

JUSTICE DAVAR'S THREE-LIMBED DESCRIPTION OF THE PARSI COMMUNITY IS NOT THE LAW OF THE LAND.

**Some High-aided Lawyers Misguide and
Some Head Priests Get an Excuse for Volte-face.**

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It is said-not very wrongly-that Parsis are law-abiding citizens. To be able to abide by the law, you are required to know the law. Many Parsis have therefore developed another companion quality of thinking that they know the law too well. This quality, however, is not a virtue but is almost a vice. Because law is not as easy as "common sense", as some people think. It often becomes too complicated, intricate and even intriguing. (One of the meanings of the word "intrigue" is "clandestine love affair"). The popular maxim: Law is an ass has some sense - common as also uncommon. But I am of the very learned view that if at all you want to compare law with an animal, call it a monkey rather than a donkey. Because you wont know where it will jump; its jumping posture may appear to be towards south and you may find the actual jump to north!

Coming back to Parsis, their law-abiding often takes up the monkey-shape of law meddling or even law dabbling. In the last half of the 20th century, this virus spread amongst newspaper writers, reporters, journalists, columnists and worst still, a class of some learned scholar Dasturjis. The latter class suddenly began to talk of "the Law of the Land" and that became a good excuse for them to justify their volte-face (which in Gujarati is aptly and idiomatically translated as "Gulant Marvi"- another monkey habit.)

Before I elaborate, let me declare solemnly but non pompously that I am in the legal field since more than half a century. This in not a delicious declaration, because Sindhis, Punjabis, and Americans pronounce the word "lawyer" as "liar", and Chennaists emphasise the last letter by saying "liar-a", as is their linguistic habit. Yet I declare this, so that some Parsis may not dismiss me as a non-lawyer or not qualified to speak law. God! I have spoken such tremendous amount of law that I myself am tired of it. But the habit has gone so deep-rooted that I start speaking law at the drop of a hat and very zealously so. Look here! I am even writing law for you, and have not yet come to the point. In law, unlike literature, writing is worse than speaking. And it is not for nothing that I have written my educational qualifications after my name for the first time in this magazine, after nine years.!

So to come to the point (at last) the hat was dropped in the first decade of the last (20th) century, when a question arose: "What is the legal definition of a Parsi?" Actually, the question did not arise by itself, but was made to arise unnecessarily, inexpediently, redundantly and clumsily (Like the famous Parsi lady journalist Bachi Karkaria, I keep Roget's Thesaurus handy). The question rather, not the question but the answer - had entered huge judgements of justices Davar and Beamon in a tremendously huge litigation, so huge that even the famous scholar Sir Jivanji Modi was severely cross examined and rather adversely commented upon by J. Beamon, and so curious that his Judgment said to the effect that the aforesaid question was not relevant to the litigation!

The Judgements were delivered by the two Justices (admittedly after many pangs of delivery) on 8-11-1908. The case was Dinsha Maneckji Petit Vs. Jamshetji Jijibhai - I. L. R.(1908) 33 Bom 509 = 11 Bom. L. R. 85 = 2 I. C. 701. (Don't bother about these figures, letters and equations. I am just showing of).

The facts leading to these Judgments were as follows. A French lady claimed that she was married to a Parsi gentleman; that before marriage she was converted to Zoroastrianism through a Navjot performed by a duly ordained Dasturji; that she was then married to the Parsi gentleman according to the Zoroastrian rites (of Ashirvad etc.); and that therefore she had got the right to enter Parsi Fire temples, and to have all the benefits in the Parsi Trusts holding such Fire temples, as also the Donkhma's and other Parsi Public Charities.

To a non-lawyer layman this leads to a series of questions, one following the other at a little distance.

1. Were (and are) such Parsi Trusts intended for the benefit of such ladies?
2. Can the lady be called a Parsi?
3. Can Navjot and Ashirvad ceremonies stated to have been performed on her make her a Parsi according to the Parsi Religion?
4. Does the Parsi Religion at all allow conversion of a non Parsi to a Parsi?
5. Who is a Parsi? What is the definition of a Parsi?

You will please observe that the five questions form a chain; they do not constitute one single question asked in different words. One leads to the other, and has an additional element in it.

Question 1 refers to the actual provisions contained in the Deeds or Documents or Instruments of the Trusts. Any Trust has such Instrument (musical or non-musical, as the case be), which lays down the objects of the Trust and the intention of the Settlor or Donor of the Trust. The Settlor or the Donor creates the trust by the Trust-Deed setting out the aims and objects of the Trust and transferring, by virtue of the Deed, the Trust property, which he donates, to the Trustees. The Trustees are in law the owners of the Trust property, but their ownership is not absolute; it is strictly subject to the aims, objects and intentions declared by the Donor in the Trust Deed. Trustees cannot use or deal with the Trust property contrary to or in variance with the donor's intention expressed in the Deed. If they do so, they commit a breach of trust for which they are liable at law; their liability can in some cases be criminal also.

Hence, the answer to the question no.1 above is strictly confined to the provisions of the Trust Deed, its aims and objects and the intention of the donor. The question by itself has nothing to do with the religious aspect of the matter. That means questions no.2 to 5 are not relevant, once the aims, objects and Donor's intentions are clear. Whether you can call the good lady a Parsi; whether Navjot and Ashirwad make her a Parsi according to Parsi Religion; whether Parsi Religion, permits or allows or orders or enjoins conversion, irrespective of your naming it Parsi or Zoroastrian or Parsi Zoroastrian; and what is the definition of a Parsi according to that Religion - all these were beyond the scope and ambit of the Court in this case of Dinshah Vs. Jamsheji. And if the judges have gone into these questions and tried to answer them, the answers are not binding at law.

Look at what Justice Beaman said:

"And this clearly invites a precise statement of the real question we have to answer. That question is NOT whether the Zoroastrian Religion permits conversion, but when these trusts were founded, the Founders contemplated and intended that converts should be admitted to participate in them. (Page 150 of 11 Bom L. R. 85)

Both the Judges - Davar and Beaman held in no uncertain terms that the Donors never intended that converts would be the beneficiaries of these Parsi Trusts. I shall deal with the reasoning of the Judges as set out in their Judgements, later. Suffice to say here that the Judges even went to the extent of saying to the effect that the converts were not only NOT in the minds of the donors of all these Parsi Trusts, but also NOT in the mind of the whole of the Parsi Community. Justice Davar said to the effect that not a single case of conversion is brought before the court, since the Parsis' arrival in India 1200 years back. Both the Judges went through the various Trust Deeds in charge of Bombay Parsi Punchyat and at other places and held that those Trusts should be construed as confined to persons who were **of the Zoroastrian Religion and Racial Parsis.**

Thus when question no.1 is answered as above, the remaining questions 2 to 5 did not arise at all, and the judges could have avoided going into them. Mark J. Beaman's words: whether Parsi Religion permits

conversion, was not the question before the court; the real question was the intention of the founders of the Trust.

Then why this Mesh?

There is no doubt that J. Davar did go into those extraneous questions. In effect there are three such questions he dealt with:

- (i) Who is a Parsi?
 - (ii) Does Zoroastrianism permit conversion?
- and
- (iii) What are the ceremonies, if any, for conversion, if permitted?

This was not quite necessary. It seems that the case was so heavily fought out and such large bulk of evidence was led, that J. Davar perhaps thought it fit to deal with the questions. However that made the judgment **"travel over much unnecessary ground"**; **Lord phillimore of Privy Council said so in Saklat V. Bella** AIR 1925 Privy Council 298, before whom the Judgment was relied on in a Rangoon case. He pronounced:

"The Judgment in the Bombay case" (J. Davar's) "travelled over much ground - indeed in their Lordship's opinion, much unnecessary ground but both Judges came to the conclusion that the various trusts in that case must be construed as being confined to persons **who were of the Zoroastrian Religion and racial Parsis.**"

Now one of the three questions constituting "the unnecessary ground" in J. Davar's Judgment is: Who is a Parsi, and how is the Parsi community constituted.

He wrote something about the components of the Parsi Community and the vested interests have harped upon it as "the Law of the Land", which it is manifestly not. J. Davar wrote:

The Parsi Community consists of:

the descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

the descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

the children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion".

The records show that the above words were taken by J. Davar ad verbatim from the Written Statement of the Bombay Parsi Punchayat, whose trustees were the defendants in the suit. The original authors of these words were the then English Solicitors, Craigie Blunt and Cairo, who drafted the written statement for Parsi Punchayat. No evidence was led before the Court which could have prompted the Judge to arrive at this three-limbed composition. No Irani was before the court who claimed to be a Parsi or non-Parsi; there was no controversy on the point. Similarly, there was no Parsi father who claimed that his child by his non-Parsi wife was a Parsi; there was no controversy on that issue either. The records and newspaper writings of those years show that Punchayat Trustees were embarrassed at this "statement" imported by the learned Justice from their own written statement. Only a few years before, the Parsi Community had, at a public meeting held on 16-4-1905, resolved not to admit the children of Parsi fathers by alien mothers. J. Davar himself has recorded this in his Judgment as under:

"That the Parsi Community of Bombay at a meeting held on 16th April 1905, expressed its disapproval of any conversion being allowed, and are strongly opposed to any such conversion in the present times, and resolved henceforth not to admit even the children of Parsi fathers, by alien mothers. (Page 110, ibid B. L. R).

The three limbed "definition" of a Parsi is therefore not a definition at-all, much less legal definition and still much less the law of the land. **It is not binding at law; and the Bombay High Court had in two cases refused to accept the "definition," holding that it was "obiter dictum".** This means that the alleged definition was just an opinion expressed by the Judge without any trial on the issues involved and was not a binding definition if at all it was one. **In Sarwar Vs. Merwan (1950) 52 B. L. R. 876, the Division Bench consisting of Chief Justice Chagla and Justice Gajendragadkar held so. And in Jamshed Irani Vs. Banu Irani (1966) 68 B. L. R 794, Justice Modi held so.**

In the next Issue, I'll take you, my reader, in those two cases wherein the Bombay High Court refused to follow J. Davar's alleged definition of a Parsi. A definition of a word sets boundaries to its meaning; it draws an orbit around the word; anything going beyond the orbit does not fall within the definition of the word. The most telling illustrations are the definitions of various criminal offences set out in the Indian Penal Code. They declare certain acts as an offence. The acts, which are the elements constituting the offence are laid down in a boundary or orbit; all the elements should be present to establish the offence. If a single element is absent, the definition does not apply and the accused has to acquitted.

[The word "definition" comes from Latin "definire" "to limit, to set bounds to"; figurative: "to mark out to determine"; also from de-& finire," "to enclose within boundaries, to set a limit to." "Definition" therefore means "a clear statement about a thing; account of its exact limits or nature; a brief and precise meaning of a word". (Webster Universal Dictionary).]

You will observe that even J. Davar himself does not say that this is a "definition" of a Parsi. All he says is a kind of information without Judicial scrutiny; the words, "Parsi Community consists of" show that he was not laying down a legal definition after due legal inquiry.

So Davar J. is not the law of the Land as to who a Parsi is or was or can be or would be. Some say, a Parsi is Paa (quarter of) Rishi (Saint) and some define a Parsi as one who has a hair-line fracture in his brain.

(To be continued)

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ARE ZARTHOSHTI IRANIS PARSIS?

Justices : Davar & Modi : Yes

Chagla and Gajendra Gadkar : No

The Third Limb of J. Davar, Not the "Law of the Land."

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One of the spiritual Institutions of our Zarthoshti Din, for the preservation and protection of which our ancestors arrived in Sanjan was "Boonak-Paasbaani." The term means preservation of the racial gene. It is not a mere social but spiritual and religious Institution because it is directly connected with the other six such Institutions, viz. (i) Sudreh Kushti, (ii) Manthra Compositions (iii) Kriyakaam (Yasna, Rituals) (iv) Atash-Kadeh (Fire Temples having 3 grades) (v) Dokhm-e-nashini and (vi) Meher Patet.

For more than a thousand years, the Parsis in India strenuously exerted to preserve all the seven Institutions. It was a holistic formation, each of the seven depending on and connected with the other six. No person of mixed blood or gene - whether from a Parsi male or Parsi female can take any part in the other six Institutions. For centuries we stuck to this teaching of the Din, till the arrival of the 20th century with all its Godless sciences and scholarly studies. Each and every Parsi religious Trust dealing with any of the spiritual Institutions, provided in no uncertain terms that not only no mixed blood progeny would be allowed to participate into, or to take benefit of, the objects of the Trusts, but also no Parsi male or female who married a non-Parsi would be so allowed. Those Trusts are meant and intended for the Parsis born of both Parsi parents and not marrying outside. On 16th April 1905 the Parsi Community at a large public meeting resolved that the Community disapproved any conversion and that no children of Parsi fathers by alien mothers shall

be admitted to the fold. Justice Davar himself in his judgement in the famous (for some, notorious) case of Dinsha Petit Vs. Jamshedji Jijibhoy [II B.L.R. 85; I.L.R. (1908) 22 Bom 509; 2 I. C. 203] referred to this Resolution of 16-4-1905. (I have in my first article in this series quoted J. Davar's words - Parsi Pukar Vol. 9 No. 3 Jan-Feb-Mar., 2004).

In that Judgement J. Davar made a statement regarding the three limbs of which the Parsi community consisted of (Quoted on p. 22 of the aforesaid Parsi Pukar). Those were (i) Original Parsi Emigrants from Persia (ii) "the descendents of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here either permanently or temporarily and who profess the Zoroastrian Religion". (iii) "the children of a Parsi father by an alien mother, if such children are admitted into the religion of thier fathers and profess the Zoroastrian Religion."

This is put forth as the **law** of the land as **defining** a Parsi. It is neither such "law" nor a "definition." In the above issue of Parsi Pukar, the reasons for this are set out. One of the reasons is that the law itself through two judgements of three High Court Judges have held that J. Davar's alleged definition of a Parsi is not the law; and both the Judgements refused to accept it as such definition. I now take you in the interesting legal tangles.

STORY I

11th November 1944! An auspicious day for two Zarthoshti Irani families. Sarwar, the bride; Merwan, the bridegroom. Must be a nice looking pair! I am just imagining. Sarwar, a young pink-cheeked Irani girl, tall and beautiful like Sarv tree. And Merwan, an ex-military man in the Iranian Army - handsome.....

Both were born in Iran. Sarwar had come to India in 1940 and Merwan in 1943.

About 37 months passed. How was the marriage? We don't know. All we know is that on July 2, 1948, Sarwar filed a suit for divorce in the Parsi Chief Matrimonial Court under the Parsi Marriage and Divorce Act. The ground was "cruelty." Merwan filed his written statement, wherein he took his first defence, to the extreme surprise of Sarwar, that the Act did not apply to him and the Court had no jurisdiction to entertain the suit!

The matter was heard by the Parsi Matrimonial Court presided by Coyaji J. He relied on a point of law that marriage was a contract between husband and wife and its construction was governed by the local law where the marriage took place, but the question of divorce was governed by the law of domicile of the parties. Since Merwan was domiciled in Iran and not India, the Court had no jurisdiction under the Parsi Marriage Act.

Justice Coyaji's judgement was appealed against before the Bench of Chief Justice Chagla and Justice Gajendragarkar. They held: (i) that Merwan though an Irani Zoroastrian was not a Parsi.

(ii) that the Parsi Marriage & Divorce Act was not applicable to him, and

(iii) that therefore the Parsi Chief Matrimonial Court set up under that Act had no jurisdiction to try the divorce suit.

Irani Zarthoshti.... Not a Parsi? Then what about the alleged "definition" of a Parsi, mentioned in the second limb of Justice Davar's statement that Irani Zarthoshtis do

constitute a part of the Parsi Community?

Before Justice Coyaji, the Judgement of J. Davar was not even referred to. Coyaji had gone squarely on the point of domicile. But before the Appellate Bench, Davar's Judgement was relied upon as defining a Zarthoshti Irani as a Parsi. But J. Chagla refused to accept J. Davar's statement. J. Chagla said :

"Now in the first place this observation of Sir Dinshaw Davar, undoubtedly a very great authority on Parsi law is an **obiter** because the question that he and J. Beamon had to consider in that case was whether by conversion to the Zoroastrian faith a person could be a Parsi."

'Obiter' means a view expressed by the Court on an issue which was not before it for a Judicial decision, that would be binding on other Courts. J. Chagla says in no uncertain terms that the said statement of J. Davar that Zarthoshti Iranis are Parsis is not binding. J. Chagla respectfully but emphatically differs from J. Davar and continues :

It is difficult to understand with very great respect to Sir Dinshaw Davar how an Iranian who temporarily comes to India can become a Parsi."

J. Chagla then discusses the merits and demerits of this Irani-Parsi rigmarole and holds ultimately that Iranis are not Parsis.

In his Judgement J. Chagla refers to Saklat V. Bella A.I.R 1925 P. C. 298, wherein Privy Council has said that the Judgement of Davar & Beamon "travel over much unnecessary grounds" - clearly another way of stating that the statement of J. Davar enumerating the 3 limbs of the Parsi Community was obiter and not binding. I have quoted the exact wordings of Lord 'Phillimore of Privy Council in the Parsi Pukar Vol. 9 No. 3 (Jan. - Feb. - Mar. 2004).

I cannot help stating that the aforesaid last remarks of J. Chagla about J. Davar were

unconsciously unfair, because J. Davar was merely reproducing a paragraph from the written statement of the Trustees of the Parsi Punchayet. Which in turn was the mistaken belief of the English Solicitors and which had greatly embarrassed them (See Parsi Pukar - ibid page 23.) It was not a judicially binding decision that Iranis are not Parsis. And mind! The same reasoning, reasons and logic apply to the third limb of J. Davar's statement, namely that child of a Parsi father by non-Parsi mother is a Parsi. That is not the law.

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Sarwar V. Merwan was decided by J. Coyaji on 7-12-1948. Appellate Bench - JJ. Chagla and Gajendragadkar's Judgement was delivered on 16-8-1950. Should Zarthoshti Iranis be not allowed to enter Fire-temples and Dokhma from that date? Would they be not entitled to the benefits of the Parsi Charities and Institutions? Nobody suggested that. The state of affairs qua Irani Zarathoshtis continued as if nothing had happened. In Parsi Avaz Vol. 2 - 38,42 (1949), Jehangir Chiniwalla wrote a low-key cautioning article on J. Coyaji's Judgement. Let the sleeping dogs sleep. Yet the Parsi and Irani Legal Pandits were keeping a watch on the Divorce Court.

The day did arrive when the question came back with a thunder.

STORY II

In 1958 a divorce suit was filed in the Parsi Matrimonial Court, Bombay - Suit No. 45 of 1958 : Jamshed A. Irani Vs Banu J. Irani. This time it was the husband who filed it. The ground was desertion by the wife. The wife - the defendant - contended that the Court has no Jurisdiction to hear the divorce suit, because both, the husband and wife, were admitably domiciled in Iran and were not Parsi Zoroastrians. That was what C. J. Chagla held in Sarwar V. Merwan. The question then arose whether the parties could lead evidence on the issue: what is the meaning of the word 'Parsi', or who is a Parsi? The husband said such evidence should be brought before the Court.

The wife contended, No, because J. Davar had already defined a Parsi, by the three limbs, one of which was "Irani Zarathoshti." (Kyani, Bastani, Sassanian, Suhshine Restaurants.... Chikoo ni Wadi's in Dahanu.....)

If Irani Zarathoshtis are not Parsis what would happen? No entry in Agiary, Dokhma, Gahambaar..... No benefit of Parsi charities.... Most important : all marriages under the Parsi Act, invalid; children illegitimate..

An extra ordinary thing happened in Court. The Iranian Zoroastrian Anjuman in India applied to the court to be heard on the question. Counsel P. P. Khambatta appeared for the Irani Anjuman. After a few legal twists and turns, Justice Mody held that evidence should be led on the whether Iranis are Parsis, in spite of J. Davar's three limbs. One of the main reasons given by J. Modi was that J. Davar's three limbed statement was obiter. He said in his preliminary judgement :

"In the said case of Sir Dinshaw Petit V Sir Jamshedji Jijibhoy, Davar J came to the conclusion that the Iranis from Persia professing the Zoroastrian Religion, who come to India, either temporarily or permanently, would be included amongst Parsis. Now so far as that part of the Judgement of Davar J is concerned, Chagla C. J. has pointed out that it was obiter because the question that Davar and Beamon JJ. had to consider in that case was whether by conversion to the Zoroastrian faith a person could become a Parsi.... In neither of the two cases of Sir Dinshaw M Petit V Sir Jamshedji Jijibhoy and Saklat V. Bella the point directly arose whether an Iranian Zoroastrian was a Parsi, but the point was directly considered by the Appeal Court in Yezdiar V Yezdiar" (this is Sarwar V Merwan by surnames) "and it was decided that Iranian Zoroastrians may not be Parsis."

For this and other genuine and ingenious reasons J. Mody held to the effect that J. Davar's statement (the alleged definition) could not be held to be the law and evidence should be led to find out whether Iranis are Parsis. J. Mody had no hesitation to agree with J. Chagla that Davar's was obiter dicta. "Of course that decision is obiter dicta," he wrote (p. 796) in (1966) 68 Bom. L. A. 794. On p. 797 he called Davar's three limbed statement as "certain observations" which were merely obiter dicta.

And the field match of evidence started. J. Mody writes (p. 797 *ibid*) :

"The material evidence on the subject is that of Rashid Irani, Mr. P. B. Vachha, Dastoor Mirza and Mr. Jamshed Tarapore and the various documents exhibited through them."

The court room then vibrated with high scholarly academic materials. J. Mody had quite a job to sift and analyse the huge mass of data poured on him. He did it admirably well. He had to delve into the history of the Parsi as people, and the 'Parsi' as a word. The Achimienians, Sassanians, Arab conquest Nairiyosang, 66 Sanskrit Shloka's. Salman-e-Farsi, Colophones, Rivayats, present day scholars as also Azar Kaiwan, Akbar, Firdausi, Maneckji Hataria, Humayun Nasruddin Shah, Count Gobineau, Dr. West, Spiegel, Max Muller, Curzon, Malcolm, Jackson, Farman-e-Shah of Iran, pasture and cattle tax, Percy Sykes.... a thousand course dinner!! But J. Mody digested it - at times with a few pangs in the stomach and ultimately at the end of a 12 page long Judgement wrote :

"On this evidence I unhesitatingly come to the conclusion that the word Parsi as used in the Act includes not only Parsis of India but also the Zoroastrians of Iran."
(p. 809 *ibid*).

Now, my dear reader, why have I taken you in this Jungle of law and scholarship? To show that had J. Davar's three limbed state-

ment which is pushed forward as an alleged legal definition of a Parsi, been the law of the land, why did J. Mody had to go into the dense groove of historical, geographical and philological evidence to prove that Iranis are Parsis? It is there in Davar's "definition". But his three limbed statement was not the law. It was an observation in the nature of obiter dicta. Justices Mody, Chagla, Gajendragadkar and Lord Phillimore of Privy Council held so.

It is then obvious that the same reasoning applied to the third Davarian limb namely "the children of a Parsi father by a non-Parsi mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion." **This is not a legal definition. It is obiter.** The issue before Davar and Beamon was not whether such children are Parsis. There was no such child before the Court in that case. The center was a French Lady who claimed to be a Parsi by conversion to Zoroastrian religion, and the question before the Judges was not whether she could be a Parsi because of conversion, but as J. Beamon pointed out : **"the question (was) not whether the Zoroastrian Religion permits conversion but when these trusts were founded, the Founders contemplated and intended that converts should be admitted to participate in them."**

And the answer by both the Judges was an emphatic 'No' and Privy Council followed them in Saklat V Bella. It interpreted that the beneficiaries of the Parsi Charitable Trusts are persons who are of the Zoroastrian Religion and racial Parsis. (Parsi Pukar - *ibid* Vol. 9-3). THAT IS THE LAW OF THE LAND. And that is the law that the Trustees of B.P.P. are flagrantly violating. Their wooing with W.Z.O. which is trying to push in mixed genes into the Parsi Community is unlawful and illegitimate and amounts to breach of trust. "Racial Parsis" mean the children of the parents both of whom are Parsis. All our spiritual Institutions are founded on this "boonak pasbani."

(to be contd.,)