

Parsi Divorce: Time to Rethink the Legal Framework?

*Dr. Anupama Ghosal¹
Neville Contractor²*

Abstract

Unlike other communities, the Parsi community is relatively a small community in India. In pre-colonial period, due to the absence of their code of law, Parsis had to depend on the basic principles of justice and fairness but later they were generally managed by panchayats or five most influential and intelligent persons within the community, for redressal of their grievances, because of which problems arose while resolving the disputes pertaining to inheritance and matrimonial litigations. In the colonial period, the need was felt to enact Parsi Marriage and Divorce Act (PMADA) in 1865 that provided for the jury system. Out of many, two major problems that arose in the jury system was access to the matrimonial courts and time-consuming adjudication of matrimonial disputes. The inherent deficiency and inadequacy of the jury system resulted in the formation of opinions and arguments disfavouring and favouring the jury system. The Supreme Court of India finally laid down the principles which constitute the crux of the fundamental right to access justice for the Parsi community. To suit the current need of the Parsi community with the changing times and for ensuring justice and fairness, a reboot of the existing and prevalent Parsi jury system is a necessity.

Key Words: *Parsi, Marriage, Divorce, Litigation, Jury*

1. Introduction

A community with descendants from the ancient Persians, Parsis are now found mainly in Western India and are followers of the Zoroastrian religion. The mass exodus of the community from Persia was forced under coercion of the Islamic invasion, thus compelling them to seek protection in India many centuries ago. Landing in Sanjan in present day Gujarat it was in the year A.D. 717, the then King Jadao Rana permitted them to reside in the city on condition of their adopting certain local customs.³

The Parsis in India were not in possession of the code of laws that their prophet had formulated as their religious books had been lost during their exodus to India. Initially they depended on basic principles of justice and fairness but later they were generally managed by panchayats or committees of five persons comprising the most influential and intelligent within the community. These panchayats carried out the functions of the

¹ Associate Professor and Coordinator, School of Social Sciences, West Bengal National University of Juridical Sciences (WBNUJS), Kolkata

² 3rd Year B.A. LL.B (Hons), (WBNUJS), Kolkata

³ Dosabhoj Framjee, *The Parsees: Their History, Manners, Customs and Religion* (1858)

courts of justice and their decisions were willingly accepted by disputing parties. This situation continued until the eighteenth century when the panchayat system was found to be partially ineffective.⁴

With an increase in instances of litigation amongst the Parsi community, the need for a recognised code of law was strongly felt as their sacred books did not provide much guidance to courts in civil disputes. Subsequently the legislation on Parsi matrimonial and inheritance law was a contention to create a distinct legal identity for the community.⁵

The British colonial government after seeking advice from various community leaders, tried to simplify greatly diverse family rules and regulations within the gamut of four major religions: Hindus, Muslims, Christians and Parsis.⁶ Subsequently, the Parsi Marriage and Divorce Act 1865 (“PMADA”) was passed. Earlier, in the absence of any provision in the PMADA or before this legislation came into effect, it was presumed that the Common Law of England would apply to the Parsis of Bombay.⁷

The PMADA governs matrimonial alliances of Parsis who are defined as persons professing the Zoroastrian faith. The Parsis continue to maintain control over matrimonial affairs in the community by employing the jury system which came into force in 1865 and was drafted by the Parsi Law Association. Many Europeans were concerned at the time that the jury system would give Indians excess power. The existence of the matrimonial jury system also echoed the strong efforts of Parsi lobbyists in creating a separate legislation governing personal law. It showed Parsi exceptionalism in the legal arena especially through the existing Parsi matrimonial jury. No other communities could at the time have the right to jury trials involving marital cases. Juries were only used in certain criminal trials in a piecemeal fashion at local levels.⁸

Special courts are set up annually or biannually to resolve disputes among parties such as The Parsi Chief Matrimonial Courts in the presidency towns of Calcutta, Madras and Bombay⁹ and the Parsi District Matrimonial Courts in other areas¹⁰ that the respective state government deems fit.¹¹ The unique nature of these courts is their functioning which involves the chief

⁴ Ibid

⁵ Rashna Writer, *Parsi Identity*, 27 IRAN (1989).

⁶ Nivedita Menon, *A uniform civil code in India: The state of the debate in 2014*, 40 FEMINIST STUDIES 2 (2014).

⁷ Naoroji v. Roger (1867) 4 Bom. H. C. R. 1; Payne and Co. v. Pirojshah Nusserwanji Patel: MANU/MH/0099/1911.

⁸ Mitra Sharafi, *Law and Identity in Colonial South Asia* (2014)

⁹ The Parsi Marriage and Divorce Act, 1936, §19.

¹⁰ The Parsi Marriage and Divorce Act, 1936, §20.

¹¹ The Parsi Marriage and Divorce Act, 1936, §18.

justice or any other judge along with 5 delegates, comprising respected members of the Parsi community to decide matrimonial disputes barring the exceptions stated in S.19/20 which do not require the presence of delegates. These 5 member coreligionist juries normally consist of retired persons and decide on certain matrimonial suits.¹² They have the opportunity to exert their social influence over the community in a manner denied to senior men belonging to other religious groups. However, despite uniformity and modernity in similar laws in India, the practice of retaining the jury system in Parsi matrimonial adjudication continues. The issue with this system is the fact that it results in issues with regard to access to justice because these juries only sit for a limited period of time and only in certain cities in India. Moreover, the Indian judicial setup has also moved away from the system of jury trials. Therefore, in light of this, the analysis aims to explore the idea of abolishing the system of jury trials under the PMADA and whether it would allow for better access to justice and quicker dispute resolution for litigants.

2. Background of the Jury System in Colonial Times

The Indian Jury Act 1926 brought into existence the system of trial of cases by juries. Colonial British rulers were skeptical about the implications of native justice and instead preferred to be judged by a jury consisting of members of their own community. They were also wary of having to deal with an unfamiliar legal system prevalent in India. Therefore the need to protect the rights of British subjects through juries manned by their peers ensured the system's survival until Indian independence in 1947.¹³

Parsis as a community had a privileged position amongst the ruling British and therefore chose to closely follow British legalism, accepting their systems readily. Parsi divorce laws were thus extremely similar to and were an outcome of the British covenants on divorce. The PMADA 1865 contained laws for Parsis and was drafted by members of the community to be similar to English laws in those times. The adoption of the jury system was thus an outcome of emulating the colonial legal system.¹⁴ The strong political and financial standing of the Parsi community also helped them to negotiate and have distinct laws for themselves when none existed. Being a numerically insignificant community, these laws were enacted by them with

¹² The British Broadcasting Corporation, *Parsi Matrimonial courts: India's only surviving jury trials* September 24, 2015, available at <http://www.bbc.com/news/world-asia-india-34322117> (Last visited on March 29, 2018).

¹³ The Hindu, *Judged by twelve* October 18, 2016, available at <http://www.thehindu.com/features/magazine/Judged-by-twelve/article14581947.ece> (Last visited on March 29, 2016).

¹⁴ Mitra Sharafi, *The Marital Patchwork of Colonial South Asia: Forum shopping from Britain to Baroda*, 28 LAW AND HISTORY REVIEW 4 (November 2010).

the aim to have and retain a separate entity within law so as to grant statutory acceptance to community involvement in judicial procedures.¹⁵

3. Justifying the Abolition of the Jury: A Violation of the Fundamental Right to Access Justice

In order to dissolve a marriage under the PMADA, Parsi couples have to go through a more strenuous exercise with the procedure being cumbersome and extremely time consuming. The system does not permit mediation or settlement which is the case with Hindu women governed by the family court system. Since Parsi matrimonial courts only sit once or twice a year for a short duration in certain cities, it holds up resolution of matrimonial disputes. With estranged couples working away from metropolitan cities, it also greatly inconveniences the persons involved. This denies couples seeking matrimonial relief, their fundamental right to access justice under Article 14 and 21 of the Indian Constitution¹⁶. In the case of *Anita Kushwaha v. Pushap Sudan*¹⁷, the Supreme Court laid down four principles which constitute the crux of the fundamental right to access justice as follows:

1. “The State must provide an effective adjudicatory mechanism which is just, fair and objective in its approach
2. The mechanism so provided must be reasonably accessible in terms of distance
3. The process of adjudication must be speedy
4. The litigant’s access to the adjudicatory process must be affordable.”

The Supreme court held, “There is jurisprudentially no qualitative difference between denial of speedy trial in a criminal case, on the one hand, and civil suit, appeal or other proceedings, for ought we know that civil disputes can at times have an equally, if not, more severe impact on a citizen’s life or the quality of it.”¹⁸ Therefore, one could argue that the ambit of the right to access to speedy justice extends to civil suits as well. Thus, keeping in mind the constituents of the right to access justice, aspects under each criterion will be analysed in order to ascertain whether or not the present system of redressal under the PMADA is restrictive of the fundamental right to access justice.

4. Non-Neutral Approach

It is argued that the present adjudication method which involves a jury may not be fair or objective in its approach. Delegates may be biased in

¹⁵ Flavia Agnes, FAMILY LAWS AND CONSTITUTIONAL CLAIMS (Vol 1., 2011).

¹⁶ Anita Kushwaha v. Pushap Sudan AIR 2016 SC 3506.

¹⁷ Ibid.

¹⁸ Ibid.

their view points in comparison to judges who are experienced in adjudication as in the case of *K.M. Nanavati v. State of Maharashtra*¹⁹ which was considered the last criminal trial employing the jury system in India. It was felt that the jury's decisions were possibly influenced by the media and the citizens.²⁰

Jury members may also not possess specific skill sets to work on matters under consideration as they may tend to not draw a line between morality and law. There is always the risk of putting the fate of community members in the hands of laypersons. Similarly, judges in the United States, a country which has adopted the jury system, have been scrutinizing complaints regarding jurors invalidating the law by breach of decisions which are not in consonance with the law.²¹

Besides, societal benchmarks and virtues do not go hand in hand with principles of justice and can influence judgements unfavourably. The Parsis being a small community with most people knowing each other, jury members can be influenced by personal biases or their own sense of morality and do not necessarily pass impartial verdicts. For example, in the famous American trial of O. J. Simpson where the racial mix of the jury was cause for concern, there was a debate whether jurors were influenced by race. It was felt that minority jurors declined convicting minority defendants.²² In *Gregory v. UK*²³ a jury member passed a note to the judge stating that at least one jury member was displaying racial prejudice.²⁴

Furthermore, there is a lack of accountability to the legal system, the public and the parties who are involved in the case. Authority is defined by non professional decision makers who make decisions by applying varying standards. Research regarding juries in the United States also shows that juries are not equitable and do not have regard for the opinions of minority member(s) of the jury.²⁵

¹⁹ AIR 1962 SC 605.

²⁰ Telegraph India, *Teachings from a trial* Sept 7, 2016, available at https://www.telegraphindia.com/1160907/jsp/opinion/story_106622.jsp (Last visited on April 5, 2018).

²¹ John D. Jackson, *Making Juries Accountable*, THE AMERICAN JOURNAL OF COMPARATIVE LAW (2002).

²² Ibid.

²³ *Gregory v United Kingdom*, (111/1995/617/707), European Court of Human Rights, 1997.

²⁴ See *supra* note 17.

²⁵ Ibid.

5. Difficulties in Accessing Matrimonial Courts

The mechanism for redressal is not “reasonably accessible in terms of distance”²⁶ as most suits come before the Chief Matrimonial Courts in the presidency towns. Due to a small population, there are not many Parsi District Matrimonial Courts constituted. Often under S.22 of the PMADA, the jurisdiction of the Chief Matrimonial Courts may be extended so as to make aggrieved parties approach Chief Matrimonial Courts in case Parsi District Matrimonial Courts are not constituted in their area of residence. This causes great hardship as couples staying in areas without a Parsi District Matrimonial Court or those living away from presidency towns, are compelled to travel to seek redressal. This clearly makes justice inaccessible in terms of distance as a result of which filing such suits may become costly as parties to the suit would need to travel for hearings on an ongoing basis. On the other hand, it’s easier for spouses married under the Hindu Marriage Act 1955 to file divorce petitions with any district courts which fall within their local limits.²⁷

6. No Procedure of Jury Selection

There does not exist a uniform procedure for appointment of delegates under the PMADA.²⁸ For example, the method of appointing delegates in Mumbai may not be the same as that followed in Pune. This can be problematic as there is an absence of uniformity or specific transparent procedures backed by law in place. As a result, leaving such a procedure to the discretion of courts may not always result in the best selection of delegates to help adjudicate such matrimonial suits and would lack uniformity across the nation.

Jury trials may also not ensure the best outcomes in current times and changed circumstances. The technical, legal and economic concepts involved in present day cases maybe beyond the comprehension of average jury members. Since jury members do not necessarily possess a legal background or training, the possibility of being ill equipped to assess testimonies exists. In *Betancourt v. Marine Cargo Management, Inc.*²⁹, the United States District Court for the Southern District Court of Florida dismissed a number of counts of the plaintiff’s sexual abuse accusations as they covered common law tort claims that would present various legal questions and create confusion for the jury.³⁰ In *Sims v. William Howard &*

²⁶ See *supra* note 12.

²⁷ The Hindu Marriage Act, 1955, §19.

²⁸ *Delferooz Darius Dorabjee v. State of Maharashtra* AIR 2006 (NOC) 916 (Bom).

²⁹ 930 F. Supp. 606 (S.D. Fla. 1996).

³⁰ *Developments in the Law: The Civil Jury*, 110 HARVARD LAW REVIEW 7 (May, 1997).

*Son Ltd*³¹ the Court displayed its disapproval for jury trials in personal injury cases as compensation awarded by them was made without knowledge of the legally permissible scales.³²

Apprehensions about jury capabilities have been of concern to scholars through the history of the American judiciary. There has also been a drastic reduction in civil jury trials in England down to barely two to three percent of all cases. Even the Lord Chief Justice of England Lord Parker has supported abandoning the system or largely modifying it.³³ Currently, a large amount of the judge's time may be wasted in attempting to explain facts or legislation to the jury. Therefore, it is contended that this system should be done away with.

7. Redressal Over Extended Periods

Given that many such courts only sit for a small duration of time once or twice a year, couples seeking redressal do not get access to any redressal mechanism throughout the year. If adjudication is unable to be completed in one session of the court, it causes great hardship as parties may have to wait for a while for the next session. At times, suits are part-heard at the end of one session which results in parties having to wait until the next session of the Parsi Matrimonial Court for complete redressal.³⁴ In addition, the jury's capacity to function judiciously and logically is questionable in highly complex cases. Questions of facts are sometimes complex and the jury is incompetent to decide on them. It is also felt that the length of trials makes jury comprehension difficult even for jurors with above average intelligence.

Since the jury meets limited number of times a year for brief periods, litigants can misuse the system and seek adjournments for long periods, thus delaying the litigation process indefinitely. In *Sohrab Anklesaria v. Feroza Anklesaria*,³⁵ the suit took 3 years to be disposed due to continuous postponement of the matter to each successive session of the court. In view of Parsis not being governed by mainstream family law, it hurts litigants in troubled marriages adversely.

8. Jury Member Absenteeism

In the case of *Sohrab Anklesaria v. Feroza Anklesaria*³⁶, the parties had requested future dates as the arguments had not concluded in one

³¹ [1964] 2 Weekly L.R. 794 (C.A.).

³² T.B.Smith, *Civil Jury Trial: A Scottish Assessment*, 50 VIRGINIA LAW REVIEW 6 (Oct 1964).

³³ Ibid.

³⁴ *Sohrab Anklesaria v. Feroza Anklesaria* : 2016 SCC OnLine Bom 10350.

³⁵ Ibid.

³⁶ Ibid.

session. Thereafter, it was noted that a delegate was travelling on those dates and could not attend the proceedings. This could be a crucial issue because of the inconsistency in attendance of a delegate when he/she is required to vote. The decision could be based on an incomplete hearing of both parties and hence it may not be a completely informed one.³⁷ On the other hand, if 4 out of the 5 delegates remain, the chance for a 2:2 decision may result in the presiding judge voting in a manner contrary to the decision of the jury members, had the absent member been present. Thus, outcomes could completely change. Questions of fact once determined by the jury may not be subject to appeals³⁸ which deal with questions of law. The function of the jury is crucial and contingencies which have the potential to alter or cause inconsistency in decisions could severely hamper appeals relating to matrimonial suits as well.

Jurors are capable of making judgements before both parties or the party in question have presented their cases. Once these judgements are made they tend to hold on through the trial. In a study conducted by researchers D Bridgeman and D Marlowe, they interviewed 65 jurors who had conducted felony trials in California. 35% of the jurors admitted that they were fairly certain about the guilt or innocence of the accused in the beginning or mid way through the trial. 47% stated their decisions were final towards the end of the trial but before having discussions. Also in a majority of cases the jurors final judgement is similar to that of the majority of jurors as the majority generally persuades the minority jurors to toe their line. Where the majority is in favour of conviction or acquittal, the jury in 90% of the cases decided along the course of the initial majority. In cases involving high publicity, biased information can influence jurors to also take certain positions.³⁹

9. Arguments in Favour of the Jury System

The main argument in favour of delegates assisting judges is based on the concept of cultural relativism wherein questions put before the delegates would be judged with regard to the Parsi culture and practices. This is of great significance in recent times where the Supreme Court gave the petitioner relief in the case of *Goolrokh M. Gupta v. Burjor Pardiwala & Ors.*⁴⁰ and members of the community criticised the suggestion given by the court to allow the petitioner into the funeral parlour premises as it came from a 5 judge constitution bench comprising judges from other religious communities. Members of the Parsi community may believe that adjudication must be done in light of the ethos and culture of the community

³⁷ Pistonji Kekobund Bharucha v. Aloo: AIR 1984 Bom 75.

³⁸ Sohrab Anklesaria v. Feroza Anklesaria: 2017 SCC OnLine Bom 8128.

³⁹ Lawrence J. Leigh, A Theory of Jury Trial Advocacy (1984)

⁴⁰ S.L.P. No. 18889 of 2012 (S.C) (Pending).

which is best understood by its own members. Thus, this could justify the jury trial system in Parsi Matrimonial Law on the ground that it is the link between Parsi society and the legal system when dealing with certain personal law issues.

Additionally, it can also be reassuring for the litigants concerned that decisions will be made by a few people rather than only one individual alone and that leads to smaller chances of mistakes in comprehension. Since it also involves a larger group of people, it brings in fresh insights into issues as compared to legally hardened judges. Considering these juries comprise of people of good standing, education and character, litigants would imagine that they would not resort to favouritism and would be of great help in administering justice.

On the other hand, legal knowledge may be of value to the judiciary but will not aid in determining certain facts which can only be obtained from lay persons who form the jury and who are familiar with their surroundings and cultural practices.

A report published by the UK Ministry of Justice states that research conducted in a period of 18 months into over half a million cases heard in England and Wales shows that juries are fair, competent and efficacious. Two thirds of those tried are convicted and there is no display of any racial bias. They fail to reach verdicts in only a small amount of cases which are less than 1% of all cases.⁴¹ Hence, this could be an argument in favour of retaining the jury system.

10. Consequences of Amending the System

Specific qualifications have not been prescribed for persons to be selected as delegates of the jury for Parsi divorces except that they should be senior members of the community. By abolishing the jury, the administration of justice will be devoid of personal prejudices of individual jury members who have adjudicatory powers. The system will also be free of arbitrariness and abuse as it will not be subject to the whims and fancies of individual members of the jury. Besides litigants will not have to face delays in the hearing of cases as they will not have to wait for matrimonial courts to come into session for brief periods of time each year. Delays due to time taken in empaneling juries will also reduce the wait time and ensure speedy settlements.

Likewise, it will facilitate parties involved to have access to Family Courts which have the advantage of providing means of reconciliation with professional counsellors and child care centres, if the model adopted by the

⁴¹ The Guardian, *Why juries work best* February 21, 2010, available at <https://www.theguardian.com/commentisfree/2010/feb/21/juries-work-best-research> (Last visited on March 30, 2018).

Hindu community is followed. District judges dealing with such matters are also better trained in dealing with such cases. Concerned parties will also be able to apply under the jurisdiction of courts where they reside. On the flip side, community intervention in divorce litigation will end, thus making it difficult for Parsis as a community to maintain their own distinct identity. Government intervention into a specific set of laws governing a community in India also results in backlash as it is a sensitive topic and could be perceived as a move to interfere with the religious affairs of a group.

11. Conclusion

Since trial by a jury has been discarded by the Indian judiciary in other matters, it demonstrates that juries are not only unworkable but also ineffectual due to the many difficulties that emerge from such trials. Abolishing the jury system will thus bring consistency in Parsi divorce laws so that they are in uniformity with other statutes. As a result, matrimonial divorce procedures too will become simpler and fall under the jurisdiction of family/district courts.

However, it is noteworthy that the judiciary has taken note of the shortcomings of the jury system and has interpreted the statute, wherever the question has arisen, such that disposal of suits is quicker. In *Minoo Rustomji Shroff and others v. Union of India and Ors.*⁴² it was argued that there is no requirement for a jury for divorces based on mutual consent as there is no “adjudication” involved. Also in *Rohinton Panthaky v. Armin R. Panthaky*⁴³, the court allowed collection of evidence under the Civil Procedure Code by a commissioner which would not take up the time of the judge and help in quicker disposal of other cases in that time.

In conclusion, with changing times in Indian democracy, the laws controlling personal relationships need to evolve with the times. Codified personal laws of various religions have their own peculiarities. An example is the Parsi jury system which continues to be a part of Parsi personal laws. With the Supreme Court declaring the practice of triple talaq void, it is time to relook into the existence of the Parsi jury system which has inconvenienced many and restricted their access to justice which is a fundamental right. Considering that the PMADA was enacted in the pre-independence British era much before the jury system was eliminated in India, it does not justify its existence in the current changed times.

⁴² 2005 SCC OnLine Bom 288 : (2005) 2 Mah LJ 1124.

⁴³ 2014 SCC OnLine Bom 451: (2014) 3 Mah LJ 803.