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LAW COMMISSION CONSULTATION REPORT (2018) FOCUS ON MUSLIM LAW REFORMS[1]

ABSTRACT

Even today the prospect of a Uniform Civil Code is being carried on the back of the judiciary and political agendas in light of which through this paper we seek to delve into the Law Commission of India's take on the said matter with an eye on the alternative path of amending the personal laws instead to uphold both the secular fabric of the nation as well as the diversity and equality we envision to achieve.

In 1937 The Muslim Personal Law (Shariat) Application Act was passed with the sole purpose of formulating an Islamic law code to governthe Muslims in India. Ever since, the Shariat Application Act has been mandating facets of the community-based / social life of Muslims such as family relations, marriage, inheritance, and others.

The Government of India in June 2016 assigned to the Law Commission the taskof addressing the issues relatingto a prospective uniform civil code. The Law Commission used thisas a platform to confront the uncertainties that have long enveloped the notion of personal laws and the requirement or lack thereof of a common civil code that would apply to all. It was stated by the commission that a UCC is not needed to confirm the disputes in personal laws to the values of the constitution. Instead, it believed that personal laws should be amended to ensure that they lie in consonance with the fundamental rights of religion and the right to equality amongst others that the constitution warrants.

We shall through this paper discuss the notable recommendations made concerning Muslim personal law by the Commission and further contextualize it along with evaluating its consequences.

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CODIFICATION

The Islamic laws of inheritance and succession stem from the rules of succession that were either founded in the religious text of the Muslims, i.e. The Quran, or in the pre-Islamic customs and traditions which had been validated by the Prophet. The Mohammedan law of succession is largely reliant on the customary laws that dealt with succession and on the patriarchal type of family. Even though both the Shia and Sunni set up of inheritance derive their fundamental aspects from similar sources there seems to be a gulf between the two systems in general and specifically in the context of inheritance. This division can be put down to adapting differing methods to the type of rectification that was carried out by the Prophet.

The ethos of the differences between the two is that while the Shias were quick to distance themselves from the agnate system of succession, the Sunnis accepted it as still being valid and in force. Essentially the former abides by the theory of proximity while the latter still gives preference to the male agnatic heirs.Certain facets of thefollowing recommendations are also derived from the laws of other Islamic nations that have been reformed to portray a more progressive stand.

Some of the suggestions regarding the same were that succession should functionbased onproximity to the deceased rather than predilection to the male agnatic heirs. It is not possible to spot any need for such an ancient system of inheritance in today's day and age where the family structures have undergone such vast changes. A setup where the closest relatives to the deceased are overlooked for the distant male agnate heirs seems unfounded. This void however was starting to be worked around as various families looked to transfer their property in the form of gifts to the closest relatives who they wanted to inherit their property. This way they would leave the lesser property at the time when the property is mean to be distributed before which he can freely allot his property in any which way he deems fit. While this gave them greater autonomy over their property this system also had drawbacks that create rifts in the family. To avoid these rifts it is in the best interest of the people to be governed by a system that is based not on the make agnate heirs but the proximity of the bond.

The following are the suggestions that can be implemented in the dearth of a charter as has been recommended by the commission.

- Preference to Spouse Relict

This is something that was carried out in Tunisia where certain reformers in 1959 made an

addendum to Article 143 of the Law of Personal Status, 1956 to safeguard the interests of a nuclear-based family. This was done by introducing the doctrine of Radd (return) and providing it to theaid of a spouse relict in the same manner as that of other sharers of quota. It was also arranged for a daughter or a son‘s daughter to factor out any collateral. In the cases of Syria and Egypt, the law also gave the spouse relict priority over an acceptedfamily member.

- Endowment to closer heirs

This is another reform that was introduced to favor the nuclear family. So, this remedy was implemented in Egypt, Sudan, and Iraq, where a testator was aided with the right to make a bequest to one of his heirs within the one-third limitation.This provision was always available in the school of law but the Sunni schools failed to adapt the same and excluded such an endowment under any circumstances and required for there to be the consent of the heirs before partaking in it. Such a proviso enabled a man to bequeath 1/3 of his estate to his wife, daughter, or other members of his nuclear family, in addition to the laid down share which can often fail to suffice in itself.

- Rights of Orphaned Grandchildren (Right of Representation)

The fundamental principle that we discussed above wherein the ones nearer in the relationship would exclude the more remote kinsman had a loophole that posed a few troubles in the case of orphaned grandchildren who were heavily or wholly reliant upon their grandparents were left out. The remedy to this situation is the right of representation which takes place by letting the children step into the position of the deceased parent. Syria and Morocco successfully implemented this by allowing the grandson of the deceased to inherit what his father would have received or one-third of the estate, whichever of the two is less, however, a similar provision was not extended to the granddaughter. Tunisia and Egypt subsequently addressed the issue by letting either of the grandchildren be it a grandson or the granddaughter to receive up to one-third of the property. The Indonesian Supreme Court in the year 1994 amended the inheritance laws of their nation to fall in line with a more gender-neutral stance by ascertaining that both male and female heirs of the deceased could leave out collaterals. The court elucidated that “walad” in Quran‘s verse 4:176 refers to not a specific gender but children in general both. This outlook is capable of reinforcing future gender just and neutral reform improvements in not only Indonesia but other countries as well. Therefore it has been advised that we aspire to achieve the Indonesian model and observe gender neutrality while classifying the heirs.

- Rights of a Childless Widow

Another key aspect that needs to be addressed and remedied is safeguarding the rights of a Shia childless widow to inherit the land. Under the Shia school of law, a childless widow is not entitled to her share from the immovable property of her spouse, barring the share in the value of the household effects, trees, buildings, and moveable property, which also includes any debts that were due to be paid to the deceased. This rule has posed certain problems for women and more so for those women who are in rural areas and are deprived of the rights to the inheritance of agricultural land. The widow is only entitled to lay claim to her respective share as ascribed in the Quran for the buildings and trees of the property but not the land or property itself. In 2009, Iran tweaked the said rule allowing the widow, a right to the value of the immovable property, as prescribed by her share.

Given the above it is recommended that a widow(s), childless or not, would stand as a Class I heir, according to the Code suggested earlier, and would as a result receive the estate of the deceased as a Class I heir, taking one share.

Islamic laws of inheritance were actually pioneering, and a step towards gender justice, as ancient societies were fundamentally patriarchal, meaning women held no status or prestige and were virtually ignored during inheritance discussions. This phenomenon of their status being submerged and interpolated within their male counterparts' status was tackled by the Islamic laws by guaranteeing them a fixed share, a sanction of equity. This has been mentioned across the Islamic laws, with the recurring statement that no person enjoys a prerogative to supplementary slices of the estate, just because of their agnatic nature. More such recommendations like the one discussed above of childless widows would enable women to be at a more equal footing within these personal laws and take a step towards making the law a more gender-just set up where everyone is given a platform to prosper equally.

COMPULSORY REGISTRATION OF MARRIAGES

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) prescribe eighteen years as the minimum age for the bride and twenty-one years as the minimum age for the groom[2]. Hindu law on the other hand

recognizes the marriage between a sixteen-year-old girl and eighteen-year-old boy as valid, but voidable. Muslim Law in India recognizes the marriage of a minor who has attained puberty as a valid one. 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 criteria of the legal minimum age are neither void nor voidable but merely liable to pay a penalty/fine. Section 3 of the PCMA deems a marriage where one or more parties are minor as voidable at the option of the minor.[3] The question that arises out from the said dilemma is that when it comes to compulsory registration of marriage should the law promote this implicit compliance of child marriage and allow it to continue by letting these valid marriages be registered under the veil of personal laws, or should the law refuse to register these marriages, in turn, ignoring the act and allowing the act to exist without any regulations. The Delhi High Court iterated the requirement of compulsory registration of marriage despite which it is yet to be made mandatory.Implementation of this would mean that the ages of the parties getting married would have to be noted down. The Law Commission has hence recommended that the government institute an amendment to the Registration of Births and Deaths Act to comply with the Commission's earlier recommendation in its 270th Report as well as the Compulsory Registration of Marriages' Bill (2017). If put to use this would prevent parents from marrying minor children to avoid there being a written document with the proof of this illegal act which could bear severe repercussions on them and could eradicate this issue that manages to exist due to being upheld by personal laws.

UNIFORM AGE OF CONSENT OF MARRIAGE

As of now, the law stipulates that the minimum legal age for two parties to get married is 18 years of age for a woman and 21 years of age for a man.Owing to the different ages and further lack of uniformity in the age at which a valid marriage can take place, the Law Commission opined that the legal minimum age for marriage for men and women should be that of eighteen as has been mentioned in the Indian Majority Act, 1875 as the age of majority for all irrespective of religion and gender. Among other things the Commission noted, an important point was that such a law strengthens the notion that

[3]http://www.lawcommissionofindia.nic.in. (n.d.).

wives should ideally be of a younger age bracket than their husbands and hence needs to be amended to reflect a more equitable stance such as the aforementioned suggestion.

ADULTERY AS A VALID CRITERIA FOR DIVORCE

As things stand in Muslim law a wife can obtain a divorce (khula) on various grounds such as husband's impotency, him being missing for a stretched period, inability to fulfill his obligations, etc. but adultery does not constitute as one of them.

Adultery is not recognized as a ground for divorce as of now in Muslim law unless it is committed with womenwho are said to lead an 'infamous life' under which case it is said to be constituted under cruelty. Hence to avoid the continuance of such a marriage or of false charges that would help initiate a divorce given the lack of adultery being ground, it has been suggested by the Law Commission that Adultery should be instituted as a ground for divorce through an addendum in the Dissolution of Muslim Marriage Act, 1939 and should be at the disposal of not either one gender but at that of both.

IRRETRIEVABLE BREAKDOWN OF MARRIAGE AS A GROUND FOR DIVORCE

The Commission has suggested that in cases of marriage where there is little to almost no room for the couples reconciling, an option of irretrievable breakdown of marriage should be made available to avoid further complications. Envisioning a rational procedure for divorce is preemptoryto try andrestore a flourishing image of marriage that is devoid of any kind of discrepancy or disturbance. What tends to happen is that when couples are unable to claim a divorce on such grounds they start to manufacture false allegations that would help them make progress towards achieving that divorce which poses a myriad of problems as the real reason is as basic as incompatibility on any terms. Also keeping in mind that matrimonial suits are very lengthy, it often results in individuals spending a significant amount of time in court proceedings which would further compound on their misery, in the absence of which they could be trying to get a grasp of their life back and figuring things out peacefully. Another drawback of these lengthy procedures is the involvement of children of such wedlock in the whole process, which can be eradicated.

COMMUNITY OF PROPERTY UPON MARRIAGE AND DIVORCE

The Bill for Irretrievable Breakdown of Marriage in the year 2013 terminated and was met with a lot of criticism regarding the fact that it resulted in putting women in a rather weak spot.

Accordingly,the commission called for a doctrine that would acknowledge the community of property, i.e. the property that has been self-acquired post marriage. Globally and more so in India women compromise their careers to support families, things like childbearing and other chores have a more drastic effect on them vis a vis their husband's career and that work yields no monetary returns. For these reasons irrespective of whether the women is directly contributing to the family income, her other domains of work must qualify her for an equal share of all income that is obtained after their marriage or estate that is procured post-marriage from any of the spouses, should be considered as a common share that belongs equally to both members in the marriage and divided equally upon divorce.

While the inherited property won't itself be a part of this bracket, its' worth can be accounted for to determine maintenance or/and alimony.Because an absolute equal split of property post-marriage could bring an unfair burden to one of the parties, this cannot be set as a yardstick or a standard, hence the say of the court would be retained in cases of such nature. The commission suggested that both parties in the marriage should be in an equitable position when it comes to the post-marriage property acquired and that the availability of a no-fault divorce must accompany such community of self-acquired property which shall be reflected through an amendment in the act of Dissolution of Muslim Marriages(1939).

LAWS SHOULD BE MADE DISABLE FRIENDLY

The Commission hadback then asked for leprosy to be removed as a ground for divorce which no more remains a ground under Muslim Law. The disease is in today's day curable and also common, so a provision of this sort amounted to discrepancy against individuals that are undergoing the said condition. It is to be noted that remains just one of the many means which contributes to the law discriminates against persons with disabilities.

The Equals Centre for Promotion of Social Justice submitted a draft that illustrated India's lack of initiative to move towards an inclusive society vis a vis how various countries have systematically moved towards incorporating provisions that end discrimination towards differently abled persons. This remains the case despite India having sanctioned"The UN Convention on the Rights of Persons with Disabilities" in the year 2007 which makes it obligatory to (i) respect, (ii) protect and (iii) fulfill the rights of persons with disabilities.

Despite this, there are occasions on which those with disability are put in a disadvantaged

position such as a parent who if havinga disability is unable to safeguard the custody of his offspring.

To make progress to an inclusive society certain terms need to be further analyzed rather than be used in a general manner. These terms include terms such as lunacy, mental disorder, and unsound mind. This will also help in narrowing down the definition to include fewer illnesses than before and exclude those from being barred from marrying who are capable of being medicated and treated as has been suggested by the commission.

POLYGAMY

It was observed by the commission that in India it is evident that in most of the cases related to polygamy the women are not kept in the loop concerning the second or subsequent marriages of their husbands. Hence, the point of contention with the practice of polygamy is to safeguard the interests of women. Polyandrous relationships which take place without the consent of the wife are violative of her marital rights. Furthermore, the fact that only men are allowed to have multiple spouses is a violation of the principles of equality. Although polygamy is allowed in Islam, it has been observed that it is not frequently carried out by the Muslims but rather exploited by those of other religious beliefs who use it as an excuse to partake in subsequent marriages under the veil of converting to Islam.

The Law Commission while discussing this acknowledged the international context of Muslim laws in the country by pointing out the reforms related to Muslim Personal Law which enforce monogamy or impose restrictive measures for polygamous arrangements that took place in countries such as Algeria, Libya, Egypt, and Lebanon just to name a few. Comparative law indicates that only a handpicked countries continue this act and India is one of the countries among Saudi Arabia, Iran, and Indonesia where the practice continues to prevail.

For the aforementioned reasons it has been recommended that the Nikah-Nama should criminalize the act of polygamy and another valuable input was that section 494 of the Indian Penal Code which prohibits bigamous marriage should be operative in all communities with no exceptions. The decision does not stem from a morally different position but from the discrepancy that exists in the law between the options available to a woman and a man which is vastly different. However, given the fact that the issue remained under judicial consideration, the

commission retained its suggestions for the time being.

CUSTODY

According to the established mode of operation, it is stipulated that Muslim personal law would be applicable in the cases of custody and guardianship. However, given the fact that these rules are not codified, it is according to the customs and precious usages that these issues are dealt with. The rights relating to custody and guardianship of a minor differ widely among the varying schools of the Islamic law that exist and despite their differences, there is an underlying essence which is the 'Principle of Best Interest'.

In Sunni law, the mother is assigned totake care of her daughter till she is said to come to age which is believed to happen once she undergoes her menses. For a son on the other hand a mother has custody until he is capable enough of committing the regular basic acts such as eating and attending to the bathroom on his own after which the right to raise him is transferred to the father. Given that there can be different interpretations of when a son has reached the required stage where the right then transfers to the father that age has been fixated at seven after which he is assumed to be able to be in control of the requirements. The contention point here is that in case a mother is said to be indulging in an act considered to be immoral her rights regarding custody are compromised under the belief that it will hamper the child, however, the threshold of this act is problematic. While this is viewed as highlighting the welfare of the child, it is also unfair to the mother who if marries someone else will also lose the right, and hence this aspect needs to be scrutinized and changed.

Different rules are applied in Shia law, where the mother has a right to the custody of a boy till he attains the age of two whereas the age in the case of a daughter happens to be seven. Post these respective periods the custody is handed over to the father and subsequently to others on his side of the family such as the grandfather. The explanation that is given to justify this is that a term of two years is all that is needed for breastfeeding a boy after which it is the hand holding of the father that he requires which is problematic on various levels and shall be discussed hereafter.

There also seems to be a lack of clarity around what is the definition of a minor, and while some schools of thought consider puberty as a yardstickbecause children can attain puberty at different times depending on external factors such as genes and diet it is more advantageous to arrive at a

uniform age that we could then consider the age of majority which has been suggested to be, followingThe Indian Majority Act, 1875.

GUARDIANSHIP

The guardian is in control of the important life decisions of the child and his future, which has been vested solely with the father in Islamic Law. A father as per Islamic law takes all decisions for the child and this holds even in circumstances wherein the child is momentarily under the custody of the mother or any other relative for that matter who is from the maternal side of the family. Under Muslim law, the father is vested with the right to fix and arrange the marriage of the child, a right that is given to other male relatives after the father instead of being given to the mother. In such cases, the power of the father is unchecked as not only does the mother not have any say but the will of the minor is also not taken into consideration for their marriage.

Such distribution of rights alludes to the ancient and regressive notion that a mother is not capable of taking important calls that will have a bearing on the future of the child and hence every attempt is made to keep her from getting the status of a guardian.

In Gulam Hussain Kutubuddin Maner v. Abdul RashidAbdulrazak Maner, the Supreme Court said and I quote "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." This further established that in the presence of a father a mother is helpless when it comes to having a say in any major decisions of the child's life.

What the law through these acts is perpetuating is in line with the typical division of work that is done on a gender basis. It has its roots in thearchaic belief system wherein a man's role is to be the breadwinner and the earner in the family whereas the role of a woman was restricted to looking after the needs of the family member and the house and catering to them.While this thinking could be acceptable in certain times, in where such gender stereotypes have been challenged it is only fair both the spouses be equally burdened with both the responsibilities alike and if there was to be a decision it should be up to them to decide and not prescribed or preached by in the law. A mother in today's day and age should be entitled to make choices for the child and have an equal say in matters relating to the child and should not only be there to be physically and emotionally available for the children. The Commission also mentioned that the principle of best interest should exist and continue to apply if there is a lack of codified law on

the discussed matters.

ADOPTION

Adoption was common and considered valid a long time back until it was declared prohibited under the order of the Quran. The Quran states "that if one calls someone his son or considers him so, this does not establish the father-son tie between the two. Allah has not made your adopted sons as your sons. These are only words from the person's mouth and not the truth itself." Islamic jurisprudence does not, citing various reasons, permit adoption. Issues have also been raised surrounding the uncertainty in what a relationship would be like between the women of the family and let's say a male adopted child who is technically not a member of the family by blood.

The commission explained how actionin the form of Juvenile Justice (Care and Protection of Children) Act, 2015 does not transgress upon the stipulated law under the Muslim law but just looks out for those who do not wish to comply with that law and facilitates a recourse. The followers of Islam are still entitled to abide by the faith and not follow it but the law is for those who wish to adopt and provide their adopted heir the same rights as they would their children. In the case of Shabnam Hashmi v. Union of India, the Supreme Court observed that "though the concept of adoption is prohibited under Muslim law, the Juvenile Justice (Care and Protection of Children) Act, 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 and may adopt a child." So it has been established that a Muslim can be free to choose which law he wants to be governed by and act under it.

TRIPLE TALAQ AND NIKAH HALALA

The commission went onto point out how various judgments have conveyed their disliking for the practice of triple talaq before 2017 when it was officially set aside.

The Law Commission suggested fines for a man who indulges in the act of committing a unilateral divorce which in the opinion of the commission would also put a halt to the practice of Nikah Halala.

In the triple talaq layoutwhich encompasses over three months if the husband once pronounces talaq, he can try and resolve his issues with his wife. In circumstances that involve living together (cohabitation) in the stipulated three months, the divorce will be assumed to be taken back however at the expiry of the term in the absence of an official revocation it would be considered to be irrevocable.

According to the Quran,"if divorce is pronounced twice, the husband should either retain her honorably or release her kindly. If he divorces her third time, she is unlawful for him unless she marries another husband (and he also divorces her willfully)".

There is a dichotomy when it comes to whether the concept of reuniting should exist or not in Islamic law. While most are against the motion of the Hanafi sect which is what is most Muslims in India abide by it is possible to reunite for a couple if the wife remarries someone else not as a condition but as a coincidence. However, the ground reality is that this provision is exploited and used as a prerequisite for a wife to reunite with her husband.This practice is what is known as Nikah Halala and is considered unlawful when used as a stipulation to reunite.

CONCLUSION

The Law Commission via these reforms is incorporating more progressive and just amendments to laws that are discriminatory and regressive. The policy that has been opted for by the commission is one that first looks to uphold quality within the communities rather than equality between the communities. The existence of the different communities in India is the bedrock of its democracy, it is not required to wipe out the differences between the communities themselves to curb discrimination but to recognize and appreciate the diversity while eradicating the discriminatory aspects of the personal laws individually as the Consultationpaper seeks to do. The paper further goes onto perpetuate the notion that unity is not equivalent to uniformity and can also lead to division.

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