

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

**VOLUME 2 ISSUE 7**

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# **FAMILY LAW AS A PRODUCT OF TRADITIONS AND CULTURES**

Authored By - Kalyani Bhagwat

LLM 2

## **1. Abstract:**

This Research contains a study of how Family law is a product of our varied traditions and cultures. The Research focuses on how varied cultures and varied traditions affect the law making process especially in Family Law. The research article has been prepared by LLM II student Kalyani Bhagwat under the guidance of Prof. Mayura Borde.

## **2. Introduction:**

We often speak of law and culture in one breath. That may be so because both systems impose on each person and organization required rules of behavior. Yet, law and culture are quite different, though they relate to and affect each other. Therefore, it is desirable to examine their similarities and differences and their relationship. While the structures of law and culture are more similar than we might expect, their differences greatly affect the enforcement of the rules issued under each.

To be sure, both systems consist of rules and their enforcement. Most of our thoughts and knowledge, and many aspects of our lives and livelihood, in whatever form they take, are subject to rules and their enforcement. Here we speak of rules that are directives of behaviour by humans, backed by enforcement of other humans. Yet, law and culture differ in fundamental details, including: (a) the identity of those who initiate the rules; (b) the rules' underlying purposes and values; (c) how these rules are (i) initiated, (ii) developed, (iii) expressed, (iv) and enforced; and (d) the extent of their acceptance by those to whom they apply.

## **3. Key Words:**

2.1. Tradition means: a belief, principle or way of acting which people in a particular society or group have continued to follow for a long time.

2.3. Culture: Culture means the way of life especially the general customs and beliefs of a particular group of people. Law as the product of traditions and culture

2.4. Tradition and culture are connected with religions. Religion is the origin of Law. Law as the product of Tradition.

## 4. Family Law as Product of Tradition and Cultures:-

**4.1. Laws are Limited:** India is divided into five religious communities namely Hindus, Muslims, Christians, Parsis and Jews but laws are limited to matrimonial relations and remedy thereof, maintenance, succession, will, partitions, religious endowment, adoption guardianship etc. Regarding making provisions the law of Quran with respect to Muslim and Law of Shastras with respect to Hindus shall be always attach.<sup>1</sup>

**4.2. Tradition of Sati system:**<sup>2</sup> Sati Was an ancient Hindu custom, according to which a wife scarifies herself at the pyre of her husband. The origin of Sati is not definitely known but generally it has been saying God Shiva's wife, Sati. On finding that her husband was not invited by her father Daksha for some Yaga to which all other goddess are invited Sati created fire and scarifies herself in front of the guests for her husband. **Ban of Sati System:** All the Ancient scripters disagree with sati and say that one should not die before one's certain time. A pregnant woman was not allowed to commit sati. On 4<sup>th</sup> December 1829 the practice was formally banned in the Bengal Presidency by the Governor Lord William Bentinck by passing a regulation burning alive the widow of Hindus illegal and punishable under criminal court. But the ban was challenged in the privy council in London finally implemented in 1832.

**4.3. Section 306:** Unfortunately abetment of sati could not find place to be a special offence under IPC but Judiciary has held that abetment of Sati is an offence of abetment of suicide and punishable under section 306 IPC. (Sati Mata Ki Jai).<sup>3</sup>

**4.4. Tradition of Polygamy:** No Restriction: Polygamy had existed in India and there was no restriction on the bigamy except the Mohammed law which prohibited not to marry more

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<sup>1</sup> Law as a product of tradition and cultures, research article at Utkal university available at <https://utkaluniversity.ac.in/wp-content/uploads/2022/08/Law-as-the-product-of-tradition-and-culture.pdf> last seen on 13/12/2022

<sup>2</sup> Law as a product of tradition and cultures, research article at Utkal university available at <https://utkaluniversity.ac.in/wp-content/uploads/2022/08/Law-as-the-product-of-tradition-and-culture.pdf> last seen on 13/12/2022.

<sup>3</sup> Law as a product of tradition and cultures, research article at Utkal university available at <https://utkaluniversity.ac.in/wp-content/uploads/2022/08/Law-as-the-product-of-tradition-and-culture.pdf> last seen on 13/12/2022

than four wives. In 1860 Under IPC bigamy was made a specific offence under section 494 and it was allowed by the customs. Section 60 of Indian Christian Marriage Act 1872 Prohibited of polygamy.<sup>4</sup>

#### 4.5. 'Tradition of Child Marriage:

1. Meaning of Marriage: During colonial time in India Child marriages were official marriage in childhood. At the time marriage spouse were not aware about the meaning of marriage. 2. In the year 1929 an Act was passed i.e. Child marriage Restraint Act 1929 it restricted the child marriage but did not abolish it. Under this Act child means a person who if a male has not completed 21 years of age and if a female has not completed eighteen years of age. This law was introduced after all the religions prohibit the child marriage but still it has not abolished completely as per UNICEF 70% marriage take place below the statutory age for marriage.

**4.6. Husband and wife are different Persons in India:** During colonial time married woman suffered serious irregularities a married woman could not sue for any tort committed by a third person unless her husband joined with her as plaintiff. She also could not be sued for a tort committed by her unless her husband was made a defendant. But Britisher did not recognize as single person. Husband and wife were always treated as different persons.

**4.7. Traditional System of settlement of Disputes:** When any person was alleged to have committed any crime or immoral act, that person was brought the matter to the panchayat, where all persons of the village were sitting and decide the case. So these were called Gram nyalaya system abolished and regular court were constituted.<sup>5</sup>

**4.8. SECTION 377 :-** Section 377 of the Indian Penal Code, 1860 that use to criminalize unnatural offences that is if intercourse takes place between two men or between two women, the same will be declared as an offence under this provision was scrapped off by the Supreme Court of India on the grounds that homosexuality is no more an offence in the eyes of law. Supreme Court in the landmark judgment of Navtej Singh Johar v. Union of India decriminalized all kinds of consensual sex among adults which were inclusive of homosexual sex also. This decision by the apex court brought in a revolutionary change in the Indian society,

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<sup>4</sup> Law as a product of tradition and cultures, research article at Utkal university available at <https://utkaluniversity.ac.in/wp-content/uploads/2022/08/Law-as-the-product-of-tradition-and-culture.pdf> last seen on 13/12/2022

<sup>5</sup> Law as a product of tradition and cultures, research article at Utkal university available at <https://utkaluniversity.ac.in/wp-content/uploads/2022/08/Law-as-the-product-of-tradition-and-culture.pdf> last seen on 13/12/2022

traditions and beliefs. It was a welcoming judgment for the majority of the people especially the queer community. The Supreme Court in a way established Article 21 once again placing that every individual has a right to life and personal liberty which should not be curbed due to societal norms.

**4.9. LIVE-IN-RELATIONSHIPS:-** A living relationship couple are the ones who cohabit, with no expectations being the bottom line. However, there is no legal definition to describe the concept in Indian law. It is more of a westernized theory with very less relevance with the Indian tradition. So the Supreme Court, at various instances taken the liberty to elaborate on the concept through their judgements. It is different from a marriage. (Marriage or wedlock or matrimony, is a socially/ritually acknowledgeable union of a couple). Live in relationship partners don't force on obligations.

In a typical marriage, the partners are given certain rights and duties to be performed by either of them. There are several personal laws such as the Hindu laws, Muslim laws, Christian Laws, etc. that govern and protect the marital bond of a recognized couple. Live-in relationships, being an alien concept to the Indian legislature does not have any legal implications for the couples who live together without marriage involved in the relationship. Since living relationships also support pre-marital sex, there are high chances of a child being born. These children, unlike the successors born out of wedlock, do not have any rights over the inheritance. Besides this, society treats them as illegitimate children, which is unacceptable. However, the Hon'ble Supreme Court cleared them of this ill-fated. And granted them the status of a legitimate child along with the right to property.

Live-in relationships were legally considered void-ab-initio. But in a judgement in 1978, such relationships are valid for the first time because of the Supreme Court. If the requisites of a marriage such as mental soundness, the fulfilment of the legal age of marriage, consent, etc. are all satisfied, the couple is considered to be in a legal live-in relationship. The couple is also regarded as married if they live together for a considerably long period until proven otherwise. The apex court has given five different types of living together in the excellent judgement of Indra Sarma Vs V.K.V.Sarma in 2013. It also stated that such relationships fall within the ambit of Section 2(f) of the Protection of Women Against Domestic Violence Act, 2005 that provides an insight into the said concept. In living relationships, the facets of the relationship might come to a conclusion, irrespective of any decision made by the couple.

**Legal provisions for the protection of children born in a live-in relationship:** Mental trauma affects children who are born out of in such a relationship. There could be custody problems or maintenance problems as the child grows. The courts have declared such children to be legitimate. Additionally, they have the right to property, not just ancestral but also self-bought property. Since there is no special law for the maintenance of children born out of such relationships, the law decides to provide children with protection. Thus, evolved the section 125 of the CrPC. The section includes provision for all children who cannot claim remedies in their laws. The Indian law also does not allow the couples living together to adopt a child as per the terms laid down by CARA.

Therefore, though live-in relationships have become legally valid, it is still not legally binding on the partners. It could be a benefit as well as a disadvantage depending on the expectations of the couple. In a society that shamed premarital sex, accepting a practice like live-in is a big step forward. There is no specific personal laws are governing these relationships.<sup>6</sup>

**4.10. ADULTERY:- India's top court has ruled adultery is no longer a crime, striking down a 158-year-old colonial-era law which it said treated women as male property.**

Previously any man who had sex with a married woman, without the permission of her husband, had committed a crime.

A petitioner had challenged the law saying it was arbitrary and discriminated against men and women. It is not clear how many men have been prosecuted under the law - there is no data available. This is the second colonial-era law struck down by India's Supreme Court this month - **it also overturned a 157-year-old law which effectively criminalised gay sex in India**. While reading out the judgement on adultery, Chief Justice Dipak Misra said that while it could be grounds for civil issues like divorce, "it cannot be a criminal offence".

**Who challenged the law?** Last August, Joseph Shine, a 41-year-old Indian businessman living in Italy, petitioned the Supreme Court to strike down the law. He argued that it discriminated against men by only holding them liable for extra-marital relationships, while treating women like objects. "Married women are not a special case for the purpose of prosecution for adultery. They are not in any way situated differently than men," his petition said. The law, Mr Shine said, also "indirectly discriminates against women by holding an erroneous presumption that women are the property of men".

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<sup>6</sup> Live-In Relationship – What Does The Indian Law Say? By staff available at <https://vakilsearch.com/advice/live-relationship-indian-law-say/> last seen on 30 November 2022.

In his 45-page petition, Mr Shine liberally quotes from American poet Ralph Waldo Emerson, women rights activist Mary Wollstonecraft and former UN Secretary General Kofi Annan on gender equality and the rights of women. Previous pleas were dismissed by the court in the interests of "stability of marriages." However, India's ruling BJP government had opposed the petition, insisting that adultery should remain a criminal offence. "Diluting adultery laws will impact the sanctity of marriages. Making adultery legal will hurt marriage bonds," a government counsel told the court, adding that "Indian ethos gives paramount importance to the institution and sanctity of marriage". **What did the adultery law say?** The law dictated that the woman could not be punished as an abettor. Instead, the man was considered to be a seducer. It also did not allow women to file a complaint against an adulterous husband. A man accused of adultery could be sent to a prison for a maximum of five years, made to pay a fine, or both. And although there is no information on actual convictions under the law, Kaleeswaram Raj, a lawyer for the petitioner, said the adultery law was "often misused" by husbands during matrimonial disputes such as divorce, or civil cases relating to wives receiving maintenance.

"Men would often file criminal complaints against suspected or imagined men who they would allege were having affairs with their wives. These charges could never be proved, but ended up smearing the reputations of their estranged or divorced partners," he told the BBC.

**What did the judges say?** All five Supreme Court judges hearing the case said the law was archaic, arbitrary and unconstitutional. "Husband is not the master of wife. Women should be treated with equality along with men," Chief Justice Misra said. Judge Rohinton Nariman said that "ancient notions of man being perpetrator and woman being victim no longer hold good". Justice DY Chandrachud said the law "perpetuates subordinate status of women, denies dignity, sexual autonomy, is based on gender stereotypes". He said the law sought to "control sexuality of woman (and) hits the autonomy and dignity of woman". Critics have called the law **"staggeringly sexist", "crudely anti-woman", and "violative of the right to equality"**. **"The legal system should not regulate whom one sleeps with," wrote Rashmi Kalia, who teaches law. The main concern, according to the respected journal Economic and Political Weekly,** is "not whether the expectations of fidelity in a marriage are right or wrong, or whether adultery denotes sexual freedom."

"It is whether the state can and should monitor a relationship between adults that is too complex, sensitive and individual for it to be capable of doing in a just manner," the journal wrote in a recent editorial.

**4.11. TRIPPLE TALAQ:-** Instant Talaq or "Triple *Talaq*" or "*Talaq-e-Biddat*" is an Islamic practice that allows men to divorce their wives immediately by uttering the word "*talaq*" (divorce) three times. The pronouncement can be oral or written, or as in recent times, delivered by electronic means - telephone, SMS, email or social media.

**What is the landmark Judgment passed by The Hon'ble Supreme Court in Sayara Bano Vs UOI:-**  
The Hon'ble Supreme Court heard the Petition for ban of practice of Triple Talaq through a Constitution bench comprising of 5 Judges from different religions - Justice Kurian Joseph, a catholic, Justice UU Lalit, a Hindu and Justice RF Nariman, a Parsi, Chief Justice Khehar, a Sikh and Justice Abdul Nazeer, a Muslim. On August 22, 2017, this bench declared **Triple Talaq or Talaq-e Biddat** as unconstitutional by a 3:2 majority. Justices Kurian, Lalit and Nariman delivered the majority judgement while Chief Justice Khehar and Justice Nazeer dissented with the majority.

**Chief Justice Khehar And Justice Abdul Nazeer [Minority Judgment- written By Chief Justice Khehar** The minority bench observed that: "*we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to 'Talaq-e-Biddat'. We hope and expect that the contemplated legislation will also take into consideration advances in Muslim 'personal law' – 'Shariat', as have been corrected by legislation the world over, even by theocratic Islamic States. When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind*".

**While dissenting the majority view the Minority bench observed as following** "*Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing 'talaq-e-biddat' as a means for severing their matrimonial relationship.*

*The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining 'talaq-e-biddat' (three pronouncements of 'talaq', at one and the same time) – as one, or alternatively, if it is decided that the practice of 'talaq-e-biddat' be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate*".

**Justice Kurian Josph [Part of Majority ]**Justice Kurian Josph has boldly shown his disagreement on the Minority view of CJI by stating that: "*I find it extremely difficult to agree with the learned Chief Justice that the practice of triple talaq has to be considered integral to the religious denomination in question and that the same is part of their personal law.*"

Majority view of Justices R.F **Nariman** and U.U **Lalit [Majority- Judgment written by RF Nariman]** The bench held that the practice of Triple talaq is arbitrary in nature by observing the following: "It is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the 393 fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act (Muslim Personal Law Shariat Application Act), insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him."

Taking into consideration the arguments of various religious groups and aggrieved petitioners, the Hon'ble Supreme Court with the majority ratio of 3:2 set aside the practice of Triple Talaq or Talaq-e- Biddat by holding it unconstitutional and arbitrary in nature; the Hon'ble Court further directed the Government of Union of India to consider the views taken by the court in the Judgment and lay down a proper legislature to regulate the practice of divorce in Muslim community.

**The Muslim Women (Protection of Rights on Marriage ) Bill, 2017 (Triple Talaq Bill):-**

Taking into consideration the views of the Hon'ble Supreme Court in the Judgment of Shayara bano Vs. Union of India, the Hon'ble Law Minister Shri Ravi Shankar Prasad took an initiative to present the **Triple Talaq Bill** before the Lower House, Lok Sabha, which was passed by majority by the Lower house on December 28, 2017. The Statement of Objects and Reasons of the Bill notes that the judgment has not worked as a deterrent in bringing down the number of instances of triple talaq. It explains, "It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to talaq-e-biddat, urgent suitable legislation is necessary to give some relief to them.

The Union Government claims that the legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help sub-serve their fundamental rights of non-discrimination and empowerment. **Highlights of Bill:-** The preamble of the Bill reads as "*To protect the rights of the Married Muslim Women and prohibit divorce by pronouncing Talaq by their Husbands and provide for matters connected therewith or incidental thereto*" The main highlights of the said bill are Sections 3 and 4 which criminalize the practice of Triple Talaq. Section 3 of the Bill states that "talaq-e-biddat" shall be 'void' and 'illegal'. This is followed by consequence of such void action in terms of Section 4 thereof, stating, whoever pronounces *talaq-e-biddat* shall be punished with imprisonment which may extend to three years and fine. Further **Section 7** of the Act makes the offence cognizable and non-bailable offence.

The said Bill has gained appreciations at the same time the Bill has been heavily criticized by many. The Bill will now be placed before the Upper House i.e. before Hon'ble Rajya Sabha on January 2, 2018, and if the said Bill is passed with Majority the same will be sent for approval to the Hon'ble President of India and if the Hon'ble President assents to the said Bill then the new act will come in force as **The Muslim Women (Protection of Rights on Marriage) Act.**

## CONCLUSION:-

Most important factor in coming near future is that law has developed in varied factors especially in family as Family law is the keen most important law that is largely affected by cultures and traditions. With the change in cultural perspectives and adoption of varied different cultures and traditions, laws must be and will be developed with the change in time and era. Section 377, Triple Talaq, Adultery, Same Sex Marriages are the best example of the change in cultural perspective with time where our law lacks.

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