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INDIAN FAMILY LAW NEEDS A CONSTITUTIONAL FLOOR, NOT MERELY A UNIFORM CODE

-Devika Singhal

Family law in India is discussed primarily in terms of personal laws versus the Uniform Civil Code. However, that debate overlooks a much more pressing fault line within Indian law, which recognizes marriage under a plurality of religions and civil marriages but does not necessarily ensure that all spouses have an equal right to access and exit marriage with dignity and economic stability. The solution does not involve imposing sameness. Rather, it involves ensuring a constitutional minimum under legal pluralism.¹

MARRIAGE: FROM COMMUNITY STATUS TO CONSTITUTIONAL CHOICE

Indian marriage is still a legally defined institution governed by the Hindu Marriage Act, the Special Marriage Act, the Muslim personal laws, and the Christian/Parsi marriage laws. There is nothing unconstitutional about such a pluralistic arrangement. Indeed, as Gopika Solanki and Narendra Subramanian argue, the personal law system is another example of the intersection of community identity, state governance, and gendered citizenship.² The constitutional problem begins when community or family authority overrides individual agency.

In *Shafin Jahan v. Asokan K.M.*, the Supreme Court located the choice of a partner within personal liberty and dignity.³ That rule ought to be followed in every matrimonial regime. The test of validity will have to be age, capacity, consent, and legality and not social acceptability.

¹ Flavia Agnes, *Family Law Volume 2: Marriage, Divorce, and Matrimonial Litigation* 1-116 (Oxford Univ. Press 2012).

² Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge Univ. Press 2011); Narendra Subramanian, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India* (Stanford Univ. Press 2014).

³ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368 (India).

The Special Marriage Act provides a secular method, but constitutionally speaking the necessity is that all methods must guarantee decisional autonomy. A marriage can have religious significance, but constitutional personality must not be surrendered for this purpose.

DIVORCE: EXIT SHOULD NOT BE A PRIVILEGE OF SUPREME COURT ACCESS

The Indian legal framework for divorce continues to be largely dependent on grounds of fault, such as cruelty, desertion, and adultery, besides consent.⁴ Such a legal structure tends to make personal breakdowns become accusations. It benefits the one who is capable of proving their case and may keep alive a dead relationship.

This strictness has been relaxed by the Supreme Court. As per *Amardeep Singh v. Harveen Kaur*, the provision of six months' waiting period in case of divorce through mutual consent provided in Section 13B(2) of Hindu Marriage Act, 1955 is only directory in nature and is thus exemptible.⁵ As per *Shilpa Sailesh v. Varun Sreenivasan*, the Supreme Court, while sitting as a Constitution Bench, is competent to dissolve marriages on the ground of irretrievable breakdown of marriage relationship under Article 142.⁶

The problem lies in the institutions. The remedy under Article 142 is exceptional, and it can only be obtained from the Supreme Court. The spouse should not have to have the money to go to the apex court because the statute uses untruthful terminology in relation to the breakdown of the marriage. The Parliament needs to legislate on the concept of irretrievable breakdown as a well-regulated ground in all the statutes related to marriages, taking into account issues relating to cooling off period, children, housing, and finance. The divorce process should not be made easy in the sense that it is carefree. It should be made easy in the sense that it is legitimate and non-punitive.

MAINTENANCE: NOT CHARITY, BUT THE ECONOMIC LAW OF MARRIAGE

In matters of maintenance, family law of India has come closest to remedial universality. Maintenance provisions are found in Sections 24 and 25 of the Hindu Marriage Act. The Domestic Violence Act has provision for monetary relief, while Section 144 of the Bharatiya

⁴ The Hindu Marriage Act, No. 25 of 1955, §§ 13, 13B, India Code (1955); The Special Marriage Act, No. 43 of 1954, §§ 27, 28, India Code (1954).

⁵ *Amardeep Singh v. Harveen Kaur*, (2017) 8 SCC 746 (India).

⁶ *Shilpa Sailesh v. Varun Sreenivasan*, (2023) 14 SCC 231 (India).

Nagarik Suraksha Sanhita mirrors the provision of summary nature available under Section 125 of the Code of Criminal Procedure.⁷

In *Rajnish v. Neha*, the confusion arising due to the existence of multiple claims was noted. Disclosure of assets and liabilities, taking into consideration previous awards, and considering maintenance from the date of application were held to be the correct approach.⁸ This is important since an entitlement which is stalled by hidden incomes, adjournment, and fragmented hearing procedures cannot be termed as help.

Another constitutional development was seen in *Mohd. Abdul Samad v. State of Telangana*. In this case, the Court stated that a divorced Muslim woman has the right to seek maintenance under Section 125 of the Code as well as from the Muslim Women (Protection of Rights on Divorce) Act, 1986.⁹ The judgement refuses to accept the proposition that one's religious identity can have an adverse effect on access to a secular means against destitution. In a more recent case of *Smt. N. Usha Rani v. Moodudula Srinivas*, it was not possible for a person to avoid maintenance by entering into a de facto marriage.¹⁰

These choices suggest a superior theory of family law. Maintenance must take into account dependency that arises or is accentuated by the relationship itself, including dependency through unpaid labor, career sacrifice, disability, parenting duties, or eviction from one's home. Maintenance must neither punish nor assume fault on the part of either spouse, nor can it presume dependency on the part of all women and provision on the part of all men.

A BETTER REFORM AGENDA

Farrah Ahmed rightly cautions that personal law cannot be assessed only through the binary of religious freedom versus uniformity.¹¹ The critical issue is whether each regime ensures equal citizenship. Thus, what India needs to do is provide a common floor and not seek full codification at once, which would entail compulsory registration, voluntary consent, equality

⁷ The Hindu Marriage Act, No. 25 of 1955, §§ 24-25, India Code (1955); The Protection of Women from Domestic Violence Act, No. 43 of 2005, § 20, India Code (2005); The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 144, India Code (2023).

⁸ *Rajnish v. Neha*, (2021) 2 SCC 324 (India).

⁹ *Mohd. Abdul Samad v. State of Telangana*, 2024 SCC OnLine SC 1686 (India); The Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986, §§ 3-4, India Code (1986).

¹⁰ *Smt. N. Usha Rani v. Moodudula Srinivas*, 2025 INSC 129 (India).

¹¹ Farrah Ahmed, The Problem with Personal Law in India, in *The Cambridge Companion to Comparative Family Law* 225, 225-53 (Shazia Choudhry & Jonathan Herring eds., 2019).

of minimum age and capacity, easy exit without fault, financial disclosure, interim maintenance, and enforceability.

Indian family law is not going to lie in either the romance of pluralism or the self-executing nature of uniformity. The key test of its legitimacy will be whether one is able to choose a marriage voluntarily and leave it with dignity and without being impoverished on account of the breakdown of the marriage.