



ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - journal@lexresearchhub.com

VOLUME II, ISSUE III
APR - JUNE, 2021

<https://journal.lexresearchhub.com>

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Publications**

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**A CRITICAL STUDY OF THE JURY SYSTEM
UNDER THE PARSI MATRIMONIAL LAW IN
INDIA**

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ABSTRACT

Jury trials have been followed in criminal cases since the very inception of the Judicial system. In 2018, the case of Naomi Sam Irani v. Union of India brought into light the presence of the jury system in the Parsi Family courts in which the petitioner challenged the jury system and demands its abolishment. The major question of the debate was whether there a need to retain the jury system in matrimonial disputes when countries like Australia and China follow the jury system for criminal cases only, whereas marriage being a personal affair of the two parties allows the people of the same community decide on their divorce. The article studies the need for the jury system in personal law and it flashes a light on the criticism against the jury trials since it tends to violate the fundamental right mentioned under articles 14 and 21 of the Constitution. With the rising demand for a Uniform Civil code in personal law, retaining the age-old custom of the jury trials becomes a barrier in the way. Hence, the article studies the famous Naomi Sam Irani case which challenged the jury system and questions the Centre's decision for retaining the system for the protection of Parsis. It contends that jury trials cause a delay in the verdict and violates the right to privacy of a person. Finally, it attempts to analyze the consequences of the decision and a need for a uniform civil code for every community in India to get speedy justice.

Keywords - *Jury system, Parsi Marriage and Divorce Law, Parsi Community.*

INTRODUCTION

The jury system was introduced in India by the British Judicial system in 1665. Earlier almost all the criminal cases took place in Jury trials. The code of Criminal Procedure, 1898 contained the provisions for the same.¹ It was after the Bombay High Court overturned the verdict passed by the jury in the famous Nanavati case², the jury system was abolished in India. The 14th Law Commission Report stated it to be time-consuming and lack of professional jurors as the reason for the abolishment.³ But jury trials are not extinct in India. The Parsi Matrimonial Courts are the

¹Code of Criminal Procedure, 1898, No. 5, Acts of Parliament, vol. 1, § 297-298.

²K.M Nanavati v. The State of Maharashtra, AIR 605 1962 SCR Supl. (1) 567.

³Archit Chakraborty & Ananya Sharma, *The culmination of jury trial: a closer look*, THE LAW BRIDGE, Sept 2009, <https://thelawbrigade.com/constitutional-law/culmination-of-jury-trials-a-closer-look/>.

only surviving courts with jury trials in India today. “The Parsi matrimonial courts are unique in India - no other body of personal law uses a jury”.⁴

The Parsi Marriage and Divorce Act enacted in 1865, was based on English Matrimonial Causes Act, 1857. After the last amendment in 1988, the act contains a provision for a jury trial in divorce cases. Section 18 of the act allows the community marital disputes to be heard in special courts in the presidential towns of Bombay, Kolkata, and Madras. Section 24, 25, 26, 27, and 46 lays down a procedure for jury trials in divorce cases. The Parsi Community being the descendants of Persian Zoroastrians follows majorly the common law. Being the minority community in India, the Parsi jury system stands as an age-old community custom.

PRESENCE OF JURY SYSTEM IN OTHER COUNTRIES

Major countries have restricted the jury system. “While in the United States, the majority of the cases end up in plea-bargains. In Austria, the jury system is used only in serious cases. In contrast, in China, lay assessors are appointed to serve in minor criminal offenses. In South Korea, the jury system was introduced in 2008 and is restricted in serious cases the only”.⁵

To a greater surprise, Parsi Matrimonial law is not the only personal law retaining jury trials. Official Code of Georgia Annotated, section 19-5-1 requires jury trials to be conducted in matrimonial matters. According to the Georgia law (O.C.G.A)- “Unless an issuable defense is filed as provided by law and a jury trial is demanded in writing by either party on or before the call of the case for trial, in all petitions for divorce and permanent alimony the judge shall hear and determine all issues of law and fact and any other issues raised in the pleadings.”⁶ Hence, a jury trial in a divorce case is available to a spouse if a written demand is made on or before the call of the case.⁷ Similarly, Texas is the state in the USA where the couple can ask for a jury to be present or a verdict be given by the jury in the divorce case.

⁴Mitra Sharafi, *Law and Identity in Colonial Asia-Parsi Legal Culture, 1772-1947*, (Print Publication, 2014).

⁵Dr. Kennedy M. Maranga, *The Jury System a Symbol of Justice: Comparative Analysis*, (Feb 2011).

⁶O.C.G.A, 1982, Constitution of The United States, 2007 edition, vol. 1, § 19-5-1(a).

⁷Franklin v. Franklin, 267 Ga. 82 (1996).

STUDYING THE NAOMI SAM IRANI V. UNION OF INDIA CASE

In 2017, a married Parsi woman, 33, mother of two children filed a writ petition in the Supreme Court challenging the pre-independence legislation of the jury system under The Parsi Marriage and Divorce Act, 1936⁸ (herewith PMDA, 1936). Her husband filed a case for the dissolution of 11-year-old marriage in Bombay High Court (chief matrimonial court) in 2016. The case remained pending in the court because of the non-appointment of jurors (also called delegates). Aggrieved by the one-and-a-half-year delay in the verdict, she challenged the jury trial and certain sections of the act claiming it to be violative of Article 14 and 21 of the constitution of India.⁹ The said act was stated to be discriminatory against the Parsi community and violates the privacy of people. The petition contended for the abolishment of jury trials in matrimonial disputes and giving the Parsi community the right to speedy justice under Hindu Family courts.

The petition claims the system to be cumbersome and the petition states that “the impugned provision of the said Act is archaic which pre-dates the country's independence. More importantly, it pre-dates the abolition of the jury system in our criminal jurisprudence in the 1960s and as such, it cannot be retained for just one community”. A case under the act, 1936 is decided by the presiding judge aided by 5 delegates where the judge decides the question of law and the delegates the question of fact.¹⁰ Delegates, elected for 10 years, belong to the Parsi community and are termed as public servants. The system of 5 delegates with the judge deciding on the decision of whether the Parsi couple should be given divorce or not results in unnecessary intrusion of the community members into the personal matters of an individual.

Article 14 states “Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.” Abiding by this provision of equality the judiciary, in 2017, held the 1800-year-old practice of triple talaq as unconstitutional and violative against article 14 of the constitution.¹¹ But the center decided to retain the jury system under

⁸Naomi Sam Irani v. Union of India, (2017), W.P.(C) No. 1335/2018 (X).

⁹Sam Shapoor Irani v. Naomi Sam Irani, 2016 SCC Online Bom 14116.

¹⁰Parsi Matrimonial and Divorce Act, 1936, No. 3, Acts of Parliament, 1936, § 46.

¹¹ShayaraBano v. Union of India, (2017) 9 SCC 1.

PMDA,1936 stating it to be a protector of the Parsis age-old custom. This decision strictly violates the Parsi community's right to get the benefits of family courts given to other communities. The government's decision in the Naomi case is said to be contradictory to what is held in the triple talaq case.

The supporters contend the jury beneficial as it allows emotion to influence the verdict that the judge does not give in for. Randall M. Kessler, a family law attorney and founding partner of Kessler, Schwarz & Solomiany in Atlanta stated, "the jury trial is a basic right for all litigants, and it helps ensure fairness and the right to have the community help when spouses just cannot do it themselves".¹²But on the contrary, Stephen A. Land, an Atlanta attorney, and former Fulton County assistant district attorney stated the jury system to be very time-consuming and expensive.¹³The Parsi jury system does not participate in the distribution of assets or alimony as is being done in the courts of Georgia. Thus, the Parsi community, constituting a minority community, resists the community people to get a divorce. "In the past few decades, we seem to have adopted a far more casual attitude towards marriage itself. A few years ago, a young Parsi woman told me very matter-of-factly that she and her husband had grown apart and that she had therefore filed for divorce. This took me aback because I'd never heard this from a Parsi before- Prior to this, I'd only heard of far more serious infractions, such as infidelity, as grounds for divorce. I think a lot more Parsis are willing to call it quits than try to repair their marriages," said Harvard University historian Dinyar Patel.¹⁴ Women seeking a divorce from the husband find it difficult due to the presence of a male-dominated jury in the system. The jury's verdict on facts is binding and cannot be contested in other courts. This has denied the community people proper justice since the jury lacks legal knowledge.

¹²*Id* at 3.

¹³Peralte C. Paul, *A jury in a Divorce Case? Yes, in Georgia*, Kessler & Solomiany, LLC NEWS, <https://www.ksfamilylaw.com/a-jury-in-a-divorce-case-yes-in-georgia/>.

¹⁴Soutik Biswas, Delhi correspondent, *Parsi matrimonial courts: India's only surviving jury trials*, BBC NEWS, (Sept. 24, 2015), <https://www.bbc.com/news/world-asia-india-34322117>.

CRITICISM

“The abolition of the jury system was deemed as a positive step in the history of Indian judiciary as the jury in most cases was not in a position to weigh the facts in light of proper legal complicacies and is likely to be swayed by popular and painted notions and as a mature democracy, we stand for free and fair judgment. It was seen that the consensus of the jury is often biased and the jury consists of people who mostly are not related to the legal system.”¹⁵

The presence of jury members from the same community to retain the morals makes it difficult for the parties in the case to get a divorce. The petition claimed the jury system to be biased in favor of men and restricting women’s rights to get a divorce. The petition further stated the jury gets influenced by the media and popular opinion which can deter a fair trial. “The jury judges a case based on societal norms, morality, and ethics which may not be in consonance with the principles of natural justice and ethos of a dynamic society and hence, it was deemed to be healthy to replace such a mechanism with a relatively fair and unbiased adjudication system.”¹⁶. Furthermore, the delay in the appointment of delegates with the court sitting twice a year for hearing of the cases results in justice delayed which subsequently results in justice denied.

The major criticism comes from the Parsi community itself. The jurisdiction of special courts for hearing the cases denies the community people the benefit of mediation or conciliation as provided in other family courts. The need for a uniform civil code is being called out by the petition. The right to a fair trial to the minority community needs to be provided. In the Consultation Paper by Law Commission of India, it has been stated that “In the absence of any consensus on a uniform civil code the Commission felt that the best way forward may be to preserve the diversity of personal laws but at the same time ensure that personal laws do not contradict fundamental rights guaranteed under the Constitution of India. To achieve this, all personal laws relating to matters of the family must first be codified to the greatest extent possible, and the inequalities that have

¹⁵Writ Petition(s)(Civil), No(s) 1125/2017.

¹⁶*Supranote* 14 at 4.

crept into codified law, these should be remedied by amendment.”¹⁷ Thus, bringing amendments to the Act will serve as a step to eliminate the jury system in marital matters.

The presence of a jury in personal law cases hampers the privacy of the parties. “Privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the constitution but also arises in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III of the Indian constitution.”¹⁸ As the law commission recommends amendments in laws based on their constitutional validity, the presence of a jury hearing the personal case of divorce among the parties violates one of the fundamental rights of the parties concerned.

Jury trials under personal law result in the underutilization of manpower and hence, the decision of the jury in divorce cases does not affect society at large. The jury trials are beneficial in cases that involve a large number of people as stakeholders. The abolishment of the jury system under Parsi Matrimonial law does not cause any inequalities to the minority community. 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.¹⁹

Parsi community is a minority community in India. The center to retain the system stated, “Parsi community is a special community forming part of Indian societal mosaic and it was felt necessary to protect their values, customs, beliefs, and practices in the field of personal law. Due to its scarce numbers, also requires to be protected by a separate mechanism. A special law (like PMDA Act) for that small community, with an intelligibly different or unique structure, is permissible in law”.²⁰ but the presence of a jury system that violates the right to equality and right to privacy sought its removal so that all the communities are kept on an equal footing to get speedy and natural justice. Additionally, unlike the jury system in Georgia and Texas where it is at the

¹⁷Consultation Paper on Reform on Family Law, Law Commission of India, (2018).

¹⁸Justice K.S Puttaswamy(Retd.) and Anr. v. Union of India, (2015) 8 SCC 735.

¹⁹Ghosal, AnupamaContractor, Neville, *Parsi Divorce: Time to Rethink the Legal Framework*, Indian Journal of Law and Justice, Vol. 10 No. 2, Sept. 2019, p 16 – 25.

²⁰Homiar Nariman Vaki, *Why Parsis need their distinct family laws*, THE TIMES OF INDIA, Sep 20, 2017, 08:14 IST.

discretion of the parties to opt for a jury trial, the Parsi jury system makes it mandatory for the parties to have a jury in divorce cases.

The provision of the jury under PMDA,1936 becomes a law that is violative of part III of the constitution of India.²¹ The removal of the jury will result in a speedy mechanism and will protect the rights of the party against getting heard by the people who lack knowledge of the law and decide the verdict based on personal bias and morals of the community.

CONCLUSION

In today's fight for a Uniform Civil Code for all personal laws, holding on to the age-old custom of the jury system becomes an obstacle in implementing a radical change necessary in society. The present Parsi marriage and divorce act, 1936 requires some amendments as per the country's constitutional provision. Privacy which is fundamental right now, cannot be neglected. The right to a fair trial under the right to life also needs to be provided to the community. The system of the jury, which has been abolished in the country way back, finds no place to be accepted in deciding divorce cases. Personal law finds no need to have a jury system since a jury becomes effective in criminal cases which are considered to be crimes against the state. A consistent reading of the petition filed by the petitioner against the jury system and the constitutional laws confirms that the Parsi divorce law needs to be amended. The only jury trial present in India serves as a threat to the just and proper judicial system in India. Thus, if equality is required for every religious community in the country, the abolishment of the jury system under the Parsi Matrimonial Act will be a step toward providing the minority community the right to speedy justice and ensure their fundamental rights not being violated.

²¹INDIAN CONST. Art 13, cl. 1.

* This article is based on the author's opinion and is not to offend any community or criticize any other writer who has done the work on this topic. It is a pure research-based work that includes the author's perspective as well.