to be affected, through provisions under matrimonial remedies, if granted, under the relevant law. There is however, no specific statute applicable to the Parsis.

CRIMINAL PROCEDURE CODE: MAINTENANCE PROVISION

4.86 Section 125 CrPC is a reincarnation of the section 488 of the old code, CrPC 1898 at the same time widening the ambit of the section by increasing the number of dependants that can claim maintenance. It was brought in as a welfare measure to protect the weaker sections like women and children. In CrPC 1973, relevant provisions are found in Chapter IX (Section 125-128). Section 125 of the CrPC includes wife, divorced as well as not divorced, minor children, legitimate or illegitimate, father and mother.

4.87 Section 125 provides, *inter alia*, that if any person "having sufficient means, neglects or refuses to maintain his child "unable to maintain itself", a magistrate of first class may "upon proof of such neglect or refusal, order such person to make a monthly allowance for" its maintenance. The provision applies equally to legitimate as well as illegitimate children" and also both to male and female children, whether married or unmarried. Section 125 to 128 prescribe a self contained speedy procedure for compelling a person to maintain his wife, children and parents. The right of a wife and children to be maintained by the husband and by the father is a statutory right created by the Act and it is not dependent upon the personal law.²⁶²

4.88 The word 'child' has not been defined in the CrPC. It means a person who has not attained full age i.e. 18 years as prescribed by the Indian Majority Act, 1875, and who is unable to enter into a contract

²⁶²KariyadanPokkar v.KayatBeeranKutti, (1895) 19 Mad 461.

or to enforce any claim under the law. Under clause(c) of sub section (1) a child need not be a minor, but he must be by reason of physical or mental abnormality unable to maintain himself.²⁶³

4.89 The basis of application for maintenance is the paternity of the Child²⁶⁴ however, the Supreme Court in *Sumitra Devi v. Bhaaikan Choudhary* ruled that in deciding the application whether the child is legitimate or illegitimate would not consideration. An illegitimate minor child is, therefore, entitled to maintenance.²⁶⁵

4.90 In *Ramesh Chandra Kausal v. Mrs Veena Kausal* ²⁶⁶ the Supreme Court on Section 125 observed that:

It is a measure of social justice and specially enacted to protect women and children and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39. There is no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social function to fulfil.

4.91 It is notable that there is no provision in the CrPC regarding a widowed daughter who is not a minor. If such a daughter cannot maintain herself, neither can her parents nor her in-laws be compelled by the criminal courts to maintain her under the provisions of the CrPC, and this seems to be a lacuna in the Code.

4.92 Section 125 CrPC, however, also deals with 'destitution' which is different from maintenance in the sense that one need not be destitute in order to seek or claim maintenance. The question of maintenance of divorced wives under various personal laws has been dealt with in the chapter on marriage. However, for maintenance of children and parents the section continues to be relevant.

²⁶³*Nanakchand v. Chandra Kishore*, AIR 1970 SC 446.

²⁶⁴*Abdul v. Ayesha*, AIR 1960 Kerala 101.

²⁶⁵ AIR 1985 SC 765.

²⁶⁶ AIR 1978 SC 1807.

4.93 It is worth noting that financially independent daughters, married daughters, are also be able to support and maintain their parents.²⁶⁷ In *Vasant vs. Govindrao Upasrao Naik*,²⁶⁸ Criminal Revision Application No. 172/2014, the Bombay High Court held that married daughters who have financial capacity are also obligated to maintain their own parents. The court stated that when woman can inherit an equal share in property as their brothers their obligation for maintaining their own family also exists.

It is true that Cl.(d) has used the expression “his father or mother” but, in our opinion, the use of the word ‘his’ does not exclude the parents claiming maintenance from their daughter. Section 2(y) Cr.P.C. provides that the words and expressions used herein and not defined but defined in the Indian Penal code have the meanings respectively assigned to them in that Code. S.8 of the Indian Penal Code lays down that the pronoun ‘his’ in Cl.(d) of S.125(1), Cr.P.C. also indicates a female.....In other words, the parents will be entitled to claim maintenance against their daughter provided, however, the other conditions as mentioned in the Section are fulfilled. Before ordering maintenance in favour of a father or a mother against their married daughter, the Court must be satisfied that the daughter has sufficient means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain himself or herself.

Thus, maintenance of parents can be claimed from any child regardless of gender.

²⁶⁷ See *Dr. Mrs. Vijaya Arbat v. Kashirao Sawai* AIR 1987 SC 1100,

²⁶⁸ (2017) 1 HLR 169.

5. INHERITANCE AND SUCCESSION

5.1. The term ‘inheritance’ has been defined in Black’s Law Dictionary as, “a. Property received from an ancestor under the laws of intestacy; b. Property that a person receives by bequest or devise.”²⁶⁹ The dictionary, further, defines ‘succession’ as, “the acquisition of rights or property by inheritance under the laws of descent and distribution”²⁷⁰. Succession is mainly of two kinds-

1. Intestate succession – “a. The method used to distribute property owned by a person who dies without a valid will; b. Succession by the common law of descent.” This type of succession is also termed hereditary succession, descent and distribution;
2. Testamentary succession - “Succession resulting from the designation of an heir in a testament executed in the legally required form”.

5.2. A perusal of the above definitions indicates that, ‘inheritance’ is associated with the act of receiving property, while ‘succession’ is related to acquiring rights or title in the property received by way of ‘inheritance’. ‘Inheritance’ may be termed as a means to an end, that end being ‘succession’. Sir William Blackstone maintains the distinction between ‘inheritance’ and ‘succession’ by dealing with the latter in the contexts of corporation sole, corporation aggregate, property acquired upon marriage and property acquired by way of suit or judgment. He deals with inheritance in the context of freehold estates and later in that of coparcenary property.²⁷¹ However, these terms are so closely intertwined, that for all intents and purposes, they are used synonymously. While it is true, that succession can also

²⁶⁹ Black Law’s Dictionary, 8th ed., 2004

²⁷⁰ Ibid.

²⁷¹ Wilfrid Prest (ed.), *William Blackstone: Commentaries on the Laws of England – Book II on the Right of Things* (Oxford University Press, Oxford, 1stedn., 2006).

be of 'power vis-à-vis office', in this chapter 'succession' will be dealt with in terms of 'property'.

5.3. Sir Henry Maine observes, "All laws of inheritance are made up of the debris of the various forms which family law has assumed."²⁷² The laws (statutes, customs, usages, precedents, *et al.*) pertaining to inheritance and succession followed in India are due a long impending overhaul. This chapter will deal with personal laws of Hindus, Muslims, Christians and Parsis apropos inheritance and succession and make certain suggestions after an examination of the drawbacks of each system.

HINDU LAW

5.4. Inheritance under Hindu Law can be classified into two categories – (a) traditional system, and (b) statutory.

5.5 Under the traditional system two prominent schools of Hindu law are essentially required to be analysed, namely, the *Dayabhaga* school (applicable in Bengal and Assam) and the *Mitakshara* school (applicable in rest of India). The most pronounced point of distinction between the two schools is that, traditionally, while *Dayabhaga* school based its law of succession on the principle of "spiritual benefit", entailing that those who could impart maximum spiritual benefit to the deceased would succeed, *Mitakshara* school based its law of succession on the "principle of propinquity", meaning that those nearer in blood relationship would succeed.

5.6 Under the traditional *Mitakshara* law of inheritance, the coparcenary²⁷³ could consist only of males, while *Dayabhaga* law permitted females to be a part of coparcenary as well. *Mitakshara* law created an interest in favour of sons (includes - grandson and great-

²⁷² See Smith :op cit p. 80

²⁷³ The concept is explained later in the paper.

grandson), in the coparcenary, as soon as they were conceived, and they could ask for partition during the lifetime of the father. Such property devolved by 'rule of survivorship' and not by rules of succession. The *Dayabhaga* law, on the other hand, created no such interest and the property would devolve only by succession upon the death of the father.

5.7 It is noteworthy that under the traditional *Mitakshara* law, testamentary disposition of property was not permitted. This power, however, has been granted by virtue of section 30 the Hindu Succession Act, 1956.

5.8 Having taken a brief look at the traditional Hindu law of succession, it would be appropriate to point out that the current statutory law (the Act 1956) has incorporated in itself and hence replaced, the traditional law. Under the scheme of the statutory law, the difference between the two schools stands moot, as it presents a uniform law system of inheritance applicable to all Hindus irrespective of any school or sub-school to which they belong.

5.9 The move to codify Hindu Law had met with stiff opposition from conservatives who felt that codification would dilute the age old law enumerated in the *Smritis*. Initially the idea was to bring forth a Hindu Code that abolished the concept of coparcenary and joint family system. Many members were not willing to accord equal property rights to women. Recognising this opposition from fellow Parliamentarians, Mr. Biswas, the then Law Minister remarked that:

“We male members of this house are in a huge majority. I do not wish that the tyranny of the majority may be imposed on the minority, the female members of this house.”²⁷⁴

²⁷⁴ The Constituent Assembly of India, (Legislative) Debates Vol.VI 1949 Part II in 174th Law Commission Report, para 2.6.

5.10 However, due to this opposition, both these concepts were retained by the Parliament. Consequently, section 6 of the Act 1956 allowed the gender discriminatory concept of Mitakshara coparcenary, denying women equal property rights.

5.11 In a move towards removing gender disparity, daughters, irrespective of their marital status were made the primary heir in father's property in preference to the male collaterals. However, a daughter could claim this right only with regard to his separate property and not the coparcenary property. With the 2005 amendment in the Act 1956, daughters were given the status of coparceners, there remains, however, scope of improvement in the Act 1956.

Abolition of Coparcenary

5.12 The concept of coparcenary is unique to Hindu law. Hindu coparcenary is a much narrower institution than the joint family.²⁷⁵ Coparcenary rights can only be claimed over ancestral property. A Hindu male had absolute right over one's separate property but his right over ancestral property was subject to the claims of the coparceners. Coparcenary cannot be created by parties and is purely a creature of law.²⁷⁶ Under the *Mitakshara* School of law, three generation of males from the last holder of the property constitute *Mitakshara* coparcenary. Coparceners are related to each other either by blood or adoption. Mayne defines coparceners as three generation next to the owner, in unbroken male descent, i.e., propositus, his sons, grandsons and great grandsons, all of them constitute a single coparcenary.²⁷⁷

²⁷⁵ For further discussion see Satyajeet Desai, *Mulla Hindu Law*(22ndedn.,Lexis Nexis, Gurgaon, Rep. 2017) 340; see also See *Yenumula v.Ramandora* (1870) 6 MHCR 94; *Tirumal Rao v.Rangadani* (1912) 23 MLJ 79.

²⁷⁶*Ibid*

²⁷⁷ See Mayne, *Treatise on Hindu Law & Usage*, 707 (Bharat Law House, New Delhi, 17thedn.).

5.13 One of the most important incidents of coparcenary is that coparceners acquire a right in the ancestral property by birth and doctrine of survivorship. Doctrine of survivorship means that on the death of a coparcener, the property does not pass to other coparceners by succession. Instead the probable share of other coparceners increases with every death in the coparcenary and decreases with every birth. The share of the coparceners is, thus, probable and can only be converted into fixed share by claiming partition.

5.14 In *Rohit Chauhan v. Surinder Singh & Ors.*,²⁷⁸ the apex Court observed that the property consisting of ancestral property is called a 'coparcenary property' and a coparcener is the one who shares equally with other descendants in inheritance in the estate of common ancestor. The interest of the coparceners remains in flux, it increases with the death of a coparcener and reduces with the birth in the family. **The Court further opined that until the time an ancestral property remains in the hand of a single person, it would be treated as the separate property of that person, and any alienation of the property cannot be called into question. However, as soon as an issue is born, the property will acquire the nature of an ancestral property, entitling the issue born as the coparcener.**²⁷⁹

5.15 The essence of coparcenary, under *Mitakshara* Law is 'the unity of ownership',²⁸⁰ while under *Dayabhaga* Law, it is 'unity of possession'.²⁸¹ **In the Hindu jurisprudence, coparcenary is attributed to the interpretation of 'daya' by Vignaneshwara, according to whom it is only that property which becomes the**

²⁷⁸ AIR 2013 SC 3525.

²⁷⁹Ibid.

²⁸⁰*Vellikannu v. R. Singaperumal&Anr.*, AIR 2005 SC 2587.

²⁸¹*Commissioner of Income Tax v. Prafulla Kumar Panja&Ors.*, [1993] 200 ITR 706 (Cal).

property of another person, solely by reason of relation to the owner.

5.16 Membership of a coparcenary is dynamic and not static, as fresh links are being continually added to the chain of descendants by births and earlier links are being constantly detached or removed by death.²⁸²

5.17 Coparcenary is related to the idea of 'joint tenancy'. In the case of joint tenancy, the joint owners own the property in coparcenary, where their shares cannot be ascertained before the partition of property. Each joint owner owns or has a right to the extent of his share. Joint tenants have unity of title, unity of commencement of title, unity of interest, so as in law to have equal share in the joint estate, unity of possession, as well of every part as of the whole, and right of survivorship.²⁸³

5.18 In *Uttam v. Saubhag Singh &Ors.*,²⁸⁴ the plaintiff, grandson of the deceased - *J*, claimed the suit property to be ancestral and that he was a coparcener in the same. The parties to the suit agreed to be governed by proviso of section 6 of the Hindu Succession Act 1956, as *J* had left a widow and three sons. The question that came before the Supreme Court for consideration was whether it would be the share of *J* that would be divided, keeping the joint family property intact or after the application of section 8 joint family property ceases to exist. The character of joint family property if remained intact, would further decide appellant's right to sue for the partition.

²⁸² See *Yenumula v. Ramandora* (1870) 6 MHCR 94; *Tirumal Rao v. Rangadani*(1912) 23 MLJ 79.

²⁸³ See *Commissioner of Wealth-Tax v. KantilalManilal*, (1973) 90 ITR 289 Guj.

²⁸⁴AIR 2016 SC 1169.

5.19 The Supreme Court referred to *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*,²⁸⁵ where in the presence of a widow and daughter was held as class I heirs, the Court held that the proviso to section 6 would come into play and section 6 would be excluded. The Court, also held that in order to ascertain the share of heirs in the property it was necessary to ascertain the share of the deceased in the coparcenary property. What was, therefore, required was to assume that a partition in the property, between the deceased and his coparceners, had taken place immediately before his death. This assumption once made was irrevocable.

5.20 The Supreme Court, in the case of *Uttam*²⁸⁶ observed that when section 8 comes into picture the property would devolve by *intestacy and not by survivorship*. The Court added that on a conjoint reading of sections 4, 8 and 19 of the Act 1956, it is found that once section 8 is pressed into service and the property devolves by the principles of intestacy, the joint family property loses its character as such and those who succeed, hold it as tenants-in-common, not as joint-tenants. The Court, concluded that the case would attract the proviso to section 6 in the presence of a Class I female heir and a notional partition must be assumed to have taken effect in 1973, i.e., when *J* died. The appellant would have been entitled to a share had he been born in 1973, however, he was born in 1977, so such a share could not be allotted to him. The Court held that the ancestral property, upon the death of *J* in 1973, devolved by succession under section 8 of the Act 1956, thereby losing its character of a joint family property, held by his widow and other coparceners as tenants-in-common, not as joint-tenants. Thus, a suit for partition by the appellant was held to be not maintainable.

²⁸⁵ (1978) 3 SCC 383. See also *Shyama Devi v. Manju Shukla* (1994) 6 SCC 342.

²⁸⁶ AIR 2016 SC 1169.

5.21 Although, the system of coparcenary had been an essential feature of the system of Hindu Succession, there have been views of doing away with the concept since the time of codification of Hindu Laws. In the light of the above discussion it can be deduced that the concept of coparcenary is losing its character. In fact, the broader concept of Hindu Joint Family itself had been a point of discord. The B.N. Rau Committee, i.e., the Hindu Law Committee (1941), entrusted with the task of codifying Hindu law was of the opinion that the system of Hindu Joint Family be abolished. The Report submitted by the Committee in 1947,²⁸⁷ did contain an opinion of Hon. Srinivasa Sastri to the effect:

...There is some point in the joint family system being disrupted. But the joint family is already crumbling; many in roads have been made into it; the modern spirit does not favour its continuance any longer. The choice is between the maintenance of big estates and recognition of the independence of individual members of joint family. The latter in my opinion, is a more important aim as it affords greater scope for individual initiative and prosperity.²⁸⁸

5.22 Based on the recommendations of the Committee, Kerala abolished the Joint Family System in 1975 by enacting the Kerala Hindu Joint Family (Abolition) Act, 1975.

5.23 The Law Commission of India in its 174th Report 'Property Rights of Women: Proposed Reforms under the Hindu Law' (2000), had also opined in the favour of the abolition of coparcenary. However, the report further explained that unless daughters are not made coparceners, the system cannot be abolished because that would reduce only the male descendants as tenants-in-common in the absence of joint tenancy. Now that daughters have been made a member of the coparcenary by the Hindu Succession (Amendment) Act 2005, it has brought with itself a new set of concoctions.

²⁸⁷Report of the Hindu Law Committee (1947)

²⁸⁸*Id* at 15.

5.24 This new system of coparcenary where daughters are also coparceners though necessary in light of granting equal rights to a female issue, is replete with inherent lacunae. Making daughters coparceners has decreased the shares of other Class I female heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit stands reduced. In States where the wife takes a share on partition, as in Maharashtra, the widow's potential share is now equal the son's and daughter's. But where the wife takes no share on partition, as in Tamil Nadu or Andhra Pradesh, the widow's potential share has fallen below the daughter's. Moreover, a thorough reading and interpretation of the phrase "daughter of a coparcener" in section 6 of the amended Act, reveals an undue advantage to the daughter's daughter.

5.25 To solve these anomalies, and inconsistencies now that daughters have been made coparceners like sons, the recommendation of the Law Commission in its 174th Report (2000) may be taken forward.

5.26 Therefore, it is suggested that the coparcenary be abolished at the Central level and the right in a property by birth be extinguished,²⁸⁹ by opting for 'tenancy-in-common',²⁹⁰ instead of 'joint tenancy'.

Abolition of Hindu Undivided Family (HUF)

5.27 An offshoot of the coparcenary aspect of the personal law of Hindus can be seen in the realm of taxation laws. The concept of HUF

²⁸⁹ Also suggested by the Hindu Law Committee in its Report (1947), at 13.

²⁹⁰ In *Valiyaveettil Konnappan v. Mangot Velia Kunniyil Manikkam*, AIR 1968 Ker 229, the court emphasised the distinction between the rights arising from joint tenancy and tenancy in common. It was observed that in case of tenants-in-common there is only unity of possession, not of title or interest.

finds its roots in the Hindu joint family system. According to the colonial interpretation, “HUF was a joint family that was held together by strong ties of kinship and entailed a variety of joint property relations among the members”.²⁹¹ Hence, a legal status was given to the HUF as a trading entity. In the debate on the Super Tax Bill 1917, it was proposed that HUF be recognized as a distinct category for taxation, in order to overcome the problem of the dual characteristics of being a family and a business entity. This interpretation led to the recognition of the HUF as a separate tax entity which was subsequently incorporated into the Income Tax Act 1922.

5.28 In present times, HUF is neither congruent with corporate governance, nor is it conducive for the tax regime. In 1936, the Income Tax Enquiry Report had warned of substantive revenue loss if HUF is granted special exemptions. Preferential tax treatment to the HUF has been commented upon by various other committees too in the post- independence era. The Taxation Enquiry Commission (1953-54) noted that there were certain anomalies in the tax treatment of the Hindu undivided family but came to the conclusion that it would be inexpedient to make any far reaching changes in this regard, particularly for the reason that the Hindu Code Bill was then pending before Parliament.²⁹² Then, in the ‘Final Report on Rationalisation and Simplification of the Tax Structure’, S. Bhoothalingam had stated that there has always been some scope to use the institution of the HUF as a means of lowering the tax liability of individuals and that “in economic terms it would be justifiable to restrict or diminish the tax benefits which can thus be acquired in a perfectly legal way.”²⁹³

²⁹¹Chirashree Das Gupta and Mohit Gupta, “The Hindu Undivided Family in Independent India’s Corporate Governance and Tax Regime” *South Asia Multi-Disciplinary Acad. Jnl* available at:

<http://journals.openedition.org/samaj/4300> (last visited on 22-01-2018).

²⁹²Government of India, Report of the Taxation Inquiry Commission 118 (Ministry of Finance, Dept. of Economic Affairs, 1953-54).

²⁹³*Id.* at 43

5.29 Thereby, the special status given to the entity of HUF, was only for the purpose of taxation. Now, this status if being used for the evasion of tax only. Reflecting the same concern Ramanujam, a former Chief Commissioner of Income Tax, had averred that

the government carries out any amount of amendment to the Hindu law without looking into the revenue loss caused by the recognition of the HUF as a separate taxable entity. HUF may be a boon to the taxpaying Hindu. But it is definitely a bane to government revenues.²⁹⁴

5.30 As soon as coparcenary is abolished the institution of HUF would inevitably collapse. In *Commissioner of Income Tax & Ors. v. N. Ramanatha Reddiar (HUF) & Ors.*,²⁹⁵ it was to be decided that, whether after the commencement of Kerala Hindu Joint Family System Abolition Act, 1975, Income Tax Department had right to make assessments on the HUF status of the assessed respondent. The Court held that once the entity of Joint Family is being abolished by a competent legislature, the Income Tax Department had no right to look into the status of a 'non-existing' entity.

5.31 In Direct Taxes Enquiry Committee Report 1971, i.e., Wanchoo Committee clearly stated that the institution of HUF has been used for tax avoidance.²⁹⁶ Thus, the institution of HUF was a so-called 'gift' by the British when they could not comprehend the complex socio-economic structure of the Indian families. **However, today, when it has been seventy-two years since independence, it is high time that it is understood that justifying this institution on the ground of deep-rooted sentiments at the cost of the country's revenues may not be judicious.**

²⁹⁴ T.C.A. Ramanujam, "HUF: Bane or Boon" available at: <https://www.thehindubusinessline.com/todays-paper/tp-opinion/HUF-Bane-or-Boon/article20217532.ece> (last visited on 22-03-2018).

²⁹⁵ (1997) 10 SCC 478.

²⁹⁶ Government of India, Final Report of Direct Taxes Inquiry Committee 73-75 (Ministry of Finance, 1971).

Rights of females related to agricultural land.

5.32 The 2005 amendment to the Act, 1956, by omitting sub-section (2) of section 4, has brought agricultural land within the purview of section 6 of the Act. Therefore, daughters too are now coparceners in agricultural land along with other coparcenary property.

5.33 Prior to 2005 amendment, heritable tenancy rights to agricultural land devolved under respective State laws. For example, in Uttar Pradesh, U.P. Zamindari Abolition and Land Reforms Act, 1950 (UPZALR Act), governed these rights under sections 171 to 174 of the Act. UPZALR Act governs rights related to land irrespective of whether the tenure-holder is a Hindu, Muslim, Christian or follower of any other religion.²⁹⁷

5.34 As per section 171 of the UPZLAR Act, when a *bhumidar*,²⁹⁸ or *asami*,²⁹⁹ being a male, dies, his interest in his land-holding devolves upon his heirs specified in sub-section (2). It is worthwhile to note that his widow, unmarried daughter and male lineal descendant receive equal shares (section 171 (2)(a) read with sub-section (1)(i)). Even a married daughter is included in the inheritance under clause (c) of section 171(2).

5.35 Section 172(1) of the UPZALR Act, entails that a female's interest inherited from a male shall remain a limited one. However, this is not to be confused with the orthodox Hindu Law. Her estate is a limited one in the sense that upon her death or remarriage, the interest does not devolve upon her heirs but shall devolve upon the

²⁹⁷ R.R. Maurya, *Uttar Pradesh Land Laws* 223 (Central Law Publications, 21st edition, 2015).

²⁹⁸ Highest type of tenure-holder. The interest held by a *bhumidar* is permanent, heritable and transferable.

²⁹⁹ *Asami* at the bottom in the cadre of tenure-holders. Their interest is neither permanent nor transferable, but only heritable.

heirs of the last male tenure-holder from whom the female had succeeded. Except this, the Act does not restrict a female to deal with her property. She is not the holder of a life-estate as considered under English Law or under orthodox Hindu Law.³⁰⁰

5.36 Where a tenure-holder is a female and has not inherited the land from a male, then upon her death the land-holding shall devolve in accordance with the provisions of section 174 and not under section 172(1) of the UPZALR Act. Therefore, where a female makes a purchase of some land holding herself or acquires the land by gift or even by adverse possession, upon her death the property shall devolve upon her heirs and not the heirs of the last male owner.³⁰¹

5.37 It may be noted that Muslim Personal Law (Shariat) Application Act, 1937, by virtue of section 2, excludes the agricultural land, from the purview of Muslim Personal Law (Shariat).

5.38 In *Tukaram Genba Jadhav &Ors. v. Laxman Genba Jadhav &Anr.*,³⁰² the Bombay High Court relying on the judgment of the Supreme Court in *Accountants and Secretarial Services Pvt. Ltd. v. Union of India*³⁰³, observed that the section 4(2) of the Act 1956 entailed that, except for fragmentation of agricultural holdings or fixation of ceilings or devolution of tenancy rights, in respect of agricultural holdings, Act 1956 applied to agricultural lands as well. If, however, there was a local law dealing with the specific provision carved out in section 4(2) then that local law will prevail unaffected by the provisions of the Act 1956.

³⁰⁰ R.R. Maurya, *Uttar Pradesh Land Laws* 223 (Central Law Publications, 21st edition, 2015).

³⁰¹ *Smt. Phool Kunwar v. Dy. Director, Consolidation*, 1991 R.D. 82.

³⁰² (1994) 96 Bom LR 227.

³⁰³ AIR 1988 SC 1708.

5.39 On a careful reading of the referred Supreme Court judgment, the view of the Bombay High Court appears erroneous. It is submitted that para 5 of the judgment of the Supreme Court clearly states that the more harmonious interpretation would be that any subject matter that involves transfer or alienation of any property, **other than agricultural land** or devolution of any property, **other than agricultural land**, would fall under the Concurrent List and not the State List. This clearly entails that the Apex Court acknowledged that agricultural land would be an exception and would fall under the State List, not the Concurrent List (emphasis added). This dichotomy has since been resolved by the omission of section 4(2) of the Act 1956. Now, devolution of rights to agricultural lands is undoubtedly included under section 8 of the Act 1956.

Need for relocation and reconciliation of heirs

5.40 In 2008 the 204th Report of the Law Commission, 'Proposal to amend the Hindu Succession Act as Amended by Act of 39 of 2005', made certain observations regarding the locations of heirs among different classes as provided in the Schedule to the Act, 1956. The Report brought to attention five major issues that inadvertently arose after the 2005 amendment to the Act 1956. They are as follows:

1. Certain class II heirs that had been promoted to class I post the amendment in 2005, are not deleted from class II. This resulted in duplication of certain heirs which featured in both class I and class II. As per 2005 amendment in the aforesaid Act following relations *viz*:
 - Son of a predeceased daughter of a predeceased daughter (i.e. daughter's daughter's son);
 - Daughter of a predeceased daughter of a predeceased daughter (i.e. daughter's daughter's daughter).
 - Daughter of a predeceased son of a predeceased daughter (i.e. daughter's son's daughter);
 - Daughter of a predeceased daughter of a predeceased son (i.e. son's daughter's daughter)have been elevated to Class I but they are not deleted from Class II.

2. Two of the male descendants in the daughter's line are not listed as Class I heirs while their female counterparts are so listed. This omission creates 'reverse discrimination' against the male descendants.
3. 'Father' should be relocated from class II to class I as this relation is certainly closer than some of the existing relations provided in class I which even extend to the third degree. This would also be in line with objective sought to be achieved by The Senior Citizens (Maintenance, Protection and Welfare) Act, 2007. The father and mother as class I heirs may take between them one share. Section 10 is required to be amended accordingly.
4. 'Father's widow' as provided under class II should be clarified to indicate step-mother and not real/biological mother, who finds a place in class I.
5. Rewording of class I heirs in simpler terms. The revised list will read as follows:
 - Son, daughter, widow, mother and father.
 - Where any son or daughter pre-deceased the intestate, then children of such pre-deceased son or daughter, as the case may be, and widow of a pre-deceased son, if any.
 - And so on in succession among the heirs of the descending branch of successors pre-deceasing the intestate.

Thus, Section 10 may be amended accordingly.

Steps towards gender equality

5.41 In the past there have been several legislative exercises to make the traditional Hindu law of succession, more equitable in nature. Hindu Women's Right to Property Act, 1937, putting the widow of a coparcener in his place upon his death, thereby entitling her to claim her share in the coparcenary and also ask for partition if she so wanted. The most significant change at the Central level was ushered in by the Hindu Succession (Amendment) Act, 2005, by entitling the daughter of coparcener to become, by birth, a coparcener in her own right just as a son would have.³⁰⁴ Section 6 of the Act 1956 deals with devolution of interest of a Hindu in coparcenary property

³⁰⁴ Section 6(1) (a) & (b).

and recognises the rule of devolution by survivorship among the members of the coparcenary.

5.42 In *Prakash & Ors. v. Phulavati & Ors.*,³⁰⁵ the question arose whether the right of a daughter to be a coparcener would be applicable to living daughters of living coparceners as on 9th September 2005, i.e., date of enforcement of the Amendment Act, 2005, irrespective of when such daughters were born or would the amendment in section 6 of the Act 1956 be applicable to a daughter born after the said date? The Supreme Court held that this right is available to daughters living on the date of the amendment irrespective of the fact when they were born.

5.43 In *Danamma @ Suman Surpur&Anr. v. Amar &Ors.*,³⁰⁶ a suit for partition was instituted in 2002. During the pendency of the suit section 6 of the Act, 1956 was amended in 2005. The trial court decreed the suit in 2007. The question which arose for consideration of the Supreme Court, was whether the appellant daughters, since born before the enactment of 1956 Act, could not be treated as the coparceners? The alternate question was whether, after passing of the Hindu Succession (Amendment) Act, 2005, the appellants would become coparcener “by birth” in their “own right in the same manner as the son” and are therefore entitled to equal share as that of a son? The Court held that the controversy regarding the first question was settled with the “authoritative pronouncement” in *Prakash & Ors. v. Phulavati & Ors.*,³⁰⁷ adding that the rights of the appellants got crystallised in the year 2005 itself and thus the shares in the partition suit shall devolve upon the appellants as well. Regarding the second question, the Court confirmed that the amended section 6 statutorily recognises the rights of daughters as coparceners since birth. The Court added, that it is the factum of birth that creates the

³⁰⁵ AIR 2016 SC 769.

³⁰⁶ AIR 2018 SC 721

³⁰⁷ AIR 2016 SC 769.

coparcenary. Therefore, the sons and daughters of a coparcener become coparceners by virtue of birth.

5.44 The Statement of Objects and Reasons of the Hindu Succession (Amendment) Act, 2005, clearly stated that the retention of the *Mitakshara* coparcenary property without including the females in it entailed that the females could not inherit the ancestral property in the same manner as their male counterparts did. It was also said that the law, excluding the daughter from participating in the coparcenary ownership is not only gender-discriminatory but also led to oppression and violation of her fundamental right of equality guaranteed under the Constitution.

5.45 To render social justice to women, States such as Andhra Pradesh,³⁰⁸ Tamil Nadu,³⁰⁹ Karnataka,³¹⁰ and Maharashtra,³¹¹ made necessary changes, in their respective laws, giving equal right to daughters in Hindu (*Mitakshara*) law (coparcenary property), long before the Central law did.

5.46 The Central law, taking a sign from the progressive approach of these States towards gender justice, enacted the 2005 amendment to the Act, 1956. Therefore, it is evident that when it came to rights of daughters in the coparcenary property or gender justice in the law of inheritance applicable to Hindus, in general, the torch bearers were State laws whilst the Central law merely followed the suit.

5.47 It might also be worthwhile to note that *stridhana* being an absolute property of a woman with the right of disposal at her pleasure, cannot be a part of coparcenary property. Her husband or

³⁰⁸ Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

³⁰⁹ Hindu Succession (Tamil Nadu Amendment) Act, 1989.

³¹⁰ Hindu Succession (Karnataka Amendment) Act, 1990.

³¹¹ Hindu Succession (Maharashtra Amendment) Act, 1994.

any other member of his family has no right, title or control over the property held as *stridhana*.³¹²

5.48 In the spirit of gender equality, sections 23 and 24 of the Act 1956 too have been repealed by the Centre by virtue of 2005 amendment. This removed the disability of a female heir which barred her from claiming partition of a dwelling house until the male heirs chose to divide their shares. The amendment also entitled, the widows of pre-deceased sons or brothers who had remarried when the succession opened.

5.49 That being said, there is still inherent discrimination the Act 1956, which needs to be addressed. The following section deals with the loophole in the statute.

Addressing the issue of ‘self-acquired property’ of a Hindu female

5.50 Under the current scheme, if a Hindu female dies intestate, her property will first devolve upon her husband, sons and daughters (including children of predeceased son or daughter). In the absence of these heirs, the next in line are the heirs of the husband, in their absence her mother and father and in their absence, the heirs of her father. Exceptions to this are that if the property is acquired by her through her natal family, then it shall devolve first upon the heirs of her father and then on the heirs of the husband, while if the property is inherited by her through her husband or father-in-law, will devolve upon the heirs of her husband.

5.51 In case of self-acquired property of a Hindu female or property received by way of will, gift, settlement, etc. The scheme of succession provides that the property would first devolve upon

³¹² See: *Pratibha Rani v. Suraj Kumar* AIR 1985 SC 628; *Balkrishna Ramchandara Kadam v. Sangeeta Balkrishna Kadam* AIR 1997 SC 3562; and *Rashmi Kumar v. Mahesh Kumar Bhada* (1997) 2 SCC 397.

husband and children of the female intestate. In their absence, it devolves upon the heirs of the husband. In case heirs of husbands are also not present, it devolves upon the mother and father of the deceased. In their absence it devolves upon the heirs of the father and lastly upon the heirs of the mother.

5.52 Thus, the heirs of husband, including his Class II heirs, agnates and cognates have a prior claim over the property of female intestate compared to her own parents and siblings. This is in stark contrast to the scheme of succession provided for male intestate, wherein the mother of male intestate is a Class I heir and father and siblings have been made Class II heir. The parents of a man's wife are nowhere in the scheme of succession.

5.53 The constitutionality of section 15 was challenged before the Bombay High Court in *Sonabai Yeshwant Jadhav v. BalaGovinda Yadav*.³¹³ However, the court upheld section 15 on the ground of reasonable classification. It opined that:

The Constitution does not posit totally unguided non-classified quality. Equal protection under the laws is not an abstract proposition. Laws are intended to solve specific problems and achieve definite objective and hence, absolute equality or total uniformity is impossible of achievement. The governing principles of Art. 14 operate upon the filed that amongst the equal the law should be equal and be so administered. Discrimination is forbidden between the classes and persons who are substantially similarly circumstance. If the person or groups are rationally classified and such classified bears the testimony of long standing position of the personal law. then surely law can reach them differently and such different treatment would not result in discrimination.

5.54 This separate scheme of succession is an output of patriarchal society, where a woman is considered to have severed all

³¹³AIR 1983 Bom 156.

ties with her natal family on her marriage. While on one hand by making daughters coparceners, this notion has been challenged by the 2005 Amendment Act, a provision that echoes the same logic has been retained.

5.55 The marital status of a man does not affect the manner in which his property devolves; however, the marital status of women is the determining factor for ascertaining the mode of succession for her property. It is a high time that we examine this discriminatory scheme of succession of property in an age where gender equality is a cherished ideal.³¹⁴ The unjustness of this scheme became apparent in *Omprakash v. Radhacharan*³¹⁵. In this case, a woman became a widow within three months of her marriage, after which she was driven out of her matrimonial home. She went to her parent's home, received education and got employment. On her death she had various bank accounts and provident funds in her name. Her mother, filed for a succession certificate. However, the courts denied her claim as according to section 15 of the Act 1956, husband and heirs of husband have a prior claim over a married female intestate's property. Since it was the self acquired property of the deceased, section 15(1) was applicable and therefore the mother was not eligible to inherit the property of the deceased. The court while deciding this case acknowledges that this was a hard case as the deceased had never visited her in laws house and neither had they supported her after throwing her out of their house. Had it been a male in place of female, his mother being a Class I heir would have been eligible to inherit the property.

³¹⁴ See Poonam Pradhan Saxena, "Reinforcing Patriarchal Dictates Through Judicial Mechanism: Need to Reform Law of Succession to Hindu Female Intestates" (2009) JILI 221.

³¹⁵ 2009 (7) SCALE 51

5.56 A similar situation arose before the Delhi High Court in *Ganny Kaur v. State of NCT of Delhi*³¹⁶. In this case the question before the court was whether compensation granted by the State for the 1984 riot victims should be given to persons in accordance with the HAS 1956 or whether State could award compensation equitably to the next of kin without considering the scheme of the 1956 Act? In this case, compensation was awarded for the death a woman, her husband and their two children.

5.57 The court in this case held that the compensation being an ex gratia payment could not be considered property held by the deceased. Therefore, the mother of the woman and the father of the husband were given equitable compensation as they both stood in the same position.

5.58 It is argued that the logic behind classifying the property on the basis of its origin is to let the property remain in the family to which it originally belonged. However, a close analysis of section 15 shows that this is not the case. While property inherited by a female from her father devolves (in the absence of children or grand children) upon the heirs of her father, the property inherited from her mother also devolves on the heirs of father. Had the logic been to let the property remain within the originating family, property inherited from mother would have devolved on her mother's blood relatives and not relatives through marriage. The entire scheme of succession under section 15 discriminates against women and reinforces the secondary status of woman in a patriarchal society. While granting coparcenary status to females may have been hailed as a progressive step, it does not do much for the property rights of Hindu women.

5.59 The problem with 2005 Amendment Act is that it strives to bring gender neutral provisions within a gender discriminatory

³¹⁶ AIR 2007 Del 273.

framework. This has created a lot of ambiguity and contradictions in practical scenarios.

5.60 The 207th Report of the Law Commission ‘A proposal to amend section 15 of the Hindu Succession Act 1956 in case a female dies intestate leaving her self-acquired property with no heirs’ (2008), suggested addition of clause (c) to section 15(2) of the Act, 1956, in order to remedy this issue. The proposed amendment read as follows:

(c) if a female Hindu leaves any self-acquired property, in the absence of husband and any son or daughter of the deceased (including the children of any pre-deceased son or daughter), the said property would devolve not upon heirs as mentioned in sub Section (1) in the chronology, but the heirs in category (b)+(c) would inherit simultaneously. If she has no heirs in category (c), then heirs in category (b) + (d) would inherit simultaneously.

5.61 **This Commission suggests further modifications in this regard.** In case a Hindu widow dies issueless, her self-acquired property should devolve upon heirs in category (b) limited to the mother-in-law and father-in-law of the deceased female, simultaneously with heirs in category (c). If she has heirs either in (b) or (c) alone, then such heirs would inherit the property completely. If she has no heirs either in category (b) or (c), then, such property should be inherited by heirs in categories (d) + (e) simultaneously.

5.62 Gender gap in effective ownership is one of the most important reason for gender inequity.³¹⁷ Equal right of Hindu women over property will remain a distant dream till the legislature overhauls the succession scheme under the Act 1956. There is no rationale behind providing separate succession scheme for men and women. The 2005 amendment Act while claiming to be progressive with respect to coparcenary right, grossly overlooked the fact that the

³¹⁷ Meera Velayudhan, “Women’s Rights and Entitlement to Land in SouthAsia:Changing Forms of Engagements” at 4 in Kalpana Kannabiran , *Women and Law: Critical Feminist Perspectives* (Sage Law, Delhi, 2014).

primary scheme of succession under the Act, 1956 is in itself discriminatory.

Testamentary succession

5.63 Testamentary succession among Hindus has been dealt with under section 30 of the Act, 1956. The section reads as follows:

Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so [disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

5.64 It can be seen from the above that 'any Hindu' is free to dispose of any property, be it self-acquired or even his undivided interest in a coparcenary. This further entails that a widow(s) or unmarried daughter(s)/other dependants (as listed under section 21 of Hindu Adoption and Maintenance Act, 1956) (HAMA) who have no means to sustain themselves may be deprived of their share, by will, and the entire property may be assigned of to a son or anyone that the testator may choose. This *prima facie* creates an inequitable situation and a spouse/other dependant with no means of sustenance might be left with naught for survival in such scenarios.

5.65 While a widow may claim maintenance from a dependent who has inherited by way of a will, from the testator, under section 22 of HAMA, there is certainly no 'charge' created on the estate of the deceased husband (unless it has been created in the manner so provided under section 27 of HAMA).³¹⁸ In the absence of any decree or instrument providing for a charge, the widow would have no recourse against a 'transferee for consideration and without notice of

³¹⁸ See *Sadhu Singh v. Gurdwara Sahib Narike&Ors.*, AIR 2006 SC 3282.

the right' (section 39 of the Transfer of Property Act, 1882), who has no obligation to maintain her under HAMA or under CrPC, 1973.

5.66 It is hereby suggested that some portion (to be fixed by law) of the property (including self-acquired property) of a Hindu, which he or she is capable of disposing under section 30 of HSA, 1956, be reserved for widow(s)/unmarried daughter(s)/other dependants (as listed under section 21 of HAMA), to ensure that such situation does not arise.

5.67 While it may be averred that a person should have an absolute right to dispose of their self-acquired property, it is submitted that in the interest of social and economic justice as well as equity, law may affix some portion which may not be disposed of by will. This stands supported by the law laid down by the Apex Court to the effect that right to property is a constitutional right under Article 300-A, not a fundamental right under Part III of the Constitution and may very well be regulated by the State.³¹⁹

MUSLIM LAW

5.68 Muslim law of inheritance and succession can be traced to rules of succession found in the Holy Quran or in the traditions, pre-Islamic customs which received approval of the Prophet. The Mohammedan law of succession is based on Pre-Islamic customary law of succession and on the patriarchal form of family.³²⁰

5.69 There are some notable differences in two main sects of Islam. Both Shia and Sunni systems of inheritance took authoritative

³¹⁹ See *Rajiv Sarin v. State of Uttarakhand*, (2011) 8 SCC 708; *Laxman Lal v. State of Rajasthan*, (2013) 3 SCC 764; *KT Plantation (P) Ltd. v. State of Karnataka* (2011) 9 SCC 1.

³²⁰ Mulla, *Commentary on Mohammedan Law* 784, 785 (Dwivedi Law Agency, Allahabad, 2006).

sources which were almost identical but the dichotomy arose due a fundamental difference in approach to the nature of reforms effected by the Prophet. The essence of this difference was that Sunnis accepted the pre-Islamic system of agnate succession or tribal heirs as still relevant and operative, except in so far as it has been modified in certain very radical aspects, while the Shias discarded the agnate system of inheritance completely and set out to erect a totally new system on the basis of Quranic provisions.³²¹

5.70 The Quranic law and the Islamic law of inheritance (the *'ilm al-fara'id* or “science of the shares”) are best understood in the backdrop of the tribal customary law of pre-Islamic Arabia, that is, the customary inheritance practices of the nomadic Arabs living in the Hijaz prior to the rise of Islam. This tribal society was patrilineal in its structure; individual tribes were formed of adult males who traced their descent from a common ancestor through exclusive male links. The tribe was bound by unwritten rules that had evolved as a manifestation of its spirit and character. These rules served to consolidate the tribe's military strength and to preserve its patrimony by limiting inheritance rights to the male agnate relatives (*asaba*) of the deceased, arranged in a hierarchical order, with sons and their descendants being first in order of priority.³²²

5.71 The system of agnate succession as it existed in pre-Islamic Arabia, was that a man's heirs were limited to males who were related to him through the male line. Descendants were given priority to ascendants, ascendants to collateral and descendants of father to descendants of a more remote ancestor. Within each of these classes, the nearer in degree was preferred to the remote and where the two claimants were equal both in, order and degree, one related to both parents was preferred to one related only through the father.³²³

³²¹ Norman Anderson, *Law Reform in the Muslim World* 147 (The Athlone Press, London, 1976).

³²² Noel J. Coulson, *A History of Islamic Law* 9-10, 15-16 (Edinburgh, 1964).

³²³ *Id.* at 148.

5.72 To reform the tribal structure of inheritance a set of reforms were introduced. Under these, nine quota-sharers were specifically mentioned in the Quran, six of whom were women- mothers, daughters, wives and sisters of full, consanguine and uterine blood, and to these son's daughter and 'true' grandmother were added, on the principle of analogy, by Sunni jurists. The other quota-sharers were males, three of whom were named in the Quran – husbands, uterine brothers (not agnates) and fathers (who would be entitled as quota-sharers only when ousted by a son or son's son from inheriting as the nearest agnate). Here too, Sunni jurists added the paternal grandfather on the principle of analogy.³²⁴ The first essential is to give any entitled quota-sharer his or her prescribed share, which varies, and then to allot the remainder to the nearest agnate. If there is no agnate, however remote, then any quota-sharers will first take their prescribed shares and then divide the residue between them proportionately, by the doctrine of *radd* or 'return'.³²⁵

5.73 However, the Quranic reforms were short-lived. Just after Prophet Muhammad, Muslim jurists fused together the pre-Islamic tribal customary law and the Quranic inheritance. The latter imposes compulsory rules for the division of a minimum of two-thirds of every estate; bequests may not normally exceed one-third of the estate and may not be made in favour of any person who stands to inherit a share. Since the bulk of the estate was often preserved for the closest surviving male agnate, Coulson³²⁶ concluded that the tribal component within the Islamic law of inheritance had prevailed over the Quranic, nuclear family component. In his view, the Islamic law of inheritance gives superior rights to the male agnate relatives. Thus,

³²⁴ *Ibid.*

³²⁵ *Id* at 149.

³²⁶ Coulson, *cited in* David S. Powers, "The Islamic Inheritance System: A Socio-Historical approach" 8 *Arab L.Q.* 13 (1993).

the agnatic, extended family had reasserted its dominance over the nuclear family.³²⁷

5.74 Shias, on the other hand, divided all relatives into three classes: first, a class composed of descendants (irrespective of whether they were agnates or not), together with father and mother; second, a class made up of brothers and sisters and their descendants, together with grandparents and great grandparents; finally, a class which comprises uncles and aunts and great uncles and aunts and their descendants, on both, paternal and maternal side. Any claimant from the first class will exclude all others and so on. However, husband and wife will in all cases be entitled to their respective share.³²⁸

5.75 At this juncture and before proceeding further, it is necessary to state that the presumption of Hindu Law regarding joint family, joint family property or joint family funds has got to be completely kept out of mind while deliberating on Muslim Law of inheritance and succession.³²⁹ These concepts are absent in Muslim Law.³³⁰ The heirs are only tenants-in-common whose shares are well defined under the law.³³¹ The concept of right by birth in the property is absent in the Muslim Law. While the person is alive, nobody can claim right in the property merely because he is heir-apparent or heir-presumptive. Inheritance opens upon the death of a person.³³²

5.76 Muslim law does not make any distinction between movable and immovable property, concept of self-acquired and ancestral property also does not exist.³³³

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ *Shaikh Safir Mohd. v. Basir Mohd.*, AIR 1961 Ori 92. See also Mulla, at 792.

³³⁰ *Sukrullah v. Zahura Bibi*, AIR 1932 All 512. See also Mulla, at 792.

³³¹ *Mohammed Subhan v. (Dr.) Misbahuddin Ahmad*, AIR 1971 Raj 274. See also, Mulla, at 793.

³³² Mulla at 798.

³³³ Mulla, at 790, 791.

5.77 The doctrine of partial partition does not apply to Muslims as they hold the land as tenants-in-common and not as co-sharers or join-tenants.³³⁴ The division is done by metes and bounds, where specific share of heirs is already determined by the law.³³⁵ The residue, after the payment of the funeral and other expenses such as debts etc., devolves on the heirs of the deceased. The heirs succeed to the estate as tenants-in-common in specific shares.

Sunni law of inheritance

5.78 Under Sunni Law, broadly there are two classes of successors that are entitled to inherit – (a) Relations by blood and marriage, (b) Unrelated successors. Relations by blood and marriage are further sub-divided into Class I - Quranic heirs (twelve relations who have their prescribed shares), Class II - Agnatic heirs (also referred to as residuaries. All male agnates and four females who are sharers but are converted into residuaries in some cases) and Class III - Uterine heirs (distant kindred, all other blood relations).

5.79 Thereafter there are four subsidiary classes which succeed only by way of exception in the very unlikely event of absence of all from the first three classes.

5.80 The Quran deals exhaustively with the law of inheritance. The very first class consists of certain close relations of the deceased to whom a specific share is allotted. The shares are fixed and class I heirs take precedence over other two classes. However, the rule must not be conceived as creating a preferential class of heirs which takes the bulk of the property. On the contrary, on perusal of usual cases, it is found that from the whole of the property, a slice is taken out as per the dictates of the Quran and the residue (mostly being the bulk of the

³³⁴ *Mst. Haliman v. Mohd. Manir*, AIR 1971 Pat 385. See also, Mulla, at 800.

³³⁵ *Mohd. Abdullah v. Mohd. Rahiman*, AIR 1934 Mad 234. See also, Mulla, at 802.

property) goes to the heirs/residuaries. The Quranic heirs consist mainly of females barring a few exceptions. Bulk of the property, in most of the cases, is sought to be kept intact for the second class, who are mostly all males.³³⁶

5.81 The Quranic heirs consist of (a) heirs by affinity – wife, husband, and (b) heirs by blood relations – father, true grandfather, mother, true grandmother, daughter, son’s daughter, full sister, consanguine sister, uterine brother, uterine sister.³³⁷ If a woman dies leaving children or agnatic descendants, the husband is entitled to $\frac{1}{4}$ of the net estate, but if there are no children, he gets $\frac{1}{2}$ of the net estate. The wife inherits $\frac{1}{8}$ if there are children and $\frac{1}{4}$ if there are none. In case of plurality of wives, the $\frac{1}{8}$ or $\frac{1}{4}$ share is equally divided between them.³³⁸ There are primary Quranic heirs who can never be excluded completely from inheriting. They are the parents of the deceased, the spouses, and the children. Daughter receives $\frac{1}{2}$ (in case there is one daughter) and $\frac{2}{3}$ in case two or more daughters inherit collectively. If the daughter(s) co-exist with a son, she is made an agnatic heir.³³⁹ When a parent is survived by one or more sons, the children, including the daughters, act as agnatic/residuary heirs, giving the sons twice the share of inheritance than that of their sisters.

5.82 The Agnatic heirs are divided into three groups. The first group comprises of male agnatic heirs who trace their relation to the deceased by a male line (*‘aṣab binafsihī*). They are also called ‘residuary heirs in their own right’. They are divided into four subgroups. The first consists of the sons (and in their absence their male issue, irrespective of degrees removed). In the absence of this

³³⁶ Asaf A.A. Fyzee, *Outlines of Mohammedan Law* 398-399 (Oxford University Press, New Delhi, 4th edn., 1974).

³³⁷ Fyzee. *Id* at 403.

³³⁸ Fyzee. *Id* at 405.

³³⁹ Fyzee, *Id.* chart opp 404.

subgroup, the ascendants, that is, the father and the father's ascendants, irrespective of degrees removed, will inherit the residue; third, brothers (and in the absence of brothers, the brother's male issue); and fourth, paternal uncles (and their issue). Within the respective subgroups, the heir closest in degree takes priority.³⁴⁰ The second group of residuary heirs are the so-called agnatic co-sharers, also termed 'residuary heirs in right of another' (*'aṣab bi-ghayrihi*). These are female Quranic heirs who are converted into the group of residuary heirs by a male agnate related to the deceased in the same degree as themselves. Finally, there is a group of the female agnatic heirs, also known as 'residuary heirs with another' (*'aṣab ma'a ghayrihi*). They consist of the consanguine or germane sisters of the deceased and as a general principle they belong to the category of Quranic heirs.³⁴¹

5.83 In the absence of Quranic heirs and agnatic heirs, the inheritance passes to the distant relatives. Distant kindred are either female relatives or relatives tracing their relationship to the deceased through a female line.³⁴² It is believed that in terms of probability they never get a share of inheritance. They are divided into four sub-groups with each group excluding the one below in the hierarchy.

Shia law of inheritance

5.84 Unlike Sunni Law, the Shia law divides heirs on two grounds – (a) heirs by consanguinity (*Nasab*), i.e., heirs by blood relationship, and (b) heirs by special cause (*Sahbab*), i.e., heirs by marriage (husband and wife).³⁴³

³⁴⁰ Nadjma Yassari, "Intestate Succession in Islamic Countries" in Kenneth Reid, Marius de Waal, *et al.* (eds.) *Comparative Succession Law: Volume II: Intestate Succession* (Oxford University Press, 2015).

³⁴¹ *Ibid.* See also, Fyzee at 419.

³⁴² Yassari, *ibid.*

³⁴³ Mulla, at 843.

5.85 Heirs by consanguinity are further divided into three classes and each class is sub-divided into two sections:³⁴⁴

Class I – (i) Parents

(ii) Children and other lineal descendants, how lowsoever.

Class II – (i) Grandparents (true or false) how highsoever.

(ii) Siblings and their descendants how lowsoever.

Class III – (i) Paternal, and,

(ii) maternal uncles and aunts of the deceased, and of his parents and grandparents how highsoever, and their descendants how lowsoever.

5.86 Heirs by special cause are divided into two kinds – (a) heirs by marriage (*Zoujiyat*) (b) heirs by special relationship (*Wala*). The latter is not recognised in India.³⁴⁵

Evaluation of the two systems

5.87 It is abundantly clear that the Sunni system of inheritance and the Shia system of inheritance differ widely. It is so even when the starting point of both the systems is the immutable text of the Quran. The Shia system gives priority to the immediate family of the deceased setting aside the concept of Agnatic heirs which in itself was a remnant of the tribal history of pre-Islamic Arabia. Under the Shia system, no relative is solely excluded on the basis of gender alone, i.e., males and females inherit together even if males generally receive twice the share of females. Fyzee mentions that when someone questioned this disparity in the shares of males and females, Imam Ja'far al-Sadiq said,

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

A female is excused from the performance of many duties imposed by law upon a male, such as service in the holy wars, maintenance or support of relations and payment of expiatory fines, and for this reason her share of inheritance has been justly limited to half the portion of a male.³⁴⁶

5.88 It is also averred that a Muslim woman has to be maintained financially by her husband during her marital life, irrespective of whether she is rich or poor. Additionally, the obligation to maintain an unmarried or divorced female has to be discharged by her male relative, irrespective of the fact whether he is financially sound to do so or not.³⁴⁷

5.89 To summarise, following the principles of Sunnah, Sunni law gives entitlement to the male agnatic heirs, on the other hand Shia law follows principle of proximity. Sunni and Shia interpreted Quranic law from different perspectives.³⁴⁸ For Sunnis, Quranic rules are there to substantiate the traditional tribal rules of inheritances, but for Shias it constituted the fundamental principles of succession.³⁴⁹ The net result is that there are different outcomes with regard to inheritance when it comes to the one nearer to the deceased. Therefore, it has been observed that this has led to the phenomena of “religious conversions of convenience”.³⁵⁰ People in some countries such as Iraq and Lebanon have converted to Shia sect in order to fall under its scheme of inheritance, specially parents having only daughters in order to preserve their daughters’ right of inheritance against remote agnatic heirs.³⁵¹

³⁴⁶ See Fyzee, at 448.

³⁴⁷ Mohd. Altaf Hussain Ahangar, “Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal” 28 *Arab L.Q.* 134 (2014).

³⁴⁸ Richard Kimber, “The Qur’anic Law of Inheritance” 5 *Islamic L. & Soc’y* 291 (1998).

³⁴⁹ Noel J. Coulson, *Succession in the Muslim family*, 130-133 (Cambridge 1971) cited in Kimber, *Id* at 293.

³⁵⁰ Yassari, citing Lucy Carrol, “Application of the Islamic Law of Succession: Was the Propositus a Sunni or a Shi’i,?” 2 *Islamic L. & Soc’y* 24 (1995).

³⁵¹ *Ibid.*

5.90 Some of the elements of these systems can be retained, but a conversation needs to be initiated on creation of an optional statutory law which can be opted into much like how the Muslim Personal Law Shariat Application Act, 1937 was enacted as an optional legislation before it was extended to different states in the 1950s and 1960s. The codified law discussed below must also borrow from some of the laws that have been reformed in other Islamic countries.

International Islamic Inheritance Reforms

5.91 Owing to the central position of the Quran while deducing the law related to inheritance, Islamic law of inheritance has largely remained unchanged.³⁵² Beginning as early as 1943, Egypt enacted its law of inheritance. Several other countries, including Syria, Tunisia, Morocco, Iraq and Pakistan followed the suit within the next twenty years. Although several changes were made to the law of inheritance in Muslim countries, none of the changes sought to reform the Quranic prescriptions of inheritance shares or the classes of heirs created through consensus. Those laws that did challenge such prescriptions were either later amended or altogether repealed. For example, Iraq's Law of Personal Status, 1959 changed how the property of the deceased would be divided. The new law was largely of German origin which was previously in force in the Ottoman Empire.³⁵³ It allowed Iraqi citizens the right to execute a will if they wished to dispose of their property according to the traditional Islamic law of inheritance. In absence of a will, the government would divide the land according to a system that openly defied the Islamic law of inheritance. This change in the Islamic law of inheritance lasted for

³⁵² Yasir Billoo, "Change and Authority in Islamic Law: The Islamic Law of Inheritance in Modern Muslim States" 84 *U. Det. Mercy L. Rev.* 647 (2007) citing Martha Mundy, 3 "The Family, Inheritance and Islam: A Re-examination of the Sociology of Fara'id Law" in Aziz Al Azmeh (ed.), *Islamic Law: Social and Historical Contexts* (1988).

³⁵³ See Norman Anderson, *Law Reform in the Muslim World* 147 (The Athlone Press, London, 1976)

about four years. In 1963, Abd al-Karim Qasem, the erstwhile Iraqi dictator, was overthrown and one of the first things to go with him was the change in the inheritance law. This is also a good example of change not taken within the parameters of Islamic law. Such change will not gain the authenticity the law requires for it to be effective.³⁵⁴

Codification of succession law of Muslims³⁵⁵ -

5.92 It is desirable that in order to eliminate the obfuscation and to demystify the currently esoteric inheritance law followed among Muslims, a complete code, i.e., Muslim Code of Inheritance and Succession, applicable to both the sects – the Sunnis and the Shias, along all the schools falling under either, may be formulated. This would entail abolition of the Muslim Personal Law (Shariat) Application Act, 1937³⁵⁶.

Succession be based on proximity to the deceased rather than preference to male agnates heirs –

5.93 Succession should be based on the proximity to the deceased. It is hard to see the relevance of the pre-Islamic Arabian tribal system of inheritance in today's time where nuclear families are replacing extended families. It is irrefutable that preference to remote male agnatic heirs against the nearer and dearer relatives of the deceased is anachronistic. It may be observed that this lacuna is already being circumvented by many Muslim families by making transfers of property *inter vivos* by way of gifts to the closer relatives. The rules of inheritance apply to property owned by the deceased only at the time of death or at the time he enters his final sickness. Until then, the proprietor is free to dispose of the property as he wishes. Thus, a

³⁵⁴ Billoo, at 651.

³⁵⁵ It is to be noted that inheritance under Muslim Law is under challenge in Delhi High Court in *Sahara Kalyan Samiti & Anr v. Union of India* WP(C)1892/2017

³⁵⁶ Section 2 of the Act is under challenged before the Supreme Court in *Moullim Mohsin Bin Hussain Bin Abdad Al Kathiri v. Union of India*, W.P (C) No. 235/2018

proprietor who wants to exercise a greater degree of autonomy over his property gifts away a chunk of property to the ones he wishes to. This effectively decreases the quantum of property left to be divided among the heirs upon his death. This has its own drawbacks. One, the transfer is complete by way of gift, it is irrevocable. In case of a revenue generating property or a dwelling house on which owner wanted to exercise a greater degree of control, his hands get tied. Further, if the formalities of the transfer are not observed properly, the gift property reverts to inheritable property which is to be divided among heirs. Thus, the heirs have an interest in demonstrating that the transfer made by way of gift was not done properly. This creates rifts in the families.

5.94 Taking these factors into consideration, and the fact that both Shia and Sunni systems of inheritance owe their origin to a common source, i.e., the Quran, **it is suggested that a classification system of heirs may be adopted based on proximity of the relationship of the heirs with the deceased.** Class I heirs may include the spouse(s) relict, parents of the deceased, son(s) and/or daughter(s) of the deceased. Further, the Class I heirs of pre-deceased son(s) and/or daughter(s) shall take between them one share. In case there are more than one widows of the deceased, then both or all of them would take one share between themselves. Class II heirs may include the full-blood sibling(s) of the deceased, descendants of the siblings of the deceased how lowsoever, grandparents of the deceased. Class III heirs may include all other relatives. Class I heirs of the intestate may inherit the property completely, each taking one share (*per capita* distribution) to the exclusion of Class II and Class III heirs. In the absence of Class I heirs, Class II heirs may inherit the property to the exclusion of Class III heirs, with the division of shares to be done *per stripes*. In the absence of the first two classes of heirs, Class III heirs may inherit the property, with the division of shares to be done *per stripes*.

5.95 In the absence of a Code, as suggested above, the following suggestions may be adopted:

Preference to Spouse Relict –

5.96 In Tunisia the reformers, in 1959, in order to protect the interests of the nuclear family, added an addendum to Article 143 of the Law of Personal Status, 1956. They introduced the doctrine of ‘*radd*’ or return and extended it to the spouse relict on an equal footing with other quota-sharers. They also provided that a daughter or a son’s daughter will exclude any collateral. In Egypt³⁵⁷ and Syria³⁵⁸, the law gave the spouse relict priority over an acknowledged kinsman.³⁵⁹

Bequest to closer heirs –

5.97 In favour of the nuclear family a reform was introduced in Egypt,³⁶⁰ Sudan³⁶¹ and Iraq, giving the testator the right to make a complete bequest to one of his heirs (of course, within the bequeathable 1/3 parameter). This was always a part of the Shia doctrine, however, the Sunni schools either completely excluded a bequest to an heir in all circumstances³⁶² or required consent of other heirs³⁶³ before allowing it. This made it possible for a man to bequeath 1/3 of his estate to his wife, daughter or other member of his nuclear family, in addition to the prescribed share, which alone could have been inadequate.

³⁵⁷ Article 30, Law of Inheritance, 1943.

³⁵⁸ Article 288, Law of Inheritance, 1953.

³⁵⁹ See Norman Anderson, *Law Reform in the Muslim World* 147 (The Athlone Press, London, 1976) at 152.

³⁶⁰ Article 37 of the Law of Testamentary Dispositions of 1946.

³⁶¹ Judicial Circular No. 53 of 1945.

³⁶² Maliki system.

³⁶³ Hanafi system.

Orphaned Grandchildren – right of representation –

5.98 The basic principle that ‘the nearer in degree excludes the more remote’ caused a problem when orphaned grandchildren who may have been completely dependant upon their grandparents stood excluded. The right of representation (children stepping into the shoes of the deceased parent) remedies this situation. Syria and Morocco allowed the grandson of the deceased to inherit what his father would have received or one-third of the estate, whichever is less. A similar provision for the granddaughter was still lacking. Egypt and Tunisia responded to the problem by allowing either the grandson or the grand daughter to receive up to one-third of the estate. The right of representation was adopted in Pakistan as a part of Muslim Family Laws Ordinance, 1961. There, the law created a representational scheme of all grandchildren inheriting per stirpes the inheritance their parents would have received.³⁶⁴ The Indonesian Supreme Court in 1994 nudged the inheritance laws of country in a more gender-neutral direction by holding that a male or a female child of the deceased could exclude collaterals. The court interpreted “*walad*” in Quran’s verse 4:176 to mean both male and female children³⁶⁵. This interpretation can buttress future gender-neutral reforms in Indonesia as well as other countries. **Thus, it is suggested that taking from the Indonesian example, gender-neutrality be observed while classifying the heirs.**

Rights of a Childless Widow

5.99 The right of a Shia childless widow, to inherit land, also needs to be addressed and remedied. A childless widow, under the Shia law, does not take her share from the immovable property of her husband. However, she is entitled to her proper share in the value of the

³⁶⁴ Billoo, *citing* N J. Coulson, *Succession in the Muslim Family*, 145 (1971). *See also*, Anderson, at 153-154.

³⁶⁵ Decision of the Supreme Court No. 86.K/AG/1994, July 27, 1995

household effects, trees, buildings and moveable property, including debts due to the deceased.³⁶⁶ This rule, which resulted in particular hardship for women in rural area as regards the transfer of agricultural land. Only when the estate included land with buildings and/or trees could the widow claim the equivalent of her respective Quranic share of the value of the buildings and/or trees, but she could neither claim the land itself nor its value. In 2009, Iran amended this rule allowing the widow, a right to the value of immovable property, according to her share.

5.100 In view of the above, **it is recommended that a widow(s), childless or not, would be a Class I heir, according to the Code suggested earlier and would therefore inherit the property of the deceased as a Class I heir, taking one share.**

CHRISTIAN LAW

5.101 The Law of Succession that applies to Indian Christians has seen vicissitudes of its own. To briefly trace the history of law of intestate succession applicable to Indian Christians, it is imperative to segregate it into three distinct periods, *viz*, (i) pre-1865, (ii) between 1865 and 1925 and (iii) post-1925.³⁶⁷

5.102 **Pre-1865:** It was the famous case of *Abraham v. Abraham*,³⁶⁸ that established the law of succession for Christians in India. The Privy Council, in this case, observed,

When a Hindu becomes a convert to Christianity, the Hindu is no doubt released from the trammels of Hindu Law. However, in regard to matters in which Christianity has no concern, it does not of necessity (sic) involve any change of right or relation such as rights to

³⁶⁶ Fyzee, at 446.

³⁶⁷ E.D. Devadason, *Christian Law in India*, 296 (DSI Publications, Madras, 1974).

³⁶⁸ 9 M.I.A. 105

or interest in and powers over property. It is open to the convert to renounce the old Hindu Law along with the old Hindu religion which he has renounced or retain the old Hindu Law though he has renounced the old Hindu religion.

5.103 This case established that those Christians who were converted but are still following Hindu customs and manners would be governed by ancient Hindu Law of Succession. However, if a convert has completely westernised, it is for him to prove that he has adopted the western way of living, customs and laws.³⁶⁹

5.104 **1865-1925:** The Indian Succession Act was passed in (the Act 1865). The Act, as interpreted by the Courts, introduced a change in approach which had been historically followed. In *Dagree v. Pacotti San Jao*,³⁷⁰ the question arose whether those converted into Christianity would be governed by the ancient Hindu law, irrespective of the fact that the converts follow the Hindu customs. The Bombay High Court, held that unless it is proved that the deceased was a Hindu, Mohammedan or Buddhist, the Act of 1865 would apply, and not the Hindu law.³⁷¹ The same view was reiterated by the Privy Council in 1921 in the case of *Kamawati v. Digbijai Singh*.³⁷² Thus, even if a Christian convert followed Hindu usages and customs, the 1865 Act would apply. Executing a will, was the only option to devolve the property according to the Hindu Law.

5.105 **Post 1925:** In 1925, the Indian Succession Act (the Act 1925), was passed, consolidating the laws of succession. By virtue of section 29 of the Act, Hindus were exempted from the rules of succession and additionally, Muslims, Buddhists, Jains, Sikhs as well as 'others' were also exempted. The words 'any other law for the time

³⁶⁹ E.D. Devadason, *Christian Law in India*, 296 (DSI Publications, Madras, 1974).

³⁷⁰ ILR 19 Bom. 783.

³⁷¹ See also, *Ponnusami Nandan v. Dorasami Ayyan*, ILR 2 Mad. 209; *Administrator General of Madras v. Anandanchari & Ors.*, ILR 9 Mad. 466; *Tellis v. Saldhana*, ILR 10 Mad. 69.

³⁷² (1922) 24 BOMLR 626

being in force' can be interpreted in light of Article 13 of the Constitution which includes rules, regulations, notifications, customs or usage having force of law. Thus, section 29 affirmed the stand of Privy Council in the case of *Abraham*³⁷³. In the case of Coorg Christians, Khasias and Jyentengs in Khasia and Jaintia Hills in Assam, Mundas and Oraons in the Provinces of Bihar and Orissa, it was taken cognisance that they follow the ancient customary law of succession.³⁷⁴ The applicability of the Act 1925 comes into picture only when the Christians are not governed by any other customary or statutory laws. For instance, Christians in Goa, Daman and Diu are governed by Portuguese Civil Code, 1867 while those in Pondicherry are governed by customary Hindu law, the Act 1925, and the French Civil Code, 1804.³⁷⁵

5.106 State of Kerala and the *Mary Roy* case: Kerala posed a unique challenge in implementation of the Act 1925. It was formed by the enactment of State Reorganisation Act, 1956 which merged Travancore, Cochin and certain parts of Malabar. Separate laws, viz, Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1921 were applicable in Travancore and Cochin. After independence in 1947, Travancore and Cochin continued to be Princely States. It was after the signature of their rulers on Instrument of Accession in 1949, that they became part of Union as Part B States.³⁷⁶ Thereafter, Part B States (Laws) Act, 1951 was enacted for the purpose of providing for the extension of certain enactments mentioned in the Schedule including Act 1925 to Part B States and also for repealing the corresponding Acts and Ordinances then in force in the Part B States. After merger, specific provisions

³⁷³ 9 MIA 105

³⁷⁴ E.D. Devadason, *Christian Law in India*, 296 (DSI Publications, Madras, 1974).

³⁷⁵ Archana Mishra, "Breaking Silence - Christian Women's Inheritance Rights under Indian Succession Act, 1925" 4 (2015) available at: <https://www.researchgate.net/publication/291349382> (last visited on 27-02-2018).

³⁷⁶ Sebastian Champappillyae, "Christian Law of Succession and *Mary Roy's* Case" (1994) 4 SCC (Jour) 9.

were made to save the “existing laws” and the “law in force” by virtue of section 119 of the States Reorganisation Act, 1956 which resulted in three different legislations applicable to Christians in Kerala. The State Legislative Assembly of Kerala introduced, “Christian Succession Acts (Repeal) Bill, 1958 to repeal the Travancore Christian Succession Act, 1916 and the Cochin Christian Succession Act, 1921. The Statement of Objects and Reasons of the Bill of 1958 read:

[I]t is considered necessary to have a uniform law to govern the intestate succession among Christians for the whole of the State and for that purpose to repeal the Travancore Christian Succession Act and the Cochin Christian Succession Act. The Bill is intended for this purpose.

5.107 The objective of the Bill was to apply Act 1925 to all Christians in Kerala. The Bill, though lapsed, highlighted the need to bring one law of succession in the State.³⁷⁷ In *Mary Roy v. State of Kerala*,³⁷⁸ the validity of sections 24, 28 and 29 of the Travancore Christian Succession Act, 1916 was challenged. It was contended that the sections are in violation of Article 14 of the Constitution. Another issue for determination was, whether after the coming into force of the Part B States (Laws) Act 1951, the Travancore Act continued to govern intestate succession of the Indian Christian Community in the territories originally forming part of the erstwhile state of Travancore or was it governed by the Act 1925. The Supreme Court held that by virtue of section 3 of Part B States (Laws) Act, 1951, the Act 1925 extended to Part B State of Travancore-Cochin. It was further observed that, since the provisions of the Travancore Christian Succession Act, 1916 were not expressly saved by the Part B State (Laws) Act, 1951, thereby they were superseded by the Act 1925. The Act 1925 became applicable to the intestate succession of property of Indian Christian of the State of Travancore. However, the court declined to examine the provisions which affected the property rights

³⁷⁷ Mishra, at 5.

³⁷⁸ AIR 1986 SC 1011.

of women belonging to that State.³⁷⁹ The court took the view from April 1, 1951 the Travancore Act stood repealed and from the same date the Act 1925, be given effect.

5.108 Following the decision of the Supreme Court in *Mary Roy* the High Court of Kerala ruled that the Cochin Christian Succession Act, 1921 also stood repealed by the Part B States (Laws) Act, 1951.³⁸⁰

INDIAN SUCCESSION ACT, 1925

5.109 Today the Indian Succession Act, 1925 (the Act 1925) is the principal legislative measure in India dealing with the substantive law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindus and Muslims. It is also the principal legislative measure dealing with machinery of succession in regard to the testamentary and intestate succession in respect of such persons.³⁸¹ General provisions under the Act 1925 relating to intestate succession are based on the law of England, the notable features of which are: (1) there is no discrimination based on sex among the heirs, (2) there is no discrimination between persons related by full blood and those related by half blood, and (3) relations by adoption are not recognised.³⁸² Both movable and immovable property could be inherited under the Act 1925 by kindred. Kindred under the Act contemplates only relation by blood through lawful wedlock, therefore the terms ‘wife’, ‘husband’ or ‘lineal descendants’ refer to legitimate relationships. It lays uniform rule for devolution of property for both male and female dying

³⁷⁹ Archana Mishra, “Vicissitudes of Women’s Inheritance Right – England, Canada, and India at the dawn of 21st century” 58 *JILI* 493 (2016).

³⁸⁰ *V.M. Mathew v. Eliswa*, 1988(1) KLT 310; *Joseph v. Mary*, 1988(2) KLT 27.

³⁸¹ 247th Report of the Law Commission of India on “Sections 41 to 48 of the Indian Succession Act, 1925 – Proposed Reforms” (Sept. 2014).

³⁸² Report of the Committee on the Status of Women in India, Ministry of Education & Social Welfare Department of Social Welfare, Government of India, “Towards Equality” (Dec. 1974) at 494.

intestate. The shares inherited by the heirs, including female heirs, are absolute and freely alienable.

5.110 Part-V of the Act 1925, contains the provisions relating to the intestate succession. It deals with the intestate succession. Chapter I (Sections 29 & 30) of this part of the Act is preliminary while Chapter II (Sections 31 to 49) deals with 'Rules in cases of Intestates other than Parsis' and Chapter III (Sections 50-56) contains special rules for Parsi intestates.

5.111 **It is suggested that on the lines of the suggestions made pertaining to succession under Muslim Law, Part-V of the Act 1925 be appropriately amended to incorporate a three-class system of succession for Christians.** The three-class system is being suggested because it is based on ensuring that the proximal relationships of the deceased intestate are the ones who inherit the property, and only in their absence, the property devolves upon distant kindred. Moreover, this system is gender-neutral, does not differentiate between natural or adopted issue, and remedies some of the existing lacunae in the current scheme of the Act 1925, which turn out to be unfair for the widow and mother of the deceased intestate (as will be discussed in following paragraphs). In light of above, the recommended classes and their respective shares are as follows:

5.112 Class I heirs may include the spouse relict, parents of the deceased, son(s) and/or daughter(s) (natural or adopted) of the deceased. Further, the Class I heirs of pre-deceased son(s) and/or daughter(s) shall take between them one share. Class II heirs may include the full-blood sibling(s) of the deceased, lineal descendants of the siblings of the deceased, grandparents of the deceased. Class III heirs may include all other relatives. Class I heirs of the intestate may inherit the property completely, each taking one share (per capita

distribution) to the exclusion of Class II and Class III heirs. In the absence of Class I heirs, Class II heirs may inherit the property to the exclusion of Class III heirs, with the division of shares to be done per stripes. In the absence of the first two classes of heirs, Class III heirs may inherit the property, with the division of shares to be done per stripes.

5.113 In case the above suggestion is not accepted, the following issues in the Act 1925, are required to be addressed.

5.114 **Section 33:** In nutshell, this section states that the widow of the intestate would receive $1/3^{\text{rd}}$ of the property in the presence of lineal descendants of the deceased with $2/3^{\text{rd}}$ going to the lineal descendants. In case there are no lineal descendants but there are kindred, the widow will receive $1/2$ of the property, with the remaining $1/2$ going to the kindred. Finally, if there are neither lineal descendants, nor kindred, whole of the property of the deceased will go to his widow.

5.115 With regard to the first situation, it is required to be noted that in presence of lineal descendants, the share of the widow is fixed at $1/3^{\text{rd}}$. Now, even if there is just one lineal descendant, he or she gets $2/3^{\text{rd}}$ share while the widow still gets $1/3^{\text{rd}}$. This division is inherently fallacious and unfair and needs to be remedied. Even in the UK, where the intestate leaves issue, the law has been amended to provide the surviving spouse or a civil partner, personal chattels absolutely, statutory legacy,³⁸³ and then the residuary estate is divided in equal halves between the surviving spouse/civil partner and the issue of the intestate.³⁸⁴

³⁸³ 'Statutory legacy' is a concept borrowed from English Law wherein a widow is entitled to receive a fixed net sum from the deceased's estate, leaving other close surviving members.

³⁸⁴ Section 46(1)(A), (B) and (C), Administration of Estates Act, 1925.

5.116 It is suggested that the section may be so amended that the property be divided in such a manner that the widow and lineal descendants get equal shares.³⁸⁵

5.117 With regard to the second situation involving kindreds, the Law Commission of India in its 110th Report 'Indian Succession Act 1925', in 1985 highlighted the change made in the law in England, wherein, in the absence of lineal descendants, parents, brother or sister of the whole blood or issue of such brother or sister, the husband intestate's whole property passes on to the widow.³⁸⁶ The Commission had recommended that the same should be adopted in India, and section 33 should be amended accordingly. This Commission reiterates this recommendation.

5.118 **Section 33A:** The section provides for 'statutory legacy' for Christian spouses who are to inherit property in the absence of lineal descendants.

5.119 Firstly, the current understanding of this section is that it does not apply to Indian Christians and that clause (b) of section 33A(5) is an independent clause which is not to be read with clause (a).³⁸⁷ Such an interpretation has the effect of making this section inapplicable to the majority of the Christians in India, i.e., Indian Christians and makes it applicable only to a miniscule minority like Europeans and Anglo-Indians.³⁸⁸ It is well established that in order to interpret a provision, intention of the legislature must be taken into account. The Preamble to the amended section speaks of providing more liberally for the surviving spouse in the absence of lineal

³⁸⁵ See also B. Sivaramayya, "The Indian Succession Act, 1925" in K.D. Gangrade (ed.), *II Social Legislation in India* 89 (Concept Publishing Company Pvt. Ltd., New Delhi, rep. 2011) cited in Mishra – Vicissitudes, at 496.

³⁸⁶ Section 46, Intestates' Estates Act, 1952.

³⁸⁷ *Arulayi v. Antonimuthu*, AIR 1945 Mad 47.

³⁸⁸ B.B. Mitra, *The Indian Succession Act*, Sukumar Ray (ed.) 93-95 (Eastern Law House, New Delhi, 15th edn., 2013).

descendants, in case of total intestacy. This object can only be achieved if clause (b) of section 33A (5) is read together with clause (a).³⁸⁹ This way the benefit can be extended to the Indian Christian community as there appears to be no logic as to why they should be deprived of this benefit.

5.120 It is suggested that the section be redrafted to remove the ambiguity and be made explicit and unambiguous and applicable to the surviving spouse belonging to the entire Indian Christian community, in case of total intestacy and in the absence of lineal descendants.

5.121 Secondly, monetary amount of statutory legacy is a mere sum of five thousand rupees with an interest of four per cent per annum until payment, if the net value of the property of the deceased intestate exceeds the said sum. The Law Commission in its 110th Report (1985) suggested raising the amount to thirty-five thousand rupees and the rate of interest to nine per cent per annum.³⁹⁰ However, there have been no amendments made in the section till date.

5.122 The present Commission suggests that the sum as well as the rate of interest be appropriately increased, taking into consideration the fall in the value of rupee since 1926, increased cost of living etc.

5.123 Sections 42, 43, 44, 45 and 46: Sections 41-49 apply in the absence of lineal descendants. These section 42 states that if the intestate's father is living he shall succeed the property. On a simple reading this section appears manifestly unjust and gender biased. As suggested by the Law Commission in its 247th Report 'Indian

³⁸⁹ *Ibid.*

³⁹⁰ 110th Report (1985), at 56.

Succession Act' (2014), it should be reworded and 'father' should be replaced with 'parents' to include the mother within the section's ambit. In UK, the Administration of Estates Act, 1925 gives equal status to both father and mother and they have equal shares.

5.124 Additionally, the surviving parent inherits the property absolutely.³⁹¹ It is suggested that the same approach should be here and section 43 should be amended appropriately to state that if one parent of the intestate survives the other, the surviving parent should inherit the property absolutely. Likewise, section 44 should be reworded to read "Where both of the parents of the intestate are dead...". A similar amendment would be required to be carried out in section 45 to provide for the scenario where both of the parents of the intestate are dead, instead of merely the father.³⁹² If these amendments are carried out, then the current section 46 becomes redundant and may be deleted.

5.125 **Section 47:** It was suggested by the Law Commission of India in its 110th Report (1985) as well as the 247th Report (2014) that section 47 be reworded to clearly indicate that it would be operative only if at least one brother or sister survives the death of the intestate. This can be done by adding "but has left a brother or sister" after the existing words "nor mother". The present Commission reiterates this recommendation.³⁹³ Additionally, it is suggested that the words "father" and "mother" be replaced with a more gender-neutral word, i.e., "parents".

5.126 **Section 48:** The section in its current form provides for distribution *per capita*. This would entail that the death of one issue of a deceased brother or sister would extinguish the right of inheritance of his or her (issue's) descendants as his or her share would become part of the corpus that would be equally divided among other

³⁹¹ Section 46(1)(iii) and (iv).

³⁹² See 247th Report (2014), at 16.

³⁹³ See 110th Report (1985), at 62 and *Id* at 13, 18.

surviving members who are nearer in degree. Thus, the property in *per capita* distribution would not devolve upon the descendants of the deceased issue. This method of distribution is contrary to the method followed in section 47. Section 47 follows distribution *per stripes* thereby entitling the descendants of the deceased issue to equal division of the share of their deceased parent, among themselves. The Commission in its 110th Report (1985) as well as the 247th Report (2014) recommended to add an explanation clause after the section, which would read as follows:

Explanation: Where such relatives are children of or sisters of the intestate, they shall take stripes.³⁹⁴
Consequently, illustration (iv) of section 48 would change accordingly.³⁹⁵

5.127 **Testamentary disposition of property:** Section 59 governs the testamentary disposition. On lines of recommendation made regarding testamentary disposition in the case of Hindus and borrowing from the Muslim law, it is suggested the section be appropriately amended so that in the case of Christians too, some portion of the property (to be fixed by law) can be kept outside the power of disposition by will of the testator. This restricted portion may be used for the welfare and maintenance of the testator's widow, unmarried daughter, minor son or elderly dependant parents. In the event the maintenance may be claimed by these dependants through section 125 of the CrPC, it might be more judicious to allow them to claim it as a matter of right, after fulfilling some basic procedural requirements (determined by law), without making them to wait in long queue of the justice delivery system. Additionally, this would ease the burden of the overburdened courts.

³⁹⁴ See 110th Report (1985), *id.* at 63 and 247th Report (2014), *id.* at 19, 20.

³⁹⁵ *Ibid.*

PARSI LAW

5.128 Prior to 1837, the English Common Law, subject to certain exceptions related to marriage and bigamy, applied to the Parsi community in India. Thus, the law of primogeniture³⁹⁶ in the male line that prevailed in England, governed the intestate succession among Parsis in India. Thereafter, Parsee Chattels Real Act 1837 (Act 9 of 1937) declared that on and from 1st June 1837, all immovable properties within the jurisdiction of any court established by His Majesty's Charter, shall, as far as the transmission of such property on the death and intestacy of any Parsi or by virtue of the last will of any such Parsi, be taken to have been in the nature of chattels real,³⁹⁷ and not of free-hold. After Act of 1837 the Parsis were free from the operation of the law of primogeniture, they were, in cases of intestacy, governed by English Statute of Distributions.³⁹⁸

5.129 In 1859, the Managing Committee of the Parsi Law Association framed a "Draft Code of Inheritance, Succession and other matters" with an objective to have a law in accordance with their customs and traditions. A Commission was appointed by the Government of Bombay, in 1861, to look into the matter. The Commission's recommendations resulted into the introduction of two Bills-The Parsi Marriage and Divorce Bill and The Succession and Inheritance (Parsis) Bill- in Legislative Council of India in 1862. The Parsee Intestate Succession Act was passed in 1865, replacing the Parsee Chattels Real Act, 1837. Later, when Indian Succession Act was passed in 1925, the provisions of the 1865 Act were incorporated verbatim. Thereafter, the 1865 Act was repealed.³⁹⁹

³⁹⁶ A rule of inheritance where the oldest male child inherits the estate to the exclusion of younger siblings.

³⁹⁷ A real property interest that is less than a free-hold such as a leasehold. (Black's Law Dictionary, 8th edition, 2004).

³⁹⁸ B.B. Mitra, *The Indian Succession Act*, Sukumar Ray (ed.) 93-95 (Eastern Law House, New Delhi, 15th edn., 2013).122 at 108-109.

³⁹⁹ *Ibid.*

Intestate Succession Among Parsis In India

5.130 Sections 50-56 of the Indian Succession Act, 1925 (the Act 1925), deal with intestate succession among Parsis in India. These provisions were amended in 1939 and thereafter in 1991 to remedy the problem of gender discrimination.

5.131 It may be noted that the Law Commission of India in its 110th Report (1985) recommended that the impugned provisions should be amended taking into consideration the Constitutional and fundamental rights relating to gender equality. The erstwhile provisions were patently discriminatory giving sons double the share of daughters, where the intestate was a male.⁴⁰⁰ Even among relatives mentioned in Part I and II of Schedule II of the Act 1925, the males took double the share than that of females. Now this situation stand remedied, and sons and daughters, receive equal shares upon death of the intestate.

5.132 Section 50 lays down general principles that are applicable to intestate succession among Parsis. In clause (a) it is provided that there is no distinction between those who were born in the lifetime of the intestate and those who were subsequently born alive. This is based on the dictum that a child *en ventre* is a child *in esse*. Clause (b) lays down that the share of a lineal descendant of the intestate would not be taken into account in division of assets, if he or she predeceased the intestate without leaving a widow/widower, or, his or her own lineal descendant, or, the latter's widow/widower. Clause (c) debars a widow/widower of any relative of the intestate from inheritance, if he or she remarries during the lifetime of the intestate. This particular clause echoes the sentiments of the Parsi community and was given effect in 1939 as it was decided in the case of *Tehangir*

⁴⁰⁰ See 110th Report (1985), at 64-66.

v. *Pirojbai*,⁴⁰¹ under Parsi Intestate Succession Act, 1865, that the widower (son-in-law) will receive his deceased wife's share even though he had remarried, in the absence of a provision to the contrary.

5.133 Section 51 deals with the division of the intestate's property among the spouse relict, children and parents. It lays down that the spouse relict and each child would receive the property in equal shares. In the absence of the spouse relict, the children would inherit the property in equal shares. If the parent(s) of the deceased intestate are alive then each parent(s) would be entitled to inherit a share equal to half the share of each child.⁴⁰²

5.134 **Section 52 has been omitted from the current scheme.** Under the original section 52, where a Parsi died intestate leaving children but no widow, each son received a share four times the share of each daughter.

5.135 Section 53 of the Act deals with the division of share of a predeceased child of the intestate where the latter has left lineal descendants. Clause (a) lays down that where the predeceased child was a son, his widow and children take shares in a manner as if he had died immediately after the intestate's death. However, a proviso to this clause states that if the predeceased son leaves behind a widow, or, the widow of the lineal descendant of the predeceased son but no lineal descendant (i.e., the lineal descendant of the predeceased son is himself deceased but has left behind his widow), the widow will get her distributive share while the residue will be treated as belonging to the intestate without taking into account the share of the predeceased son. The widow's share is not contingent upon the existence of the child of predeceased son. This proviso gave effect to the decision in

⁴⁰¹ 11 Bom. 1 C 4, 69, 73

⁴⁰² See *Perviz Sarosh Batliwalla v. Mrs. Viloo Plumber*, AIR 2000 Bom 189.

Mancherji v. Mithibai,⁴⁰³ wherein it was held that a childless widow of a predeceased son was entitled to a moiety in the share which her husband would have got had he been alive at the time of the intestate's death. Clause (b) lays down that if the predeceased child of the intestate was a daughter, then her share will be equally divided among her children. This would entail that the husband of the predeceased daughter of the intestate does not inherit from his wife's share.

5.136 Clause (c) states that if the child of a predeceased child has also passed away during the lifetime of the intestate, his or her share would be divided the same way as provided in clauses (a) or (b), as the case may be. Clause (d) lays down that where a remoter lineal descendant has predeceased the intestate, the provision of clause (c) will apply *mutatis mutandis*.

5.137 Section 54 deals with the scenario where the intestate leaves no lineal descendant but leaves a spouse relict or a spouse relict of any lineal descendant. Assuming W1 to be the spouse relict of the intestate and W2 to be the spouse relict of the lineal descendant of the intestate, clauses (a) to (e) can be summarised as follows:

- (a) Only W1 and no W2: W1 will take half the property,
- (b) Both W1 and W2: both receive one-third property. If there are more than one W2 then one-third property will be equally divided among them;
- (c) No W1 but one W2: W2 will get one-third property. If there are more than one W2, two-thirds property will be divided among W2s in equal shares;
- (d) The residue that remains after (a) or (b) or (c), shall be distributed, in order, among relatives of the intestate mentioned in Part I of Schedule II. The distribution shall be in such a manner that males and females who are in the same degree of propinquity shall receive equal shares;

⁴⁰³ (1877) ILR 1 Bom 506.

- (e) In case there are no relatives to receive the residue as mentioned in the above clause, the whole residue shall revert to relatives mentioned in clauses (a) to (c).

5.138 The old section 55 was replaced in 1991 with a new one to ensure equality of genders by making the share of females in the same degree of propinquity equal to that of the males. Section 55 applies when a Parsi intestate dies leaving behind neither lineal descendants, spouse relict nor spouse relict of any lineal descendant. In such a case the property devolves upon the relatives mentioned in Part II of Schedule II, in order of their mention.

5.139 It may be noted that the first six entries of Part II overlap with the six entries of Part I. However, Part I is applicable only when section 54 is attracted, i.e., for distribution of residue left after the W1 or W2 or both, as the case may be, have already received their shares. On the other hand, Part II applies when section 55 is attracted, i.e., there is no W1 or W2 or any lineal descendant of the intestate in existence. Thus, it will be the common first six entries that will be entitled to receive the intestate's property (in order of their mention) in case the intestate dies leaving behind neither W1, W2 nor any lineal descendant, and only then entries seven onwards will come to inherit (again, in order of their mention).

5.140 Section 56 is a residuary section and lays down that in case there is no relative of the deceased Parsi intestate, that would attract any of the previous sections of Chapter III, then the intestate's property shall be divided among relatives who are in nearest degree of kindred to him. In *Hirjibai v. Barjori*,⁴⁰⁴ the court held that the words 'relative' and 'kindred' have been used synonymously, in the legislative scheme.

⁴⁰⁴ ILR 22 Bom 909.

5.141 This discussion sums up the law of intestate succession among the Parsi community in India. It may be noted that, after 1991 amendment , the sections are well-balanced and lay down that the shares of males and females in the same degree of propinquity would be equal. However, one issue that needs to be addressed is that the definition of 'Parsi' has not been provided in the Act, 1925. The term has been defined in the Parsi Marriage and Divorce Act, 1936, to mean a Parsi Zoroastrian. The children of a Parsi father even with a non-Parsi mother would be Parsis if they are admitted into and profess the Zoroastrian religion. The same does not apply to the children born to a Parsi mother and a non-Parsi father. Such children would not be Parsis. Even the Parsi mother ceases to be a part of the Parsi community if she marries outside the community. Consequently, the children are not entitled to inherit the property of a deceased Parsi intestate. This situation needs to be remedied. As previously suggested in the chapter dealing with marriage and divorce, in the present paper, the Parsi woman should be allowed to retain her identity and status of a Parsi even if she marries outside the community. Consequently, it is suggested that, the children born of such marriage should be allowed to inherit if they choose to profess Zoroastrian religion and not to adopt their father's religion.

5.142 **Testamentary disposition of property:** Section 59 governs the testamentary disposition in case of Parsis too. On lines of recommendation made regarding testamentary disposition in the case of Hindus and Christians, borrowing from the Muslim law, it is suggested that the section be appropriately amended so that some portion of the property (to be fixed by law) can be kept outside the power of disposition by will of the testator. This restricted portion be earmarked for the welfare and maintenance of the testator's widow, unmarried daughter, minor son or elderly dependant parents.

Inheritance rights of illegitimate children

5.143 The 110th Report (1985) of the Law Commission had proposed that the definition of 'child', should be provided under the Act 1925 and include:

- (a) An adopted child, in the case of any one whose personal law permits adoption.
- (b) An illegitimate child.

5.144 The Commission was of the opinion that excluding adopted and illegitimate children from the definition of 'child' and disentitling them from inheritance goes against modern socio-legal ethos and the disentitles an innocent child. While the status of adopted children as regards inheritance has been dealt with under the chapter pertaining to 'Adoption and Maintenance', in the present paper, in this part the inheritance rights of illegitimate children are discussed.

5.145 The Hindu Marriage Act, 1955, (HMA, 1955) under the amended section 16 (w-e-f 27-05-1976) recognises, children born of marriages which are null and void under section 11 or voidable under section 12, as legitimate. However, section 16(3) states that such children will not have rights in or to the property of any person, other than the parents, which they would have been incapable of possessing but for the passing of the Act.

5.146 The Supreme Court in *Jinia Keotin & Ors. v. Kumar Sitaram Manjhi & Ors.*,⁴⁰⁵ observed that as per section 16(3) the deemed legitimate children will have property right only in the self-acquired property of the parents. This view was followed in several other cases, until the Supreme Court interpreted the section differently in *Revanasidappa & Ors. v. Mallikarjuna & Ors.*,⁴⁰⁶ wherein the Court held that if a child is deemed to be legitimate, his/her right cannot be

⁴⁰⁵ (2003) 1 SCC 730. See also, *Neelamma & Ors. v. Sarojamma & Ors.* (2006) 9 SCC 612; *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*, AIR 2010 SC 2685.

⁴⁰⁶ (2011) 11 SCC 1.

restricted to inherit only self-acquired property of the parents, but he/she is also entitled to ancestral property. The court observed that:

The relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights, which are given to other children born in valid marriage. This is the crux of Section 16(3).

5.147 It further opined that the legislature used the term 'property' without specifying it to be ancestral or self-acquired. Considering the fact that a restrictive interpretation of the word property under section 16(3) would be counter-productive to the benevolent intent of the amending Act, the Court held that it should include ancestral property within its ambit. Though the Court dissented from its judgment in *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*,⁴⁰⁷ it deemed it appropriate to refer the matter to a larger bench. It may be noted that though the Court was of the view that illegitimate children will be entitled to all the rights which are afforded to children born in a valid marriage, such a view cannot be said to apply to children born of live-in relationships, for certain reasons discussed in the following paragraphs.

5.148 Section 16 of the HMA, 1955, comes into play only to legitimise children born of void and voidable marriages. It may be noted that children born in live-in relationships which are in the nature of marriage, i.e., long-term cohabitation of partners, are deemed to be legitimate,⁴⁰⁸ and would thus, attract the legal fiction of section 16(3). On the other hand, children born of live-in relationships of a transient nature, i.e., of a short duration, which would not entail the presumption of marriage under section 114 of the Indian Evidence Act, 1872, would be outside the purview of section 16 as such a relationship cannot be categorised as either a void or voidable

⁴⁰⁷ AIR 2010 SC 2685.

⁴⁰⁸ See *S.P.S. Balasubramanyam v. Suruttayan*, AIR 1992 SC 756.

marriage and in the absence of a law on this point would continue to be bastardised. So, it appears, that either ways the legal fiction created by section 16 of the HMA, 1955, would not apply to children born in live-in relationships.

5.149 Therefore, it is recommended that the Parliament should enact a law to address the issue of legitimisation of children born of live-in relationships that fail to reach the threshold of a deemed marriage. Further, such children should be entitled to inherit the self-acquired property of their parents.

5.150 In Mohammedan Law, where the paternity of a child is under doubt, the acknowledgment of the father confers legitimacy on the child (*iqrar*). In this system, legitimacy and legitimisation have to be distinguished.⁴⁰⁹ While legitimacy is a status that results from certain facts, legitimisation is a proceeding which creates a status which did not exist before.⁴¹⁰ Where a person has been proved to be illegitimate, no statement made by another man that he is his child can confer legitimacy on the person, however, in the absence of such proof, the statement or acknowledgment is enough substantive evidence that the person so acknowledged is a legitimate child of the man.⁴¹¹

5.151 If a woman gives birth to an illegitimate child, not only would the child be excluded from inheritance but also the woman would be punishable for *zina* (illicit intercourse).⁴¹² An illegitimate child, under Hanafi law, cannot inherit from father, but they may inherit from mother. In *Bafatun v. Bilaiti Kanum*,⁴¹³ the Court that where a woman under Hanafi law died leaving behind a husband and an illegitimate

⁴⁰⁹ Fyzee, at 189.

⁴¹⁰ *Ibid.*

⁴¹¹ *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 234.

⁴¹² Fyzee, at 191.

⁴¹³ (1903) 30 Cal. 683.

son of her sister, the husband could take half the property and the other half went to the illegitimate son.

5.152 Under Shia law, there is a distinction between *walad al-zina* (child of fornication) which is a *nullus filius* and inherits from neither the father nor mother, and *walad al-mala'ina* (child of imprecation or a child disowned), who inherits from the mother.⁴¹⁴

5.153 It may be noted that since live-in relationships are not recognised in Islam and an illegitimate child is already entitled to inherit from his or her mother and can claim maintenance under section 125 of the CrPC.

5.154 Under Christian law the word 'child' does not include an illegitimate child.⁴¹⁵ Thus, it is clear that illegitimate children, under the Christian law have no right of inheritance. However, it may be noted that as per section 21 of the Indian Divorce Act, 1869, children begotten of an annulled marriage; where the second marriage has been annulled on the ground that a former husband or wife was living but the subsequent marriage was contracted *bona fide* with the belief that the former spouse was deceased; or where the marriage was annulled on the ground of insanity; will be considered as legitimate and shall be entitled to succeed the estate of the parent who at the time of the marriage was competent to contract. Reading this with section 19 of the aforementioned Act, it appears that children begotten of a marriage that was annulled due to impotency or due to the marriage being contracted within the prohibited degrees, would not get the benefit of being considered as legitimate and thus would not be entitled to inheritance.

5.155 This distinction appears inexplicable and unfounded. It should be addressed by the Legislature forthwith. Section 21 of the Indian Divorce Act, 1869, should be appropriately amended to confer

⁴¹⁴ Fyzee, at 463.

⁴¹⁵ *In the Goods of Sarah Ezra*, AIR 1931 Cal. 560, 562. See also, *Smith v. Massey* (1906) ILR30 Bom. 500.

legitimacy on children begotten of all annulled marriages. All such children should be entitled to succeed the estate of their parents.

5.156 The judgment of Kerala High Court, in *Antony v. Siyath*,⁴¹⁶ merits discussion in this context. The Court held therein that all illegitimate children are a result of cohabitation of a man and a woman as husband and wife. The Court further said that if such children are not conferred legitimacy then the benevolent object of section 16 of HMA, 1955 as well as section 21 of Indian Divorce Act, 1869, would not be fulfilled. Moreover, the Court reasoned, that if such children can claim maintenance under section 125 of CrPC, there is no ostensible rationale behind denying them the right to inherit the estate of their parents.

5.157 While this interpretation of the existing law on the point is certainly progressive and laudable, the fact remains that it would be applicable only in the State of Kerala. Moreover, equating all illegitimate children with legitimate children may tantamount to undermining the institution of marriage. Thus, a need is felt for a Central legislation to confer legitimacy on illegitimate children, under certain circumstances, irrespective of their religion and entitling them to inherit the property of their parents.

5.158 As regards Parsis, it has been observed that when on the death of a Parsi intestate, the Recorder's Court, in 1811, admitted an illegitimate son on evidence of customs and usage, the decision to do this was considered to be erroneous and was reversed by a subsequent Recorder. It was held that, among Parsis, an illegitimate son is entitled to life maintenance only.⁴¹⁷ This dispute was, apropos

⁴¹⁶ (2008) 4 KLT 1002. See also, *Rameshwari Devi v. State of Bihar* (2000) 2 SCC 431; *Badri Prasad v. Dy. Director of Consolidation* (1978) 3 SCC 527; *Vidyadhari v. Sukhrana Bai* (2008) 2 SCC 238.

⁴¹⁷ Report into the usages recognised as law by the Parsee Community of India, and into the necessity of special legislation in connection with them, October 13, 1862, para 4 in J.D. 1863 cited in Jesse S. Palsetia, *The Parsis of India: Preservation of*

Parsi inheritance law, one of the earliest matters to come up before the British Courts in Bombay. Subsequently, the Parsee *Panchayet* introduced reforms in 1818 to outlaw bigamy and illegitimacy.⁴¹⁸ The illegitimate children may seek recourse of section 125 CrPC to get maintenance, however, under the Indian Succession Act, 1925, there appears to be no provision to afford them any inheritance rights. The requisites for a valid Parsi marriage are listed under section 3 of The Parsi Marriage and Divorce Act, 1936. Subsection 2 of section 3 categorically states that, notwithstanding the fact a marriage is invalid due to non-fulfilment of conditions provided under this section, the children begotten from such a marriage would be legitimate. This entails that such children should have the right to inherit the property as provided in the Act of 1925.

5.159 In view of the aforesaid discussion, it is suggested that illegitimate children, for the purpose of intestate succession under the Act 1925, should be given a right to inherit the self-acquired property of their parents. To put this in effect, as recommended by the Law Commission in its 110th Report 'Indian Succession Act 1925' in 1985, a viable definition of 'child' should be included in the Act 1925. The definition should include 'illegitimate child'.

5.160 It may be noted that, as witnessed earlier in this Chapter, while the Courts are trying to afford inheritance rights to children born out of wedlock as much as possible by interpreting the law liberally, the lack of a secular Central law in this regard is conspicuous by its absence.

Identity in Bombay City 199 (Koninklijke Brill NV, Leiden, The Netherlands, 2001) available at: <https://bit.ly/2HfDAG4> (last visited on 06-04-2018).

⁴¹⁸ Manokjee Cursetjee, *The Parsee Panchayet* 27, 28 (Bombay, 1860) cited in Jesse S. Palsetia, *ibid.*