

A Content Analysis of the Hindu Marriage Act - 2017

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Abstract

In 2017, the Parliament of the Pakistan unanimously passed a long-awaited legislation namely the Hindu Marriage Act, 2017. The legislation on the Hindu marriage was to serve the purpose of providing a legal status to the Hindu marriages. The Act is considered a landmark legislation dealing with the personal law of the Hindu community. Since the present legislation is a recent phenomenon, there exists no scholarly work analyzing the context and content of the Act, 2017. The present study intends to interpret the structure of and the themes lies in the text of the Act while employing primarily a qualitative content analysis methodology. The article gives two-fold explanation of the text of the Act, 2017; firstly, the text of the Act is heavily relied upon the text of the Hindu Marriage Act, 1955 of India; secondly, it is a manifestation of the post-colonial legal plurality and the Hindu customary laws. It is argued that the one, who wishes to understand the essence of context and content of the Act, needs to have an understanding of both the legal pluralism and the Hindu customary laws. The present study generates a debate on the correlation between the customary law and the state law.

Keywords: Hindu Women's Forced Marriages; Hindu Customary Law; Legal Pluralism; Hindu Marriage Legislation; Legislative Business in Parliament.

1. Introduction

In 1947, the emergence of Pakistan on the name of Islam has left great ideological impacts on the subsequent constitutional history of the country. Pakistan emerged as a home of people having different history and the ethno-cultural background. The demography of Pakistan suggests a huge diversity and plurality amongst the ethnic groups living in Pakistan. In 1947, broadly, Pakistan had been a country having five major ethnic groups: Bengalis, Punjabis, Sindhis, Baloch and Pashtuns. All the five cultural denominations have had very rich history and greater cultural diversity. Each and every group has had its own political and economic interests. It is to say that one of the most vital factors hindering the constitution-makers to reach at a consensus was a socio-economic polarization of the society. The factors which reduced the possibility of a national constitutional consensus includes a political disparity amongst the small and large provinces; the issue of national language; the issue of distribution of the powers between the centre and the provinces; the controversy over the nature of constitution either it be an Islamic or modern, democratic and an organic constitution. In addition,

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Pakistan being a home of people having different history and culture was destined to face an identity crisis.

In this backdrop, the constitution-makers were left with nothing but to find some commonalities amongst the constituents of Pakistan. The constitution-makers and the then political elite came up with a commonality of religion-the Islam. They realized that the religion Islam, being a religion of the majority of the Pakistan, could provide a common ground amongst all the citizen of Pakistan. In addition, Islam being a popular slogan behind the creation of Pakistan provided them with a justification to support their argument in the favour of an Islamic outlook of the new constitution of Pakistan. Further, the ulema or religious scholars, within the Constituent Assembly and in public gatherings had managed to develop a pressure on the constitution-makers to follow the Islamist's version of the constitution. The Islamic outlook of the new constitution and subsequent constitutional debates has left an adverse impact on the ideological position of the country as well as on the lives of the religious minorities of Pakistan. The impact of the Islamist's version of the constitution served two purposes: on the one side, it indicates a clear deviation from the concept of a modern-welfare state conceived by Mr. Jinnah, the father of the nation; and, on the other side, it also adversely affected the socio-religious status of the lives of the religious minorities of the country. It has proved a clear deviation from the vision of Mr. Jinnah who has noticeably declared equal citizenship to all the citizens of Pakistan irrespective of their gender, caste and religious orientation. Mr. Jinnah clearly mentions in his speech that:

"You are free: you are free to go to your temples; you are free to go to your mosques or to any other places of worship in the State of Pakistan. You may belong to any religion, caste or creed-that has nothing to do with the business of the State... We are starting with this fundamental principle: that we are all citizens and equal citizens of one State", (Debate of the Constituent Assembly of Pakistan, dated August 11, 1947, p. 20).

In addition to ethnic pluralism in the country, Pakistan is a home of people having followers of many religions such as of Islam, in majority, Christianity, Buddhism, Sikhism, Jainism, Ahamdiyah community, and Hinduism, second largest majority after Islam. In 1947, the followers of Hinduism have been nearly fifteen per cent of the total population of the Western Wing (present day Pakistan) of Pakistan. With the passage of time, the number of the Hindus has reduced up to two per cent of the total population of Pakistan (Minority Rights Group International, 2021). The decrease in the Hindu population, in Pakistan, has happened due to two reasons: first reason was a huge migration of the Hindu community to India in the post-partition political scenario which caused the ethno-religious cleansing of the community; and, second reason has been the forced conversions of the Hindus especially of the women who are forced to abandon their religion and

to get marry with the Muslims. According to the latest population breakdown of Pakistan Bureau of Statistics, the Sindh is the home of nearly ninety-four per cent of the total Hindu population living in Pakistan. Rest six per cent live in the other part of Pakistan especially in the Khyber Pakhatunkhwa (Pakistan Bureau of Statistics, 2021). The Hindus are considered one of the most marginalized religious minorities of Pakistan since they are facing socio-economic challenges ranging from forced conversions, bonded labour to physical attacks.

In addition to socio-economic inequalities, the Hindu community had to face the problem of solemnization of their marriages since there existed no legal document providing a legal status to the Hindu community's marriages. The absence of the legal status of the Hindu marriages results in difficulties in getting a passport issued, getting registered in the National Database and Registration Authority (NADRA) and marital life related issues such as divorce and inheritance. Most importantly, the Hindu women have been facing the problem of forced marriages resulting in a systematic and institutionalized cleansing of the Hindu community. It has been observed that approximately three hundred Hindu women are forced to abandon their religion and to get married forcefully with non-Hindu men-noticeably the Muslims (Movement for Solidarity and Peace, 2014). In this backdrop, marriage legislation with the name of the Hindu Marriage Act, 2017 was passed in the Parliament of Pakistan to provide a legal status to the Hindu marriages. The Act of 2017 apparently, meant to resolve the Hindu marriage related issues, needs a contextual and textual overview to understand the themes of and purpose behind this marriage legislation for the solemnization of the Hindu marriages. What follows is a navigational map of the historical evolution of the Hindu marriage legislation and textual study of the Hindu Marriage Act, 2017.

2. Constitutional Status of Religious Minorities in Pakistan

In accordance with the vision of Mr. Jinnah, the Constitution of 1973 of Pakistan provides for an equal citizenry to all without discrimination of race, color, gender or religious orientation. The Constitution provides for equal socio-economic opportunities for all the citizens. It provides for a citizen with some fundamental rights that include the freedom of association, religion, speech, assembly, profession etc. It is to say that, in theory, all the religio-ethnic denominations of Pakistan are equal citizen of the country. The life, property and respect of every citizen are safeguarded in the Constitution of Pakistan. Similarly, the Constitution of Pakistan grants some special right to the religious minorities of Pakistan. Take the example of Article thirty-six of the Constitution which protects the economic and political rights of the religious minorities as an equal citizen of Pakistan. It reads "the State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services" (The Constitution of 1973 of Pakistan, Art. 36). Additionally, all the religious denominations or communities are free to profess, propagate and practice their respective

religion. Under the Article twenty of the Constitution of Pakistan, it is provided that “every citizen shall have the right to profess, practice and propagate his religion”, freely, (The Constitution of Pakistan, Art. 20-A). Further, it provides for freedom of establishing a religious institution where a religious community can teach and propagate its religious beliefs and practices freely. The Article reads that “every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions” (The Constitution of Pakistan, Art. 20-B).

Despite having provided for an equal citizenry to all without discrimination of gender and religion, not only in the Constitution of 1973, but in the previous two permanent Constitutions of 1956 and 1962 respectively, the subsequent socio-political developments have totally changed the outlook of the Constitution and the society of Pakistan. The constitutional amendment to the Constitution of Pakistan to Islamize the Constitution, on the one side, and to prolong their rule, on the other side, by the rulers has given rise to the intolerance against the religious minorities of Pakistan. The lives of the religious minorities have become miserable especially of the Hindu community that have been facing the challenges of forced marriages and bonded labour in the country. Some of the constitutional amendments to the Constitution of Pakistan have totally changed the essence of the true message of Islam. We can take the examples of the some of the Articles of the Constitution of Pakistan which indicate discrimination against the religious minorities of Pakistan. For example, debarring non-Muslims to hold the office of the Prime Minister and the President, (The Constitution of Pakistan, Art. 41 & 91), shows a discriminatory outlook of the Constitution towards the religious minorities of the country. In a word, the empowerment of Islamists through such constitutional amendments has led to an institutionalized exclusion of religious minorities from the socio-political apparatus of Pakistan. In addition, it has not only granted a predominant role to the orthodox ulema but also proved a clear and sweeping deviation from the vision of Mr. Jinnah, the founder of Pakistan.

3. Introducing the Hindu Marriage Act, 2017

Before the passage of legislation on the Hindu marriage in 2017, there existed no proper law providing a legal status to the Hindu marriages in Pakistan. In Pakistan, the ceremonial formalities of the Hindu marriages were being carried out through the pre-partition acts and legal orders introduced by the colonial masters-the British (Subramanian, 2010). For example, the Widows' Marriage Act, 1856 and the Hindu Marriage Disabilities Removal Act, 1946 provided for the solemnization of the Hindu marriages. Similarly, the divorce related issues were settled in accordance with the provisions of the Hindu Woman's Right to Separate Residence and Maintenance Act, 1946 (Desai, 1981). Likewise, if there arises an issue related to inheritance and property, the Acts namely the Hindu Disposition of Property Act, 1916; the Hindu Inheritance (Removal of Disabilities) Act, 1928; the Hindu Law of Inheritance, 1929; and

the Hindu Gains of Learning Act, 1930 collectively provided for legal provisions to resolve the issues of property and inheritance (Farhat, 2015).

When it comes to the legislation on the Hindu marriages, there was no formal law providing for a legal status to the Hindu marriages. In the colonial India, the Hindu marriages were being solemnized in accordance with the personal and the customary laws of the Hindu community (Makwana and Xavier, 2016). After Independence in 1947, Indian Parliament passed legislation on the Hindu marriage with the name of the Hindu Marriage Act, 1955. It provided a comprehensive and centralized law giving legal status to the Hindu marriages (Nair, 2021).

In Pakistan, National Database and Registration Authority (NADRA) refused to provide an identity card to a Hindu woman when she failed to provide a documented marriage proof in 2009. The Supreme Court of Pakistan directed to the then government to introduce a comprehensive Hindu marriage legislation providing for a legal status to their marriages. The then government made some efforts for the Hindu marriage legislation but it proved all in vain. For that matter, Kishan Chand of Pakistan Muslim League Quaid-i-Azam (PML-Q) introduced a Bill titled the Hindu Marriage Bill, 2011 in the House in 2011. However, the Bill could not get passed since the Hindu community was unable to reach at a consensus on the draft of the Bill (Express Tribune, 2021). Similarly, Mustafa Nawaz Khokhar of Pakistan People Party Parliamentarians (P.P.P.P.) made a statement mentioning the introduction of a draft Bill for the Hindu Marriage Bill, 2012. Nonetheless, with the completion of the term of the National Assembly in March 2013, the proposed Bill lapsed without any further development on it, (Ahmad, 2021). In March 2014, a jointly drafted a new bill for the Hindu marriage was introduced by Dr. Darshan of Pakistan Muslim League Nawaz (PML-N) and Mr. Ramesh Lal of PPP, (Daily Dawn, 2015). In February 2016, the draft of the Bill got approval of the National Assembly's Standing Committee on Law and Justice. The Bill got applicability to the Federal Capital and three provinces (Punjab, Balochistan and Khyber Pakhatunkhwa) after the passage of a resolution by all the three provincial assemblies under the Article 144 of the Constitution of Pakistan (The Constitution of Pakistan, Art. 144). Nonetheless, the Bill was not applicable to the Sindh province since it has already passed a bill namely the Hindu Marriage Act, 2016 dealing with the Hindu marriage's solemnization in the province. Finally, a much-awaited legislation on the Hindu marriage got passed in the National Assembly and the Senate on September 26, 2016 and on February 17, 2017 respectively. After unanimously passed by the Parliament of Pakistan, the Bill of the Hindu marriage received an assent of the President of Pakistan on March 17, 2017.

4. Content Analysis of the Hindu Marriage Act, 2017

It is a cultural context which shapes the constitutional framework of a country or a nation (Menon, 2021). Similarly, the structure and the text of the Hindu Marriage Act, 2017 is a clear manifestation of the Hindu customary law.

Although there exists some variations in the Hindu customary law, since it has passed through some evolutionary changes with the passage of time (Kusum, 2007), the customary law of the Hindu dominates in the text of the Hindu Marriage Act, 2017. Since the Hindu customary law varies from a Hindu sub-community to other sub-community and from a place to place, it is not possible to make generalization about the customary law of the community. The text of the Hindu Marriage Act, 2017 although dominated by the customary law, indicates some divergence from the customary laws which are being practiced by the some sub-communities of the Hindu community in the world.

4.1. Preamble to the Act, 2017

The preamble to the Act describes the purpose behind the introduction of this legislation which is to provide a legal status to the Hindu marriages. The text of the preamble sets a context to the introduction of the Act, 2017. It says that the state has achieved the purpose, mentioned in the Constitution of Pakistan, providing for the protection of the family related issue of its religious minorities. By introducing the Hindu Marriage Act, the state has accepted legitimate rights of the minorities especially of the Hindus of Pakistan. The preamble mentions that the Act is to solemnize the Hindu marriages. In a word, it is to serve the purpose of providing for a centralized constitutional formula for the solemnization of and providing legal status to the Hindu marriages in Pakistan (Preamble to the Hindu Marriage Act, 2017).

4.2. Conditions for the Hindu Marriage

The Act mentions some pre-conditions to be fulfilled before getting solemnized a Hindu marriage. . The prerequisites to be fulfilled include: (a) soundness of mind of both the parties needed for getting a valid consent; (b) both parties are required to be reached at the age of eighteen years; (c) the parties should not fall in the category of prohibited relationship; and, (d) at the time of marriage, neither of the parties should have a living spouse (The Hindu Marriage Act, 2017, Art. 4). The requirement to be of a soundness of the mind of the both parties is to serve two purposes: first, stopping the marriage of lunatics who are unable to look after the children and the spouse both; second, to avoid the complexities of reproduction of children out of a mentally unsound spouse (The Hindu Marriage Act, Art. 5). It further sets a minimum age for getting married for both the groom and the bride. According to the Act, the minimum age for a groom is twenty-one years whereas for a bride it is eighteen years (The Hindu Marriage Act, Art. 5). According to the Act, the third pre-condition is that both the parties must fall out of the prohibited relationship. According to the Act, a marriage would fall in the category of a prohibited relationship: “if a spouse is lineal ascendant (mother, father, grandmother, grandfather, great grandmother, great grandfather) of the other; if he/she is lineal descendant (children, grandchildren, great grandchildren) of the other; if one spouse is the husband or wife a lineal descendant or ascendant

of the other; if a spouse is widow or ex-spouse of your sibling or of your mother's or father's sibling or is of your grandmother's siblings or grandfather's sibling" (The Hindu Marriage Act, Art. 3).

4.3. Process of Registration of the Marriage

The Act makes it mandatory for both the parties to get the marriage registered with a designated registrar office within the fifteen days of the marriage's solemnization. The marriage needs to be registered with a designated registrar who is responsible for keeping the marriage records. In addition to maintain the record of the marriages, the registrar is also responsible to provide with a documented proof of a marriage when it is required for any inspection or for evidence. The registrar has to prepare three copies of the shadiparat or a documented proof of a marriage. Out of these three copies, one is to be given to the groom, one to the bride and one to keep for the official records. In addition, the registrar is required to get the shadiparat signed from both the parties-the groom and the bride (The Hindu Marriage Act, Art. 6).

4.4. Termination of the Marriage

It is provided in the Act that a spouse can file a petition for a judicial separation on the grounds that: the petitioner is mistreated by the other party; the petitioner is deserted, for consecutive two years, by the other party; the other party has changed the religion and is no more a Hindu by his/her religion; the petitioner is unable to live with the respondent who is no more a person of a sound mind; and, the other party is suffering from diseases such as leprosy and Aids (The Hindu Marriage Act, Art. 9). Additionally, a wife can unilaterally file a petition asking for the termination of her marriage on the grounds that "the husband has married again despite the petitioner, who is the wife of the former, was alive" (The Hindu Marriage Act, Art. 20) "before the solemnization of the second marriage provided that the second wife is alive at the time of the filing a petition; or the husband has intentionally neglected or has not been able to provide the basic needs to her for continuous period of two years; or the husband has been given four years or upwards imprisonment sentence; or she, whether consummated or not, was solemnized at the age when she was under the eighteen years of age and she has refused the marriage prior to attaining that age" (The Hindu Marriage Act, Art. 12). Similarly, a marriage can be terminated by a mutual consent of both the parties (The Hindu Marriage Act, Art. 15). It is to say that this judicial separation has made a marriage a more flexible bond for either of the party among the Hindu community of the Pakistan.

4.5. Protection of Women and Child Rights

The Act provides a protection to a woman and her children. A wife, if not provided with the enough financial support, can file a petition to claim her conjugal rights from her husband. Similarly, the Act considers a child as a legitimate one even if he/she is born out of a void or voidable marriage. The

Hindu Marriage Act, 2017 also gives a right of termination of a marriage to a woman. On the other side, if, in the petition for the termination, the respondent is a wife, the court shall not declare a marriage terminated until the enough arrangements are not made ensuring the financial security of the wife and her children (The Hindu Marriage Act, Art. 13). The Act also provides for a widow to get remarried after the passage of the six months period of her husband's death (The Hindu Marriage Act, Art. 17).

4.6. Void and Voidable Marriage

A court can declare a marriage void which is solemnized after the commencement of the Hindu Marriage Act, 2017 against the petition filed by the real parents of the either party or by the either of the party himself/herself on the grounds that: either of the party falls in the category of a prohibited relationship or either of the party is having a living spouse at the time of the marriage (The Hindu Marriage Act, Art. 4 & 10). Similarly, a marriage can be declared voidable by a court against the petition filed on the following grounds "if owing to impotence of the respondent, a marriage has not been consummated or either of parties has not reached to the age of the eighteen at the time of marriage or the petitioner's consent was obtained forcefully or by fraud or the respondent got pregnancy out of other man instead of the petitioner" (The Hindu Marriage Act, Art. 10). In a word, the grounds on which a marriage can be declared void or voidable discourage under-age and forced marriages, to some extent, of the Hindu community in Pakistan. Similarly, it provides a free will to a woman for her choice and also protects her child she has conceived not from the other party but from someone else.

4.7. Miscellaneous Punishments for the Breach of the Act

The Act suggests some punishments for those who are not to abide by the clauses of it. For example, a breach of the any of the clauses indicating the preconditions for a marriage is a punishable offense (The Hindu Marriage Act, Art. 21). The Act suggests a punishment of six months along with five thousand rupees fine on the breach of the clauses mentioning the minimum age for a marriage and on the degree of prohibited relationship (The Hindu Marriage Act, Art. 21). Similarly, if there found any irregularity in the process of the registration of a marriage, the punishment for this offense is three months prison and one thousand rupees fine. In addition, if someone conceals and put misinformation in the shaidparat, he/she is to be served with six month imprisonment along with one hundred thousand rupees fine (The Hindu Marriage Act, Art. 23). For all the purposes, the above mentioned punishments are considered "non-compoundable (an offence in which the parties involved in are not authorized to have a compromise) and non-cognizable (an offence on which a police officer has not authority to arrest without a warrant)" (The Hindu Marriage Act, Art. 24). At the end of the document of the Hindu Marriage Act, 2017, a two-page shadiparat is annexed which needs to be dully signed by the both parties.

5. Conclusion

Although the Hindu Marriage Act, 2017 has served the purpose of the solemnization of the marriage of the Hindu community, it is still long way to resolve the family issues of the Hindu community especially the issue of forced marriages of the Hindu women. On the basis of a textual study of the Act, we can draw broadly three conclusions out of it. First, the text of the Hindu Marriage Act, 2017 manifests the mixture of the Hindu customary law and the state's legislative endeavors. Second, the text of the Act, 2017 is a clear manifestation of the Hindu Marriage Act, 1955 of India on which the former has been heavily relied upon. Third, the text of the Act is an indication of the legal pluralism which is being practiced in the post-colonial states where the centuries old customs and changes into them through the legislations are carried out to make the customary laws in accordance with modern day requirements of the Hindu community.

It is to say that the mixture of customary law and the legislative frameworks present a clear picture of continuity and change processes which are considered necessary to live in the plural and heterogeneous societies. The text of the Hindu Marriage Act, 2017 seems, on some points, in a clear contrast with the Hindu customary laws and, on some points, in consistent with the customary law of the Hindu community. Such contrast and similarity has resulted in a great confusion which is manifested in the text and the terminology of the Hindu Marriage Act, 2017. The confusion and the loopholes, in the text of the Act, 2017 are being misused and exploited by the many to suit their own interests. What needed is to disseminate the awareness among the Hindu community about the safeguards the Hindu Marriage Act, 2017 provides for especially to the Hindu women. The Hindu women are being exploited not only by the Muslims, forcing them to abandon their religion, but also from the Hindu males since the Hindu women do not know about the safeguards they are provided by the text of the Hindu Marriage Act, 2017.

The value and usefulness of any legislation lies in its flexibility and organic spirit. It needs to be a manifestation of the notion of continuity and change. Same applies to the marriage legislation of the Hindu community in Pakistan. The Hindu Marriage Act, 2017 is a very important legislation providing for the safeguards for and a legal status to the Hindu marriages in the country. What may make it a more useful legislation for the Hindu community is an execution of the purpose described in the preamble of Act and making it an organic law. . It is argued that, on the one hand, it needs to continue with the centuries old customary laws, being respected and practiced by the Hindu community. On the other hand, it needs to be amended as per the requirements of the time to resolve the marriage related issues being faced by the Hindu community in Pakistan. If it happens, the Hindu Marriage Act, 2017 can prove a more beneficial legislation for the Hindu community along with

servicing the purpose mentioned behind the introduction of the Hindu Marriage Act, 2017.

In the last analysis, the Act 2017 is a beginning of marriage legislation for the Hindu community but not the end in Pakistan. It is necessary to introduce some more legal frameworks for the betterment of the community's marital life. It is necessary to bring some amendments to the Hindu Marriage Act, 2017 to make it a more effective and dynamic legislation. In addition, it is also imperative to spread awareness especially among the Hindu women about their rights provided in the Act through social and national media.

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