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EXPLORING FAMILY LAW

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ABSTRACT

Family is a branch of civil law that deals with all things that occur in a family. It deals with marriage, divorce, children, and other family responsibilities. If all goes well, the state does not intervene in the family except to constitute it by requiring registration when people marry. The law defines who can marry, and what happens to individuals when they acquire family or marital property. If there are problems and the people choose to dissolve the family, called dissolution of marriage or divorce, then the state intervenes and pronounces it over with a decree. If there are problems with the family members assuming their responsibilities the court might intervene upon a petition. Family law governs what happens to family property during the death of one of its members or a divorce. Wills and trusts are discussed as are other economic factors. Major changes in family laws in the U.S. and other countries now grant legal rights, including the right to marry, to those who identify as LBGTQ so that marriage is no longer restricted to just one man and one woman. Family law is the area of law that addresses family relationships. It includes creating family relationships and breaking them through divorce and termination of parental rights. This law addresses adoption, contested custody of children, etc.

Keywords- Adoption, LBGTQ, Marriage, Family, Divorce, Parental Rights, Legal Rights

INTRODUCTION

The Hindu Marriage Act, of 1955 serves as an indispensable foundation for the law of family in India, covering most facets of Hindu marriage. The Act also deals with problems associated with issues of monogamy and polygamy within a Hindu marriage as well as voidable marriages. It plays a role, in guiding the process of divorce. It outlines reasons for divorce such as adultery, cruelty, desertion, conversion, mental illness and more. Additionally, it addresses an aspect of providing support to the dependent spouse during and after divorce proceedings through Section 24. Another significant law that governs

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inheritance rights among Hindus is the Hindu Succession Act of 1956. This legislation establishes guidelines for distributing property among legal heirs in cases where someone passes away without leaving behind a will. The Act also. Grants daughters their share in ancestral property—a crucial step towards promoting gender equality, within Hindu families.

In the case of Matrimonial law in the Indian context, a practical definition capturing the essence of the term has been given in Mulla's Principles of Hindu law [S 13.31], which says that "The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other." In a significant judgment delivered on 21st June (***Kannain Naidu vs Kamsala Ammal***), the Madras High Court held that unpaid domestic labour performed by a married woman must be taken into account when determining legal rights to marital property. The facts of the case were as follows: after a decade and a half of marriage, the husband moved to work in Saudi Arabia. The wife was responsible for managing the husband's affairs in India, looking after the marital home, and for the care and upbringing of the children. As part of this process, she purchased certain properties using funds provided by her husband. When the husband returned to India, disputes arose between the two, following which the husband filed a suit asking that his wife be injuncted from alienating any of the properties. The trial court held in favour of the husband, on the basis that the properties had been purchased with his money, and were in his name.

This part of the holding was affirmed on appeal (certain other parts were reversed, but they do not concern us here), and the matter then reached the High Court on a second appeal. In law, the study of institutions began with legal scholars and judges debating the relative competencies of courts and legislatures as decision-makers.[2] Legal Process scholars developed these ideas, elevating questions of institutional choice and institutional design.[3]

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[2] William N. Eskridge, Jr. & Philip P. Frickey, An Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, lix-lxii (William N. Eskridge, Jr. & Philip P. Frickey eds., The Found. Press 1994) (tent. ed. 1958).

[3] Id. at xciv-xcv (describing contention of Legal Process theorists that members of pluralist society will disagree about what law should be, and therefore it is critical to have clear and consistent process for determining content of the law)

Family law about children focuses in most countries on issues of legitimacy, adoption, custody, education, and control of the child's welfare. A child's "**legitimacy**" was for centuries a matter of great significance in many parts of the world, particularly in cultures that traced descent and inheritance in the male line (that is, patrilineally). Only a child born to parents who were legally married to one another at the time of the birth was considered "legitimate" and therefore entitled to rights of inheritance and succession through the father's family line. The child of an unwed mother was branded as "illegitimate" or with other more derogatory labels and suffered social disabilities or even ostracism as a result. The biological father was not usually required by law to support his out-of-wedlock children.

Today, the issue of legitimacy has become less important, at least in most Western countries, because the obligation for support is increasingly based on biological parentage rather than upon the parents' marital status. Rights of inheritance have been extended to children born to unmarried women. Legal devices, such as adoption and legitimation, have also narrowed the difference between the legal status of illegitimate and legitimate children.

The practice of dissolving a marriage is as old as marriage itself. Cultures vary greatly in their attitude toward marital dissolution and in the ease with which spouses are able to leave a marriage they find intolerable. Each of the four major world religions—Judaism, Christianity, Islam, and Hinduism—has a distinct body of laws governing marriage and family relations. In none of these religions is divorce approved, but both Jewish and Islamic law contain provisions for dissolving a marriage if the couple is unable to live together peacefully. But in both religions the husband is in a more privileged position, in terms of his ability to initiate a divorce or to prevent his wife from obtaining one.

Hindu religious law, on the other hand, has no provision for the formal dissolution of a marriage, which is viewed as an irreversible, permanent sacramental commitment, particularly for the wife. The husband cannot legally extricate himself from the marriage either, but he may take a second wife more to his liking if he wishes.

Within Christianity the different denominations vary in their approach, with some freely allowing divorce and remarriage and others discourage it strongly or making it impossible.

For the Roman Catholic Church marriage is a sacrament that binds a man and woman forever and cannot be dissolved. The church does, however, provide a procedure for annulling a marriage (determining that it was never valid) under certain conditions—for instance, if it is shown that it was entered into under false pretences or that one party had no intention to live up to the promises made when it was solemnized. In many Catholic-majority countries, such as Brazil, Italy, and Ireland, divorce was forbidden by national law until the 1970s or even later. This remains the case in the Philippines even today. Almost all other countries provide their citizens some legal access to divorce, though the specific terms under which this can be done vary widely. Until relatively recently the divorce laws of most countries and U.S. states required that the party wishing to divorce show cause—that is, prove that his or her spouse committed some fault so serious as to make the continuation of the marriage impossible. Typically, laws of this kind lay down a list of specific "grounds" for divorce, such as adultery, abandonment, or cruelty, that the court considers sufficient justification for dissolving the marriage. In some countries, if both parties are proven to have committed such a fault, the divorce may be denied.

Beginning in the late 1960s, many countries in Europe and elsewhere reformed their divorce laws, moving away from requiring proof of fault and toward divorce by mutual consent and no-fault divorce. Under no-fault divorce, it is not assumed that one party is guilty and the other innocent. The party desiring the divorce must simply show that the marriage has irretrievably broken down; the consent of the other spouse is not required. In the United States the first no-fault divorce law was passed in California in 1969. By 1974 half of the U.S. states had followed suit, and today no-fault divorce is available in all of them except New York.

This broad definition encompasses political, social, and economic institutions, ranging from the practice of gift-giving (an abstract institution without formal rules) to the adjudicative process (a concrete institution with formal rules).[4] Institutions generally have three components: normative, regulative, and cognitive.[5] Consider the two institutions just mentioned—gifts and adjudication: the normative component of the institution tells a

[4] N, supra note 19, at 27-33.

[5] infra text accompanying notes 72-74.

person how they should act,[6] the regulative component provides rules to guide action,[7]and the cognitive component relieves a person of conscious thought because compliance is routine.[8]As this broad definition implies, a seemingly infinite number of practices and arrangements could qualify as institutions

In the United States family law comes within the jurisdiction of the individual states, not, as in most countries, the federal government. There is, as a result, much inconsistency from one state to another. For example, under the laws of some states, all property brought into the marriage by either spouse or acquired by them during the marriage is treated as community property, belonging equally to both. In other states each spouse retains the right of ownership over any property he or she brought into or earned during the marriage. The question of the relative fairness of these two ways of handling spousal property rights is not easy to resolve. If husband and wife are allowed to maintain separate rights of property, they are in much the same situation as two unmarried adults. But in case of divorce, unless specific items have already been deliberately placed into joint ownership or made subject to a prenuptial agreement, this system can lead to the impoverishment of the party with fewer assets, usually the wife. In community property states divorce may pose other problems.

A fair resolution of the property issue must take into consideration the relative responsibilities of the spouses: **Do both spouses earn an income, or is one responsible for supporting the family while the other takes care of the home and raises the children?** The trend in most countries has been to allow separate rights of property to the spouses while providing rules for a fair division when there is a divorce. Laws of most countries require the husband to support his wife and children. As more women have begun working outside the home, however, many governments have made the wife equally responsible for supporting her family and, in case of divorce, for paying child support (if

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[6] Sociologists emphasize the normative aspect of institutions, partly due to their focus on kinship and religious systems, where values are omnipresent and highly influential. See ALBISTON, supra note 69, at 27-28 (describing normative aspect of institutions and noting "[p]eople come to believe that institutionalized practices are correct, fair, and appropriate"); SCOTT, supra note 46, at 19

[7] SCOTT, supra note 46, at 33. Economists emphasize the regulative aspect of institutions. See id. at 35; see also NORTH, supra note 68, at 4

[8] Anthropologists and sociologists emphasize the cognitive aspect of an institution. ALBISTON, supra note 19, at 27-28

her former husband is awarded custody) or even alimony (if his earnings are significantly lower than hers). Furthermore, in the 20th century many countries, including the United States, Britain, and the countries of Western Europe, enacted legislation to ensure, through the use of public funds, minimal standards of maintenance for children in the absence of the ability or the willingness of the father to support them

The Supreme Court of India in Seema vs Ashwani Kumar reported 2006(2) SC 378, has directed all states in India to enact rules for compulsory registration of marriages irrespective of religion, in a time-bound period. This reform, which has been spearheaded by the National Commission for Women, has struck a progressive blow to check child marriages, prevent marriages without the consent of parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women, and for checking the selling of young girls under the guise of marriage.

The Supreme Court of India in another unreported decision dated March 27, 2006, has stayed the legal validity of the marriages of minor girls below eighteen years of age, which had been earlier upheld by the two high court's orders. At least seven states in India have a high incidence of child brides and the law does not take care of the anomaly to ban child marriages. It is unclear why family law scholars generally do not embrace institutionalism. Perhaps it is because family law simply implicates too many institutions[9] individual cases can involve numerous legal institutions, including courts, mediation, expert witnesses, different kinds of lawyers and advisers, including guardians ad litem and court-appointed special advocates, and so on. Entrenched social institutions, from racism to patriarchy, deeply influence family law's rules.[10] and economic institutions, from markets to the family wage, play a role in legal regulation. Beyond this institutional array, every state has its own laws, and family law practice varies by county, courthouse, city, and even judge. In short, family law might be overwhelmed by the problem of variety and has not seen the institutional forest for the trees. Indeed, as part ii shows, it is remarkably challenging—but not impossible—to map family law's institutions. The problem might also be that intimacy and close personal relationships lie at the heart of family law, and scholars thus focus on individuals and affective ties rather than the institutions that influence intimacy.

[9] Emily Stolzenberg theory. See Stolzenberg, supra note 1, at 2051-52

[10] infra text accompanying notes 161-63.

Moreover, family law doctrine emphasizes the rights of individuals: a parent has a right to the care and custody of a child, a woman has a right to terminate a pregnancy, and an individual has a right to marry someone of the same sex. These individual rights reflect narratives of heroic individuals rather than the relational aspects of life[11] and individualism in family law distracts from understanding how institutional arrangements deeply affect family relationships, both shaping preferences and channeling behavior. This, too, is a barrier that legal scholars can overcome, and an understanding of institutional arrangements can—and should—be at the fore. Whatever the reason for the lacuna, there is no compelling reason for family law exceptionalism in institutional analysis. The remainder of this article accordingly seeks to encourage more institutionalist scholarship, beginning the project of systematically and holistically integrating institutional analysis into family law.

The two principal family law legislations in India, The Hindu Marriage Act, 1955 and The Special Marriage Act, 1954 contain three sets of separate grounds in a three-tier divorce structure in these legislations. These are the fault grounds, break-down grounds on non-compliance with judicial separation or restitution of conjugal rights, and grounds of mutual consent. Irretrievable breakdown of marriage is not a ground for divorce under any codified Indian family law. The Parsi Marriage and Divorce Act, 1936 (as amended) and the Divorce Act, 1869 (as amended) follow suit. The Dissolution of Muslim Marriages Act, 1939 sets out the grounds for a decree for dissolution of marriage of Muslims. Section 29 of The Hindu Marriage Act, 1955 gives statutory recognition to customary divorces. This in effect means that parties relying on a custom need not go to court and obtain a decree for divorce. However, the onus on the party who relies on a custom is indeed weighty and the custom should be ancient, certain, reasonable and not opposed to public policy. Even though courts take judicial notice of customs, the validity of a deed of dissolution of marriage under a customary practice has to be established by substantial cogent evidence by the person propounding such custom. In Subramani Vs. M. Chandralekha reported at Judgments Today 2005 (11) SC 562, that the Apex Court following well-settled earlier

[11] See JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 19-38 (2011) (arguing for relational understanding of rights); see also Jennifer Nedelsky, Reconceiving Autonomy: Sources, Thoughts and Possibilities, 1 YALE J.L. & FEMINISM 7, 12 (1989) (describing "deeply ingrained sense that individual autonomy is to be achieved by erecting a wall (of rights) between the individual and those around him").

principles of law, held that since there was no custom prevalent in the community to which the parties belonged for dissolution of marriage by mutual consent, the alleged deed of dissolution marriage could not be executed. It is common for parties in India to attempt to use customary divorce practices as a shortcut to statutory procedures, but with the vigilant judiciary, such abuse of the process of law does not generally succeed. Regardless, multiple marriages are often solemnized in contravention of codified law by taking advantage of non-existent customs. To this extent, neither law nor the courts come to the rescue of such parties. However, Section 16 of The Hindu Marriage Act clearly provides that notwithstanding that such a marriage is null and void, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate. Consequently, even though spouses may not benefit, the statute protects and provides property and other inheritance rights to children of such unions.

Conferring such rights upon children has been recently reiterated by the Supreme Court of India in Bhogadi vs. Vuggina reported in 2006 (5) Supreme Court Cases 532. The policy of law is therefore clear to provide beneficial effects to the offspring without condoning the contravention and violation of marriage laws. Customs are slow to, but their misuse must be prevented and curtailed. The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Caught in the crossfire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross-frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who by migrating to different jurisdictions have generated a new crop of spousal and family disputes. Cross border family relationships arising from such exchange has carved out a new niche in the jurisdiction of family law disputes. Such problems have no ready-made solutions in the conventional legislations prevailing within the legal system in India. The net result: the innovative judicial system in India with its dynamic jurisprudence when invoked, provides a tailor-made answer for every individual case. But then, this does not provide a consistent, uniform and universal remedy to be adhered to in an international perspective.

In a decision dated March 3, 2006 the High Court of Bombay at Goa in a case between a 62 year old American father and 39 yeas old British mother residing in Ireland, and who

were litigating over the custody of their 8-year-old minor daughter, said to be illegally detained in Goa by the father, the court declining the issuance of a writ of habeas corpus, held that the parties could pursue their remedies in normal civil proceedings in Goa. The court dismissing the mother's plea for custody, concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible and directed that the status quo be observed. This in effect meant that the 8-year-old minor girl must continue to live in Goa in the father's house, without her mother or any other female family member.

Among other things, they repeal a controversial legal presumption introduced in 2006. It was presumed that "equal shared parental responsibility" is in the best interests of children. In many cases, this is true. But in cases of family violence, assuming both parents should have equal responsibility for a child can be dangerous. The journey to having this presumption removed has been long and littered with countless reviews, inquiries and evaluations. The 2006 reforms originated in a parliamentary inquiry established by the Howard government in 2003. Fathers' rights groups led the charge for the inquiry and for equal-time custody laws. Equal shared parental responsibility is about the decision-making duties of parents regarding the big decisions in a child's life such as education, religion and health. This is different to equal time, which is about where children actually live. It often involves the child swapping homes every week. Some children enjoy it, others feel like they are navigating two very different emotional spaces.

Because of the origins of the inquiry with fathers' rights groups, the focus was on equal time as a starting point. It was not on finding out what actually works best for children after family breakdown. The 2006 reforms did not contain a presumption of equal time, but they did include a presumption that equal shared parental responsibility is best for children. A presumption is intended as strong message to judges and the legal system. It tells a judge the law says shared parenting is generally a good thing. While that is true in some families, that can be a dangerous message to a decision-maker for families where there is violence or abuse. Although there were exceptions for family violence or child abuse, research showed orders for equal shared parental responsibility were made in many cases where there were serious allegations of family violence. An order for equal shared parental responsibility meant parents had to consult each other about important decisions regarding their children. In some families, this works well and ensures both parents have ongoing roles in their children's lives after separation. Where there has been domestic

violence, including coercive control, such an order provides the perpetrator of abuse with a legal channel to continue it. Since 2006, there have been at least six formal inquiries into the family law system as well as commissioned evaluations and independent research. Problems with the presumption and the dominance of the ideal of ongoing "meaningful" relationships are consistently reported, including by a 2017 parliamentary inquiry on family law. That report found the existing laws were "leading to unjust outcomes and compromising the safety of children".

The 2023 changes have also repealed the section about equal and substantial and significant time and simplified list of the best interests' factors. The new factors include:

- the safety of the child and others who have their care
- the views of the child
- their developmental, psychological, emotional and cultural needs
- the capacity of each of the parents to provide these needs
- the benefit to the child having a relationship each of their parents.

In terms of safety, the court must consider any history of family violence, abuse or neglect and any family violence order. Implementation of the amended legislation will have its challenges. Despite their flaws, the old laws did have useful guidance about what a court should think about if considering making order for equal (or lots of) time. And a judge can still make those orders despite the repeal of the presumption.

After more than 50 years, the law governing divorce — the process of legally dissolving a marriage — is changing in England and Wales. While everyone hopes they won't have to use divorce law, each year over 100,000 couples do. Yet for half a century the law itself has actually increased conflict between the parties and negatively affected children. The new law is intended to reduce family conflict and enable couples to dissolve their marriages or civil partnerships without the law itself making things worse. The old law was based on the Divorce Reform Act 1969, which was later incorporated into the Matrimonial Causes Act 1973. The 1973 act stated that a petitioner (the spouse seeking a divorce) could only get a divorce when their marriage had irretrievably broken down and they could prove one of five circumstances ("facts") existed. Three facts were fault-based: adultery, behaviour and desertion for two years. The other facts required two years' separation if the other spouse consented to the divorce or being separated for five years. Unless couples were willing to wait two years, the only options were to divorce for adultery or behaviour, which led to

some petitioners feeling compelled to exaggerate or distort their accounts of events during the marriage in order to get a divorce. Research by the Nuffield Foundation in 2017 found that only 29% of respondents said that their "fault" reason very closely matched the reason for the divorce. This tells us that most fault-based divorce petitions (the official document requesting a divorce) were not an accurate account of a couple's experience. About two-thirds of couples who divorced using fault grounds said it made the process more bitter, and around one-fifth said the law made it more difficult to sort out arrangements for their children. A 1990 report from the Law Commission found that the law provoked unnecessary hostility and bitterness. The commission found the process made things worse for children because it set the tone for their parents to remain in conflict following divorce.

Further calls for reform came from the Supreme Court in the high-profile case of **Owens v Owens** in 2018, which revealed the absurdity and unfairness of the law when Mrs Owens was unable to obtain a divorce. The first judge decided that the 40-year marriage had broken down, but Mrs Owens had failed to show her husband's behaviour towards her satisfied the legal requirements for a divorce. Despite finding it a "very troubling case", the court of appeal and Supreme Court could not overturn that decision because the first judge had applied the law correctly. A few months later, the government published its proposals to reform the law. The government accepted the many criticisms of the law and moved quickly to introduce a bill that became the Divorce, Dissolution and Separation Act 2020 now coming into effect.

THE NEW LAW

The new law amends the Matrimonial Causes Act 1973 (relating to marriage and divorce) and the Civil Partnership Act 2004 (relating to civil partnership and dissolution). Irretrievable breakdown remains the sole ground for divorce, but the need to prove any of the five facts has been removed. Couples will no longer have to document past wrongs to end their marriage. A divorce can be sought by one party — as before — or now by both parties jointly based on a statement of irretrievable breakdown. Joint applications will better reflect that divorce is often a mutual decision and encourage cooperation early in the process.

The court must take the statement to be conclusive evidence that the marriage has broken down irretrievably and grant the divorce. It will generally not be possible to contest a divorce application by challenging such a statement.

The divorce process will now take a minimum of 26 weeks to complete, which will be considerably quicker than in some cases under the old system. The government hopes couples will use this period to plan for the future or, in some cases, to provide "a meaningful period of reflection and the chance to reconsider" whether to end the marriage. Civil partnership dissolution will operate in the same way.

THE FUTURE OF DIVORCE

Despite the new divorce process being cheaper to administer and moving online, the Ministry of Justice has no plans to reduce the application fee. However, by avoiding one party blaming another, the new system might still save couples money in the long run. A more conciliatory, civil approach should make it easier for couples to resolve matters of finances, property and children.

The new law is likely to lead to a short-term surge in divorces, as happened after the last reform in the early 1970s. However, once this increase subsides, the overall number of divorces will probably be as much as they would have been without the reforms. In recent decades, efforts to develop a more constructive and child-focused system of family justice have been compromised by English divorce law itself. The new law will be an improvement and finally bring the law in line with how people live and love in the 21st century.

CONCLUSION

The changes in family law have significant implications for individuals and society as a whole. These changes reflect a growing recognition of the evolving nature of family structures and the need for legal systems to adapt to these changes. The reasons behind these changes can be attributed to several factors. Firstly, societal attitudes towards marriage, divorce, and parenthood have shifted over time. There is a greater emphasis on individual autonomy and personal happiness, leading to a higher divorce rate and an increase in non-traditional family structures such as single-parent households, blended

families, and same-sex couples. Family law has responded to these shifts by providing legal protections and rights to individuals in these diverse family arrangements.

Secondly, there is an increased focus on the best interests of the child in family law. Courts and lawmakers recognize that children are often the most vulnerable parties in family disputes and should be shielded from harm. Consequently, there has been a shift towards promoting shared parenting arrangements, encouraging both parents to have meaningful involvement in their children's lives, and prioritizing the child's well-being and stability.

Thirdly, gender equality and women's rights movements have played a significant role in shaping family law. Historically, family law was often biased against women, placing them in vulnerable positions during divorce and custody proceedings. However, changes in family law have aimed to rectify these disparities by promoting gender-neutral laws and ensuring fair treatment for all parties involved.

Furthermore, advancements in assisted reproductive technologies and the rise of surrogacy and adoption have necessitated legal frameworks to address the complex issues arising from these practices. Family law has adapted to provide legal recognition and protections for individuals involved in these alternative methods of family building.

Overall, the changes in family law reflect a society that acknowledges and embraces diverse family structures, prioritizes the well-being of children, and strives for greater equality and fairness. These changes are necessary to meet the needs and realities of modern families, and they aim to provide legal support and protection to individuals navigating the complexities of family life in the 21st century.

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